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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS-SC-16-0062; SC16-984-2 FR]

Walnuts Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the California Walnut Board (Board) to increase the assessment rate established for the 2016-17 and subsequent marketing years from \$0.0379 to \$0.0465 per kernelweight pound of assessable walnuts. The Board locally administers the marketing order and is comprised of growers and handlers of walnuts operating within the area of production. Assessments upon walnut handlers are used by the Board to fund reasonable and necessary expenses of the program. The marketing year began on September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT:

Terry Vawter, Senior Marketing Specialist, or Jeffrey Smutny, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or Email: Terry.Vawter@ams.usda.gov or Jeffrey.Smutny@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program,

AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts beginning on September 1, 2016, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate for the 2016-17 and subsequent marketing years from \$0.0379 to \$0.0465 per kernelweight pound of assessable walnuts.

The order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses

and collect assessments from handlers to administer the program. All members of the Board, but one, are growers and handlers of California walnuts. They are familiar with the Board's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2015-16 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of \$0.0379 per kernelweight pound of assessable walnuts that would continue in effect from year to year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

The Board met on June 9, 2016, and unanimously recommended 2016-17 expenditures of \$23,143,050 and an assessment rate of \$0.0465 per kernelweight pound of assessable walnuts. In comparison, last year's budgeted expenditures were \$22,668,980. The assessment rate of \$0.0465 is \$0.0086 per pound higher than the rate currently in effect. The quantity of assessable walnuts for the 2016-17 marketing year is estimated at 553,000 tons inshell or 497,700,000 kernelweight pounds, which is the three-year average of walnut production. At the recommended higher assessment rate of \$0.0465 per kernelweight pound, the Board should collect approximately \$23,143,050 in assessment income, making income and expenses equal. The Board estimates it will begin the 2016-17 marketing year with \$9,827,284 in its monetary reserve, which is well within the requirements of the order.

The Board noted that sales of California walnuts in the domestic market have been declining in recent years, and embarked upon an enhanced market development and promotion program in the 2015-16 marketing year that was designed to reverse the trend. Noting that making such a commitment for a single year would likely not result in long-term gains, they voted to continue such market development and promotion programs. Thus, it is

maintaining its programs at a level near that of the 2015–16 marketing year. In addition, personnel changes will result in an overlap of duties and expenses, as some positions will be added so that experience and continuity can be maintained despite staff

retirements. Thus, employee costs are expected to be higher this marketing year. Added to that, the implementation of the Food Safety Modernization Act (FSMA) may result in added costs to the industry and, in some cases, to the Board as well. For that reason, the

Grades and Standards Committee and the Production Research Committee requested increased budgets. The following table compares major budget expenditures recommended by the Board for the 2015–16 and 2016–17 marketing years:

Budget expense categories	2015–16	2016–17
Employee Expenses	\$ 1,846,500	\$ 2,292,000
Travel/Board Expenses/Annual Audit	191,000	206,000
Office Expenses	254,000	262,000
Controlled Purchases	10,000	10,000
Crop Acreage Survey	10,000	0
Crop Estimate	130,000	130,000
Production Research Director	94,500	175,000
Production Research	1,700,000	1,800,000
Sustainability Project	75,000	75,000
Grades and Standards Research	600,000	800,000
Domestic Market Development	18,478,440	18,398,040
Reserve for Contingency	32,790	59,010

The assessment rate recommended by the Board was derived by dividing anticipated assessment revenue needed by estimated shipments of California walnuts certified as merchantable. The 553,000 ton (inshell) estimate for merchantable shipments is an average of shipments during three prior years. Pursuant to § 984.51(b) of the order, this figure is converted to a merchantable kernelweight basis using a factor of 0.45 (553,000 tons × 2,000 pounds per ton × 0.45), which yields 497,700,000 kernelweight pounds. At \$0.0465 per pound, the new assessment rate should generate \$23,143,050 in assessment income, which is equal to estimated expenses.

Section 984.69 of the order authorizes the Board to carry over excess funds into subsequent marketing years as a reserve, provided that funds already in the reserve do not exceed approximately two years' budgeted expenses. Current reserve funds total \$9,827,284 and are well within that requirement.

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

Although this assessment rate will be effective for an indefinite period, the Board will continue to meet prior to or during each marketing year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public, and interested persons may express their views at these meetings. USDA will evaluate Board recommendations

and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Board's 2016–17 budget and those for subsequent marketing years would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are approximately 5,700 growers of California walnuts in the production area and approximately 90 handlers subject to regulation under the order. The Small Business Administration (SBA) defines small agricultural businesses as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,500,000 (13 CFR 121.201).

According to USDA's National Agricultural Statistics Service's (NASS's) 2012 Census of Agriculture, approximately 86 percent of California's walnut farms were smaller than 100

acres. Further, NASS reports that the average yield for 2014 was 1.97 tons per acre, and the average price received for 2014 was \$3,230 per ton.

A 100-acre farm with an average yield of 1.97 tons per acre would therefore have been expected to produce about 197 tons of walnuts during the 2014–15 marketing year. At \$3,230 per ton, that farm's production would have had an approximate value of \$636,310. Since Census of Agriculture information indicates that the majority of California's walnut farms are smaller than 100 acres, it could be concluded that the majority of the growers had receipts of less than \$636,310 in 2014–15, which is well below the SBA threshold of \$750,000. Thus, the majority of California's walnut growers would be considered small growers according to SBA's definition.

According to information supplied by the Board, approximately two-thirds of California's walnut handlers shipped merchantable walnuts valued under \$7,500,000 during the 2014–15 marketing year and would, therefore, be considered small businesses according to the SBA definition.

This rule increases the assessment rate established for the Board and collected from handlers for the 2016–17 and subsequent marketing years from \$0.0379 to \$0.0465 per kernelweight pound of assessable walnuts. At its meeting on June 9, 2016, the Board unanimously recommended 2016–17 expenditures of \$23,143,050 and an assessment rate of \$0.0465 per kernelweight pound of assessable walnuts. The assessment rate of \$0.0465 is \$0.0086 higher than the 2015–16 rate. The quantity of assessable walnuts for the 2016–17 marketing year is estimated at 553,000 tons inshell weight, or

497,700,000 kernelweight pounds. Thus, the \$0.0465 rate should provide \$23,143,050 in assessment income, which is equal to the estimated expenses.

The increased assessment rate is due to continuing domestic marketing and promotion programs, as well as to increased personnel and committee expenses. The Board believes that California walnut sales can be improved in the domestic market through continued promotional activities. In addition, the Grades and Standards Committee and Production Research Committee have asked for additional funds in case the implementation of FSMA requires new methods or processes for growing, harvesting, and shipping walnuts.

The major expenses for the 2016–17 marketing year include: \$2,292,000 for employee expenses; \$206,000 for travel, Board expenses, and annual audit expenses; \$262,000 for office expenses; \$10,000 for controlled purchases; \$0 for the crop acreage survey; \$130,000 for the crop estimate; \$175,000 for the salary of the Production Research Director; \$1,800,000 for production research; \$75,000 for sustainability; \$800,000 for grades and standards research; \$18,398,040 for domestic market development projects; and \$59,010 for the contingency reserve.

In comparison, the major expenses for the 2015–16 marketing year included: \$1,846,500 for employee expenses; \$191,000 for travel, board expenses, and annual audit expenses; \$254,000 for office expenses; \$10,000 for controlled purchases; \$100,000 for the crop acreage survey; \$130,000 for the crop estimate; \$94,500 for the salary of the Production Research Director; \$1,700,000 for production research; \$75,000 for sustainability; \$600,000 for grades and standards research; \$18,478,440 for domestic market development projects; and \$32,790 for the contingency reserve.

The Board reviewed and unanimously recommended 2016–17 expenditures of \$23,143,050 at its meeting on June 9, 2016. Prior to arriving at this budget, the Board considered a recommendation from the Budget and Personnel Committee (Committee), which also reviewed the proposed budget. The Committee debated the relative value of the increased assessment rate, given the focus on domestic promotion programs. It also considered information from various other committees, who deliberated and formulated their own budgets of expenses and made their recommendations to the Committee. Those committees include the Market Development, Production Research, and Grades and Standards Committees.

The Budget and Personnel Committee considered alternative expenditure levels, such as reducing the proposed budgets recommended by the other committees and changing the funding for domestic marketing projects, as well as not increasing the assessment rate. The Committee ultimately decided that the proposed expenditures and assessment rate were reasonable and necessary to assist in improving domestic sales, maintaining staff continuity, and preparing for potential FSMA mandates. Thus, the Committee unanimously agreed to recommend the budget to the Board.

The assessment rate of \$0.0465 per kernelweight pound of assessable walnuts was derived by dividing anticipated assessment revenue needed by expected shipments of California walnuts certified as merchantable. Merchantable shipments for the year are estimated at 497,700,000 pounds. It was determined that \$23,143,050 in assessment income was needed, and assessment income will equal expenses of \$23,143,050.

Unexpended funds may be retained in a financial reserve, provided that funds in the financial reserve do not exceed approximately two years' budgeted expenses.

According to NASS, the season average grower prices for the years 2013 and 2014 were \$3,710 and \$3,230 per ton, respectively. These prices provide a range within which the 2016–17 season average price could fall. Dividing these average grower prices by 2,000 pounds per ton provides an inshell price per pound range of \$1.62 to \$1.86. Dividing these inshell per pound prices by the 0.45 conversion factor (inshell to kernelweight) established in the order yields a 2016–17 price range estimate of \$3.60 to \$4.13 per kernelweight pound of assessable walnuts.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of \$0.0465 per kernelweight pound is divided by the low and high estimates of the price range. The estimated assessment revenue for the 2016–17 marketing year as a percentage of total grower revenue will thus likely range between 1.13 and 1.29 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Board's meeting was widely publicized throughout the California walnut industry, and all interested persons

were invited to attend the meeting and encouraged to participate in Board deliberations on all issues. Like all Board meetings, the June 9, 2016, meeting was a public meeting, and all entities, both large and small, were free to express views on this issue.

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

This rule imposes no additional reporting or recordkeeping requirements on either small or large California walnut handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this action.

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

A proposed rule concerning this action was published in the **Federal Register** on September 16, 2016 (FR 81 63718). Copies of the rule were provided to all walnut handlers, as well as to Board members. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period, ending October 17, 2016, was provided for interested persons to respond to the proposal. Two comments were received: one supportive of the increase and the other questioning the impact of the rule on small businesses.

The commenter who questioned the increase noted that the budget for the 2016–17 marketing year contained not only funds to continue the expanded marketing programs but also to fund additional staff members hired to work alongside existing staff who are preparing to retire. The Board's goal is for the newly hired staff members to learn from the retiring employees so that minimal staff expertise is lost. While the commenter did not object to the practice, the commenter questioned why small California walnut handlers, who comprise the majority of walnut

handlers, have to bear the burden of the increased assessment rate.

As previously noted, assessments are minimal and uniform on all handlers. Thus, small handlers bear a proportional burden compared to larger handlers. The increase was recommended unanimously by the Board, which is made up of small and large handlers, as well as small and large growers, representing the entire California walnut industry. The Board made the unanimous recommendation based upon deliberations by four of its standing committees: the Market Development Committee, Production Research Committee, Grades and Standards Committee, and Budget and Personnel Committee. All four committees reviewed the proposed expenses and crop size, and considered alternative assessment rates. All of the committees recommended the increased assessment rate and determined that the budget was prudent, resulting in a unanimous recommendation from the Board.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

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

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because handlers are already receiving 2016–17 crop walnuts from growers, the crop year began on September 1, 2016, and the assessment rate applies to all walnuts received during the 2016–17 and subsequent seasons. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 984

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

§ 984.347 Assessment rate.

On and after September 1, 2016, an assessment rate of \$0.0465 per kernelweight pound is established for California merchantable walnuts.

Dated: December 12, 2016.

Bruce Summers,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2016–30307 Filed 12–16–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR PARTS 1, 210, 212, 214, 215, 231, 235, 245, 245a, 247, 253, 264, 274a, and 286

[Docket No. USCBP–2013–0011; CBP Dec. No. 16–27]

RIN 1651–AA96

Definition of Form I–94 To Include Electronic Format

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This final rule adopts, without change, interim amendments to the Department of Homeland Security (DHS) regulations which were published in the **Federal Register** on March 27, 2013, as CBP Dec. No. 13–06. These amendments enabled DHS to transition the issuance of the Form I–94 (Arrival/Departure Record) to an automated process. In the automated process, DHS creates a Form I–94 in an electronic format based on passenger, passport and visa information DHS obtains electronically from air and sea carriers and the Department of State (DOS) as well as through the inspection process. This document addresses the comments received in response to the interim rule and discusses some operational modifications to the Form I–94 process that were implemented after publication of the interim rule.

DATES: This final rule is effective January 18, 2017.

FOR FURTHER INFORMATION CONTACT:

Suzanne Shepherd, U.S. Customs and Border Protection Office of Field Operations by telephone (202) 344–2073 or by email, Suzanne.M.Shepherd@dhs.gov.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

ACI–A Airports Council International–North America
 ACIP American Council on International Personnel
 ADIS Arrival and Departure Information System
 AILA American Immigration Lawyers Association
 APA Administrative Procedure Act
 APIS Advance Passenger Information Systems
 CBP U.S. Customs and Border Protection
 CBSA Canadian Border Services Agency
 CCD Consular Consolidated Database
 CFR Code of Federal Regulations
 DHS Department of Homeland Security
 DIS Deferred Inspection Site
 DMV Departments of Motor Vehicles
 DOS Department of State
 DOT Department of Transportation
 ESTA Electronic System of Travel Authorization
 FAQ Frequently Asked Question
 FNU First Name Unknown
 FOIA Freedom of Information Act
 ICAO International Civil Aviation Organization
 ICE U.S. Immigration and Customs Enforcement
 IFR Interim Final Rule
 INA Immigration and Nationality Act
 INM Instituto Nacional de Migración
 INS Immigration and Naturalization Service
 LNU Last Name Unknown
 MRZ Machine Readable Zone
 NAFSA NAFSA: Association of International Educators
 OIS Office of Immigration Statistics
 OMB Office of Management and Budget
 OTTI Office of Travel and Tourism Industries
 PIA Privacy Impact Assessment
 PII Personally Identifiable Information
 POE Port of Entry
 SAVE USCIS's Systematic Alien Verification for Entitlements program
 SEVIS Student and Exchange Visitor Information System
 SEVP Student and Exchange Visitor Information Program
 SHRM Society for Human Resource Management
 SSA Social Security Administration
 USCIS U.S. Citizenship and Immigration Services
 USDA U.S. Department of Agriculture
 VWP Visa Waiver Program

Executive Summary

The Form I–94 (Arrival/Departure Record) is issued by DHS to certain nonimmigrant foreign nationals upon arrival in the United States or when they change status in the United States.

The Form I-94 is used to document arrival and departure and provides evidence of the terms of admission or parole. The Form I-94 is also used by individuals granted asylum in the United States as a proof of their grant of asylum and by refugees as proof of their refugee status. CBP, a component of DHS, generally issues the Form I-94 to nonimmigrants at the time they lawfully enter the United States. Nonimmigrant travelers use the Form I-94 for various purposes such as completing the Form I-9 to verify employment eligibility, applying for immigration benefits, or presenting to a university to verify eligibility for enrollment.

On March 27, 2013, CBP published an interim final rule (IFR) in the **Federal Register** (78 FR 18457) that added to the regulations a definition of "Form I-94" to allow the Form I-94 to be in either paper or electronic format. Prior to the effective date of the IFR, the Form I-94 was a paper form only. The IFR made necessary changes to the regulations to enable CBP to transition from only paper to allow for an electronic form. In the case of air and sea ports of entry, the regulation allowed CBP to transition to an automated process whereby CBP creates an electronic Form I-94 based on information collected via the Advance Passenger Information System (APIS) along with visa information transmitted to CBP by the Department of State. The automated process applies only to nonimmigrants arriving at air and sea ports of entry because APIS data is currently collected only for air and sea. The automation of the Form I-94 process for nonimmigrants arriving by air or sea eliminates duplicative information collections and saves time

and money for the traveling public, carriers, and CBP.

CBP makes the electronic Form I-94 available through a Web site. To access the Form I-94 through the Web site the traveler inputs information from his/her passport. If needed, nonimmigrants may print out a copy of the Form I-94 from the Web site and present it to third parties in lieu of the paper form. CBP continues to provide a paper Form I-94 to certain classes of aliens, such as asylees, certain parolees, and others upon request or whenever CBP determines the issuance of a paper form is appropriate.¹

This regulation also is consistent with CBP's enhancements to the I-94 Web site to enable travelers arriving at a land port of entry to submit the Form I-94 information to CBP and pay the required fee prior to arrival. Unlike the automated process for air and sea where CBP creates an electronic Form I-94 based on information collected via APIS and other sources, this I-94 land border process enables travelers to provide the Form I-94 information to CBP electronically prior to arrival to facilitate the land border issuance process. The enhanced I-94 Web site launched on September 29, 2016.

DHS received eighteen submissions in response to the IFR. Most of these submissions contained comments providing support, voicing concerns, highlighting issues, or offering suggestions for modifications to the automation process. After review of the comments, CBP has decided to finalize the interim final rule without change. However, CBP has made some operational changes, primarily to the I-94 Web site, in response to the

comments. These changes, which are described in the comment responses, are intended to help travelers retrieve their Form I-94 information and travel history more easily.

CBP has completed an updated economic assessment analyzing the effects of the automation of the Form I-94. This rule affects CBP, air and sea carriers that transport foreign nationals to the United States, and the foreign nationals themselves. CBP will incur costs associated with linking its data systems and building and maintaining the I-94 Web site. CBP benefits through lower printing, storage, and contract costs. CBP estimated a net benefit of \$15.5 million for CBP in 2013. Carriers benefit as a result of lower printing and storage costs. CBP estimated a net benefit of \$1.3 million for carriers in 2013. Foreign nationals traveling to the United States incur opportunity costs associated with logging onto the Web site to access their electronic Form I-94, printing their Form I-94, and, for some travelers, the cost to drive to a location with internet access so they can access and print their electronic Form I-94. Foreign nationals benefit from a reduced opportunity cost associated with filling out a paper Form I-94 and reduced opportunity and fee costs associated with filing a Form I-102 to replace a lost Form I-94. CBP estimates a net benefit of between \$4141.1 million and \$6565.9 million in 2013 for foreign travelers. In total, CBP estimates that net benefits to all parties ranged from \$5757.9 million to \$8282.7 million in 2013. Net benefits to U.S. entities (carriers and CBP) totaled \$16.8 million in 2013. Net benefits are summarized in table ES-1 below.

EXHIBIT ES-1—NET BENEFITS

[Undiscounted 2012\$]*

	2012	2013	2014	2015	2016	2017
CBP	- 1,321,000	15,461,360	15,461,360	15,461,360	16,167,798	20,447,110
Carriers	0	1,344,450	1,344,450	1,344,450	1,344,450	1,344,450
Travelers—Low	0	41,109,614	76,986,391	80,597,880	85,173,424	93,439,507
Travelers—Primary	0	51,503,032	96,140,493	100,696,430	106,131,707	115,548,989
Travelers—High	0	65,882,967	122,641,373	128,504,014	135,128,784	146,138,820
Grand Total—Low	- 1,321,000	57,915,424	93,792,201	97,403,690	102,685,671	115,231,067
Grand Total—Primary	- 1,321,000	68,308,842	112,946,303	117,502,240	123,643,955	137,340,549
Grand Total—High	- 1,321,000	82,688,777	139,447,183	145,309,824	152,641,032	167,930,380

* Estimates may not total due to rounding.

¹ As of September 2015, CBP has automated the Form I-94 process for refugees. Refugees can now

access their Form I-94 from the I-94 Web site. CBP no longer provides a paper Form I-94 to refugees

unless one is requested or CBP determines that it is appropriate to issue one.

Background

The Form I-94

Prior to the implementation of the IFR, the Form I-94 was generally issued to foreign nationals at ports of entry (POEs) at the time they lawfully enter the United States. See 8 CFR 235.1(h). The Form I-94 is also issued when a foreign national changes immigration status within the United States. The Form I-94 is used to document status in the United States, the authorized length of stay, and departure. The Form I-94 collects biographical information, visa and passport information, and the address and phone number where the traveler can be reached while in the United States.

The Form I-94 has been used for approximately 50 years by DHS, its predecessor agencies, and external stakeholders for a variety of purposes. CBP and U.S. Immigration and Customs Enforcement (ICE), components of DHS, use the form to document arrival and departure, as well as class of admission or duration of parole. U.S. Citizenship and Immigration Services (USCIS), also a component of DHS, issues Forms I-94 to foreign nationals extending their authorized length of stay or changing their immigration status while in the United States and to individuals granted asylum or refugee status in the United States as proof of their grant of asylum or refugee status. USCIS also uses Form I-94 information to verify lawful admission or parole when adjudicating immigration benefit requests, confirming employment authorization for employers participating in USCIS's E-Verify program, or verifying immigration status for benefit granting state and federal government agencies participating in USCIS's Systematic Alien Verification for Entitlements (SAVE) program. The Form I-94 is also used by the Social Security Administration (SSA), state agencies, such as Departments of Motor Vehicles (DMV), and public assistance agencies and organizations, to verify eligibility for benefits. The form is used by certain foreign nationals for evidence of lawful admission or parole, as well as, where applicable, employment eligibility and eligibility for public benefits. For more complete information on the Form I-94, its uses, and the automation, please refer to the background section of the IFR.

Automation of the Form I-94 at Airports and Seaports

Nearly all of the traveler information collected on the Form I-94 is also collected by CBP in advance of the traveler's arrival via the Advance

Passenger Information System (APIS). Using information collected via APIS along with visa information transmitted to CBP by DOS, CBP is now able to generate Forms I-94 electronically, which reduces paperwork burdens for travelers and reduces costs for air and sea carriers and CBP.

On March 27, 2013, CBP published an IFR in the **Federal Register** (78 FR 18457) amending the DHS regulations to include new definitions at 8 CFR 1.4 for the term "Form I-94" and other terms when used in relation to the Form I-94. The IFR became effective on April 26, 2013, and on that date, CBP began the transition to an automated Form I-94 process whereby CBP creates an electronic Form I-94 for travelers arriving by air or sea based on the information in its databases. CBP continues to provide a paper Form I-94 to those who request such form, as well as to certain classes of aliens, such as asylees, certain parolees, and whenever CBP determines the issuance of a paper form is appropriate. For these individuals arriving by air and sea carriers, an electronic Form I-94 is also created.

Travelers are able to access and print their electronic Form I-94 via the Web site CBP has established for this purpose: www.cbp.gov/I94.² Travelers to whom an electronic Form I-94 has been issued may log on to the Web site using identifying information and print a copy of the electronic Form I-94. In order to access the Form I-94 from the Web site, the traveler is required to enter information from his or her passport; thus, a third party without access to the traveler's passport is not able to access the Form I-94 from the Web site. The printout from the Web site is the equivalent of the departure portion of the paper form and contains the same information as the departure portion of the paper form. CBP continues to stamp the traveler's passport at the time of inspection and will annotate the stamp with the class of admission or parole and duration of admission or parole.

Enhanced Form I-94 Land Border Process

In addition to the automation of the Form I-94 at air and sea ports of entry, on September 29, 2016, CBP modified the process by which a traveler arriving at the land border can provide Form I-94 information and pay the related fee by adding an electronic option. Specifically, CBP enhanced the I-94 Web site to enable travelers arriving at a land port of entry to submit the Form

I-94 information to CBP and pay the required fee prior to arrival. CBP expects that these enhancements will result in time savings to travelers who choose this option.

Before September 29, 2016, when a traveler requiring a Form I-94 arrived at the land border, he/she provided the I-94 information to a CBP officer who input the data into a CBP computer system. After determining the traveler's admissibility, the CBP officer printed a Form I-94A³ for the traveler and referred him/her to the cashier to pay the \$6 fee.⁴

Under the new process, a traveler who requires an I-94 and intends to enter the United States at a land port of entry will have the option to either follow the above process or to apply for an I-94 and pay the \$6 fee up to seven days in advance of arrival. Using the I-94 Web site, the traveler enters all of the necessary data for I-94 processing that would be collected by CBP at the port of entry. Upon paying the fee, the traveler will receive a "provisional I-94". This "provisional I-94" will become effective after the traveler presents it to a CBP officer at a land port of entry and completes the issuance process with a CBP officer. If the "provisional I-94" is not processed within 7 days of submitting the application, it will expire and the fee will be forfeited.

The I-94 Web site will instruct the traveler to appear at the land port of entry for an interview and biometric collection. When the traveler arrives at the port of entry, he/she completes the issuance process with a CBP officer. The CBP officer will locate the traveler's information by swiping the traveler's passport or other travel document in CBP's database. This will verify that the fee was paid and pre-populate the data fields from the document swipe and the information provided by the traveler in the Web site. If the CBP officer determines that the traveler is admissible, the CBP officer will print out a Form I-94A to give to the traveler.

Discussion of Comments

Overview

Although CBP promulgated the IFR without first soliciting public comment, CBP provided a thirty-day post-promulgation comment period soliciting public comments that CBP would consider before adopting the interim regulations as final. CBP received

³ The Form I-94A is the version of the Form I-94 that CBP issues at land ports of entry.

⁴ The amount of fee for the issuance of the Form I-94 at a land border port of entry is provided for in 8 CFR 103.7(b)(1)(i)(D).

² The direct link is: <https://i94.cbp.dhs.gov/I94/request.html>.

eighteen submissions in response to the IFR. Commenters included individuals, the American Immigration Lawyers Association (AILA), the American Council on International Personnel (ACIP), the Society for Human Resource Management (SHRM), Feld Entertainment, Inc., the Intel Corporation, NAFSA: Association of International Educators (NAFSA), and the Airports Council International-North America (ACI-NA). Many commenters raised multiple issues, and several issues were raised by numerous commenters. Of the eighteen submissions, most included comments seeking clarification of specific issues, highlighting concerns or issues with the Form I-94 automation, or offering solutions to issues or alternatives. Several of the operational issues raised by commenters have already been addressed by CBP, which our responses reflect. CBP has grouped the issues by topic and provides responses below.

Benefits of Automation

Comment: Many commenters were supportive of the change to an electronic Form I-94, saying that it will provide increased efficiency for passengers, airlines, and CBP. Commenters said that no longer requiring passengers to fill out the paper form on the plane while en route to the United States would not only save passengers time, but would also save air carriers time and money and would free up airline staff to perform other duties. Commenters also anticipated reduced wait times at the POEs, and increased officer efficiency.

Response: CBP appreciates this feedback and agrees that the automation of the Form I-94 benefits the traveling public, air and sea carriers, and CBP.

Comment: One commenter requested that the Form I-94 be automated for the land ports as well as air and sea, as this will help reduce wait times and improve commerce at the land border.

Response: CBP agrees that automating the Form I-94 at land POEs would provide benefits to travelers and is exploring expanding automation to include land border POEs. However, the electronic Form I-94 relies in large part on information collected via APIS, and APIS data is currently collected only for air and sea. Therefore, CBP cannot fully automate the Form I-94 process at land border POE's at this time. CBP's enhanced Form I-94 land border process, however, is expected to increase the efficiency of the entry process and reduce administrative duties for CBP officers, ultimately resulting in shorter wait times for travelers requiring a Form I-94.

Regulatory Amendments

Comment: One commenter requested that the Form I-94 printout from the I-94 Web site be added to the list of evidence of registration for purposes of Immigration and Nationality Act (INA) section 264(e).

Response: The list of acceptable registration documents for purposes of INA 264(e) is found in 8 CFR 264.1(b). The Form I-94, Arrival-Departure Record, is already included in the list of evidence of registration in 8 CFR 264.1(b). The IFR added a new provision to the regulations to define "Form I-94" and related terms. The new definition makes clear that the Form I-94 now includes information collected electronically, and also defines "original Form I-94" to include the printout from the I-94 Web site. Due to the new definition provided for the Form I-94, CBP believes it is clear that the printout constitutes evidence of registration and no further change is needed.

Comment: One commenter requested that the definition of "original document" in 8 CFR 274a.2(b)(1)(v) be amended to include a Form I-94 printout.

Response: CBP believes that the definition of "original Form I-94" included in the IFR accomplishes the desired result, and, therefore, it is not necessary to amend 8 CFR 274a.2(b)(1)(v). That definition provides that the term "original Form I-94" includes, but is not limited to, any printout or electronic transmission of information from DHS systems containing the electronic record of admission or arrival/departure. See 8 CFR 1.4(d). 8 CFR 274a.2 concerns the Form I-9, which is a USCIS form. USCIS agrees that a printout of the Form I-94 from the Web site constitutes an "original document" under this regulation.

Comment: One commenter, NAFSA, requested that paragraph (e) of section 1.4 be amended to add "or electronic transmission" after the word "printout." The commenter states that the revision would clarify that a traveler may present an electronic version of the Form I-94, such as a PDF or image scan.

Response: CBP believes that such amendment is unnecessary and could cause confusion as to what can be presented or submitted in various situations. For example, at this time, a printout of the Form I-94 is still necessary in a number of situations, including the completion of the USCIS Form I-9. However, the current definition specifically states that the terms in question "are not limited to" providing a printout, and thus, could be

applied more broadly as appropriate by stakeholders. Although CBP is hopeful that the Form I-94 in electronic form will be accepted in the future by all stakeholders to whom these regulations apply and that a printout will not always be required, that is not the case now.

Administrative Procedure Act

Comment: One commenter, Feld Entertainment, Inc., disagreed that the rulemaking is procedural. The commenter states that because the rule was promulgated without prior notice and comment, it violates the Administrative Procedure Act (APA). The commenter was also concerned that the comments received in response to the IFR would be disregarded.

Response: The IFR enabled CBP to transition to an automated process whereby CBP creates a Form I-94 in an electronic format. CBP has not changed the substantive regulations relating to the Form I-94, but only the operational means by which CBP issues the form. Thus, the rule is a procedural rule exempt from prior notice-and-comment requirements under the APA. CBP already has adopted a number of the commenters' operational suggestions, which are described in many of the responses below. Many of the commenters' questions have been addressed on the FAQs page of the I-94 Web site for easy reference.

Web Site and Printouts

Comment: One commenter noted that the Web site option is helpful for those who lose or misplace their Forms I-94, or when the paper form becomes so worn that it is no longer accepted by agencies.

Response: CBP appreciates this feedback, and agrees that the Web site makes it easier for travelers to obtain copies of their Forms I-94 when necessary. Since the implementation of the Form I-94 automation, CBP has expanded the Web site to provide additional benefits, including allowing nonimmigrants to access their five-year travel history.

Comment: A few commenters requested that the Web site be updated to reflect changes in status granted by USCIS. Commenters said that, if this is done, nonimmigrants who have had a change of status will not have to file a Form I-102 for a replacement Form I-94 if needed.

Response: CBP agrees that providing this information through the Web site would be helpful and would reduce the number of Forms I-102 that would be filed. The Form I-102 is the USCIS form

nonimmigrants use to apply for a new or replacement Form I-94. Adding information about changes of status granted by USCIS to the Web site is not currently possible. However, CBP is looking into whether USCIS information can be reliably added to the Web site in the future. Any updates on this issue will be included in the FAQs page of the I-94 Web site.

Comment: A few commenters, including AILA, disagreed with the assumption in the economic analysis that B-1/B-2 visa holders would not access the Web site. Commenters said that these visa holders, especially those in the United States for at least six months, would have reason to obtain their Form I-94 records or may wish to obtain a record of their admission for future use.

Response: CBP agrees that some B-1/B-2 visa holders, including those who are given a year to stay as a B-1/B-2 visa holder, may have a need to access the I-94 Web site. Accordingly, CBP has revised the assumption in the economic analysis. Based on Web site query history since the interim rule went into effect, we now assume that one percent of B-1/B-2 visa holders will access the I-94 Web site. In addition, CBP agrees that some travelers may wish to obtain a record of their admission for future use. CBP has made changes to the I-94 Web site to allow travelers to access their most recent Form I-94 record as well as a five-year travel history. This can now be accessed by travelers who have already left the United States in addition to those present in the United States.

Comment: Some commenters noted that CBP is assuming all travelers will have access to a printer. The commenters stated that it is not as easy as CBP assumes for a foreign national to access public libraries soon after arrival in the United States. They would have to learn that public libraries offer internet, that one can print from them, that there is a library nearby, that public transportation is available, how to navigate public transportation, and explain what library resources are needed.

One commenter, the Intel Corporation, was concerned that employees would not be able to access the Web site before they must start work in the United States, which is problematic because the Form I-94 is required to complete the Form I-9. The commenter stated that it has a company policy to complete the Form I-9 during new employee orientation, which requires the employee to have his or her Form I-94 in hand. The company does not allow new hires access to company

computers until after the new employee orientation, and due to data privacy protection protocol, the company cannot allow employees to access Personally Identifiable Information (PII) on a computer assigned to someone else. The commenter suggests CBP provide a way for the employer to access the new hire's Form I-94 number directly.

Several commenters suggested that CBP print a copy of the departure portion for the traveler and include instructions on how to print more copies, or alternatively, that CBP provide kiosks at the airports where foreign nationals can inspect and print the Form I-94.

Response: CBP recognizes that access to the internet and printers is a barrier to many travelers who need their electronic Form I-94, including those who need to present their Form I-94 when completing the Form I-9. For this reason employers, or third parties, may access Form I-94 records when consent is obtained from the record holder. For more information on third party consent visit: <https://i94.cbp.dhs.gov/I94/request.html>.

In the regulatory assessment for the interim final rule, CBP discussed the difficulties some foreign nationals face when they need to access the I-94 Web site to print their electronic Form I-94. The analysis estimated that approximately 1,028,876 travelers would need to drive 20 miles and that it would take 60 minutes of a traveler's time to access and print their electronic Form I-94. CBP estimated that this cost aliens about \$21 million in 2013. We have updated these estimates for this final rule in the economic assessment. For more information, see the below section entitled *Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*. CBP now estimates that it cost \$17 million in 2014 (the first full year the rule is in effect). CBP acknowledges that this represents a significant negative impact to these travelers and strives to minimize this burden to the extent possible. To that end, CBP continues to provide paper Forms I-94 upon request when the individual arrives in the United States at the port's secondary inspection station and at Deferred Inspection Sites (DISs) once the traveler is in the United States.

CBP recognizes the potential usefulness of placing kiosks at ports where foreign nationals could inspect and print their Forms I-94 and has evaluated the merits of placing such kiosks at the busiest 20 airports and the busiest 20 seaports. Based on this analysis, for travelers' benefits to exceed

the kiosks costs, greater than one percent of the subset of travelers who would otherwise need to travel to access and print their electronic Form I-94 would instead need to use a kiosk. Based on the few travelers who currently request paper Forms I-94, CBP does not believe there are enough foreign nationals who would take advantage of the kiosks to offset CBP's costs of installing them. In addition, due to budget constraints, CBP does not have the funds to acquire these kiosks at this time. See the *Regulatory Alternatives* section of the economic assessment below for more information.

Comment: One commenter had concerns about what a traveler would do if he or she loses his or her passport and cannot access the necessary information to retrieve the Form I-94 from the Web site.

Response: CBP believes that making the Form I-94 available on the Web site will not put travelers who lose their passports in a worse position than they were in prior to the automation of the Form I-94. Paper Forms I-94 were typically stored or stapled into a traveler's passport; thus, prior to automation, loss of a passport would have required the traveler to obtain a new Form I-94 as well. With automation, if the traveler loses his or her passport, but has the passport information documented elsewhere, he or she will be able to obtain the Form I-94 from the Web site. CBP has made various updates to the I-94 Web site to address some of the comments. One of these updates is that a traveler no longer needs to enter the date and class of admission, which will make accessing the Form I-94 record easier for travelers.

Comment: Many commenters encouraged CBP to make archival records of Form I-94 records available indefinitely, as this will reduce the administrative burden placed on CBP to respond to Freedom of Information Act (FOIA) requests.

Response: CBP has made changes to the I-94 Web site to allow travelers to access their most recent Form I-94 record, even if the traveler has already departed the United States. Although CBP is not able to make the Form I-94 records available on the Web site indefinitely, CBP has updated the Web site so that Form I-94 records are available dating back five years. The Web site also now allows travelers to request their five-year U.S. border crossing history. Travelers frequently request their five-year travel history from DHS, as this history is often required when they apply for certain benefits. CBP agrees that providing this information through the Web site will

help reduce FOIA requests regarding travel history. More details about the benefits CBP anticipates from this change can be found in the economic assessment below, entitled “*Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*.”

Comment: One commenter asked whether nonimmigrants who received paper Forms I–94 would be able to get replacements from the Web site.

Response: The Web site now provides access to Forms I–94 issued up to five years prior to the query date. Currently, nonimmigrants who have received paper Forms I–94 since 2009 are able to access their Form I–94 information via the Web site.

Comment: Several commenters were concerned that foreign nationals may not be able to access their records on the Web site due to typographical or biographical errors that occur during the creation of the electronic Form I–94 record. In particular, a few commenters noted that information is frequently entered incorrectly on visas, especially incorrect name spellings. Information drawn from visas would then be incorrect, and travelers would not be successful when querying their Form I–94 record.

Response: Most of the biographical information CBP uses in creating the electronic Form I–94 is drawn from the traveler’s passport. The only information drawn from the visa for the Form I–94 is the visa classification and issuance date. The exact format of the name used in the electronic Form I–94 is found in the Machine Readable Zone (MRZ) of the passport, found at the bottom of the biographical page of the passport. A traveler having trouble finding his or her Form I–94 record should look at the way his or her name is formatted in the passport MRZ. The MRZ shows the traveler’s name immediately following the three letter country code, as last/surname and given name separated by chevrons (<<<<). A traveler should not include the country code when querying his or her Form I–94 record. The MRZ does not use punctuation such as hyphens or apostrophes. In some cases, a traveler’s name might be truncated in the MRZ; in such cases, the traveler should query the truncated version of the name. CBP has included guidance on this issue on the FAQs page of the I–94 Web site, along with an example passport page for reference.

Comment: A few commenters requested that CBP ensure that the Web site is accessible on a variety of platforms and browsers, including

mobile devices. Commenters also requested that both www.cbp.gov/I-94 and www.cbp.gov/I-94 [note the hyphen in I–94] direct users to the proper Web site.

Response: Although CBP does not have the resources to conduct testing on multiple platforms, CBP has not received any feedback concerning a lack of functionality on any platform. Due to updates that CBP has made to www.cbp.gov as a whole, the full address for the Form I–94 retrieval Web site is now: <https://i94.cbp.dhs.gov/I-94/request.html>. Both web addresses www.cbp.gov/I-94 and www.cbp.gov/I-94 direct users to a Web site with information about the Form I–94, and includes a link to the Form I–94 retrieval page.

Comment: Several commenters, including AILA, ACIP, SHRM, and Feld Entertainment, suggested adding an endorsement or other information on the printout to help educate those stakeholders who are not accustomed to seeing Form I–94 printouts from the Web site, and might be reluctant to accept the printout. Some commenters also suggested including a phone number or email address on the printout.

Response: CBP agrees that additional language on the printout would help educate stakeholders, and has added language to the printout indicating that the Form I–94 has now been automated for most nonimmigrants. While CBP has decided not to add a phone number or email to the printout, there is a link on the I–94 retrieval Web site that directs users to the CBP help desk.

Comment: A few commenters stated that it was unclear how CBP would prevent fraudulent printouts.

Response: CBP does not believe that the printout creates a greater risk of fraud than the paper Forms I–94, which did not contain any security features. CBP continues to encourage stakeholders to verify a traveler’s information through SAVE or E-Verify, when registered or enrolled, respectively, in these services, and only as authorized.

The SAVE program is a USCIS service that helps federal, state, and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants so only those entitled to benefits receive them. More information on SAVE can be found at: <http://www.uscis.gov/save>.

E-Verify is a web-based system that allows businesses to confirm the eligibility of their employees to work in the United States. More information on E-Verify can be found at: <http://www.uscis.gov/e-verify>.

Comment: A few commenters had privacy concerns related to the Web site. One commenter was concerned that CBP will automatically collect information on those persons attempting to access the Form I–94 information from the Web site. Another commenter was concerned that the personal information available on the Web site could be accessed by unauthorized parties, which put refugees or those seeking asylum in the United States at risk.

Response: DHS/CBP has issued a Privacy Impact Assessment (PIA), which describes the I–94 Web site, and posted it online at: <https://www.dhs.gov/sites/default/files/publications/privacy/PIAs/pia-cbp-16-I-94-automation-20130227.pdf>. DHS/CBP has also updated and reissued the System of Records Notice (SORN) for the Nonimmigrant and Immigrant Information System (NIIS) at 80 FR 13398, a system for maintaining the arrival and departure records of nonimmigrants, and for APIS at 80 FR 13407. CBP is in the process of updating the PIA, which will discuss how the I–94 Web site will retain information about attempts to access the I–94 Web site (*i.e.* the search history) for only three months and as part of the Web site’s audit log. The search history, as part of the audit log, is part of the Web site’s infrastructure. The audit log is only maintained in the Web site’s infrastructure, and the search history is retained for only three months, to reduce the risk of improper use or disclosure of the search history. The benefits of keeping an audit log of searches conducted on the I–94 Web site include preventing improper and unauthorized use of the Web site, and holding accountable anyone who uses the I–94 Web site improperly or without authorization.

CBP believes that the benefits of having an audit log outweigh the small and limited risks of improper use and disclosure of search histories. The log of search histories allows CBP to conduct audits and uncover when an unauthorized party is attempting to obtain information from the I–94 Web site. For example, if a single access point conducts multiple searches for different individuals, CBP will investigate whether someone or something is conducting searches without the travelers’ consent. CBP has included a new security consent page to the Form I–94 retrieval Web site that users must read and accept before querying an Form I–94 record. The security page requires users to affirm that they are authorized to obtain that traveler’s history, and to understand

that unauthorized or improper use could result in criminal and civil penalties. With respect to information pertaining to persons whose asylee status is prohibited from public disclosure pursuant to 8 CFR 208.6, CBP is taking the added precaution of requiring asylees to manually submit verifiable identity information before they may access their Form I-94 information. Asylees will continue to receive a paper Form I-94. Refugees and certain parolees may access their Form I-94 via the Web site.

Automatic Revalidation

Comment: Numerous commenters were concerned about how the automation of the Form I-94 would affect automatic revalidation.⁵ Commenters noted that nonimmigrants seeking to use the automatic revalidation provisions will have to demonstrate to carriers that they are legally allowed to board the plane or vessel with an expired visa and a passport stamp that reflects a change or extension of status. Thus, commenters encourage CBP to require air and sea carriers to provide instructions to their personnel regarding the documentation for such persons.

Specifically, commenters suggested that CBP officers would need to override a nonimmigrant's automated departure record when a nonimmigrant seeks readmission under 22 CFR 41.112(d). Commenters also recommended that CBP emphasize in training that CBP officers will be expected to reactivate previously closed Form I-94 records for automatic revalidation.

Commenters were concerned that admission errors are common in automatic revalidation and that nonimmigrants without a paper Form I-94 may experience challenges during the inspection process. Commenters additionally noted that for nonimmigrants to print Forms I-94 to retain in the event they go to Canada or Mexico and wish to use the automatic revalidation provisions upon return to the United States would be very burdensome on those with limited internet and printing capabilities.

Response: The IFR expanded the definition of a Form I-94 to include electronic means. It did not change the requirements for the issuance and use of

the Form I-94. Automatic revalidation requirements are outlined in 8 CFR 214.1(b) and 22 CFR 41.112(d). Under the automatic revalidation provisions, certain temporary visitors holding expired nonimmigrant visas who seek to return to the United States may be admitted at a U.S. port of entry by CBP if they meet certain requirements including, but not limited to certain nonimmigrants with a valid, unexpired admission stamp on the Form I-94 or an electronic Form I-94. CBP maintains the electronic Form I-94 record in CBP systems and will use the electronic format to revalidate a previous, unexpired admission or extension of stay if all other revalidation requirements are met.

CBP has provided guidance to CBP officers at POEs regarding automatic revalidation. The primary processing system allows a CBP officer to re-use an existing Form I-94 when automatic revalidation requirements are met. CBP has also conducted outreach with the travel industry about the new documentary requirements. CBP has updated the Carrier Information Guide to assist carriers in recognizing acceptable documents and to ensure that carriers are informed of the Form I-94 automation. The Carrier Information Guide now includes an example of the electronic Form I-94 Web site printout and guidance to carriers on automatic revalidation.

An air carrier or vessel may require evidence of an unexpired admission by a traveler prior to embarkation. The Form I-94 Web site printout is evidence of that admission and can be presented to a carrier if requested. CBP has made changes to the I-94 Web site to allow travelers to access their Form I-94 records after departure. This allows travelers who have already departed the United States, but who may need the printout for automatic revalidation purposes to obtain the printout to present to a carrier.

CBP has included guidance on automatic revalidation in the FAQs on the I-94 Web site.

Departure

Comment: Some commenters stated that it was unclear what procedures were to be followed at the time of departure. Commenters were particularly concerned about the procedures that should be followed in the case of a nonimmigrant arriving by air or sea but departing by land. The commenters were concerned that CBP's database would record the arrival information, but would not record the departure, which could create difficulties for nonimmigrants seeking

to travel to the United States in the future. Commenters wanted to know whether nonimmigrants departing by land have any affirmative duties to ensure that departures by land are recorded correctly.

Response: CBP has added information concerning departure by land to the FAQs page of the I-94 Web site. CBP and the Canadian Border Services Agency (CBSA) have partnered to create an entry/exit system that exchanges entry information at land border ports of entry for certain individuals. Information collected on entry to one country is shared in order to electronically record as exit from the other. Thus, entry into Canada from the United States now creates a departure record for the United States.

CBP does not currently have a system for automatically recording departures by land to Mexico. If a traveler departs the United States by land to Mexico, the traveler may wish to retain evidence of departure to Mexico. Evidence of departure can include, but is not limited to, entry stamps in a passport, transportation tickets, pay stubs and/or other receipts. A traveler can request an entry stamp from the Instituto Nacional de Migración (INM) when entering Mexico. CBP is not, however, placing any affirmative duty on the travelers to carry such evidence.

Travelers departing the United States by air or sea will have their departures recorded automatically when the air or sea carrier sends CBP departure manifests.

Comment: One commenter was concerned that airlines do not always timely update their departure manifests when travelers cancel and rebook flights. Where CBP relies on carrier data, CBP might document inaccurate departure data, which could result in denial of benefits. The traveler would have no means to seek redress.

Response: APIS reports whether a person is "on board" or "not on board" in order to accurately reflect changes in reservations. CBP relies on confirmed departure information, and has updated the I-94 Web site to ensure that only confirmed departures are reflected. DHS is able to independently verify departures through DHS law enforcement databases, and overstay records are reviewed before any adverse action is taken.⁶

⁶ According to confirmation studies conducted by CBP and outside studies conducted by contractors and GAO, CBP estimates that 99% of APIS departure data is accurate. CBP also confirms departure data independently by using information travelers send from outside the U.S., visa information from the State Department, or subsequent arrival data.

⁵ Automatic revalidation allows certain persons to seek readmission to the United States for the duration of an unexpired period of a previous admission. Pursuant to 8 CFR 214.1 and 22 CFR 41.112, automatic revalidation allows readmittance of certain aliens who have been out of the United States for thirty days or less in a contiguous territory and who have an unexpired nonimmigrant visa.

The DHS TRIP program is an established means for a traveler to inquire to seek resolution to any difficulties experienced during travel into or departure from the United States. A traveler can submit evidence of a timely departure in DHS TRIP. If a traveler believes that CBP maintains incorrect departure information, the traveler can apply for redress at <http://www.dhs.gov/dhs-trip>.

Visa Classification

Comment: A number of commenters requested clarification on how visa classification data will populate an automated Form I-94 when a nonimmigrant has more than one visa.

Response: CBP receives visa information from DOS. There may be instances where a traveler has multiple eligible visa classifications. In these cases, the CBP officer determines at the time of entry which visa classification the traveler qualifies for and admits the traveler under that class of admission. The electronic Form I-94 record will reflect the class of admission chosen by the CBP officer at the time of entry. This process is substantially the same as the process followed during issuance of a paper Form I-94.

Comment: Commenters asked how nonimmigrants seeking to enter the United States from Visa Waiver Program (VWP) countries would be handled in view of the Form I-94 automation.

Response: Travelers entering the United States under the VWP used to receive a Form I-94W, which is different than the Form I-94. The Form I-94W was automated by the Electronic System for Traveler Authorization (ESTA) in August 2010. VWP visitors no longer receive a Form I-94W when arriving in the United States by air or sea, but rather must apply for and receive an ESTA prior to travel to the United States. For further information about ESTA, see 8 CFR 217.5 and www.cbp.gov/esta/. Upon arrival in the United States, VWP visitors receive an annotated stamp in their passports. This process is not affected by the automation of the Form I-94.

Errors and CBP Officer Training

Comment: A few commenters were concerned that frequently there are errors in admission records due to CBP officer error or misapplication of periods of stay for the various nonimmigrant visa categories. Commenters believe that more training is necessary for CBP officers on visa categories, automatic revalidation, and creation of the automated Form I-94.

Response: CBP officers are trained in all aspects of the inspection process.

CBP conducts ongoing training in the form of field guidance, musters, on-the-job training, and online training modules. CBP has provided field guidance and musters to CBP officers at the Ports of Entry (POEs) regarding the Form I-94 automation process. CBP has issued additional guidance to CBP officers to help the officers properly create the electronic Form I-94. CBP continues to instruct officers to verify information and make any needed corrections prior to creating the electronic Form I-94.

Comment: Some commenters were concerned that the regulations do not require CBP to stamp the passport, and state that CBP does not currently stamp passports consistently. Thus, there is no way for some travelers to review their admission information at the time of entry.

Response: It is CBP's policy to stamp the passport of visitors to the United States, or provide them a receipt, as in the case of Global Entry members.⁷ CBP has provided extensive guidance and training to CBP officers at POEs regarding the documentation of a lawful admission into the United States with a CBP admission stamp. CBP will continue to provide guidance and training to CBP officers at the POEs to ensure that officers are stamping passports consistently. CBP notes, however, that a traveler will be able to find his or her admission record on the I-94 retrieval Web site regardless of whether the passport contains an admission stamp.

Comment: Some commenters noted that variations on naming conventions and other data occur in travel documents and records. These commenters stated that there are often variations due to inconsistent rules for transliterating non-Latin alphabets, and inconsistent rules for non-standard characters or naming conventions. The systems must be configured so that travelers are not harmed by variations in names and systems. Commenters prefer that CBP use information from the biographical page of the passport rather than information from the visa, as the visa name is often incorrect. The commenters indicated that DOS naming conventions are often not compatible with the conventions of other agencies. In particular, the First Name Unknown (FNU) or Last Name Unknown (LNU) designations create problems for nonimmigrants when the U.S. visa is

used as the primary source for an official name.

Response: CBP has met with USCIS, DOS, and representatives from ICE's Student and Exchange Visitor Program (SEVP) to discuss naming conventions and to attempt to resolve inconsistencies. Currently, CBP creates the Form I-94 admission record using the name found in the MRZ of the passport, not the visa. APIS and CBP use standard International Civil Aviation Organization (ICAO) naming conventions. CBP will use FNU or LNU only when a traveler does not have both a given and surname.

Comment: A few commenters suggested that CBP establish additional resources to help address questions and correct errors. Specific suggestions included creating an ombudsman for the electronic Form I-94, creating a Web site with guidance, and establishing dedicated help lines and email addresses for use by travelers, employers, and other government agencies. Commenters were concerned that there was not a mechanism established for correcting errors in the electronic records and no access to the Web site at the time of entry into the United States.

Response: Although CBP does not have the resources to create a dedicated helpline or ombudsman, CBP has included additional guidance on the I-94 Web site under the FAQs tab. Travelers can check the passport admission stamp obtained at the time of entry into the United States to verify the correct date and class of admission, and ask the CBP officer to make corrections if needed.

CBP will correct any errors in Form I-94 records that originated with CBP at CBP's Deferred Inspection Sites (DISs). DISs, located at most major airports, will provide assistance to travelers requiring Form I-94 corrections or modifications. In many cases, corrections can be completed through a telephone call to a DIS. However, in some cases, the traveler may be required to appear in person in order to verify identity or to provide additional documentation to CBP. CBP has provided guidance and training to the CBP officers at the DISs about Form I-94 corrections. A list of all DISs can be found at <http://www.cbp.gov/document/forms/deferred-inspection-sites>.

Travelers may also visit the CBP INFO Center at <https://help.cbp.gov> for assistance. The INFO Center has staff dedicated to responding to Form I-94 issues. CBP has included a link to the CBP INFO Center on the Form I-94 retrieval Web site.

⁷ Nonimmigrant Global Entry members receive a printed Form I-94 from the Global Entry kiosk, and can also retrieve the Form I-94 from the I-94 Web site.

Coordination With Other Agencies

Comment: Some commenters complained of disparate guidance from various government agencies concerning the automated Form I-94. For example, some commenters stated that the SSA published guidance indicating that either an unexpired admission stamp or a printout from the Form I-94 Web site will be accepted as proof of nonimmigrant status. USCIS, however, has published guidance on its Web site stating that USCIS and state DMVs will require a printout of the Form I-94. Further, one commenter noted that at least one DMV office still required a stamp on the Form I-94 and had not heard of the change to the automated Form I-94.

Response: CBP has conducted extensive outreach to other agencies and to DMVs regarding the automation of the Form I-94. The requirements of various federal and state agencies may differ for practical or legal reasons, resulting in some agencies being able to accept the admission stamp while others may still require a printout of the Form I-94. Per commenters' suggestions, CBP has added the following language on the Form I-94 printout to aid in educating stakeholders not familiar with the electronic Form I-94:

Effective April 26, 2013, DHS began automating the admission process. An alien lawfully admitted or paroled into the United States is no longer required to be in possession of a preprinted Form I-94. A record of admission printed from the CBP Web site constitutes a lawful record of admission. See 8 CFR 1.4(d).

Comment: Some commenters had particular concerns about completing USCIS's Form I-9, as that form requests the Form I-94 number. Commenters suggested that either the period of admission or the passport number and country of issuance serve as the required data fields on the Form I-9. Otherwise, workers without internet access will have trouble completing the Form I-9.

Response: USCIS, the owner of the Form I-9 (Employment Eligibility Verification), is reviewing its forms and applicable regulations and policies, but at this time, it is not able to change the required information on Section 1 of the Form I-9. For completion of Section 2 of Form I-9, employees who are aliens authorized for employment with a specific employer incident to their nonimmigrant status may choose to present their foreign passport together with Form I-94 in paper format (which includes a printout from the Web site); admission stamps are not acceptable for

Form I-9 purposes. Refugees and asylees may also choose to present Forms I-94 for completion of Section 2 and Section 3 of the Form I-9, although they also have the option to present other documents instead. Refugees may choose to present a Form I-94 printout or a paper Form I-94 with a refugee stamp as an acceptable receipt for Form I-9 purposes that does not need to be paired with any other document. Asylees who wish to show a Form I-94 may present their paper Form I-94 as a List C document in combination with a valid List B document.

Comment: A few commenters, including AILA and the Intel Corporation, were concerned that inconsistent rules regarding when a Form I-94 printout is acceptable will materially affect foreign nationals' access to employment and benefits, such as Social Security cards, driver's licenses and extensions or changes of nonimmigrant status. Commenters also said that inconsistent rules could adversely affect U.S. businesses; for example, if DHS continues to require printouts bearing an admission number, employers could be fined by DHS for failure to record this number on the Form I-9. A delay or grace period in any enforcement actions related to the I-9 regarding the entry of admission numbers is encouraged.

Response: The requirements to record document numbers on Section 2 of the Form I-9 have not changed. DHS regulations require employers to record the necessary information from documents the employee presents to complete Form I-9 within three days from the date of hire. Section 1 of Form I-9 requires employees who attest to being aliens authorized to work in the United States to record either their alien number (or USCIS number) or Form I-94 admission number. Section 1 of Form I-9 must be completed by the employee at the time of hire (*i.e.*, first day of work for pay). The Form I-94 number can be found on the Form I-94 printout; there is no requirement that the number must come from the Form I-94 itself. The timing requirements for Form I-9 completion are regulatory. DHS may provide more flexibility in the timing requirements in a future rulemaking.

Employees are still required to present documents of their choice from the Lists of Acceptable Documents specified in the Form I-9 to show identity and employment authorization on Form I-9. To satisfy 8 CFR 274a.2, original documents must be presented to employers, which employers must examine to make a determination regarding whether the documents appear to be genuine and to reasonably

relate to the person presenting them. According to USCIS, which issues the Form I-9, if an employee chooses to present a Form I-94 along with their foreign passport to show identity and employment authorization in Section 2 of the Form I-9, he or she will need to present to his or her employer a Form I-94 in paper format, which includes a Form I-94 printed out from the CBP Web site. If an employee provides the Form I-94 he or she obtained from the CBP Web site with his or her foreign passport as a List A document, the employer should accept these documents if they appear to be genuine and reasonably relate to the person presenting them. Form I-9 rules permit employees to present certain receipts in lieu of the original document(s): 1. A receipt for a replacement of a lost, stolen, or damaged document; 2. the arrival portion of the Form I-94 or Form I-94A containing a Temporary I-551 stamp and photograph; and 3. the departure portion of Form I-94 or I-94A with an unexpired refugee admission stamp. 8 CFR 274a.2(b). USCIS has determined that a Form I-94 printed out from the CBP Web site by a refugee is acceptable for Form I-9 purposes without an unexpired refugee admission stamp as long as the printout provides the class of admission as "RE" and duration of admission as "D/S [duration of status]."

In the benefits-granting context, DHS will continue its outreach to other federal, State, and local agencies to indicate that when a Form I-94 is required as proof of valid admission to the United States, a Form I-94 in either paper or print-out format is acceptable.

Comment: Commenters encouraged CBP to continue education outreach to agencies, employers, and other stakeholders that might remain unaware of the change to electronic Forms I-94. Commenters specifically urged education to improve access to and use of DHS verification tools, such as SAVE and E-Verify.

Response: CBP has conducted extensive outreach to local, state, and federal agencies, scholarly organizations, and other non-governmental entities both before and after automation. CBP involved all DHS components, DOS, SSA, and the Department of Commerce in the automation process through working groups. CBP in conjunction with USCIS provided guidance and support to all major DMVs that participate in the SAVE program. CBP coordinated with NAFSA and other student organizations to inform academic institutions. CBP has met with the U.S. Chamber of Commerce, the travel and tourism

industry, refugee and asylum groups, local law enforcement representatives, and other interested organizations during planning and development of the electronic Form I-94.

Employers seeking employment eligibility verification can do so through the E-Verify program offered by USCIS. Government agencies have access to status verification or other inquiries through a variety of sources, including law enforcement channels and the SAVE program offered by USCIS.

SEVIS

Comment: One commenter, NAFSA, suggested that CBP should include the SEVIS number in the electronic Form I-94 record for nonimmigrants who are monitored through SEVIS. The commenter stated that this would further DHS's fulfillment of its responsibility to notify educational institutions and exchange program sponsors that the student has been properly admitted into the United States. The commenter noted that CBP officers often write the SEVIS number on the paper Form I-94 of F and M students and J exchange visitors, and that this notation is used by Designated School Officials and Responsible Officers to ensure that the POE information is associated with the correct SEVIS record.

Another commenter asked how the admission record will be tied to the proper SEVIS number, if a student has more than one SEVIS record. The commenter stated that this is of particular concern because CBP is no longer stamping the Form I-20 or DS-2019 upon entry in the United States, and there is no way that the student can make sure the correct SEVIS I-20 is getting mapped to the admission number.

Response: The Student and Exchange Visitor Information System (SEVIS) is utilized to track and monitor schools, exchange visitor programs, and F, M and J nonimmigrants while they visit the United States and participate in the U.S. education system. The SEVIS number is the number generated when a Form I-20 or Form DS-2019 is issued to an individual to participate in a specific educational or cultural exchange program at a specific institution. CBP currently verifies SEVIS numbers prior to admission into the United States. CBP now requires officers to document SEVIS numbers, if applicable, in the electronic Form I-94 record, but these numbers are not accessible to the public or academic institution. The SEVIS number is not currently documented on the Form I-94 Web site or printout, as it is not a data

element required or collected on the paper version of the Form I-94. CBP will explore the feasibility of including the SEVIS number on the Web site and printout. CBP has provided guidance to the field to include the SEVIS number on the foreign travel document with the CBP admission stamp when practical.

CBP has updated its systems to help ensure that the correct SEVIS record is mapped to the proper arrival/departure record. The SEVIS information is stored in CBP systems, and the Arrival and Departure Information System (ADIS) feeds information to SEVP for each student. CBP is continuing to work to enhance its systems to do a real-time query of the SEVIS number to prevent admission on an invalid SEVIS number.

Comment: One commenter requested that CBP establish a mechanism for Designated School Officials to request a review when there is a problem with a SEVIS record.

Response: If there is a problem with the SEVIS record, the Designated School Official should contact SEVP, which oversees SEVIS. SEVP would then work with CBP if SEVP determines that the problem relates to the electronic Form I-94 or is otherwise CBP-related. More information about SEVIS can be found on the SEVIS Web site: www.ice.gov/sevis/.

Additional Comments

Comment: A few commenters requested that CBP include additional information on the tear sheet that is handed out to travelers at the POEs to include the purposes of the Form I-94 and a help line phone number or email address. Commenters stated that not all foreign nationals understand the importance of the Form I-94 or how soon they might need to print one.

Response: CBP designed the tear sheet to fit into the traveler's passport and inform travelers, in 12 languages, how to access their Form I-94 records. Due to the size of the tear sheet and the desirability of including any information in multiple languages, CBP is not able to add additional information. Additionally, as the traveling public becomes more familiar with the Form I-94 automation, CBP plans to phase out distribution of the tear sheets.

Comment: One commenter asked when all nonimmigrants arriving in the United States by air or sea will be processed electronically.

Response: CBP rolled out the Form I-94 automation over the weeks following the effective date of the IFR, April 26, 2013. The Form I-94 automation for air and sea passengers is now complete.

Comment: One commenter asked if the 11 digit admission number from the Form I-94 will continue to be used in the electronic Form I-94 format and whether it will be provided to the traveler at the time of admission.

Response: The 11 digit number has not changed and will continue to be issued electronically to travelers. Travelers can use the I-94 Web site to find their Form I-94 number.

Comment: One commenter was concerned about travelers having notice of the option to request a paper Form I-94 from CBP. The commenter stated that requesting a paper form is not in the regulations and it is not clear if the traveler should make the request on the plane or at the POE.

Response: Travelers may request the paper form at the POE from the CBP officer. CBP has updated information on the Web site, www.cbp.gov/194, to indicate that a paper form may be requested at the time of inspection. If someone requests a paper form, the person will be given the card stock form, properly annotated, with their electronic Form I-94 number written on the card. Due to the extra time this process takes, issuance of a paper Form I-94 will be completed in the secondary inspection area. Conclusion

Based on the analysis of the comments received, DHS is adopting the interim regulations as a final rule. In response to the comments, CBP has made some operational changes regarding the issuance of the Form I-94 that are described below.

Operational Changes to the Form I-94 Process

In response to some public comments received, and after studying usage and common problems of the I-94 Web site, CBP has made some changes to the I-94 Web site since the initial rollout of the Form I-94 automation, including the addition of new features. These changes and new features are summarized below. As described in several of the comment responses, CBP believes these changes make the Web site a better resource for the public and address user concerns.

First, the Web site now allows a traveler to retrieve his or her most recent Form I-94 even if he or she has departed the United States. A traveler may retrieve a Form I-94 issued up to five years prior to the request date.

Second, a traveler may now retrieve his or her five-year United States border crossing history from the Web site. The border crossing history information is drawn from Form I-94 records. If a traveler has entered and departed the United States with more than one travel

document during the five years, for example an old and new passport, he or she will need to query each document to retrieve the complete five-year history. CBP expects that this update to the Web site will provide a convenient alternative to the filing of a FOIA request when a traveler needs his or her five-year border crossing history when applying for certain benefits.

Third, the date and class of admission are no longer required to retrieve a Form I-94, as these data points were commonly problematic for travelers attempting to retrieve their Form I-94. This change also allows travelers to input the same information to retrieve both the Form I-94 and the travel history.

Additional operational changes include a new security consent page that addresses both privacy and security issues, an endorsement added to the Form I-94 printout indicating that the Form I-94 has been automated, and updates to the FAQs page of the I-94 Web site to reflect these changes and to address additional common questions.

Statutory and Regulatory Requirements

Executive Order 13563 and Executive Order 12866 (Regulatory Planning and Review) and (Improving Regulation and Regulatory Review)

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is an “economically significant regulatory action” under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this regulation.

1. Purpose of the Rule

This rule amends the definition of the Form I-94, Arrival/Departure Record, to include an electronic format. This revision enables DHS to transition to an automated process for air and sea ports of entry whereby DHS creates a Form I-94 in an electronic format based on passenger, passport, and visa information DHS obtains electronically from air and sea carriers and the Department of State as well as through the inspection process. This rule also is consistent with CBP’s transition to

accepting I-94 submissions online for use at the land border.

This rule results in substantial cost savings (benefits) for travelers, carriers, and CBP. CBP estimates the total net benefits to both domestic and foreign entities in 2013 ranged from \$57.9 million to \$82.7 million.⁸ Separately, CBP estimates a net benefit in 2013 of between \$41.1 million and \$65.9 million for foreign travelers, \$1.3 million for carriers, and \$15.5 million for CBP. Net benefits to U.S. entities (carriers and CBP) in 2013 totaled \$16.8 million. In the following regulatory assessment, we present the costs and benefits to CBP, carriers, and travelers from Form I-94 automation using a six-year period of analysis beginning in year 2012.

2. Baseline Condition and Affected Parties

a. Automation at the Air and Sea Ports of Entry

Prior to the implementation of the interim final rule CBP published on March 27, 2013 in the **Federal Register** (78 FR 18457), CBP required any alien traveling to the United States, other than under the Visa Waiver Program, to complete a paper Form I-94 prior to arrival. When arriving by air and sea, the carrier provided the form to the alien while en route to the United States. The alien typically completed the form while en route to the United States, spending approximately 8 minutes filling out the form.⁹ Upon arrival at the U.S. airport or seaport, the alien presented the completed Form I-94 to the CBP officer for inspection. If permitted to enter the United States, the officer tore the form at the perforation, stamped the lower portion, and returned it to the alien. The officer sent the top portion of the form to a centralized facility where all Forms I-94 were entered into CBP’s data systems. Generally, the alien later returned the lower portion of the Form I-94 to the carrier upon departure from the United States, who in turn returned it to CBP.

In addition to acting as an arrival and departure record, the Form I-94 also serves as evidence of admission or parole into the United States for nonimmigrants. Some third parties,

⁸ OMB Circular A-4 states regulatory analyses should focus on benefits and costs that accrue to citizens and residents of the United States (http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf; see “Scope of Analysis” section on page 15). In order to make this distinction clear, CBP has shown the costs and benefits to foreign travelers as well as impacts to U.S. entities.

⁹ See 78 FR 70570 (November 26, 2013) for the latest burden estimate for the Form I-94’s information collection.

such as universities or local or state government benefit-granting agencies, may require an alien to present evidence of admission or parole to the United States. Prior to the interim final rule, in these cases, the alien could present the bottom portion of the Form I-94, which was returned to them when they were admitted, paroled, or adjusted to an immigration status. Aliens could also choose to present Form I-94 to establish employment eligibility and identity or eligibility for certain public benefits.

If an alien loses the bottom portion of the Form I-94, he or she may file Form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, with USCIS to request a replacement. The form has a Paperwork Reduction Act burden of 25 minutes per form and a fee of \$330. According to the USCIS, prior to the implementation of this rule, 17,700 Forms I-102 were filed each year. At the time the interim final rule was published, USCIS estimated that the rule would result in a decrease in the number of Forms I-102 filed to 8,804 in 2013 and 5,771 in later years.¹⁰ Following the implementation of the rule in April 2013, the total number of Forms I-102 filed in 2013 was 13,715. USCIS now expects 6,782 Forms I-102 to be filed each year.¹¹ This is a reduction of 10,918 each year due to this rule.

According to the Office of Immigration Statistics (OIS),¹² about 53.9 million aliens entered the United States using a Form I-94 or equivalent (*i.e.* using a Form I-94W or obtaining an electronic travel authorization when entering under the Visa Waiver Program) in 2012. Of these, about 20.3 million entered under the Visa Waiver Program (VWP). These aliens do not use a Form I-94 and are therefore unaffected by this rule,¹³ so we exclude them from this analysis. Additionally, OIS figures include all modes of transportation. I-94 automation affects only aliens

¹⁰ Communication with USCIS on February 8, 2013.

¹¹ Supporting Statement for Form I-102. Available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201402-1615-001. Accessed September 28, 2016.

¹² 2012 Yearbook of Immigration Statistics. Table 28. <https://www.dhs.gov/yearbook-immigration-statistics>. Accessed October 26, 2016.

¹³ In addition to automating the Form I-94, this final rule adds a valid, unexpired nonimmigrant DHS admission or parole stamp to the list of documents that constitute evidence of registration. Thus, such a stamp can serve as evidence of registration for Visa Waiver Program travelers and for travelers arriving by land who would otherwise be required to comply with any registration requirement under the INA. However, the addition of the passport stamp to the list of documents that constitute evidence of registration does not have an economic impact on travelers. Therefore, this analysis focuses on the changes to the Form I-94.

arriving by air and sea, so we must exclude those arriving by land. We therefore subtract the number of aliens entering the U.S. at land border ports using a Form I-94 in 2012. According to CBP's Office of Field Operations, about 15.4 million aliens arriving from Mexico and 1.2 million arriving from Canada entered the United States at the land border using a Form I-94 in 2012. We subtract these from the admission total, leaving 16,952,996 non-VWP aliens who arrived in the U.S. by air or sea using a Form I-94 in 2012.

We next estimate the number of Form I-94 travelers to the United States in the rest of the period of analysis.¹⁴ For 2013 and 2014, we again use actual data from the Office of Immigration statistics. For 2015 through 2017, we use the traveler projections developed by the Office of Travel and Tourism Industries (OTTI) within the U.S. Department of Commerce.¹⁵ The OTTI forecasts travel growth through 2020 for the 20 countries with the highest 2014 travel volume. Since the vast majority of travelers from most countries arrive in the United States by air and sea, we assume that OTTI's travel growth rates best reflect air and sea travel growth. For Mexico and Canada, we subtract the number of Form I-94 travelers arriving by land in 2012 before applying the OTTI growth rates.¹⁶ We apply the OTTI projected growth rates to the number of Forms I-94 by country we obtained from OIS. For countries not separately forecasted by OTTI, we use OTTI's average growth rate for overseas travel for each year to determine overseas travel from these countries. We present the total number of projected Forms I-94 for each year from 2012-2017 absent the rule in Exhibit 1 below.

EXHIBIT 1—PROJECTED FORM I-94 RESPONDENTS TRAVELING BY AIR AND SEA

[*denotes projection]

2012	16,952,996
2013	16,832,602
2014	20,680,611
2015	21,700,329

¹⁴ 2013 and 2014 Yearbook of Immigration Statistics. Table 28. <https://www.dhs.gov/yearbook-immigration-statistics>. Accessed October 26, 2016.

¹⁵ U.S. Department of Commerce, Office of Travel and Tourism Industries "Forecast of International Travelers to the United States by Top Origin Countries." October 2015. Available at <http://travel.trade.gov/view/f-2000-99-001/forecast/Forecast-COUNTRIES.pdf>.

¹⁶ For the purposes of these projections, we assume that aliens arriving from Mexico and Canada at land borders are Mexican and Canadian citizens. There are a small number of citizens of other countries who enter the U.S. at land borders. Because the number for each country is small, the effect on the projections is minimal.

EXHIBIT 1—PROJECTED FORM I-94 RESPONDENTS TRAVELING BY AIR AND SEA—Continued

[*denotes projection]

2016	22,628,579
2017	23,871,524

b. Electronic Implementation at the Land Border

This rule affects the process of obtaining a Form I-94 for travelers arriving by air and sea and is consistent with CBP's transition to accepting I-94 submissions online for use at the land border. In addition to the automation at air and sea ports of entry, CBP modified the process by which a traveler arriving at the land border can provide Form I-94 information and pay the related fee by adding an electronic option. The enhanced I-94 Web site launched on September 29, 2016.

Due to the differences in documentary requirements for land border entries, the Form I-94 issuance process varies slightly at a land border port of entry than at an air or sea port of entry. Currently when a traveler requiring a Form I-94 arrives at the land border, he/she goes to secondary inspection where he/she provides the I-94 information to a CBP officer who inputs the data into a computer. The process takes approximately 8 minutes in addition to the time of the actual inspection. After determining the traveler's admissibility, the CBP officer then prints a Form I-94 for the traveler and refers him/her to the cashier to pay the associated \$6 fee.¹⁷ It takes approximately 20 minutes to wait in line to pay the fee and approximately 2 minutes to pay the fee.

3. Costs

We next estimate the costs and benefits of this rule for all affected parties. For the interim final rule, we assumed that the rule would go into effect on January 1, 2013. The rule actually went into effect on April 22, 2013. Because certain key data on arrivals by class of admission is only available publicly on an annual basis, we incorporate some prorated arrivals estimates into this analysis. For the purpose of this analysis, we assume that the rule went into effect on May 1, 2013 and we prorate the 2013 estimates to reflect that the rule was in effect for 8 months of the year. To the extent that travel among various classes of admission is not consistent throughout the year, the 2013 estimates may be overstated or understated.

¹⁷ The amount of fee for the issuance of the Form I-94 at a land border port of entry is provided for in 8 CFR 103.7(b)(1)(ii)(D).

The costs of this rule are borne by both CBP and aliens traveling to the United States.

a. Costs to CBP of Automation at the Air and Sea Ports of Entry

This rule allows for the automation of the paper Form I-94 in the air and sea environments.¹⁸ Almost all of the traveler information collected on the Form I-94 prior to the implementation of this rule was redundant in the air and sea environments because CBP already obtained the same information electronically from other sources. In advance of the implementation of this rule, CBP linked its data systems to use the information from these alternate sources to create an electronic Form I-94 during the admission process. CBP creates the electronic Form I-94 by pulling information from the traveler's Advance Passenger Information System (APIS) record and any Consular Consolidated Database (CCD) record and then by entering any additional data obtained during the inspection process. This electronic process allows stakeholders that have access to CBP's databases to continue to have access to traveler information electronically. CBP's Office of Information Technology estimates the cost to link data systems and to fully automate the Form I-94 was about \$1 million in calendar year 2012. In addition, it estimates the cost to develop the secure Web site was about \$321,000 in 2012. CBP anticipates spending \$92,000 per year in operations and maintenance costs for these systems. In total, CBP incurred costs of \$1,321,000 in 2012 and will incur costs of \$92,000 in following years.

b. Costs of Electronic Implementation at the Land Border

CBP's Office of Information Technology estimates that it cost approximately \$540,000 in 2016 to develop the Web site and create the online payment capabilities. CBP will not bear any additional costs to process travelers as a result of this process.

Travelers will not face new costs or time burdens under the new optional process at the land border. Under this process, travelers will have the option to use a new CBP Web site to answer the Form I-94 questions and to pay the \$6 fee in advance of travel. As the Form I-94 questions are not changing, the time burden to submit the information is not changing. Similarly, we estimate that it will take the traveler 2 minutes to pay the fee online, which is the same as the

¹⁸ A small number of paper Forms I-94 are still being used for certain aliens such as aslyees, certain parolees, and those who request a paper Form I-94.

time it takes if the traveler pays at the border, and the fee itself is not changing.

c. Costs Borne by Travelers to the United States From Automation at Air and Sea Ports of Entry

Although most travelers do not use the Form I-94 for any reason once they are admitted or paroled to the United States, some aliens do make use of the form to demonstrate lawful admission or parole to the United States to the Social Security Administration, universities, state agencies such as Departments of Motor Vehicles, public assistance agencies and organizations, or some other party.

Aliens may also choose to present a Form I-94 to establish employment eligibility and identity, or eligibility for certain public benefits. To accommodate this need for the Form I-94, CBP has made an electronic Form I-94 available to aliens on the secure I-94 Web site. Travelers receive written information on how to access the Web site upon their arrival to the United States. Aliens may log into the Web site using 5 pieces of basic identifying information that is either known to the traveler (e.g. their first name, last/surname, and date of birth) or readily available on their passport (e.g. passport number, country

of issuance). CBP estimates that it takes the traveler 4 minutes to log into the Web site using identifying information and to print the electronic form. This is less time than the paper Form I-94's 8 minute time burden for entering 17 data elements. This 4 minute estimate does not include the time it takes to travel to a location with computer and internet access; that cost is treated separately later in this section.

In addition, CBP makes the paper Form I-94 available to certain classes of aliens and upon request at the secondary inspection station at ports of entry and at CBP Deferred Inspection Sites (DIS), which are located at most ports of entry and are largely open during regular business hours. Since the interim final rule went into effect, very few travelers have requested the paper form.

To estimate the costs to travelers to access their Form I-94 electronically, we must first determine the number of aliens who access the Web site, the number who do not have ready access to the internet, the distance they have to travel to access the internet, and the average wage rate for all aliens entering the United States by air or sea. First, we assess the number of aliens who access the Web site. Exhibit 2 shows the

number of travelers who entered the United States by air or sea in 2012 sorted by various categories of admission.¹⁹ The majority of Form I-94 visitors to the United States—about 76 percent—are tourists and business travelers entering on B-1/B-2 visas. In most cases, these travelers do not have a need for their Form I-94 now that the passport stamp serves as evidence of alien registration. While in the U.S., these B-1/B-2 visa travelers may use their foreign driver's license, so there is generally no need for them to apply for a U.S. driver's license. They are ineligible for employment or enrollment in a university while traveling on a B-1/B-2 visa. They are generally not eligible for public benefits without a change in status. For these reasons, for the analysis for the interim final rule, we assumed that no B-1/B-2 visa holders would need to access the Web site to obtain their electronic Form I-94. However, public comments stated that some B-1/B-2 travelers do in fact need their Form I-94. According to the Web site's query history, approximately 1 percent of B-1/B-2 travelers access the Web site.²⁰ Therefore, for this analysis, we assume that 1 percent of these travelers will continue to access the Web site in the future.

EXHIBIT 2—2012 AIR AND SEA FORM I-94 RESPONDENTS BY CLASS OF ADMISSION *

	Number	Percentage
Tourists and Business Travelers (B-1/B-2)	12,938,329	76.3
Temporary workers	1,631,683	9.6
Students	1,594,816	9.4
Other/Unknown	461,935	2.7
Diplomats	326,233	1.9
Total	16,952,996	.....

* Estimates may not total due to rounding.

Because so many parties at various levels of government and outside of the government use the Form I-94, prior to the implementation of the interim final rule CBP could not estimate the number of non-B-1/B-2 travelers that would access the Web site. For the analysis of the interim final rule, we assumed that all travelers, other than B-1/B-2 travelers, who previously received a paper Form I-94 would log into the Web site to print off their electronic Form I-

94. According to the Web site's query history since the implementation of the interim final rule, approximately 75 percent of non-B-1/B-2 travelers access the Web site. Exhibit 3 shows the number of travelers we estimate will access their electronic Form I-94 via the CBP Web site during the period of analysis. We note that those with a need for a Form I-94 who face obstacles to accessing their Form I-94 electronically may request a paper Form I-94 at the

secondary inspection station upon their arrival at the port or at a DIS during their stay in the United States. However, according to CBP subject matter experts, very few aliens have requested paper Forms I-94 at the ports of entry and those who have requested them at DIS have done so primarily to correct erroneous information on their electronic Form I-94.

EXHIBIT 3—ESTIMATED TRAVELERS NEEDING TO ACCESS ELECTRONIC FORM I-94

	B-1/B-2	Other *	Total
2012	0	0	0

¹⁹ CBP analysis of data from 2012 Yearbook of Immigration Statistics. Table 28. <http://www.dhs.gov/files/statistics/publications/yearbook.shtm>. Accessed June 4, 2014.

²⁰ Communication with CBP's Office of Field Operations on June 10, 2014.

EXHIBIT 3—ESTIMATED TRAVELERS NEEDING TO ACCESS ELECTRONIC FORM I-94—Continued

	B-1/B-2	Other*	Total
2013**	85,622	1,994,663	2,080,285
2014	157,793	3,675,979	3,833,772
2015	165,574	3,857,233	4,022,807
2016	172,656	4,022,230	4,194,886
2017	182,140	4,243,163	4,425,303

* Other includes temporary workers, students, diplomats, and others/unknowns.

** 2013 travelers are estimated based on the rule being in effect for two thirds (8 months) of the year.

We next estimate the number of aliens who do not have ready access to the internet while in the United States and would need to travel to access their electronic Form I-94. We assume that students and diplomats have ready access to the internet at their schools or places of business respectively. The 1 percent of B-1/B-2 travelers who access their electronic Form I-94 typically need it when staying in the United States for over 6 months. These people likely have other uses for the internet during their stay and could access their electronic Form I-94 when using the internet for another purpose. Therefore, we assume they do not need to travel to access their electronic Form I-94. Also, as noted above, CBP will continue to make the paper Form I-94 available upon request at the secondary inspection station at ports of entry or at DIS to those with a need for a Form I-94 and who face obstacles to accessing their electronic Form I-94.

Temporary workers come to the United States for varying lengths of time to fill positions where there is a shortage of labor in the United States. These positions can be in very highly technical occupations, such as computer programming, but they can also be in less technical occupations such as agricultural labor.

Because this category of admission includes such a wide range of workers, we cannot say with certainty that all temporary workers have ready access to the internet while in the United States. Similarly, we do not know how accessible the internet is for those in the "Other/Unknown" category. The aliens least likely to have internet access are those working as temporary agricultural laborers.

According to the U.S. Department of Agriculture (USDA), approximately 67 percent of farms have internet access.²¹ The primary use for the electronic Form I-94 for these temporary workers is to

demonstrate employment eligibility to their employers. Generally, this document will be the only acceptable evidence of employment authorization that such workers will have to satisfy the Employment Eligibility Verification (Form I-9) requirements. Because of the Form I-9 requirements, many employers do not allow their employees to begin working for pay until the workers have presented them with the print-out of their electronic Form I-94. The employers have spent a considerable amount of money bringing these foreign workers to the United States to work. By offering internet access to employees, employees and employers can complete the employment eligibility verification process timely, which allows the employee to begin working sooner. Because this incremental use of the internet is virtually costless to the employer and the employer would benefit from their employee's prompt access to their electronic Form I-94, we assume that employers with internet access allow their employees to use their internet connection to access their electronic Forms I-94.²² As stated previously, 67 percent of farms have internet access. For the purposes of this analysis, we assume that 33 percent (100 percent-67 percent) of travelers in the "Temporary Workers" and "Other/Unknown" categories (for example, 690,894 in 2012) would need to travel to access their electronic Form I-94.

CBP received several public comments regarding the ability of travelers to obtain their printed electronic Form I-94 before they need it. One employer of temporary workers commented that according to their company policy, employees cannot use company computers to access the

internet until they have demonstrated their legal admission to the United States by presenting a copy of their Form I-94.

While CBP believes that most employers with internet access allow their employees to use a company computer to access their Form I-94, we acknowledge that a small number of employers may choose not to do so, or company policy may prohibit non-employees from accessing company equipment. These travelers are included in the 33 percent of temporary workers who we assume have to travel to access the internet.

One commenter noted that employees sometimes need to start work very soon after arrival and do not have time to travel to a location where they can print their electronic Form I-94. Once again, CBP notes that any traveler, but particularly travelers with an immediate need for their Form I-94 may request a paper Form I-94 at the secondary inspection station at ports of entry or at CBP DIS. Another commenter said that travelers often do not know they need a Form I-94 until after they have left the airport, so requesting a paper Form I-94 at the port is not a practical option. CBP acknowledges that many people may not know that they need their Form I-94 until it is asked of them. As such, CBP has made access to the I-94 Web site as easy as possible and will continue to provide paper Forms I-94 upon request at CBP DIS. Another commenter suggested that CBP provide kiosks at the ports of entry where travelers could print their electronic Form I-94 prior to leaving the airport. CBP has explored the possibility of placing kiosks at the largest airports and seaports to give travelers the opportunity to print their Form I-94 prior to leaving the port of entry. CBP has determined that the benefits to the public do not outweigh the cost to CBP, so it is not proceeding with kiosks at this time. See the Regulatory Alternatives section for more information.

Now that we have estimated the number of aliens who do not have ready access to the internet, we need to

²¹ United States Department of Agriculture National Agricultural Statistics Service. "Farm Computer Usage and Ownership." August 2013. Available at: <http://usda.mannlib.cornell.edu/usda/current/FarmComp/FarmComp-08-20-2013.pdf>. Accessed June 4, 2014.

²² It is also possible that some employers without internet access help transport their employees to a location with internet access. Employers have expended considerable effort to sponsor temporary workers and they may view this as part of the cost of using foreign temporary workers. However, as the burden of demonstrating employment eligibility is on the worker, we assume that the worker must bear any travel costs to obtain their electronic Form I-94. To the extent that the employer is able to provide more efficient access to the internet, costs to workers will be lower.

develop an assumption for how long it takes to travel to a location where they can access the internet. Based on our online review of internet services provided by public libraries, we found that virtually all public libraries provide public access to computers and the internet, though many charge a nominal fee for printing. There are 16,766 public libraries in the United States.²³ According to the Department of Education, 94 percent of households live within 10 miles of a public library and 83 percent live within 5 miles of one.²⁴ Given the large number of library locations nationwide that provide access to the internet and the fact that CBP makes the paper Form I-94 available upon request at ports and DIS, we believe most aliens who travel to access the internet to print their electronic Form I-94 only need to travel a short distance to do so. We estimate that round-trip distance required to access a computer terminal and printing station at a public library is 20 miles. We also assume that traveling to and from a library takes 60 minutes of an aliens' time, which includes travel time and the time to enter the library, locate an available computer, wait to access the computer and print a Form I-94. In this analysis, we assume that users pay \$0.25 to print their electronic Form I-94 based on a review of available online printing fees charged at public libraries.

We next estimate the value of time for those travelers affected by this rule. Federal agencies typically estimate a monetary value of time used or saved as a result of their regulatory actions. This allows agencies to estimate the additional costs and benefits of their regulatory actions on affected parties. The U.S. Department of Transportation (DOT) provides guidance on the value of time to use for economic analysis.²⁵ This guidance provides point estimates as well as ranges for values of time for travelers based on average wage rate analysis for different categories of travel.

According to DOT estimates, the value of travel time is more than twice as high for air travelers than for those traveling by surface modes, which can

be explained by the relatively high cost of air travel. We note that the DOT estimates are intended to be used to analyze actions that will reduce the time spent traveling. A person's value of time while traveling may differ from their value of reducing travel time. In most instances, this rule does not reduce the time spent traveling because an alien typically completes the Form I-94 while en route to the United States, but rather reduces the time spent on paperwork while traveling. The traveler is now able to spend this time on leisure or business activities such as reading or drafting documents. CBP believes that using the DOT values of travel time in this situation is the most appropriate estimate because it reflects the higher values of time for air travelers. Further, we note that to the extent a person's value of time while traveling is different than their value of reducing travel time, this difference is likely encompassed in the DOT plausible range for the value of travel time. The DOT estimates are in 2009 dollars, but the DOT provides a methodology to inflate its estimates for future years. We have inflated the estimates to 2012 dollars, which is the first year of our period of analysis.²⁶

As a primary estimate, we use the DOT's point estimate for the value of time for all-purpose air travel, which includes both personal and business travel. This point estimate is \$44.15, when inflated to 2012 dollars. We also use the DOT's range for all-purpose travel to show a range of low and high estimates. This range is from \$36.50 to \$54.75 when inflated to 2012 dollars. We apply these low, primary, and high values of time to the travelers in our analysis. We use this travel value of time framework to estimate the costs and savings of this rule, since affected aliens previously completed the paper Form I-94 while traveling.

We recognize that those who must travel to access the internet are a special case of travelers and probably have different values of time than the average air traveler. As previously discussed, the aliens least likely to have internet access are those working as temporary agricultural laborers. To estimate the value of time for these aliens, we use the wage rate for H-2A seasonal (temporary) agricultural workers.

According to the Department of Labor, H-2A temporary agricultural workers have an average wage rate of 9.79 per hour.²⁷ We recognize that there are

other classes of temporary workers, notably H-1B visa holders, who likely have higher wage rates; however, these workers are predominantly in specialized occupations such as medicine and computer programming and are likely to have ready access to the internet. Employers of these employees have an incentive to provide this access as it is virtually costless and would allow workers to start working earlier. We note that, notwithstanding the benefits to the employer of providing this access, we received public comments indicating that some employers of H-1B employees may not allow their workers to access computers to print their electronic Form I-94. CBP does not believe this represents a large number of employers.

Further, workers in occupations such as medicine and computer programming are likely to have internet access from other sources, such as their hotel or other place of lodging. Finally, as discussed above, we have assumed that all temporary workers would access their electronic Form I-94 and that 33 percent of them would have to travel to do so. Any H-1B worker who must travel to access their electronic Form I-94 is included in these estimates. But because we do not believe the H-1B workers make up a large portion of the temporary workers who must travel to access their electronic Form I-94, we use the estimated wage of H-2A workers as our estimate for the value of time for those who must travel to access their electronic Form I-94.

Now that we have estimated the number of aliens who log into CBP's Web site to print their electronic Form I-94, the time it takes to access that Web site, the number of people who need to travel to access the internet, the time it takes to travel to and from an internet access site, and the values of time for these groups, we can calculate this rule's cost to these travelers. We first address the cost to log into CBP's electronic Form I-94 Web site. Once again, CBP estimates that it takes travelers 4 minutes to access and print their electronic Form I-94, and that it costs them \$0.25 per page to print their electronic Form I-94. Exhibit 4 shows the 2013 to 2017 travelers' costs for accessing and printing their electronic Forms I-94.²⁸ As shown, in 2013,

weighted average of state average wage rates. Available at: <http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012-Annual-Report-11-29-2013-Final%20Clean.pdf>. Accessed on June 16, 2014.

²⁸ The annual estimates of Forms I-94 in Exhibit 4 are based on projections for all visa categories using growth rate estimates developed OTTI. We adjust these estimates using our assumptions that

²³ American Library Association. "Quotable Facts about America's Libraries." September 2012. <http://www.ala.org/offices/ola/quotablefacts/quotablefacts/>. Accessed Jun 13, 2014.

²⁴ Department of Education: Households' Use of Public and Other Types of Libraries: 2002. Derived from Table 19. Available at <https://harvester.census.gov/imls/pubs/Publications/2007327.pdf>. Accessed June 4, 2014.

²⁵ U.S. Department of Transportation: "Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis." September 28, 2011. Table 5. Available at http://www.dot.gov/sites/dot.dev/files/docs/vot_guidance_092811c.pdf. Accessed June 4, 2014.

²⁶ To determine the hourly value of travel time savings in 2012 U.S. dollars, we applied the DOT's suggested growth rate of 1.6 percent per year to the hourly time values listed in 2009 U.S. dollars.

²⁷ Calculated from the Office of Foreign Labor Certification's FY 2012 Annual Report using the

traveler costs of time to access electronic Forms I-94 and their cost to print them ranged from \$5.5 million to \$8.1 million with a primary estimate of \$6.6 million.

EXHIBIT 4—TRAVELER COSTS OF TIME TO ACCESS AND COST TO PRINT ELECTRONIC FORM I-94

[Undiscounted 2012\$]*

	2013	2014	2015	2016	2017
Forms I-94	2,080,285	3,833,772	4,022,807	4,194,886	4,425,303
DOT—Low (\$)	36.50	36.50	36.50	36.50	36.50
DOT—Primary (\$)	44.15	44.15	44.15	44.15	44.15
DOT—High (\$)	54.75	54.75	54.75	54.75	54.75
Time Cost—Low (\$)	5,061,648	9,328,146	9,788,098	10,206,792	10,767,432
Time Cost—Primary (\$)	4,730,513	8,147,564	7,990,003	7,786,713	7,677,030
Time Cost—High (\$)	4,914,222	8,792,673	8,957,496	9,068,603	9,288,081
Printing Cost (\$)	520,071	958,443	1,005,702	1,048,722	1,106,326
Total Cost—Low (\$)	5,581,720	10,286,589	10,793,800	11,255,514	11,873,758
Total Cost—Primary (\$)	6,643,502	12,243,356	12,847,050	13,396,594	14,132,443
Total Cost—High (\$)	8,112,544	14,950,663	15,687,848	16,358,910	17,257,474

* Estimates may not total due to rounding.

We next address the travel costs for those aliens who do not have ready access to the internet. Once again, we assume that 33 percent of travelers in the “Temporary Workers” and “Other/Unknown” categories (approximately 12 percent of the total, see exhibit 2) would

need to travel 20 miles roundtrip and spend 60 minutes of time to access their electronic Form I-94. We also assume that these travelers have a value of time best characterized by the average H-2A wage rate of \$9.79 per hour. For the cost of travel, we use the 2012 IRS standard

mileage rate for business travel of \$0.555 per mile.²⁹ Exhibit 5 shows the 2013 to 2017 aliens’ travel costs to access the internet. As shown we estimate that the total travel costs were \$9.3 million in 2013.

EXHIBIT 5—TRAVEL COSTS *

	2013	2014	2015	2016	2017
Affected Aliens	444,381	818,952	859,333	896,092	945,312
H2A Wage Rate (\$)	9.79	9.79	9.79	9.79	9.79
Time Cost (\$)	4,350,487	8,017,542	8,412,870	8,772,738	9,254,608
Mileage Cost (\$)	4,932,626	9,090,369	9,538,597	9,946,618	10,492,967
Total Travel Cost (\$)	9,283,113	17,107,912	17,951,467	18,719,357	19,747,575

* Estimates may not total due to rounding. Undiscounted dollars.

To summarize, both CBP and aliens bear costs as a result of this rule. CBP bore the costs to link its data systems and to build a Web site so aliens can access their electronic Forms I-94. CBP continues to incur annual costs to operate and maintain the I-94 Web site. Temporary workers and aliens in the “Other/Unknown category (see Exhibit 2) bear costs when logging into the Web site, traveling to a location with public internet access and printing a paper copy of their electronic Form I-94. The costs averaged \$24.08 per traveler in

2013 for those in the temporary worker and “Other/Unknown” categories who have to travel to access their electronic Form I-94. Aliens arriving as B-1/B-2 travelers, diplomats, students, and those temporary workers and aliens in the “Other/Unknown” category who do not need to travel to access their Form I-94 bear costs when logging into the Web site and printing electronic Forms I-94. Using the primary estimate for a traveler’s value of time, these costs for these groups averaged \$3.19 per person.

Exhibit 6 summarizes the 2012–2017 costs of this rule. As shown, costs for this rule in 2013 ranged from \$15.0 million to \$17.5 million. In our primary estimate, costs for this rule are \$16.0 million in 2013. Less than one percent of these costs are incurred by the U.S. entities. These are CBP’s costs for automating the electronic Form I-94 and developing the Web site travelers use to access their electronic Form I-94. In 2013, CBP’s costs were \$92,000.

EXHIBIT 6—COST SUMMARY

[Undiscounted 2012\$]*

	2012	2013	2014	2015	2016	2017
CBP Costs						
I-94 Air/Sea Systems Costs	1,321,000	92,000	92,000	92,000	92,000	92,000

1 percent of B-1/B-2 travelers and 75 percent of non-B-1/B-2 travelers access the I-94 Web site.

²⁹ Internal Revenue Service. IR-2011-116, December 9, 2011. Available at <http://www.irs.gov/newsroom/article/0,,id=250882,00.html>.

EXHIBIT 6—COST SUMMARY—Continued
[Undiscounted 2012\$]*

	2012	2013	2014	2015	2016	2017
I-94 Land Systems Costs					540,000	0
Total CBP Costs	1,321,000	92,000	92,000	92,000	632,000	92,000
Traveler Costs						
Website Access Costs—Low	0	5,061,648	9,328,146	9,788,098	10,206,792	10,767,432
Website Access Costs—Primary	0	6,123,431	11,284,913	11,841,348	12,347,872	13,026,117
Website Access Costs—High	0	7,592,473	13,992,220	14,682,147	15,310,188	16,151,148
Travel Time Costs	0	4,350,487	8,017,542	8,412,870	8,772,738	9,254,608
Mileage Costs	0	4,932,626	9,090,369	9,538,597	9,946,618	10,492,967
Printing Costs	0	520,071	958,443	1,005,702	1,048,722	1,106,326
Total Traveler Costs—Low	0	14,864,832	27,394,501	28,745,266	29,974,870	31,621,333
Total Traveler Costs—Primary	0	15,926,615	29,351,267	30,798,517	32,115,950	33,880,018
Total Traveler Costs—High	0	17,395,656	32,058,574	33,639,315	35,078,266	37,005,049
Grand Total Costs—Low	1,321,000	14,956,832	27,486,501	28,837,266	30,606,870	31,713,333
Grand Total Costs—Primary	1,321,000	16,018,615	29,443,267	30,890,517	32,747,950	33,972,018
Grand Total Costs—High	1,321,000	17,487,656	32,150,574	33,731,315	35,710,266	37,097,049

* Estimates may not total due to rounding.

4. Benefits

a. Benefits of Automation at Air and Sea Ports of Entry

This rule has benefits for CBP, carriers, and travelers to the United States. Prior to the implementation of the interim final rule, CBP returned the bottom portion of the Form I-94 to the traveler and retained the top portion of the form. The information on the top portion of the form was entered into CBP systems for use by CBP and other agencies. CBP also received this information electronically from other sources. In 2012, CBP linked its data systems to create an electronic Form I-94, thus eliminating the need to continue entering the data from the paper Form I-94 for air and sea travelers into CBP systems. Prior to the implementation of the interim final rule, CBP spent approximately \$17.8 million per year on contract support for manual Form I-94 data entry. CBP still must spend approximately \$2.4 million in contract expenses to enter data from the paper Forms I-94 collected at the land border and the few that continue to be collected at airports and seaports. We therefore estimate that this rule saves CBP \$15.4 million each year in contract costs. It is possible that these savings could grow in future years if large numbers of travelers at the land border opt for the voluntary electronic option.

CBP processing has also become more efficient as a result of this rule. Prior to the implementation of the interim final rule, when the traveler gave the completed Form I-94 to the CBP officer during the inspection, the officer reviewed the form for errors and made corrections as needed. The officer then stamped the top and bottom portions of

the form with the admission or parole stamp, notated the alien's classification and duration of admission or parole and stapled it to the traveler's passport. The interim final rule eliminated this process.

A study of the processing times at three major U.S. airports immediately following the implementation of the interim final rule yielded mixed results; one airport showed a decrease in processing time following the change in process, another showed an increase, and the third showed no statistically significant difference in processing times. We note that CBP has since resolved some technical issues with the user interface design of the system used by CBP officers during primary inspection that arose with the automated process. CBP has anecdotal evidence that processing times have now dropped nationwide as a result of the transition to the automated Form I-94 process.

CBP is conducting a more comprehensive time study that will examine the entire time period following the implementation of the automated process, but results of this study are not yet available. Accordingly, for the purposes of this analysis, we assume that this rule will not affect CBP processing times. To the extent that eliminating the paper Form I-94 reduced processing times, CBP was able to focus its resources on other areas, improving security and expediting the processing of passengers.

We next examine the printing savings this rule generates for CBP and carriers. Prior to the implementation of the interim final rule, both CBP and carriers printed and stored Forms I-94. CBP printed forms for use in primary and

secondary passenger inspections when the traveler did not fill out a form in advance or when the traveler made an error in filling out the form. Prior to this rule, CBP spent \$153,360 each year printing the Form I-94 for air and sea travelers. Since the interim final rule's implementation, CBP no longer needs to print the Form I-94 for most of these travelers,³⁰ which eliminates this expense.

Before the implementation of the interim final rule, carriers printed the Forms I-94 for their passengers to complete before their arrival in the United States. To estimate printing costs for carriers, CBP obtained an estimate of total Form I-94 printing and storage costs from a major airline. We increased this cost proportionally based on annual international inbound passenger volumes to estimate the entire industry's cost to print and store paper Forms I-94. Based on this methodology, CBP estimates that carriers spent \$1,344,450 annually to print and store the Form I-94. Since the interim final rule's implementation, carriers no longer need to print or store the Form I-94, which eliminates these expenses.

We next estimate the value of air and sea travelers' time savings resulting from the elimination of the paper Form I-94. Prior to the implementation of the interim final rule, travelers spent 8 minutes filling out the Form I-94 while in transit to the United States. This rule eliminates the paper Form I-94 for air and sea travelers and, with it, the 8-

³⁰ CBP still prints a small number of forms for use at airports and seaports for certain aliens such as asylees, certain parolees, and those who request a paper Form I-94.

minute time burden.³¹ We again apply the DOT range of plausible values of time for air travelers, as well as their point estimate for this value, to these aliens to determine the time savings

from the Form I-94 automation. Exhibit 7 shows the 2013 to 2017 travelers' reduction in time burden resulting from no longer needing to fill out the paper Form I-94. As shown, in 2013, the value

of the reduction in time burden ranged from \$54.6 million to \$81.9 million. In our primary estimate, the reduction in time burden was \$66.1 million in 2013.

EXHIBIT 7—REDUCTION IN TIME BURDEN*

	2013	2014	2015	2016	2017
Forms I-94	11,221,734	20,680,611	21,700,329	22,628,579	23,871,524
DOT—Low (\$)	36.50	36.50	36.50	36.50	36.50
DOT—Primary (\$)	44.15	44.15	44.15	44.15	44.15
DOT—High (\$)	54.75	54.75	54.75	54.75	54.75
Benefit—Low (\$)	54,608,355	100,638,110	105,600,365	110,117,513	116,166,058
Benefit—Primary (\$)	66,063,556	121,748,978	127,752,166	133,216,876	140,534,225
Benefit—High (\$)	81,912,532	150,957,166	158,400,547	165,176,269	174,249,087

* Estimates may not total due to rounding.

We next examine the savings to aliens who need a replacement Form I-94. Prior to the implementation of the interim final rule, if aliens lost the bottom portion of their Form I-94, they could file Form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, with USCIS to request a replacement. The form has a Paperwork Reduction Act

burden of 25 minutes per response and a fee of \$330. As stated earlier, prior to the implementation of the interim final rule, 17,700 Forms I-102 were filed annually. In 2013, 13,715 Forms I-102 were filed and USCIS expects 6,782 to be filed each year starting in 2014, a reduction of 10,918 each year due to this rule. Now these travelers are able to access their electronic Form I-94, which

saves these individuals 25 minutes and \$330.³² We calculate the value of this time savings using USCIS's hourly wage estimate for Form I-102 filers of \$30.74.³³ Exhibit 8 shows the time and fee cost savings for those who would otherwise have needed to file a Form I-102 from 2013 to 2017. As shown, in 2013 the value of this time and fee savings was \$1.4 million.

EXHIBIT 8—I-102 COST SAVINGS *

	2013	2014	2015	2016	2017
I-102 Reduction	3,985	10,918	10,918	10,918	10,918
Time Burden	25	25	25	25	25
USCIS hourly wage (\$)	30.44	30.44	30.44	30.44	30.44
Time Savings (\$)	51,041	139,841	139,841	139,841	139,841
Fee Savings (\$)	1,315,050	3,602,940	3,602,940	3,602,940	3,602,940
Total Savings (\$)	1,366,091	3,742,781	3,742,781	3,742,781	3,742,781

* Estimates may not total due to rounding. Undiscounted dollars.

Following the enactment of the interim final rule, travelers could only access their current electronic Form I-94 until they departed the United States. In response to public comments on the interim final rule, CBP has enhanced the Web site to allow travelers to access their most recent Form I-94 for 5 years from the date of issuance. In addition, the Web site now provides foreign travelers with a 5 year record of their travel history. Doing so has reduced Freedom of Information Act requests received by CBP by approximately 2 percent.

Accessing the information via the Web site can be done within minutes rather than the months it can take to

receive information from a FOIA request, which is a benefit to the traveler. In addition, this saves the CBP FOIA office time, which it can spend processing other FOIA requests. CBP is exploring whether it can expand the Web site to include travel history dating back farther than 5 years. CBP is also considering whether the Web site can be set up to include travel history for non-Form I-94 users such as U.S. citizens and legal permanent residents. CBP estimates that expanding the travel history past 5 years has reduced the number of FOIA requests received by approximately 6 percent and expanding it to include travel history for U.S. citizens and legal permanent residents

will reduce FOIA requests by an additional 20 percent.

In summary, CBP, carriers, and aliens accrue benefits as a result of this rule. CBP saves on contract and printing costs as well as FOIA processing burdens. Carriers save on printing costs. All aliens save the 8 minute time burden for filling out the paper Form I-94 and certain aliens who lose their Form I-94 save the \$330 fee and 25 minute time burden for filling out the Form I-102; and, certain aliens save processing time from the elimination of the FOIA process. Because we only expect one percent of B-1/B-2 travelers to use the Web site to access their electronic Form I-94, the benefits associated with the

³¹ For those with a need to access their electronic Form I-94, this burden relief is partially offset by the 4 minute time burden to access the Web site. The costs for this access are discussed in the costs section above.

³² As discussed in the costs section, we estimate a 4 minute time burden for travelers who need to

access their electronic Form I-94. See the cost section for a complete discussion of the costs of accessing the Web site as well as the cost to travel to a location where they can access the Web site, where necessary.

³³ USCIS estimates are based on U.S. Bureau of Labor data for occupational employment statistics.

The latest supporting statement for the I-102 is available at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201206-1615-003. Accessed June 4, 2014. This supporting statement uses a wage estimate of \$30.74.

Form I-102 accrue primarily to non-B-1/B-2 travelers. Using the primary estimate for a traveler's value of time, the time burden savings for all travelers is \$5.89 per traveler. In addition, those

non-B-1/B-2 travelers who no longer need to use a Form I-102 would achieve an additional time and fee savings of \$343.81 per traveler. Exhibit 9 summarizes the benefits of air and sea

automation to each party. As shown, total benefits for this rule ranged from \$72.9 million to \$100.2 million in 2013. In our primary estimate, the benefits of this rule were \$84.3 million in 2013.

EXHIBIT 9—BENEFIT SUMMARY
[Undiscounted 2012\$]*

	2013	2014	2015	2016	2017
CBP Benefits:					
CBP Contract Savings	15,400,000	15,400,000	15,400,000	15,400,000	15,400,000
CBP Printing Savings	153,360	153,360	153,360	153,360	153,360
Total CBP Benefits	15,553,360	15,553,360	15,553,360	15,553,360	15,553,360
Carrier Printing Savings	1,344,450	1,344,450	1,344,450	1,344,450	1,344,450
Traveler Benefits:					
Form I-94 Time Savings—Low	54,608,355	100,638,110	105,600,365	110,117,513	116,166,058
Form I-94 Time Savings—Primary	66,063,556	121,748,978	127,752,166	133,216,876	140,534,225
I-94 Time Savings—High	81,912,532	150,957,166	158,400,547	165,176,269	174,249,087
Form I-102 Time Savings	51,041	139,841	139,841	139,841	139,841
Form I-102 Fee Savings	1,315,050	3,602,940	3,602,940	3,602,940	3,602,940
Total Traveler Benefits—Low	55,974,446	104,380,892	109,343,146	113,860,294	119,908,839
Total Traveler Benefits—Primary	67,429,647	125,491,760	131,494,947	136,959,658	144,277,007
Total Traveler Benefits—High	83,278,624	154,699,947	162,143,329	168,919,051	177,991,868
Grand Total Benefits—Low	72,872,256	121,278,702	126,240,956	130,758,104	136,806,649
Grand Total Benefits—Primary	84,327,457	142,389,570	148,392,757	153,857,468	161,174,817
Grand Total Benefits—High	100,176,434	171,597,757	179,041,139	185,816,861	194,889,678

* Estimates may not total due to rounding.

b. Benefits From Electronic Implementation at the Land Border

Under the new voluntary electronic I-94 submission process at the land border, once the traveler arrives at the port, he/she will go through secondary inspection, as they do under the paper process, where the CBP officer will locate the traveler's information through a document swipe in CBP's database. This will indicate that the fee was paid and pre-populate the data fields from the document swipe and the information provided by the traveler in the Web site. Once the CBP officer has determined the traveler's admissibility, the CBP officer will print out a paper I-94 to give to the traveler. The traveler will already have paid the fee, so once he/she has cleared the secondary inspection he/she will be able to enter the United States.

This voluntary process is purely beneficial to any traveler who opts into it. By paying the fee online, the traveler avoids an average 20 minute wait to do so at the port of entry. Using our primary estimate for the value of travel

time of \$44.15, the value of this time savings is \$14.72 per traveler. As this process is just a few months old, CBP does not have data on how many travelers will opt to answer the Form I-94 questions and pay the fee online. CBP is engaging in public outreach to notify the public of the option, but only travelers who have access to a computer or other device with internet connectivity will be able to participate. In 2015, nearly 7 million travelers arrived in the United States at the land border using a Form I-94. CBP does not yet have sufficient data on how many travelers will opt for the online fee payment option. For the purposes of this analysis, CBP estimates that 5 percent of these travelers, or approximately 350,000, will opt for the advance I-94 information submission and payment process, for a total savings to travelers of \$5,152,000. To the extent that the reduction in CBP officer time inputting data and processing fees results in shorter wait times, travelers would have additional time savings benefits.

This process would save CBP 8 minutes of data input time and 2 minutes of fee processing time, a total of 10 minutes of CBP officer time per traveler. Based on the estimate that 350,000 travelers will opt for the advance I-94 information submission and payment, and using the fully loaded wage rate of a CBP Officer of \$85.47 per hour,³⁴ we estimate that this process would save CBP officers 58,333 hours and \$4,985,750. We note that this is a time savings that is monetized for analytical purposes and not a budgetary savings. This time savings could be spent on other priorities including reducing wait times. In addition, this rule would reduce the amount of cash being handled at ports of entry, which would simplify port of entry oversight and auditing.

c. Aggregate Benefits

Exhibit 10 shows the total benefits of the rule—both the benefits of air and sea automation and the land border implementation.

EXHIBIT 10—BENEFIT SUMMARY
[Undiscounted 2012\$]*

	2013	2014	2015	2016	2017
CBP Benefits:					
CBP Contract Savings	15,400,000	15,400,000	15,400,000	15,400,000	15,400,000
CBP Printing Savings	153,360	153,360	153,360	153,360	153,360

³⁴ Source: CBP Position Model.

EXHIBIT 10—BENEFIT SUMMARY—Continued
[Undiscounted 2012\$]*

	2013	2014	2015	2016	2017
CBP Time Savings	0	0	0	1,246,438	4,985,750
Total CBP Benefits	15,553,360	15,553,360	15,553,360	16,799,798	20,539,110
Carrier Printing Savings	1,344,450	1,344,450	1,344,450	1,344,450	1,344,450
Traveler Benefits:					
Form I-94 Time Savings—Low	54,608,355	100,638,110	105,600,365	110,117,513	116,166,058
Form I-94 Time Savings—Primary	66,063,556	121,748,978	127,752,166	133,216,876	140,534,225
I-94 Time Savings—High	81,912,532	150,957,166	158,400,547	165,176,269	174,249,087
Form I-102 Time Savings	51,041	139,841	139,841	139,841	139,841
Form I-102 Fee Savings	1,315,050	3,602,940	3,602,940	3,602,940	3,602,940
Land Process Time Savings	0	0	0	1,288,000	5,152,000
Total Traveler Benefits—Low	55,974,446	104,380,892	109,343,146	115,148,294	125,060,839
Total Traveler Benefits—Primary	67,429,647	125,491,760	131,494,947	138,247,658	149,429,007
Total Traveler Benefits—High	83,278,624	154,699,947	162,143,329	170,207,051	183,143,868
Grand Total Benefits—Low	72,872,256	121,278,702	126,240,956	133,292,542	146,944,399
Grand Total Benefits—Primary	84,327,457	142,389,570	148,392,757	156,391,905	171,312,567
Grand Total Benefits—High	100,176,434	171,597,757	179,041,139	188,351,298	205,027,428

* Estimates may not total due to rounding.

5. Net Benefits

Exhibit 11 compares the costs of this rule to the benefits, both in total and for each party affected. As shown, in 2013,

CBP had a net benefit of \$15.5 million, carriers had a net benefit of \$1.3 million, and travelers had a net benefit of between \$41.1 and \$65.9 million. In our primary analysis, the net benefit to

travelers was \$51.3 million in 2013. Total 2013 net benefits ranged from \$57.9 million to \$82.7 million. In our primary analysis, the total net benefits were \$68.3 million in 2013.

EXHIBIT 11—NET BENEFITS
[Undiscounted 2012\$]*

	2012	2013	2014	2015	2016	2017
CBP	-1,321,000	15,461,360	15,461,360	15,461,360	16,167,798	20,447,110
Carriers	0	1,344,450	1,344,450	1,344,450	1,344,450	1,344,450
Travelers—Low	0	41,109,614	76,986,391	80,597,880	85,173,424	93,439,507
Travelers—Primary	0	51,503,032	96,140,493	100,696,430	106,131,707	115,548,989
Travelers—High	0	65,882,967	122,641,373	128,504,014	135,128,784	146,138,820
Grand Total—Low	-1,321,000	57,915,424	93,792,201	97,403,690	102,685,671	115,231,067
Grand Total—Primary	-1,321,000	68,308,842	112,946,303	117,502,240	123,643,955	137,340,549
Grand Total—High	-1,321,000	82,688,777	139,447,183	145,309,824	152,641,032	167,930,380

* Estimates may not total due to rounding.

Exhibits 12 and 13 present the present value net benefits of this rule, discounted at the 3 and 7 percent discount rates. Exhibit 14 presents

annualized net benefits at the 3 and 7 percent discount rates. Total annualized net benefits range from \$73.4 million to \$111.8 million. In the primary analysis,

annualized net benefits range from \$88.1 million to \$90.9 million, depending on the discount rate used.

EXHIBIT 12—NET BENEFITS DISCOUNTED AT A 3 PERCENT RATE
[2012 \$]*

	2012	2013	2014	2015	2016	2017
CBP	-1,321,000	15,011,029	14,573,815	14,149,335	14,364,879	17,637,857
Carriers	0	1,305,291	1,267,273	1,230,362	1,194,526	1,159,734
Travelers—Low	0	39,912,246	72,567,057	73,758,478	75,675,484	80,601,739
Travelers—Primary	0	50,002,944	90,621,635	92,151,498	94,296,647	99,673,573
Travelers—High	0	63,964,046	115,601,256	117,599,376	120,060,175	126,060,630
Grand Total—Low	-1,321,000	56,228,567	88,408,145	89,138,174	91,234,889	99,399,330
Grand Total—Primary	-1,321,000	66,319,264	106,462,723	107,531,195	109,856,052	118,471,164
Grand Total—High	-1,321,000	80,280,366	131,442,344	132,979,073	135,619,580	144,858,221

* Estimates may not total due to rounding.

EXHIBIT 13—NET BENEFITS DISCOUNTED AT A 7 PERCENT RATE
[2012 \$]*

	2012	2013	2014	2015	2016	2017
CBP	- 1,321,000	14,449,869	13,504,551	12,621,075	12,334,335	14,578,507
Carriers	0	1,256,495	1,174,295	1,097,472	1,025,674	958,574
Travelers—Low	0	38,420,200	67,242,895	65,791,878	64,978,397	66,621,077
Travelers—Primary	0	48,133,675	83,972,830	82,198,282	80,967,371	82,384,832
Travelers—High	0	61,572,866	107,119,725	104,897,553	103,089,103	104,194,959
Grand Total—Low	- 1,321,000	54,126,564	81,921,741	79,510,425	78,338,407	82,158,158
Grand Total—Primary	- 1,321,000	63,840,039	98,651,675	95,916,829	94,327,381	97,921,913
Grand Total—High	- 1,321,000	77,279,231	121,798,570	118,616,100	116,449,112	119,732,040

* Estimates may not total due to rounding.

EXHIBIT 14—ANNUALIZED NET BENEFITS DISCOUNTED AT 3 PERCENT AND 7 PERCENT
[2012 \$]*

	3 Percent	7 Percent
CBP	13,336,885	12,973,485
Carriers	1,103,496	1,080,843
Travelers—Low	61,385,839	59,420,140
Travelers—Primary	76,481,844	74,047,524
Travelers—High	97,368,099	94,285,410
Grand Total—Low	75,826,220	73,474,468
Grand Total—Primary	90,922,226	88,101,852
Grand Total—High	111,808,481	108,339,738

* Estimates may not total due to rounding.

While this rule has a large net benefit to travelers as a whole, it is important to note that the net benefits do not accrue uniformly across all travelers. We next examine the effect of this rule on each type of traveler. Exhibit 14 summarizes the costs and benefits per traveler for each class of alien discussed in this analysis. With this rule, no traveler needs to fill out the paper Form I-94 while en route to the United States, saving all travelers 8 minutes, an estimated \$5.89 per traveler. The 1 percent of B-1/B-2 travelers and 75

percent of other foreign travelers who need to access the Web site experience a cost of \$2.95 per person because of the 4 minute time burden to access the Web site. In addition, those who need to print their Form I-94 incur a \$0.25 printing cost. Those temporary workers and aliens in the “Other/Unknown” category who need to travel to access the Web site and print their Form I-94 have an additional travel cost. They need to travel an estimated 20 miles and 60 minutes round-trip to reach a location with internet access, at a cost

of \$20.89 per traveler. We reiterate that those with obstacles to accessing their electronic Forms I-94 may request a paper Form I-94 at secondary inspection stations at ports of entry or at CBP DIS. In addition, any travelers who would otherwise need to file a Form I-102 and pay the \$330 fee to obtain a replacement Form I-94 receive an additional benefit of \$342.81 as a result of this rule. Travelers who opt for the electronic filing option receive an additional benefit of \$14.72.

EXHIBIT 15—ANNUAL EFFECT OF RULE BY CLASS OF ALIEN
[Undiscounted 2012\$]*

	8 minute time cost savings	Cost of time to access & cost to print electronic Form I-94	Travel costs	Net impact**
Travelers who do not Access Website	5.89	0	0	5.89
1 percent of Tourists and Business Travelers (B-1/B-2)	5.89	- 3.19	0	2.70
75 percent of Students	5.89	- 3.19	0	2.70
75 percent of Temporary workers	5.89	- 3.19	- 20.89	- 18.21
75 percent of Other/Unknown	5.89	- 3.19	- 20.89	- 18.21
75 percent of Diplomats	5.89	- 3.19	0	2.70

* Estimates may not total due to rounding.

** In addition to this net impact, a small number of travelers experience savings resulting from no longer needing to file a Form I-102. The primary estimate of Form I-102 cost savings to travelers is \$342.81 per traveler. We do not include the Form I-102 cost savings in the net impact column of Exhibit 14 because few travelers benefit from this compared to the overall population of travelers impacted by the rule. Based on data from USCIS, we estimate that 10,918 Form I-102s per year are no longer need to be filed as a result of this rule. This is far less than one percent of the annual population of travelers affected by the rule (10,918 Form I-102s ÷ 20,815,527 travelers in 2014 <1%).

Annualized costs and benefits to all entities affected by the rule, whether

domestic or foreign, are presented in the following accounting statement.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES FOR U.S. ENTITIES, 2012–2017
[2012 \$]

	3% Discount rate	7% Discount rate
U.S. Costs:		
Annualized monetized costs	\$23.5 million	\$21.0 million.
Annualized quantified, but non-monetized costs.	None	None.
Qualitative (non-quantified) costs	None	None.
U.S. Benefits:		
Annualized monetized benefits	\$104.1 million	\$101.1 million.
Annualized quantified, but non-monetized benefits.	None	None.
Qualitative (non-quantified) benefits	Reduced primary inspection processing times	Reduced primary inspection processing times.

We estimate annualized costs to all entities affected by this rule to range from \$21.0 million to \$23.5 million. Monetized benefits of this rule range from \$101.9 million to \$104.1 million to

all entities. Non-quantified benefits of this rule include the reduced processing time that could result because of the automation of the Form I–94.

Annualized costs and benefits to U.S. entities are presented in the following accounting statement, as required by OMB Circular A–4.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES FOR U.S. ENTITIES, 2012–2017
[2012 \$]

	3% Discount rate	7% Discount rate
U.S. Costs:		
Annualized monetized costs	\$0.454 million	\$0.466 million.
Annualized quantified, but non-monetized costs.	None	None.
Qualitative (non-quantified) costs	None	None.
U.S. Benefits:		
Annualized monetized benefits	\$13.5 million	\$13.3 million.
Annualized quantified, but non-monetized benefits.	None	None.
Qualitative (non-quantified) benefits	Reduced primary inspection processing times	Reduced primary inspection processing times.

We estimate annualized costs to U.S. entities as a result of this rule to range from \$0.454 million to \$0.466 million. These are CBP’s costs for automating the electronic Form I–94 and developing the Web site travelers use to access their electronic Form I–94. Monetized benefits of this rule of \$13.3 million to \$13.5 million to U.S. entities (CBP and carriers) represent reduced Form I–94 printing and storage costs, reduced data entry contract costs, and reduced time costs for CBP officers. Non-quantified benefits of this rule include the reduced processing time that could result because of the automation of the Form I–94.

6. Regulatory Alternatives

In the analysis for the interim final rule, we considered two alternatives to the rule: (1) Eliminating the paper Form I–94 in the air and sea environments entirely and (2) providing the paper Form I–94 to all travelers who are not B–1/B–2 travelers. As a result of public comments on the interim final rule, we add a third alternative to our analysis: (3) Providing kiosks at major ports of entry where travelers have the option to

print their electronic Form I–94 prior to leaving the airport.

Under alternative one, if CBP were to eliminate the paper Form I–94 entirely in the air and sea environments, there are certain classes of vulnerable aliens who would be harmed. Under the rule, asylees and certain parolees are provided a paper Form I–94. These aliens have an immediate need for the Form I–94 and cannot wait to access their electronic Form I–94 from the Web site. These aliens represent a very small portion of overall international travel and providing them with a paper Form I–94 and entering the information into CBP data systems is not a significant cost to CBP. In addition, under this rule, CBP has continued to make the paper Form I–94 available to those travelers who request it at secondary inspection stations and at DIS. CBP provides this flexibility as a way to minimize the effect on those who face obstacles to accessing their electronic Form I–94.

CBP does not have statistics on the number of travelers who request a paper Form I–94. Anecdotal evidence suggests that few, if any, travelers go to a secondary inspection station or a DIS for

the purpose of obtaining a paper Form I–94. This may be because the travelers who need a paper Form I–94 do not know they need it when at the airport or because they find it more efficient to access the I–94 Web site and print the form than to go to secondary inspection or a DIS. Requesting a paper Form I–94 at one of these locations can take longer than the 4 minutes we estimate it takes to access the I–94 Web site and the 60 minutes in travel time we estimate that those with obstacles to internet access spend to obtain their Form I–94. As few aliens request a paper Form I–94 at secondary inspection stations or DIS, the cost to CBP for printing and data entry for these forms is minimal. Eliminating the paper Form I–94 option for asylees, certain parolees, and those travelers who request one would not result in a significant cost savings to CBP and would burden travelers who have an immediate need for an electronic Form I–94 or who face obstacles to accessing their electronic Form I–94.

Under alternative two, all non-B–1/B–2 travelers required to complete a Form I–94 would receive and complete the

paper Form I-94 during their inspection when they arrive in the United States. The electronic Form I-94 would still be automatically created during inspection, but the CBP officer would need to verify that the information appearing on the form matches the information in CBP's data systems. In addition, CBP would need to write the Form I-94 number on each paper Form I-94 so that their paper form matches the electronic record. As noted earlier, over four million, or 23.7 percent, aliens were non-B-1/B-2 travelers in 2012. Filling out and processing this many paper Forms I-94 at airports and seaports would increase processing times considerably and it would only provide at best small savings to the individual traveler. As noted in the "Net Benefits" section, the net cost of this rule to the 75 percent of temporary workers and those in the "Other/Unknown" category of aliens who need a printed Form I-94 is only \$18.20 per traveler. Conversely, this rule provides net benefits to travelers who do not need a printed Form I-94 and those arriving as students or diplomats.

CBP received several public comments related to the obstacles travelers face in accessing a computer to print their electronic Form I-94. Commenters said that many travelers need their Form I-94 very soon after arrival, sometimes within hours of arrival, and they may have difficulty learning that public libraries offer internet access, where public libraries are, and how to travel to a public library. An employer submitted a comment stating that company privacy standards prevent it from allowing new hires to access the internet in order to access the I-94 Web site. Separately, commenters pointed out problems with the accuracy of the Form I-94 information that prevent them from logging into the Web site. Others noted that there is no way to check their Form I-94 for accuracy at time of entry into the United States. One commenter suggested a solution to these problems: That CBP provide kiosks at the airports where foreign nationals can inspect and print their electronic Form I-94. CBP

considered this suggestion and made it an additional alternative to the rule.

Under alternative three, we consider the costs and benefits of placing kiosks at the busiest U.S. airports and seaports to allow travelers to inspect and print their electronic Form I-94 before leaving the port of entry. For the purposes of this alternative analysis, we examine the impact of placing dedicated kiosks at the busiest 20 airports and the busiest 20 seaports. These locations account for 92 percent of international air travelers and 95 percent of international sea travelers.³⁵

CBP uses kiosks at many major airports for the Global Entry program. These kiosks are dedicated for use by members of that program, but similar kiosks could be purchased to allow travelers to access the I-94 Web site and print their Form I-94. According to CBP's Office of Field Operations, kiosks would cost \$20,000 each and have an annual operations and maintenance cost of \$8,732. Placing a kiosk at each of the busiest 20 airports and the busiest 20 seaports would cost \$800,000 the first year and \$349,280 in each subsequent years.

The benefit of placing kiosks at the busiest airports and seaports depends on the number of people who would use the kiosks if they were available. CBP has no data on the extent to which travelers would choose to use the kiosks if they were available to them. As stated previously, few travelers request paper Forms I-94 upon their arrival in the United States, but that might be because doing so means going to the secondary inspection station, which can take a considerable amount of time. We also do not know how many people find errors on their electronic Forms I-94 that they could correct immediately if they were already at an airport or seaport rather than visiting a Deferred Inspection Site at a later time, though data suggests this could be a large number. In 2013, according to an analysis of data provided by CBP's Office of Field Operations, about 14 percent of unique visitors to the I-94 Web site were not able to locate their electronic Form I-94. This may have

been because of erroneous data on their Form I-94, but it could also be because they did not actually have an Form I-94 on the Web site (for example, if they are a U.S. citizen or if they already departed the country prior to accessing the Web site).

Accessing the Web site via a kiosk would take 4 minutes of a traveler's time, the same amount of time as via a personal computer. Therefore, we do not believe that those who do not currently access their electronic Forms I-94 (as stated earlier, this includes the 99 percent of B-1/B-2 travelers and 25 percent of non-B-1/B-2 travelers) would now access them via the kiosks. Similarly, those with easy computer access would experience no time savings by accessing their Form I-94 via the kiosk instead of via the Web site, so we do not include their benefits in the analysis. The travelers who would benefit from the availability of kiosks to access their electronic Form I-94 are those who would otherwise need to travel to access the internet. These travelers would no longer incur the opportunity cost of traveling 60 minutes or the mileage cost of driving 20 miles roundtrip. In our analysis above, we have estimated that 33 percent of travelers in the "Temporary Workers" and "Other/Unknown" categories of travelers would need to travel to access the internet. In 2014 (the first full year the interim final rule is in effect) this represents approximately 819,000 travelers. Since we do not know how many of these travelers would choose to use the kiosks, we present the costs and benefits (using the primary estimates for travel and mileage costs) that would accrue to these travelers under a wide range of assumptions of their kiosk use. The benefits reflect the total travel costs, including travel time and mileage, derived earlier in the analysis (See Exhibit 5). We present the reduction in travel costs (which is a benefit) that would result if different percentages of travelers use a kiosk rather than travel to a location where they can access the internet. The results of our analysis are presented in Exhibit 16.

EXHIBIT 16—COMPARISON OF KIOSK COSTS AND POTENTIAL BENEFITS
[Undiscounted 2012\$] *

	Kiosk use rate* (%)	2013	2014	2015	2016	2017
Benefits	100	9,283,113	17,107,912	17,951,467	18,719,357	19,747,575
	75	6,962,334	12,830,934	13,463,600	14,039,517	14,810,681
	50	4,641,556	8,553,956	8,975,733	9,359,678	9,873,788

³⁵ CBP's Operations Management Reporting database. Accessed June 30, 2014.

EXHIBIT 16—COMPARISON OF KIOSK COSTS AND POTENTIAL BENEFITS—Continued

[Undiscounted 2012\$]*

	Kiosk use rate * (%)	2013	2014	2015	2016	2017
	25	2,320,778	4,276,978	4,487,867	4,679,839	4,936,894
	10	928,311	1,710,791	1,795,147	1,871,936	1,974,758
	5	464,156	855,396	897,573	935,968	987,379
	1	92,831	171,079	179,515	187,194	197,476
CBP Costs .....	.....	.....	800,000	329,280	329,280	329,280

* Note that Kiosk Use Rate represents the percentage of those who would otherwise need to travel to access a computer, not total Form I-94 travelers. Only approximately 4 percent of total Form I-94 travelers need to travel to access the Web site (12 percent of travelers in the "Temporary Worker" or "Other/Unknown" categories times 33 percent of those categories who would need to travel to access the internet = 4 percent).

As shown in Exhibit 15, kiosks have a large potential for benefits if they are used by a substantial number of travelers. If 100 percent of travelers who would otherwise need to travel to access a computer used the kiosks instead, benefits would outpace the costs of the kiosks by a margin of \$17.2 million to \$0.8 million in 2014 and by more in later years. Even if only 5 percent of travelers who would otherwise need to travel to access a computer use the kiosks, benefits would exceed costs. However, based on CBP's experience with travelers requesting paper Forms I-94 at the ports of entry, CBP does not believe enough travelers would use the kiosks to merit the expense. Further, due to budget constraints, CBP does not have funds to acquire these kiosks at this time.

The Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare a regulatory flexibility analysis that describes the effect of a proposed rule on small entities when the agency is required to publish a general notice of proposed rulemaking. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Since a notice of proposed rulemaking was not necessary, a regulatory flexibility analysis was not required. Nonetheless, DHS has considered the impact of this rule on small entities.

This rule primarily regulates individuals and individuals are not considered small entities. In addition, the individual travelers may obtain a paper Form I-94 upon request, which would eliminate the impacts of this rule

for those travelers. Employers who have internet access may choose to allow their employees to use their internet connection to access the employee's electronic Form I-94, but they are not required to do so and are therefore not directly regulated by this rule. To the extent an employer chooses to assist an employee with accessing the internet and printing a Form I-94, this impact would not rise to being an economically significant impact under the Regulatory Flexibility Act.

This rule also regulates air and sea carriers by eliminating the need for them to provide the paper Form I-94 to their passengers. This rule would impact all small carriers that transport passengers to the United States. We therefore conclude that this rule has an impact on a substantial number of small entities.

As stated in the economic impact analysis above, we estimate that carriers spend \$1.3 million a year printing and storing forms for their passengers, based on 2011 passenger volumes. In 2011, 16,586,753 Forms I-94 provided by carriers were filed at airports and seaports. Dividing these figures, we estimate that carriers spent 8 cents per form on printing and storage costs.

Under this rule, carriers would no longer need to print and store the Forms I-94, thus eliminating these costs. According to a 2013 study by the Department of Commerce's Office of Travel and Tourism Industries,³⁶ the average airline ticket price for an international traveler traveling to the United States is \$1,588. The cost to the carrier of printing a Form I-94 is less than one hundredth of one percent of the revenue a carrier receives from the

³⁶ Department of Commerce, National Travel and Tourism Office. "Profile of Overseas Travelers to the United States: 2013 Inbound." Available at http://travel.trade.gov/outreachpages/download_data_table/2013_Overseas_Visitor_Profile.pdf. Accessed July 10, 2014.

average passenger. We therefore do not believe that this rule has a significant economic impact on small entities. We also note that any impact to small carriers would be purely beneficial.

Privacy

CBP will ensure that all Privacy Act requirements and policies are adhered to in the implementation of this rule, and will be updating the Privacy Impact Assessment (PIA) for the I-94 Web site. CBP will outline in the updated PIA how CBP will ensure compliance with Privacy Act protections. In the updated PIA, CBP will explain the privacy risks and mitigations CBP has implemented during this phase of the Form I-94 automation process. DHS/CBP will post the updated PIA online at: <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>. The PIA that covers the earlier phase of Form I-94 automation, and describes how CBP complies with the Privacy Act, is available at: <https://www.dhs.gov/sites/default/files/publications/privacy/PIAs/pia-cbp-16-I-94-automation-20130227.pdf>.

Paperwork Reduction Act

The collection of information regarding the CBP Form I-94 (Arrival/Departure Record) was previously reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under OMB Control Number 1651-0111. This OMB Control Number also includes the Electronic System for Travel Authorization (ESTA), ESTA fee, and Form I-94W, all of which are unaffected by this rule. In addition, information for the electronic Form I-94 is comprised of information already collected for APIS under approval 1651-0088. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of

information displays a valid control number assigned by OMB.

The burden hours associated with the collections of information contained in this Final Rule were previously reviewed and approved by OMB. The automation of the paper Form I-94 for commercial aircraft and vessel passengers in accordance with this Final Rule results in a reduction of 1,278,456 annual burden hours under OMB control number 1651-0111.

Also in accordance with this Final Rule, the electronic Form I-94 is available to aliens on a secure Web site.

Passengers may log into the Web site using 7 pieces of basic identifying information that is either known to the traveler (their first name, last name and date of birth) or readily available on their passport (passport number, country of issuance, date of entry, and class of admission). The estimated annual burden associated with this Web site, is 254,680 hours under OMB control number 1651-0111.

The automation of the paper Form I-94 for commercial aircraft and vessel passengers in accordance with this Final Rule results in an estimated reduction of

10,918 Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, filed, and an estimated reduction of 4,541.89 burden hours under OMB control number 1615-0079.

Exhibit 16 summarizes the difference in the burden for the previous process and the process under this rule. As OMB Control Number 1651-0111 includes ESTA and Form I-94W, we include those burden hours for informational purposes. We note that these burden hours are unaffected by this rule.

EXHIBIT 16—PRA BURDEN EFFECTS OF THE RULE

	Collection	Respondents	Burden Hours
Pre-IFR	I-94	14,000,000	1,862,000
	Website	0	0
	I-102	17,700	7,363
	ESTA	19,140,000	4,785,000
Final Rule	I-94W	100,000	333,147
	I-94	4,387,550	583,544
	Website	3,858,782	254,680
	I-102	6,782	2,821
Difference	ESTA	19,140,000	4,785,000
	I-94W	100,000	13,333
	I-94	-9,612,450	-1,278,456
	Website	3,858,782	254,680
	I-102	-10,918	-4,542
	ESTA	0	0
	I-94W	0	0

Amendments to the Regulations

For the reasons set forth above, the interim final rule amending 8 CFR parts 1, 210, 212, 214, 215, 231, 235, 245, 245a, 247, 253, 264, 274a, and 286, published at 78 FR 18457 on March 27, 2013, is adopted as a final rule without change.

Jeh Charles Johnson,
Secretary.

[FR Doc. 2016-30459 Filed 12-16-16; 8:45 am]
BILLING CODE 9111-14-P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317 and 381

[Docket No. FSIS-2016-0048]

RIN 0583-AD05

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is establishing January 1, 2020, as the uniform

compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2017, and December 31, 2018. FSIS periodically announces uniform compliance dates for new meat and poultry product labeling regulations to minimize the economic impact of label changes.

DATES: This rule is effective December 19, 2016. Comments on this final rule must be received on or before January 18, 2017.

ADDRESSES: FSIS invites interested persons to submit relevant comments on this final rule. Comments may be submitted by the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to <http://www.regulations.gov/>. Follow the online instructions at that site for submitting comments.

- *Mail, including CD-ROMs:* Send to Docket Clerk, U.S. Department of Agriculture (USDA), FSIS, OPPD, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8-163A, Washington, DC 20250-3700.

- *Hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture (USDA), FSIS, OPPD,

Patriots Plaza 3, 355 E Street SW., Room 8-163A, Washington, DC 20250-3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS-2016-0048. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to <http://www.regulations.gov/>.

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 8-164, Washington, DC 20250-3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Telephone: 301-504-0879.

SUPPLEMENTARY INFORMATION:

Background

FSIS periodically issues regulations that require changes in the labeling of meat and poultry food products. Many meat and poultry establishments also produce non-meat and non-poultry food

products that are subject to the jurisdiction of the Food and Drug Administration (FDA). FDA also periodically issues regulations that require changes in the labeling of products under its jurisdiction.

On December 14, 2004, FSIS issued a final rule that established January 1, 2008, as the uniform compliance date for new meat and poultry labeling regulations issued between January 1, 2005, and December 31, 2006. The 2004 final rule also provided that the Agency would set uniform compliance dates for new labeling regulations in 2-year increments and periodically issue final rules announcing those dates.

Consistent with that final rule, the Agency has published five final rules establishing the uniform compliance dates of January 1, 2010, January 1, 2012, January 1, 2014, January 1, 2016, and January 1, 2018 (72 FR 9651, 73 FR 75564, 75 FR 71344, 77 FR 76824, and 79 FR 71007).

The Final Rule

This final rule establishes January 1, 2020, as the uniform compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2017 and December 31, 2018, and is consistent with the previous final rules that established uniform compliance dates. In addition, FSIS's approach for establishing uniform compliance dates for new food labeling regulations is consistent with FDA's approach. FDA is also planning to publish a final rule establishing a new compliance date.

Two-year increments enhance the industry's ability to make orderly adjustments to new labeling requirements without unduly exposing consumers to outdated labels. With this approach, the meat and poultry industry is able to plan for use of label inventories and to develop new labeling materials that meet the requirements of all labeling regulations made within the two year period, thereby minimizing the economic impact of labeling changes.

This compliance approach also serves consumer's interests because the cost of multiple short-term label revisions that would otherwise occur would likely be passed on to consumers in the form of higher prices.

FSIS encourages meat and poultry companies to comply with new labeling regulations as soon as it is feasible. If companies initiate voluntary label changes, they should consider incorporating any new requirements that have been published as final regulations.

The new uniform compliance date will apply only to final FSIS regulations

that require changes in the labeling of meat and poultry products and that are published after January 1, 2017, and before December 31, 2018. For each final rule that requires changes in labeling, FSIS will specifically identify January 1, 2020, as the compliance date. All meat and poultry food products that are subject to labeling regulations promulgated between January 1, 2017, and December 31, 2018, will be required to comply with these regulations on products introduced into commerce on or after January 1, 2020. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2020, the Agency will determine an appropriate compliance date and will publish that compliance date in the rulemaking.

In rulemaking that began with the May 4, 2004, proposed rule, FSIS provided notice and solicited comment on the concept of establishing uniform compliance dates for labeling requirements (69 FR 24539). In the March 5, 2007, final rule, FSIS noted that the Agency received only four comments in response to the proposal, all fully supportive of the policy to set uniform compliance dates. Therefore, in the March 5, 2007, final rule, FSIS determined that further rulemaking for the establishment of uniform compliance dates for labeling requirements is unnecessary (72 FR 9651). The Agency did not receive comments on the 2007 final rule, and the comments FSIS received on the 2012 final rule on the uniform compliance date were outside the scope of the rule (77 FR 76824). Consistent with its statement in 2007, FSIS finds at this time that further rulemaking on this matter is unnecessary. However, FSIS is providing an opportunity for comment on the uniform compliance date established in this final rule.

Executive Order 12988

This final rule has been reviewed under the Executive Order 12988, Civil Justice Reform. Under this final rule: (1) All state and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule.

Executive Orders 12866 and 13563 and the Regulatory Flexibility Act

Executive Orders 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). Executive Order (E.O.) 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been reviewed under E.O. 12866. The Office of Management and Budget (OMB) has determined that it is a not significant regulatory action under section 3(f) of E.O. 12866 and, therefore, it has not been reviewed by OMB.

This rule does not have a significant economic impact on a substantial number of small entities; consequently, a regulatory flexibility analysis is not required (5 U.S.C. 601–612).

Paperwork Requirements

There are no paperwork or recordkeeping requirements associated with this policy under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E-Government Act Compliance

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other things, promoting the use of the Internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

USDA Nondiscrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

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

Send your completed complaint form or letter to USDA by mail, fax, or email:

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

Fax: (202) 690–7442

Email: program.intake@usda.gov.

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

Additional Public Notification

FSIS will announce this rule online through the FSIS Web page located at http://www.fsis.usda.gov/regulations_&_policies/Interim_&_Final_Rules/index.asp.

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at http://www.fsis.usda.gov/News_&_Events/Email_Subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Dated: December 14, 2016.

Alfred V. Almanza,
Acting Administrator.

[FR Doc. 2016-30463 Filed 12-16-16; 8:45 am]
BILLING CODE 3410-DM-P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Docket No. R-1553]

RIN 7100-AE63

Regulation D; Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the

low reserve tranche for 2017. The Regulation D amendments set the amount of total reservable liabilities of each depository institution that is subject to a zero percent reserve requirement in 2017 at \$15.5 million (up from \$15.2 million in 2016). This amount is known as the reserve requirement exemption amount. The Regulation D amendments also set the amount of net transaction accounts at each depository institution (over the reserve requirement exemption amount) that is subject to a three percent reserve requirement in 2017 at \$115.1 million (up from \$110.2 million in 2016). This amount is known as the low reserve tranche. The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act.

The Board is also announcing changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency at which depository institutions must submit deposit reports.

DATES: *Effective date:* January 18, 2017.

Compliance dates: The new low reserve tranche and reserve requirement exemption amount will apply to the fourteen-day reserve maintenance period that begins January 19, 2017. For depository institutions that report deposit data weekly, this maintenance period corresponds to the fourteen-day computation period that begins December 20, 2016. For depository institutions that report deposit data quarterly, this maintenance period corresponds to the seven-day computation period that begins December 20, 2016. The new values of the nonexempt deposit cutoff level, the reserve requirement exemption amount, and the reduced reporting limit will be used to determine the frequency at which a depository institution submits deposit reports effective in either June or September 2017.

FOR FURTHER INFORMATION CONTACT:

Clinton N. Chen, Attorney (202/452-3952), Legal Division, or Ezra A. Kidane, Financial Analyst (202/973-6161), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263-4869); Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Federal Reserve Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the

purpose of implementing monetary policy. Section 11(a)(2) of the Federal Reserve Act (12 U.S.C. 248(a)(2)) authorizes the Board to require reports of liabilities and assets from depository institutions to enable the Board to conduct monetary policy. The Board's actions with respect to each of these provisions are discussed in turn below.

Reserve Requirements

Pursuant to section 19(b) of the Federal Reserve Act (Act), transaction account balances maintained at each depository institution are subject to reserve requirement ratios of zero, three, or ten percent. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the reserve requirement exemption amount. Section 19(b)(11)(B) provides that, before December 31 of each year, the Board shall issue a regulation adjusting the reserve requirement exemption amount for the next calendar year if total reservable liabilities held at all depository institutions increase from one year to the next. No adjustment is made to the reserve requirement exemption amount if total reservable liabilities held at all depository institutions should decrease during the applicable time period. The Act requires the percentage increase in the reserve requirement exemption amount to be 80 percent of the increase in total reservable liabilities of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Total reservable liabilities of all depository institutions increased by 2.3 percent, from \$7,477 billion to \$7,648 billion between June 30, 2015, and June 30, 2016. Accordingly, the Board is amending Regulation D to set the reserve requirement exemption amount for 2017 at \$15.5 million, an increase of \$0.3 million from its level in 2016.¹

Pursuant to Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)), transaction account balances maintained at each depository institution over the reserve requirement exemption amount and up to a certain amount, known as the low reserve tranche, are subject to a three percent reserve requirement. Transaction account balances over the low reserve tranche are subject to a ten percent reserve requirement. Section

¹ Consistent with Board practice, the low reserve tranche and reserve requirement exemption amounts have been rounded to the nearest \$0.1 million.

19(b)(2) also provides that, before December 31 of each year, the Board shall issue a regulation adjusting the low reserve tranche for the next calendar year. The Act requires the adjustment in the low reserve tranche to be 80 percent of the percentage increase or decrease in total transaction accounts of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Net transaction accounts of all depository institutions increased 5.5 percent, from \$2,064 billion to \$2,178 billion between June 30, 2015 and June 30, 2016. Accordingly, the Board is amending Regulation D to increase the low reserve tranche for net transaction accounts by \$4.9 million, from \$110.2 million for 2016 to \$115.1 million for 2017.

The new low reserve tranche and reserve requirement exemption amount will be effective for all depository institutions for the fourteen-day reserve maintenance period beginning Thursday, January 19, 2017. For depository institutions that report deposit data weekly, this maintenance period corresponds to the fourteen-day computation period that begins December 20, 2016. For depository institutions that report deposit data quarterly, this maintenance period corresponds to the seven-day computation period that begins December 20, 2016.

2. Deposit Reports

Section 11(b)(2) of the Federal Reserve Act authorizes the Board to require depository institutions to file reports of their liabilities and assets as the Board may determine to be necessary or desirable to enable it to discharge its responsibility to monitor and control the monetary and credit aggregates. The Board screens depository institutions each year and assigns them to one of four deposit reporting panels (weekly reporters, quarterly reporters, annual reporters, or nonreporters). The panel assignment for annual reporters is effective in June of the screening year; the panel assignment for weekly and quarterly reporters is effective in September of the screening year.

In order to ease reporting burden, the Board permits smaller depository institutions to submit deposit reports less frequently than larger depository institutions. The Board permits depository institutions with net transaction accounts above the reserve requirement exemption amount but total transaction accounts, savings deposits, and small time deposits below a specified level (the “nonexempt deposit

cutoff”) to report deposit data quarterly. Depository institutions with net transaction accounts above the reserve requirement exemption amount and with total transaction accounts, savings deposits, and small time deposits greater than or equal to the nonexempt deposit cutoff are required to report deposit data weekly. The Board requires certain large depository institutions to report weekly regardless of the level of their net transaction accounts if the depository institution’s total transaction accounts, savings deposits, and small time deposits exceeds or is equal to a specified level (the “reduced reporting limit”). The nonexempt deposit cutoff level and the reduced reporting limit are adjusted annually, by an amount equal to 80 percent of the increase, if any, in total transaction accounts, savings deposits, and small time deposits of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

From June 30, 2015 to June 30, 2016, total transaction accounts, savings deposits, and small time deposits at all depository institutions increased 5.8 percent, from \$10,807 billion to \$11,433 billion. Accordingly, the Board is increasing the nonexempt deposit cutoff level by \$19.3 million to \$436.2 million in 2017 (from \$416.9 million for 2016). The Board is also increasing the reduced reporting limit by \$88 million to \$1.989 billion for 2017 (from \$1.901 billion in 2016).²

Beginning in 2017, the boundaries of the four deposit reporting panels will be defined as follows. Those depository institutions with net transaction accounts over \$15.5 million (the reserve requirement exemption amount) or with total transaction accounts, savings deposits, and small time deposits greater than or equal to \$1.989 billion (the reduced reporting limit) are subject to detailed reporting, and must file a Report of Transaction Accounts, Other Deposits and Vault Cash (FR 2900 report) either weekly or quarterly. Of this group, those with total transaction accounts, savings deposits, and small time deposits greater than or equal to \$436.2 million (the nonexempt deposit cutoff level) are required to file the FR 2900 report each week, while those with total transaction accounts, savings deposits, and small time deposits less than \$436.2 million are required to file the FR 2900 report each quarter. Those depository institutions with net transaction accounts less than or equal

to \$15.5 million (the reserve requirement exemption amount) and with total transaction accounts, savings deposits, and small time deposits less than \$1.989 billion (the reduced reporting limit) are eligible for reduced reporting, and must either file a deposit report annually or not at all. Of this group, those with total deposits greater than \$15.5 million (but with total transaction accounts, savings deposits, and small time deposits less than \$1.989 billion) are required to file the Annual Report of Deposits and Reservable Liabilities (FR 2910a) report annually, while those with total deposits less than or equal to \$15.5 million are not required to file a deposit report. A depository institution that adjusts reported values on its FR 2910a report in order to qualify for reduced reporting will be shifted to an FR 2900 reporting panel.

Notice and Regulatory Flexibility Act. The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments prescribed by statute and by the Board’s policy concerning reporting practices. The adjustments in the reserve requirement exemption amount, the low reserve tranche, the nonexempt deposit cutoff level, and the reduced reporting limit serve to reduce regulatory burdens on depository institutions. Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary. Consequently, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601, do not apply to these amendments.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

■ 2. Section 204.4(f) is revised to read as follows:

§ 204.4 Computation of required reserves.

* * * * *

(f) For all depository institutions, Edge and Agreement corporations, and United States branches and agencies of

²Consistent with Board practice, the nonexempt deposit cutoff level has been rounded to the nearest \$0.1 million, and the reduced reporting limit has been rounded to the nearest \$1 million.

foreign banks, required reserves are computed by applying the reserve requirement ratios below to net

transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities of

the institution during the computation period.

Reservable liability	Reserve requirement
Net Transaction Accounts:	
\$0 to reserve requirement exemption amount (\$15.5 million)	0 percent of amount.
Over reserve requirement exemption amount (\$15.5 million) and up to low reserve tranche (\$115.1 million).	3 percent of amount.
Over low reserve tranche (\$115.1 million)	\$2,988,000 plus 10 percent of amount over \$115.1 million.
Nonpersonal time deposits	0 percent.
Eurocurrency liabilities	0 percent.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Monetary Affairs under delegated authority, October 26, 2016.

Robert deV. Frierson,
Secretary of the Board.

[FR Doc. 2016-30320 Filed 12-16-16; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 955

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1201, 1267, 1268, and 1281

RIN 2590-AA69

Acquired Member Assets

AGENCY: Federal Housing Finance Board; Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing this final rule to reorganize and relocate the current regulation governing the Federal Home Loan Banks' (Banks) Acquired Member Asset (AMA) programs. More significantly, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), it removes and replaces references in the current regulation to, and requirements based on, ratings issued by a Nationally Recognized Statistical Ratings Organization (NRSRO). It also provides a Bank greater flexibility in choosing the model it can use to estimate the credit enhancement required for AMA loans. Additionally, the final rule adds a provision allowing a Bank to authorize the transfer of mortgage servicing rights on AMA loans to any institution, including a nonmember of the Federal Home Loan Bank System (Bank System). The final rule allows the Banks to acquire mortgage loans that exceed the conforming loan limits if they are guaranteed or insured by a department

or agency of the U.S. government. The final rule excludes a proposed provision that would have eliminated the use of private, loan-level, supplemental mortgage insurance (SMI) in the member credit enhancement structure required by the AMA regulation, but does require Banks to establish financial and operational standards that insurers must meet to be qualified to provide insurance on AMA loans. Finally, the final rule deletes some obsolete provisions from the current regulation, and clarifies certain other provisions.

DATES: The final rule is effective January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Christina Muradian, Principal Financial Analyst, *Christina.Muradian@fhfa.gov*, 202-649-3323, Division of Bank Regulation; or Neil R. Crowley, Deputy General Counsel, *Neil.Crowley@FHFA.gov*, 202-649-3055 (these are not toll-free numbers), Office of General Counsel, Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Bank System

The eleven Banks are wholesale financial institutions organized under the Federal Home Loan Bank Act (Bank Act).¹ The Banks are cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.² Each Bank serves the public interest by enhancing the availability of residential credit through its member institutions. Any eligible institution (generally, a federally insured depository institution

or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.³ As government-sponsored enterprises (GSEs), the Banks have certain privileges under federal law, which allow them to borrow funds at spreads over the rates on U.S. Treasury securities of comparable maturity that are narrower than those available to corporate borrowers generally. The Banks pass along a portion of their funding advantage to their members and housing associates—and ultimately to consumers—by providing advances⁴ and other financial services at rates that would not otherwise be available to their members. Among those financial services are the Banks' AMA programs, under which the Banks provide financing for members' housing finance activities by purchasing mortgage loans that meet the requirements of the AMA regulation.

B. Overview of the Existing AMA Regulation

The current AMA regulation has been in effect since July 2000. It authorizes the Banks to acquire certain assets (principally, conforming residential mortgage loans) from their members and housing associates as a means of advancing their housing finance mission, and prescribes the parameters within which the Banks may do so.

The core of the current AMA regulation is a three-part test, which establishes the requirements for a mortgage loan or other asset to qualify as AMA. The three-part test embodies the underlying policy regarding the acquisition of mortgages and other eligible AMA assets by the Banks. First, the asset requirement establishes that assets must be whole conforming mortgage loans, certain interests in such loans, whole loans secured by

³ See 12 U.S.C. 1424; 12 CFR part 1263.

⁴ Members are required to pledge specific collateral, mainly mortgages or other real estate related assets, to secure any advance taken down from a Bank. See 12 CFR 1266.7.

¹ See 12 U.S.C. 1423, 1432(a).

² See 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

manufactured housing, certain state and local housing finance agency (HFA) bonds, and certain other assets that qualify as eligible collateral for a Bank advance. Second, assets must meet a member nexus requirement, meaning that a Bank must acquire the AMA assets from a member or housing associate that is a participating financial institution⁵ in the Bank's AMA program or that of another Bank. In either case, the assets acquired by a Bank must be originated or held for a valid business purpose by a participating financial institution (or an affiliate thereof). Finally, to meet the credit risk-sharing requirement, a Bank must structure its AMA products such that a substantial portion of the associated credit risk of the acquired asset is borne by a participating financial institution.

C. The Proposed Rule

The Federal Housing Finance Board (Finance Board)⁶ adopted the current AMA regulation in July 2000, and neither the Finance Board nor FHFA subsequently has amended the regulation. FHFA issued the proposed rule in part to incorporate the AMA provisions into its own regulations and in part to give effect to section 939A of the Dodd-Frank Act, which requires federal agencies to remove from their regulations all references to, or requirements based on, ratings issued by NRSROs.⁷ To comply with the Dodd-Frank Act requirements, the proposed rule would have eliminated the existing requirement for the Banks' members to credit enhance the AMA assets to specific NRSRO rating levels. Instead, the proposal would have required the Banks to establish a level of credit enhancement for each AMA product, using models and methodologies of their own choosing.

The proposed rule also contemplated making a number of other substantive changes, which would have: (1) Added several credit enhancement model-related provisions; (2) allowed for the transfer of servicing on AMA loans to

nonmembers, so long as the transfer did not cause the associated mortgage loan to cease to comply with the requirements of the AMA rule; (3) allowed for federal insurance or guarantees to provide the required credit enhancement, and eliminated the requirement for a member to bear the risk of loss from unreimbursed servicing expenses; (4) removed the provisions that allow for the use of SMI or pool insurance as part of the credit enhancement structure; (5) generally prohibited Banks from acquiring loans made to any insiders of the Bank or of the selling institution; and (6) added a new "grandfather" provision to allow a Bank to continue to hold AMA loans acquired as AMA products that the Finance Board or FHFA previously authorized.

Additionally, FHFA asked for comments relating to three specific issues. First, FHFA asked whether the regulation should continue to limit the size of AMA loans to those that meet the conforming loan limits and, more broadly, on any issues related to a Bank's purchase of AMA loans on properties located in designated high-cost areas. Second, FHFA asked whether FHFA should continue to authorize the purchase of AMA loans on manufactured housing that were deemed to be chattel loans under state law. Third, FHFA asked for comments related to the use and importance of SMI and pool insurance in credit enhancement structures that were acceptable under the regulation. FHFA specifically asked what type of standards should replace those in the current AMA regulation, which are based on an insurer's NRSRO rating, and how a Bank might evaluate the claims-paying ability of an insurer in the absence of a specific NRSRO credit rating requirement. FHFA also requested comments on whether, if it were to adopt specific requirements in the rule for SMI providers, such requirements also should apply to private mortgage insurance (PMI) providers.

In developing the proposed rule, FHFA retained the key policies underlying the original AMA regulation, which the Finance Board adopted in 2000, after the courts had upheld the authority of the Finance Board to permit the Banks to engage in this activity.⁸ More specifically, the proposed rule retained the Finance Board's determination that the acquisition of AMA loans is the functional equivalent

of making advances such that it: (1) Allows the member or housing associate to use its eligible assets to access liquidity for further mission-related lending; and (2) requires all, or a material portion of, the credit risk attached to the mortgage assets to be borne by the member or housing associate.

FHFA also carried forward in the proposed rule the basic tenet of the current AMA regulation, which is that the Banks and their members each take advantage of their respective core competencies. As such, current AMA requirements allow members to do what they do best (manage their customer relationship) and for the Banks to do what they do best (manage the interest rate risk associated with those loans).⁹ The proposed rule also maintained the basic AMA credit risk-sharing structure of the current regulation, which the Finance Board purposefully designed to mirror the risk allocation of advances. Specifically, when a Bank extends an advance to a member, the member is exposed to the credit risk (on the housing assets that the advances ultimately support), and the Bank is exposed to the interest rate risk associated with funding the advance. Under the current AMA regulation, the Bank and its member similarly allocate the interest rate risk and credit risk associated with funding and holding mortgage loans whenever a member sells the Bank an AMA loan.¹⁰

The current AMA rule's "three-part test" also embodies additional underlying policy determinations related to the acquisition of mortgage assets by Banks. The asset requirement, *i.e.*, limiting AMA to loans that do not exceed the conforming loan limit, addresses mission issues and establishes a level playing field among the Banks, Federal National Mortgage Association (Fannie Mae), and Federal Home Loan Mortgage Corporation (Freddie Mac) with respect to the types of residential mortgages loans eligible for purchase. The member or housing associate nexus requirement, *i.e.*, limiting the potential sellers of AMA to a Bank member or housing associate, ensures that the Banks do not extend the benefits of their GSE status to institutions that are not part of the Bank System, thus aligning

⁵ A participating financial institution is a member or housing associate approved by a Bank to sell mortgage loans to the Bank or otherwise participate in its AMA program.

⁶ The Finance Board was regulator for the Bank System prior to the creation of FHFA in 2008, at which time supervisory and oversight responsibilities for the Bank System were transferred to FHFA. By statute, the Finance Board regulations, including the existing AMA regulations, remain in effect until such time as FHFA acts to modify or supersede them. See 12 U.S.C. 4511 note.

⁷ See 15 U.S.C. 78o-7. Although FHFA cannot include within its regulations requirements based on NRSRO ratings, the Dodd-Frank Act does not prohibit the Banks from using such ratings in conducting their business.

⁸ See *Texas Savings and Community Bankers Association v. Federal Housing Finance Board*, 201 F.3d 551 (5th Cir. 2000) (*hereinafter Texas Savings*).

⁹ Although the AMA regulation requires the member to bear a significant amount of the credit risk (which may be accomplished through a variety of ways), the Bank remains exposed to some credit risk from those loans.

¹⁰ The advance and AMA risk-allocation structures are different from the risk-allocation structure used by Fannie Mae and Freddie Mac, whereby they are exposed to the credit risk and sell the interest rate risk.

the program with the cooperative structure of the System. The credit risk-sharing requirement encourages members or housing associates to use sound underwriting practices by requiring them to retain a material exposure to the credit risk associated with the mortgage assets sold to the Bank.

The underlying policy considerations embodied in the current and proposed AMA rule are also closely aligned with the legal reasoning that supported the Finance Board's initial authorization of the mortgage loan purchase pilot program, an approval that predated adoption of the AMA regulation. Although the Federal Home Loan Bank Act (Bank Act) does not specifically authorize a Bank to purchase mortgage loans, the Finance Board determined that the authority conferred by section 11(e) of the Bank Act, which authorizes a Bank to carry out activities that are incidental to those specifically authorized by the Bank Act, provided authority for the Banks to purchase mortgage loans from their members.¹¹ Certain parties challenged the Finance Board's approval of the pilot program, but the Fifth Circuit Court of Appeals agreed with the Finance Board that the incidental powers provision of the Bank Act provided authority for the mortgage purchase program and upheld the Finance Board approval of the program.¹²

In reaching its conclusion, the court considered the Finance Board's determination that a Bank's purchase of mortgages from its members involved an activity that was incidental to the Banks' housing finance mission and represented another method by which the Banks could act as a reservoir of liquidity for members' housing finance lending, albeit in a manner that was "technically more sophisticated than, yet functionally similar to, that which occur[red] when a [Bank] makes an advance."¹³ The court also determined that the Finance Board had authority to define the scope of the incidental powers provision, given its ambiguity, and that the Finance Board's construction of that power with regard to the mortgage purchase pilot program was permissible because it was consistent with the structure and purpose of the Bank Act. In particular, the court noted that under the pilot program, the Banks used their access to low-cost funds in capital markets in an effort to improve the level of housing finance. The basic structure and

requirements for the mortgage purchase pilot program reviewed by the court later formed the basis for the specific provisions of the current AMA regulation, including the core three-part test.

D. Overview of Comments on the Proposed Regulation

The proposed rule provided a comment period of 120 days, which closed on April 15, 2016. FHFA received 65 comment letters on the proposed rule, two of which were not responsive to issues raised by the proposed rule. FHFA reviewed every comment letter and considered all of the comments in developing the final rule.

Approximately three-quarters of the commenter letters came from Bank System members, most of whom filed a substantively similar letter. The eleven Banks filed a joint letter. Eight of the nine Banks that offer the Mortgage Partnership Finance (MPF) program to their members also filed a separate joint letter, which addressed issues beyond those addressed by the joint letter from the eleven Banks. FHFA also received letters from trade associations, including the American Bankers Association, five state banking associations, an association of mortgage insurers, and one mortgage insurance company.

Taken as a whole, the comments requested changes to the proposed rule that would be at odds with the existing policy and legal principles underlying the three-part test. Some commenters suggested that Banks be permitted to purchase loans from institutions that are not Bank System members, which would effectively extend the benefits of membership to institutions that cannot become members and thus cannot receive advances from the Banks. Further, some commenters suggested Banks be permitted to create their own risk-sharing structures under which members would not necessarily be required to retain a meaningful exposure to the credit risk associated with the mortgage loans they sold to the Banks under AMA programs. None of these comments provided a reasoned analysis addressing how their proposed revisions to the proposed rule would be consistent with the legal and policy determinations on which the current regulation is predicated. After considering these comments, FHFA has determined not to alter the basic three-part test for AMA, as set forth in the proposed rule, which remains the most appropriate means of ensuring that the AMA programs operate consistently with the Banks' legal authority and with the policy and safety and soundness

goals established by the Finance Board. These goals include limiting the benefits of GSE funding to those institutions that Congress has authorized for membership or for housing associate status, which is consistent with the cooperative nature of the Bank System, and that members maintain a degree of financial "skin-in-the game" with regard to AMA assets, which helps to ensure that loans are well underwritten, protects the Banks against the expected credit risk associated with the purchased assets, and is consistent with the sharing of financial risks that are present when Banks make advances to their members.

The comments also generally opposed FHFA's proposal to remove the option of allowing SMI or pool insurance as part of the credit enhancement structure, even though no AMA products currently use that option. They further opposed the imposition of any requirements on a Bank's ability to buy loans on which any director, officer, employee, attorney, or agent of a Bank, or of the selling member institution, was the borrower. Several commenters advocated allowing the Banks to buy AMA loans with principal balances that exceed the conforming loan limits applicable to Fannie Mae and Freddie Mac, while others made a number of specific technical suggestions for changes to language of proposed rule provisions.

The primary comments regarding each of the substantive aspects of the proposed rule, as well as FHFA's responses to some of those comments, are discussed below. Comments addressing specific rule provisions are discussed in part II of **SUPPLEMENTARY INFORMATION**, which describes the final rule in detail and the ways in which it differs from the proposed rule.

1. Comments on the Definitions

Commenters recommended that FHFA make a number of technical suggestions to several of the definitions in the proposed rule. Some commenters suggested that FHFA revise the proposed definition of "AMA product" to exclude loans that the Banks acquire and hold temporarily until they aggregate a sufficient number of loans to transfer the loans to another entity, such as is done under certain off-balance sheet programs.

Other comments suggested that FHFA revise the proposed definition of "investment quality" to capture the unique characteristics of the mortgage loans acquired for the AMA program. These Banks pointed out that they acquire AMA loans over time with the expectation that a certain number of

¹¹ See 12 U.S.C. 1431(e).

¹² See, *Texas Savings*, 201 F.3d at 551.

¹³ *Id.* at 554–555.

such loans will become delinquent or go into default. Thus, even if credit enhancements were to allow a Bank to recoup full repayment of principal for a particular loan, the payments received on such a loan may not be “timely” as required by the proposed definition. Moreover, the commenters noted that the models used by the Banks to calculate the credit enhancement and pricing for a particular AMA loan already take into account the expected delinquencies and defaults for the loan pool as a whole.

Commenters also suggested that FHFA revise the proposed definition of “participating financial institution” to reflect that an institution may participate in an AMA program in more than one way, *i.e.*, as a seller, servicer, or credit enhancer of the AMA assets, but not necessarily all of these activities. The proposed definition would have included only those members that the Bank had approved to sell loans into an AMA program and, therefore, would not have captured the full set of potential participating financial institutions.

Commenters further suggested that FHFA change the proposed definition of “pool” to reflect that FHFA has allowed Banks to offer AMA products for which they aggregate loans that have been purchased from different sellers into a single pool. The proposed definition had implied that a pool would include only those loans sold by a single seller under a single master commitment.

2. Comments on the Authorization of AMA

Section 1268.2 of the proposed rule would have authorized the Banks to invest in assets that qualify as AMA under the terms of the proposed rule, but also would have added a provision regarding “grandfathered transactions,” meaning those authorized under the current AMA regulation.

Commenters suggested that FHFA expand the proposed grandfather provision to include any purchase of mortgage loans pursuant to any AMA purchase commitment agreements that remained open as of the effective date of any final rule. They suggested that FHFA make this change to address the possibility that any of the previously approved AMA products might not comply with the requirements of the final rule. The commenters, however, did not identify any specific category of current AMA loans or products to which these requested changes could apply, and did not identify which of FHFA’s proposed changes to the rule might conceivably cause any active AMA products or structures to fail to comply with the final rule.

A number of commenters urged FHFA to include within the final rule a provision allowing the Banks to sell AMA loans, or participation interests therein, to other Banks and to Bank members, including members of other Bank districts. They also asked FHFA to allow the sale of AMA loans and pools or interests in such loans or pools to any party—not just members. The commenters noted that any such sales would reduce a Bank’s exposure to market risk and free up resources for additional purchases. Commenters also asked that FHFA allow the Banks the flexibility to design other means to transfer risk associated with AMA purchase to third parties, apart from sales of the loans or interests in the loans. None of these comments provided specific requirements or suggestions for structuring such sales or any analyses of compliance issues that may arise under other regulatory requirements that could apply to such sales, including issues that could arise under federal securities laws or the risk retention rule for asset securitizations.¹⁴ Given the lack of specifics provided, FHFA has not altered the proposed rule in response to any of these comments, but notes that nothing in the current or proposed rule would prevent a Bank from selling AMA loans or developing a program to transfer risk on those loans to third parties. Any such transactions, however, would likely require that the Banks obtain FHFA approval under the new business activity regulation, which would also require that the Banks demonstrate that they have the legal authority under the Bank Act to undertake the proposed activity. Given that an assessment of the legal authority and risks associated with any such proposed transactions is apt to depend significantly on the particular facts of each proposal, FHFA does not believe that it would be appropriate to provide a general authorization for such as part of this rulemaking. Instead, FHFA expects that it would be more appropriate to identify and assess any legal, regulatory, or policy issues associated with such proposals after a Bank has devoted the time and resources to develop a specific structure and identify the market for such transactions.

3. Comments on the Asset Requirement

The proposed rule at § 1268.3(a)(1) retained the current prohibition on the Banks acquiring AMA loans that exceed the conforming loan limits. In proposing the rule, FHFA expressly asked for comments regarding loan size, including

any issues related to a Bank’s purchase of loans in designated high-cost areas, as well as whether FHFA should continue to limit the size of AMA loans to those that meet the conforming loan limits.¹⁵ A few commenters supported allowing the Banks to acquire loans that exceed the conforming loan limits, while one commenter opposed that change, and others supported the change, provided that the nonconforming loans were limited to those that are guaranteed or insured by a department or agency of the U.S. government.

The proposed rule would have added new provisions at §§ 1268.3(a)(3) and (b) to restrict the Banks from acquiring as AMA any mortgage loans that had been made to a director, officer, employee, attorney, or agent of the Bank or of the selling institution unless the Bank’s board of directors specifically approved such a purchase and FHFA endorsed the Bank’s resolution. The Bank Act generally prohibits the Banks from accepting such mortgage loans as collateral for advances.¹⁶ FHFA had proposed extending the substance of that provision to the AMA programs, reasoning that a statutory prohibition on taking a security interest in such loans logically should apply as well to the purchase of those same loans because ownership of the loan confers on the Bank a greater interest in the loan, along with the attendant risks, than does the acquisition of a security interest in the same loan. Nearly every comment letter FHFA received requested that FHFA remove the proposed provision from the final rule. Generally, commenters noted that participating financial institutions underwrite loans to such persons to the same standards as all other AMA loans, and, therefore, there is little likelihood that persons employed by the Bank or its members will obtain mortgage loans on favorable terms that might expose the Bank to increased credit risk. Accordingly, those commenters urged FHFA to permit the Banks to purchase the loans without restriction.

The proposed rule at § 1268.3(b) would have continued to authorize the Banks to purchase as AMA manufactured housing loans regardless of whether such housing qualifies as real property under state law, which would include as AMA chattel loans on manufactured housing. FHFA requested specific comments on this provision.¹⁷ A couple of commenters urged FHFA to retain this provision in the final rule, contending that manufactured housing fulfills a need for affordable housing

¹⁵ See Proposed Rule, 80 FR at 78691.

¹⁶ See 12 U.S.C. 1430(b); 12 CFR 1266.7(f).

¹⁷ See Proposed Rule, 80 FR at 78692.

¹⁴ See 12 CFR part 1234.

and that Banks should be able to continue to support their members' determinations about how to meet those needs in their market areas. No commenters opposed the provision.

The proposed rule at § 1268.3(a), which is substantively unchanged from the existing regulation, would have allowed the Banks to acquire as AMA any whole mortgage loans that are eligible to secure advances under FHFA's advances collateral regulation.¹⁸ One commenter contended that the Banks should be able to buy as AMA mortgage loans on multifamily properties, as well as residential land acquisition, development and construction loans, given that these loans also qualify as collateral for advances. FHFA notes that the existing AMA regulation already allows the Banks to buy those types of loans as AMA, given that they may qualify as other real estate-related collateral under the advance collateral regulation. The proposed amendments would not change that authority. Before commencing a program to buy such loans as AMA, however, a Bank likely would have to obtain FHFA approval under the new business activity regulation, and would have to demonstrate that the new AMA product otherwise satisfied all of the requirements of the AMA rule.

4. Comments on the Member or Housing Associate Nexus Requirement

Section 1268.4 of the proposed rule would have retained the member nexus requirement, which requires that AMA assets must have been originated or held for a valid business purpose by a member or housing associate, and must be acquired from a member or housing associate of the acquiring Bank, or from another Bank. As previously discussed, the Finance Board originally adopted this requirement to ensure that the benefits of Bank System membership are not extended to nonmembers. Commenters suggested that FHFA amend the AMA regulation to authorize the Banks to acquire mortgage loans directly from affiliates of their members, which would include nonmember institutions.

5. Comments on the Credit Risk-Sharing Requirement

The Finance Board originally established the credit risk-sharing requirement to ensure that members have a material exposure to the credit risk associated with the AMA assets that they sell to their Banks, which was consistent with the risks undertaken by

members when funding loans for their own portfolios with Bank advances. FHFA received many comments on different aspects of the credit risk-sharing requirement, nearly all of which generally supported loosening the requirement in some fashion. The comments on the individual credit risk-sharing sections, taken together, would have the effect of permitting the Banks to create what they characterized as their own risk-sharing structures, but would not necessarily have required that the Banks structure their AMA products such that the participating financial institution actually continued to have a material exposure to the credit risk associated with the mortgages they sell to the Banks. For example, some commenters asked that the Banks be allowed to transfer the credit enhancement obligation to nonmember institutions, which would have the effect of eliminating the current structure under which members bear the expected losses on the AMA products. Other commenters requested that FHFA permit arrangements under which an affiliate of a member, rather than a member itself, could satisfy any portion of the credit enhancement obligation or that FHFA allow a member to transfer its credit enhancement obligation to any other institution that is willing to assume that obligation.

Some commenters requested that FHFA allow Banks to create an AMA structure that would permit participating financial institutions to accept a price adjustment for the mortgage loans, in lieu of providing a credit enhancement for those loans. Under such an arrangement, the participating financial institution would receive a lesser price from the Bank in return for the Bank agreeing to bear the credit risk, and the price adjustment would vary in proportion to the amount of credit risk the Bank would bear. Other commenters requested that a participating financial institution meet part, or all, of its credit enhancement obligation simply by pledging collateral. Those commenters, however, did not explain how such an arrangement would work or how it would differ from the current enhancement approach used under the Mortgage Partnership Finance (MPF) program, in which a participating financial institution pledges collateral to secure its obligation to absorb a specified amount of the credit losses on mortgage loans sold to the Bank.

The proposed rule also would have carried over the timing requirements of the current regulation regarding the date by which a Bank must calculate a member's total credit enhancement obligation. Thus, the proposal would

have required that a Bank make that determination at the earlier of 270 days from the time a Bank acquires a loan from the member for a particular pool or when the pool reaches \$100 million. Commenters asked that the final rule allow the timing of determining the final credit enhancement vary based on the structure of the particular product. For example, commenters noted that under products where the member pre-funds the credit obligation the Banks should be able to calculate the required credit enhancement at the time the pool closes.

The proposed rule would have added several model-related requirements at § 1268.5(e). Specifically, the proposed rule would have required a Bank to: (1) Validate its model and methodology at least annually and make the results available to FHFA upon request; (2) institute and maintain a process for monitoring model performance that would include tracking, back-testing, benchmarking, and stress testing the model and methodology; (3) inform FHFA prior to making any material changes to the model and methodology, and (4) promptly change its model and methodology as directed by FHFA. Commenters generally requested that the final rule provide general guidance regarding models and methodologies, rather than the specific provisions proposed in the rule, described above.

The proposed rule would have eliminated the option of allowing members to use SMI and/or pool insurance to meet a part of their credit enhancement for AMA assets. The current AMA regulation allows the use of SMI as part of the credit enhancement if the insurance provider has obtained a rating from an NRSRO of no lower than the second highest investment grade. The regulation also allowed pool insurance if the insurance were used to enhance against geographic concentration or pool size risk.

FHFA proposed to remove the option of using SMI and pool insurance in the credit enhancement structure in part based on the experience during the financial crisis, when no private mortgage insurance company was able to maintain an NRSRO credit rating at the minimum level required by the current AMA regulation, and on concerns that other private mono-line insurers could face similar problems in the future. Further, FHFA considered that the Banks have in place alternate AMA structures and products that do not rely on SMI and that eliminating the use of SMI from authorized credit enhancement structures would remain consistent with the intent of the AMA regulation to require participating

¹⁸ See 12 CFR 1266.7.

financial institutions to bear the direct economic consequences of the credit risk associated with AMA assets and not transfer such risk to third parties.¹⁹ Finally, because the current AMA regulation relies on an NRSRO rating to define eligible insurers, FHFA must change or delete that provision in order to comply with section 939A of the Dodd-Frank Act, which bars federal regulatory agencies from incorporating NRSRO ratings requirements into their regulations.

In the preamble to the proposed rule, FHFA specifically requested comments regarding the use and importance of SMI or pool insurance as part of an allowable credit enhancement structure.²⁰ In particular, FHFA solicited comments on what type of requirements could replace the specific credit rating requirement for insurance providers if it were to retain these insurance options as part of the credit enhancement structure. Further, FHFA requested comments on how a Bank might evaluate the claims-paying ability of an insurer in the absence of a specific credit rating requirement. Finally, FHFA requested comments on whether, if it were to adopt in the AMA regulation specific minimum requirements of SMI and pool insurance, such requirements also should apply to PMI providers.

No commenters responded to the specific questions FHFA posed in the proposed rule regarding these topics, but many comments opposed the elimination of a provision that would authorize the use of SMI and pool insurance as part of the credit enhancement structure, and no commenters supported the removal of this option. Commenters generally argued that FHFA did not articulate a sound reason for removing the insurance option from the rule and that FHFA's focus on credit ratings for mortgage insurers ignored the actual claims paying abilities of these firms. They also pointed out that mortgage insurance providers, including those in run-off, have paid all "valid" claims, with 96 percent of claims paid in cash and the remainder due over time.²¹ Commenters also noted that mortgage insurers and their regulators have taken steps to enhance the financial strength of the insurers, improve regulatory oversight, and increase clarity and

reduce ambiguity in master insurance policies. At least one commenter noted that using insurance in the credit enhancement structure did not undermine the incentive to sell quality loans under the AMA regulation because lower insurance premiums would be associated with lower-risk mortgages.

Commenters also noted that use of SMI and pool insurance provided important economic benefits to members that sell AMA loans to the Banks, by reducing capital charges on the retained credit enhancement and transferring risk associated with the enhancement to third parties. A number of commenters stated that the Banks could develop internal ratings for SMI and pool insurance providers and pointed to the Enterprises' Private Mortgage Insurer Eligibility Requirements (PMIERS) recently adopted by Fannie Mae and Freddie Mac as an example of acceptable standards, although some commenters said that PMIERS should not be the only standard used for qualifying insurance providers. These commenters suggested that FHFA could condition use of such internal standards on a Bank demonstrating the effectiveness of its approach prior to introducing products that use SMI or pool insurance. Some comments also suggested that the rule not restrict insurance providers to mono-line mortgage insurers, although the current AMA regulation only requires that insurance be provided by an insurer. Thus, the AMA regulation already allows multiline insurers to provide SMI or pool insurance if they meet the other requirements in the regulation.

A number of commenters stated that FHFA should not impose specific requirements in the regulation on providers of borrower-financed PMI and instead should continue current practice of letting the Banks identify acceptable providers. Other commenters said that if FHFA wished to add such a requirement, it should require the PMI provider to meet PMIERS. Still other commenters urged FHFA to consider a broader range of insurance products as part of the credit enhancement structure and allow a member to rely on insurance to cover the entire credit enhancement obligation rather than just the amount in excess of the member required direct enhancement, as under the current regulation.

6. Comments on Mortgage Servicing Rights

No commenter objected to FHFA's proposal to allow a participating financial institution to transfer servicing

rights on AMA loans to any institution approved by the Bank, regardless of whether it was a member. Some commenters objected to a related change that would have relieved a participating financial institution of the responsibility for paying the unreimbursed servicing expenses on loans guaranteed or insured by a federal department or agency as a means of meeting its credit enhancement obligation for such loans. FHFA had proposed that change in order to facilitate the transfer of mortgage servicing rights on federally insured or guaranteed AMA loans to a nonmember institution, because for such loans the responsibility for unreimbursed servicing expenses transfers with servicing rights. The commenters disagreed with FHFA's statement that requiring a member to retain exposure to unreimbursed servicing expenses on loans guaranteed or insured by a department or agency of the U.S. government was unlikely to substantially affect the underwriting for such loans, given the requirements and standards already imposed by the provider of the federal guarantee or insurance. They believed that the proposed change would alter the underlying premise for AMA in the case of such federally guaranteed or insured loans—namely that members needed to have "skin in the game" for loans sold to the Banks. The commenters did not address why continuing to allow SMI or pool insurance would not similarly be contrary to this aspect of the AMA program.

7. Comments on Administrative Transactions and Agreements Between Banks

Section 1268.8 of the proposed rule addressed the delegation of administrative AMA program duties (*i.e.*, back-office operations) and the ability to terminate AMA agreements between Banks. FHFA made no substantive changes to this section of the rule when it proposed the amendment. Commenters asked FHFA to make two changes to this section. First, commenters asked to add regulatory language to the delegation of administrative duties provisions to allow a Bank to contract with other parties (including other Banks) to provide services related to administration of its own or its delegated AMA program without having to disclose such delegation to participating financial institutions. Second, commenters asked to add regulatory language to the delegation of pricing provision to allow Banks to specify that a Bank that has delegated its AMA pricing function to another Bank

¹⁹ See Proposed Rule, 80 FR at 78694–95.

²⁰ See *id.*

²¹ Payments "due over time" represent obligations of indefinite duration issued by insurers that they will pay the remainder of any amounts owed under a claim at some point in the future. In many cases, troubled insurers paid only part of what was owed under a claim (*e.g.*, 50 cents on the dollar) with the remaining amount due over time.

may retain its right to refuse to acquire AMA at certain prices pursuant to contractual provisions among the parties.

8. Comments on Other FHFA Regulations

FHFA received comments requesting that it consider two other regulations—those pertaining to Bank housing goals and new business activities—as part of its review of the AMA rule, even though FHFA had not proposed to address either of those matters as part of this rulemaking. FHFA believes that the issues raised by commenters pertain to matters that are beyond the scope of this rulemaking and are best considered as part of FHFA rulemakings related to the other regulations.

As to the matter of Bank housing goals, these commenters called on FHFA to align the AMA regulation and the new housing goals regulation. Without providing specific examples, the commenters suggested that the AMA regulation should provide flexibility for the Banks to offer AMA products and purchase AMA loans as one means to satisfy the housing goals regulation requirements. FHFA also received many comments asking it to address FHFA's current new business activity regulation, as it may be applied to the Banks' AMA programs. The majority of commenters believed that the new business activity filings were burdensome and resulted in significant delays to the Banks' ability to improve their programs. More specifically, they sought to exclude from the new business activity review process certain types of modifications or expansions to existing AMA programs and products. These suggestions are much the same as those received in response to a separate rulemaking in which FHFA had proposed certain amendments to the existing new business activity regulation, and which FHFA will consider as part of that rulemaking.

II. Section-by-Section Analysis of the Final Rule

A. Definitions—§ 1268.1

The proposed rule included definitions for four new terms to be used in the AMA regulation, which are: “AMA product,” “AMA program,” “participating financial institution,” and “pool.” FHFA intended for these terms to help simplify and clarify other provisions in the regulation and, with the exception of revisions made in response to certain comments, as discussed below, is adopting those definitions as proposed. FHFA has expanded the proposed definition of

“participating financial institution” to reflect the fact that a participating financial institution may be approved to sell AMA loans to a Bank, but also could be approved (either in conjunction with or apart from its role as a seller of loans) to service those loans, or provide a credit enhancement for them. FHFA has also clarified the wording for the definition of “pool” to reflect the fact that FHFA has authorized some Banks to aggregate AMA pools, which requires that the definition make clear that a pool may contain loans sold by more than one member or other source.

FHFA has also modified somewhat the proposed definition of “AMA product” to make clear that while each Bank may develop and establish different AMA products and structures, all such products and structures must comply with the provisions of the AMA regulation. This change was based on language suggested by the comments. FHFA did not, however, alter the definition to specifically exclude loans held by a Bank on its balance sheet for a short time prior to transferring them to another entity, as some commenters requested. Generally speaking, mortgage loans purchased under the Banks' off-balance sheet programs are not intended to qualify as AMA, and thus do not have all of the features that are necessary for a mortgage loan to qualify as AMA. Therefore, such loans would not come within the new definition of “AMA product”, which specifically includes only those loans that comply with all of the requirements of the AMA regulation.²² In light of that fact, there is no need to specifically exclude these loans from the definition.

In response to issues raised by the commenters, FHFA is also adding new definitions in the final rule for the terms “AMA investment grade” and “qualified insurer.” The term “AMA investment grade” modifies and replaces the proposed definition of “investment quality.” FHFA developed the definition of “AMA investment grade” based on comments received on the proposed definition of “investment quality.” The term “qualified insurer” is used in provisions that FHFA is adding back to § 1268.5, which will allow Banks to use pool and loan-level insurance as part of an eligible credit

²² In approving most of these off-balance sheet products, FHFA specifically recognized that the loans did not qualify as AMA loans. The one exception was the MPF Government MBS product. However, in that case, part of FHFA's reasoning for approving the product was that the Bank would purchase loans that qualified as AMA and would treat the loans as AMA loans while it accumulated them on its balance sheet.

enhancement structure for AMA products. FHFA addresses these new definitions in more detail below, in its discussion of § 1268.5 of the final rule. FHFA is also adopting, without further change, its proposed amendments to the definitions of “expected losses” and “acquired member assets” in 12 CFR part 1201.²³

B. Authorization for Acquired Member Assets—§ 1268.2

FHFA is adopting § 1268.2 as proposed.²⁴ This section generally authorizes the Banks to invest in AMA, subject to the requirements of FHFA's AMA and new business activity regulations. This section also includes a “grandfather” provision that authorizes a Bank to continue to hold as AMA any loans that FHFA or the Finance Board previously authorized for purchase, even if the loan would not meet one or more of the requirements of the final rule. The grandfather provision covers all loans that were previously authorized for purchase by any regulation, order, or other agency action, such as waiver of particular requirements that allowed a Bank to purchase the loan.²⁵ The grandfather provision at § 1268.2(b), however, does not allow a Bank to continue to purchase new loans that do not meet the requirements of the final rule after the rule becomes effective.

One commenter requested that FHFA expand the grandfather provision to include any purchase of mortgage loans pursuant to any open commitment as of the effective date of the final rule. The commenter stated that this would assure the Banks could fulfill any existing commitments to purchase loans if any of the existing Bank AMA products did not meet the requirements of the final rule. FHFA noted in proposing the rule, however, that it believed that all currently active AMA products would

²³ See Proposed Rule, 80 FR at 78690–91. FHFA also made non-substantive changes to the wording of the definition of “expected losses” to clarify the meaning of the term, but these changes were not intended to alter the scope of the proposed definition.

²⁴ Section 1268.2 carries over the substance of the general Bank authority to purchase and hold AMA now found at 12 CFR 955.2. As part of the final rule, however, FHFA is moving the loan type, member nexus, and credit-enhancement requirements also now found in current 12 CFR 955.2 to §§ 1268.3, 1268.4, and 1268.5. FHFA is also making other changes to these provisions.

²⁵ For example, on August 5, 2011, FHFA waived the ratings requirement for SMI providers in the current regulation to allow Banks to continue to buy loans that used SMI as part of the credit enhancement structure, even though no SMI provider met the ratings requirement. This grandfather provision would allow the Banks that bought loans pursuant to that waiver to continue to hold those loans.

meet the requirements of the proposed rule.²⁶ The commenter did not provide an example of an active AMA product that would not meet the requirements of the proposed rule. As a consequence, FHFA has not revised the proposed grandfather provision in response to the comment. In the unlikely event that a Bank determines that an existing AMA product would not meet all of the requirements under this final rule, FHFA would allow the Bank to continue to honor any contractual obligations it had entered into under a commitment that had been entered into prior to the effective date of this rule and that complied in all respects with the requirements of the existing AMA regulation.

C. Asset Requirement—§ 1268.3

1. Asset Types

Section 1268.3 of the final rule sets forth the four categories of asset types that are eligible for purchase as AMA. As adopted, it closely follows current 12 CFR 955.2(a), although the final rule also incorporates specific authority for Banks to acquire as AMA certain certificates representing interests in AMA-qualified whole loans, which is based on a Finance Board approval of a similar transaction in 2002. The first of these categories allows a Bank to acquire as AMA any whole loans that are eligible to secure advances to members under FHFA's advances regulation, at 12 CFR 1266.7. These assets include: (1) Fully disbursed, whole first mortgage loans on improved residential real property not more than 90 days delinquent; (2) mortgages or other loans, regardless of delinquency status, to the extent that they are insured or guaranteed by the United States or any agency thereof, and such insurance or guarantee is for the direct benefit of the holder of the mortgage or loan; (3) loans that qualify as "other real estate-related collateral," which requires that such loans also have a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, can be liquidated in due course, and in which the Bank can perfect a security interest; and (4) loans acquired from community financial institution (CFI) members or their affiliates, for small business, small farm, small agri-business, or community development purposes, and which are fully secured by collateral other than real estate, or securities representing a whole interest in such secured loans. Such CFI collateral also must have a readily ascertainable value, be able to be

reliably discounted to account for liquidation and other risks, and be able to be liquidated in due course.

As under current 12 CFR 955.2(a), § 1268.3 of the final rule authorizes a Bank to purchase as AMA manufactured housing loans regardless of whether such housing constitutes real property under state law. FHFA specifically requested comment on whether it should continue to authorize the purchase of manufactured housing loans as AMA if relevant state law considers the loans to be chattel loans. FHFA received only a few comments in response to this request, which supported retaining the current regulatory text, citing, among other things, the importance of manufactured housing in meeting affordable housing needs in certain markets. As a result, FHFA has determined not to change the scope of existing authority and the final rule will continue to allow Banks to purchase as AMA manufactured housing loans regardless of whether state law considers them to be real property or chattel loans. The third category of asset types is state and local housing finance agency bonds, which is unchanged from the corresponding provision of the current regulation. FHFA received no comments advocating for changes to this provision.

The fourth category of asset types pertains to certain certificates that represent interests in loans that qualify as AMA. This category of assets is not addressed by the current regulation, but the Finance Board had previously approved a Bank's request to acquire such assets as AMA. The effect of including this provision in the final rule is to codify the previous Finance Board determination that such assets may qualify as AMA. When the Finance Board adopted the current AMA regulation, it noted, in response to comments, that the rule would allow the Banks to buy structured products as AMA, provided the products met certain identified conditions.²⁷ Section 1268.3(d) incorporates these conditions, which require that any such certificate must: (i) Be backed by loans that themselves qualify as AMA and that meet the member nexus requirement; (ii) Meet the requirement that the certificate is enhanced to AMA investment grade; (iii) Be issued

²⁷ Currently, this authority is set forth in a discussion in the **SUPPLEMENTARY INFORMATION** of the **Federal Register** release originally adopting the AMA regulation. See Final Rule: Federal Home Loan Bank Acquired Member Assets, Core Mission Activities, Investments and Advances, 65 FR at 43974, 43977 (July 17, 2000) (*hereinafter* 2000 Final AMA Rule). The Finance Board approved one AMA product under this authority (in December 2002), which is now inactive.

pursuant to an agreement between the Bank and the participating financial institution under which the participating financial institution shares credit risk as required by the regulation; and (iv) Are acquired substantially by the initiating Bank or Banks.

By incorporating the substance of the Finance Board's earlier approval into the regulatory text, FHFA would clarify that such programs are possible under the amended regulation and would bring all relevant authority into a single provision within the regulatory text. FHFA would interpret the provisions of § 1268.3(d) of the final rule to permit the use of a third party to securitize the whole loans, as that arrangement would merely represent the use of a vehicle to invest in certain types of AMA under more favorable terms. However, if any such certificates were to have been created as a security that initially was available to investors generally, they would not qualify as AMA under this provision.²⁸

2. Restrictions on Certain Loans

Although, as discussed above, whole loans eligible to secure advances may qualify as AMA, both the current regulation and the proposed rule explicitly excluded from AMA any single-family home mortgage loans that exceed the conforming loan limits and any loans made to an entity, or secured by property, that is not located in a state. The final rule carries over without change the existing exclusion for loans not located in a state, and modifies the conforming loan provision, as described below. In proposing the rule, FHFA specifically requested comments on whether the final rule should continue to limit AMA loans to those that meet the conforming loan limits more generally.²⁹ Some commenters suggested that FHFA remove the limits for all loans, while other commenters suggested loans that are guaranteed or insured by a department or agency of the U.S. government be allowed to exceed the conforming loan limits.

After considering the comments, FHFA has decided that it would be appropriate to allow the Banks to acquire as AMA loans guaranteed or insured by a department or agency of the U.S. government without regard to the conforming loan limit, while continuing to apply the limit to other types of loans. FHFA considers the conforming loan limit, which is a statutory requirement, to be an appropriate public policy guide in determining how the GSE subsidy that

²⁸ *Id.*

²⁹ See Proposed Rule, 80 FR at 78691.

²⁶ See Proposed Rule, 80 FR at 78691.

accrues to the Banks should be used to support the housing finance efforts of their members when making loans without any federal guarantee or insurance. Because other federal statutes separately authorize certain agencies or departments of the U.S. government to insure or guarantee mortgage loans that exceed the conforming loan limit, FHFA views those provisions as evidence that public policy would favor allowing the Banks to also support those market segments, and to do so in a manner that is consistent with the limits of those programs. Accordingly, § 1268.3(a)(1) of the final rule will carry forward the existing AMA rule provision that excludes from AMA those single-family mortgages where the loan amount exceeds the conforming loan limits established pursuant to 12 U.S.C. 1717(b)(2), but will also exempt from that prohibition loans that are insured or guaranteed by a department or agency of the U.S. government.³⁰

As discussed earlier, the proposed rule would have barred a Bank from purchasing as AMA any home mortgage loans on which a director, officer, employee, attorney, or agent of a Bank or of the selling member institution was the borrower, unless the board of directors of the Bank specifically approved such purchase.³¹ As commenters point out, in the current mortgage market any loans made to such “insiders” should meet the same AMA underwriting standards that the member or other originator would apply to all of AMA-eligible loans and thus would not have a different risk profile from those other loans. Commenters also contended that such a requirement would present significant operational difficulties. For example, because of the breadth of the proposal, it would effectively require the Banks to screen out of their AMA pools not only those loans that had been made to a member’s executives, but also to any of its rank and file employees. FHFA is persuaded that the costs to the Banks of implementing this provision would likely outweigh whatever benefits might accrue from it. FHFA also recognizes that the statutory language to which FHFA looked in proposing this provision was likely intended to address the risks associated with particular practices that are less of a concern in

today’s mortgage marketplace. The original statutory provision, which pertains only to the acceptance of such loans as collateral and dates to the original Bank Act, likely was intended to prevent the Banks from accepting as collateral mortgage loans that savings and loan association members had made to their “insiders” and which may not have been underwritten as rigorously as their other loans. Given that today’s mortgage markets are much more uniform, in terms of underwriting practices, than was the case in the 1930s, it is unlikely that removing the prohibition would create any significant risks for the Banks.

While the final rule adopts or retains specific restrictions on certain loans, it does not limit the total amount of AMA assets a Bank may acquire. Nevertheless, FHFA expects each Bank’s board of directors to establish a prudential limit on its maximum holdings of AMA, which should be governed by the Bank’s ability to manage the risks inherent in funding and holding such mortgage loans.

D. Member or Housing Associate Nexus Requirement—§ 1268.4

Section 1268.4 of the proposed rule would have carried forward without substantive change the member nexus requirement of the current AMA regulation, found at 12 CFR 955.2(b). After considering the issues raised by the commenters, described below, FHFA has decided to adopt this provision of the final rule without any substantive differences from the proposed rule. Under this “member nexus” provision, an asset may be eligible for purchase as AMA only if the participating financial institution has originated or issued the assets or has held it for a valid business purpose. The “valid business purpose” provision was intended to recognize the fact that some members may conduct their mortgage lending operations through both the origination and purchase of mortgage loans, which may include the acquisition of loans from nonmember institutions as part of the normal course of business, and may then wish to sell both categories of loans to their Bank. The Finance Board and FHFA have interpreted this provision as excluding any loans that merely pass from a nonmember through a member to a Bank, because such arrangements would have the effect of extending the benefits of membership to the nonmember.³²

³² See Proposed Rule: Federal Home Loan Bank Acquired Member Assets, Core Mission Activities, Investments and Advances, 65 FR 25676, 25681 (May 3, 2000) (*hereinafter* 2000 Proposed AMA Rule).

Commenters suggested that FHFA amend the AMA rule to allow Banks to acquire loans directly from the affiliates of a Bank member, which they contend would streamline the process of acquiring loans. The Banks believe that the current requirement is inefficient because it requires the use of a two-step process whereby a nonmember affiliate that originates a mortgage loan must first assign the loan to its affiliated member prior to the member is able to sell the loan to the Bank. FHFA acknowledges that the current process may be inefficient for such members, but believes that the Finance Board struck an appropriate balance when it first adopted the AMA rule between the need for operational efficiency and the need to ensure that the benefits of Bank membership are made available only to institutions that are eligible for membership. Accordingly, FHFA decided to adopt the provision generally as proposed.

The reference in § 1268.4(a) of the final rule to assets issued “through, or on behalf of the participating financial institution” carries over from the current regulation, and is intended to address the terms under which HFA bonds may qualify as AMA. As under the current regulation, this provision allows HFA bonds issued by an underwriter for the participating financial institution, *i.e.*, a housing finance agency that has become a housing associate of the Bank, to qualify as AMA.³³ In § 1268.4(b), FHFA is also carrying over without substantive change the provisions of the current regulations that address the process through which a Bank may purchase HFA bonds as AMA from a housing associate of another Bank. Under this provision, a Bank may acquire initial-offering taxable HFA bonds from out-of-district associates, provided the Bank in whose district the HFA is located (local Bank) has a right of first refusal to purchase, or negotiate the terms of, a particular bond issue. If the local Bank refuses, or does not respond within three business days, the HFA may then offer the bonds to an out-of-district Bank.

E. Credit Risk-Sharing Requirement—§ 1268.5

1. Overview

FHFA proposed to reorganize the current credit risk-sharing requirements from two provisions of the Finance Board regulations, 12 CFR 955.2(c) and 955.3, into a single provision of the final rule, § 1268.5. The proposed rule would

³³ *Id.* at 25681.

³⁰ For loans not guaranteed or insured by a department or agency of the U.S. government, the rule allows loans on properties located in designated “high-cost areas,” where the conforming loan limit is adjusted in accordance with the criteria established in 12 U.S.C. 1717(b)(2), to remain eligible for purchase as AMA as long as the loan value is within the adjusted conforming loan limit.

³¹ See Proposed Rule, 80 FR at 78691–92.

have carried over several of the credit risk-sharing provisions without substantive changes, including the requirement that all AMA loans carry a credit enhancement and the design requirement for the credit enhancement structure to ensure that the participating financial institution retained a material economic incentive to reduce actual losses on any AMA loans.³⁴ To comply with Dodd-Frank Act mandates that generally bar regulatory agencies from incorporating NRSRO credit rating requirements into their regulations, FHFA also proposed to amend those provisions of the current AMA regulation that were based on or referenced NRSRO ratings, including allowing the Banks flexibility to use a non-NRSRO methodology and model for calculating the credit enhancement obligation. Finally, FHFA had proposed to delete existing provisions that authorize the use of private SMI or pool insurance as part of the credit enhancement structure and, as a consequence, also remove provisions from the current regulation requiring eligible SMI providers to maintain specific NRSRO ratings.

FHFA has made several changes to the credit enhancement provisions of the proposed rule in response to comments, including restoring to the rule provisions allowing the use of SMI or pool insurance as part of the credit enhancement structure. Related to that provision, and as addressed in more detail below, FHFA is also adding to the final rule a requirement that a Bank must develop and maintain written financial and operational standards under which it will review and approve insurers as eligible to provide mortgage insurance on AMA loans. This requirement replaces the provisions of the current regulation, which had required the Banks to use NRSRO ratings for evaluating mortgage insurers. The final rule will carry over from the current rule the requirements that all AMA loans be covered by a member-provided credit enhancement, and that such credit enhancement on loans other than those loans covered by a federal guarantee or insurance bear the direct economic consequences of losses from the first dollar up to expected losses, or immediately following expected losses but in an amount that is equal to or exceeding the expected losses.³⁵

2. Determining Credit Enhancements on AMA pools

Section 1268.5(b)(1) of the final rule sets forth the general requirements for how a Bank is to determine the total credit enhancement that a participating financial institution must provide for an asset or pool to qualify as AMA. Unlike under the current rule, the final rule does not require that Banks calculate the credit enhancement for AMA using NRSRO models and methodologies, or that the credit enhancement raises the credit quality of an asset or pool to a level that is equivalent to a specific NRSRO-determined rating. Instead, the final rule requires the Banks to determine and document that AMA assets are enhanced at least to “AMA investment grade.” The rule defines “AMA investment grade” as:

... a determination made by the Bank with respect to an asset or pool, based on documented analysis, including consideration of applicable insurance, credit enhancements, and other sources for repayment on the asset or pool, that the Bank has a high degree of confidence that it will be paid principal and interest in all material respects, even under reasonably likely adverse changes to expected economic conditions.

The term “AMA investment grade,” as well as its definition, represents a change from the proposed rule that FHFA made in response to comments received on the proposal. The proposed rule would have required that the enhancement on AMA assets raise them to at least “investment quality,” which would have been defined by reference to the definition of that term that is used in the Bank investment regulation, at 12 CFR 1267.1. Commenters pointed out, however, that the term “investment quality” as used in the investment regulation generally applies to debt securities and that, unlike when Banks purchase debt securities, Banks buy AMA assets with the knowledge and expectation that some of those assets will default, and become delinquent.³⁶ Thus, as commenters further noted, the fact that the definition of “investment quality” in the Bank investment rule references expectations of “full and timely payment of principal and interest” means the definition cannot be readily applied to individual mortgages or mortgage pools purchased as AMA.

game,” the rule provides them an incentive to sell high-quality loans to the Banks and the opportunity to benefit financially from good underwriting practices. See Proposed Rule, 80 FR at 78693.

³⁶ The Banks take account of these expected defaults and delinquencies and related losses when determining pricing for their purchases of AMA loans and in structuring the AMA products.

FHFA agrees with the comments and has revised the proposed definition to address those commenters’ concerns. In particular, the definition of “AMA investment grade” that is adopted in the final rule replaces the references to expectations that a Bank will receive “full and timely payment of principal and interest” with language suggested by commenters, *i.e.*, that a Bank has a high degree of confidence that “it will be paid principal and interest in all material respects.” The change recognizes that Banks will, upon purchase of the AMA asset, expect certain levels of payment defaults and delinquencies. The final definition continues to require that the Bank’s analysis of the possibility for repayment take account of adverse stress to future expected economic conditions and that the Bank should consider such adverse stresses in their analysis, to the extent that such adverse changes could reasonably occur given current economic conditions and outlooks.

While the proposed rule would not have changed the existing requirement that a Bank determine the necessary credit enhancement on a pool at the earlier of 270 days from the date of the Bank’s acquisition of the first loan in a pool or the date at which the pool reaches \$100 million in assets, § 1268.5(b)(1) of the final rule has revised those provisions such that a Bank now must determine the total credit enhancement obligation no later than 30 calendar days after a pool closes or the Bank completes the purchase of an AMA asset.³⁷ FHFA made this change based on comments that the rule should allow a Bank to calculate the credit enhancement in a manner that is consistent with the terms of specific loan funding commitments. Commenters provided as an example the Mortgage Partnership Program (MPP) for which calculating the credit enhancement at the time the pool closes would bring more certainty to participating financial institutions as to their ongoing financial obligations. FHFA believes that the change in the final rule will provide Banks sufficient flexibility to meet the concerns raised by commenters while still ensuring that all AMA pools are enhanced to levels

³⁷ As FHFA previously noted, some AMA eligible assets would be in the form of a security or certificate, such as an HFA bond or a certificate of security representing interest in a pool of whole loans. For those AMA products that involve a Bank’s purchase of a single security or instrument, and not the purchase of a pool of individual loans, the relevant date for applying this provision would be the date the purchase of the instrument is completed.

³⁴ See 2000 Final AMA Rule, 65 FR at 43976–77.

³⁵ As FHFA noted in proposing the new AMA rule, the credit risk-sharing requirements provide that participating financial institutions selling mortgages must retain a substantial portion of the credit risk, given their expertise in underwriting mortgages. In requiring the participating financial institution to have such financial “skin in the

consistent with the terms and conditions of the specific AMA product.

Under § 1268.5(b)(1), the Bank could continue to specify, as part of the terms and conditions for a particular AMA product, that a participating financial institution must provide a credit enhancement greater than that needed to enhance the asset or pool to AMA investment grade. The final rule further provides that a Bank must make its credit enhancement determinations using a model and methodology of the Bank's choosing, subject to the requirements of § 1268.5(f), which requires the Banks to provide information about their model and methodology to FHFA upon request, and which reserves FHFA's right to require changes to a Bank's model or methodology. As FHFA noted in the proposed rule, a Bank may continue to use the same NRSRO model it currently uses for making credit enhancement determinations under the final rule, and in such a case, would not need to alter the credit enhancement levels it currently requires, unless FHFA directs it to do so or its estimated enhancement levels otherwise do not comply with the rule.³⁸ For example, a Bank would need to increase credit enhancement levels if it determined that the credit enhancement currently estimated by its NRSRO model was not sufficient for an asset or pool to be AMA investment grade under the definition of that term.

FHFA is adopting as proposed the requirement that a Bank document the basis for its conclusion that the contractual credit enhancement required for a particular pool is sufficient to meet the required credit enhancement obligation for a particular AMA product, given the Bank's chosen model's relevant stress scenarios.³⁹ This provision is located at § 1268.5(b)(2) of the final rule, and that information will help FHFA monitor the Banks' use of their models and the adequacy of the specific credit enhancement structures used in each AMA product.

Section 1268.5(c) of the final rule addresses the credit risk-sharing structure for AMA products. As is the case under existing regulations, this provision generally requires that the participating financial institution providing the credit enhancement bear

the direct economic consequences of actual credit losses on the assets from the first dollar of loss up to expected losses, or immediately following expected losses in an amount equal to or exceeding expected losses.⁴⁰ This requirement would not apply to federally insured or guaranteed mortgage loans.⁴¹

As noted previously by the Finance Board, this requirement helps ensure that a participating financial institution bears the direct consequences of the credit quality of the asset or pool, and thereby has the incentive to maintain high underwriting standards for any AMA loans sold to a Bank.⁴² The participating financial institution cannot transfer this responsibility to an affiliate or nonmember entity.

While the current regulation defines "expected losses" as the base loss scenario in the methodology of an NRSRO applicable to a particular AMA asset, the final rule amends this definition to refer to the loss on the particular AMA asset or pool given the expected future economic and market conditions in the model or methodology used by the Bank to calculate the credit enhancement for an AMA product. This change results from the fact that the final rule no longer requires a Bank to use an NRSRO model, and also accommodates the potential for a Bank to adopt a model that applies a methodology that differs from that used in the Banks' current models. Otherwise, FHFA believes that this change does not alter the substance of what is currently required by the AMA rule; nor is it intended to alter how a Bank would calculate "expected losses" if the Bank continues to use its current model.

Section 1268.5(c) also continues to require that the credit enhancement remain in place at all times, *i.e.*, for the

⁴⁰ The economic responsibility of the expected credit losses may be borne by the member or housing associate in a variety of ways. For instance, under the product developed by the Chicago Bank known as MPF 100, a Bank establishes an account to absorb credit losses. As the Bank incurs losses, the member reimburses the Bank through the reduction of credit enhancement fees paid to the member by the Bank and, therefore, is exposed to the credit risk of the loans starting with the first dollar of loss. Essentially, the fees paid to the member are contingent upon the performance of the asset. Also, the rule allows for a member-provided credit enhancement to be positioned after expected losses. Authorizing this structure in the rule allows for the existing MPF Original product.

⁴¹ As is discussed below, FHFA is amending the requirement that for government insured or guaranteed loans the members or housing associates must bear responsibility for unreimbursed servicing expenses up to the amount of expected losses for the loan to qualify as AMA.

⁴² See 2000 Proposed AMA Rule, 65 FR at 25683; *see also*, 2000 Final AMA Rule, 65 FR at 43976.

life of the asset or pool.⁴³ This requirement effectively prohibits the Banks from using structures, for example, that comply with the credit rating requirement during in the first year, but that then scale back the amount of the member's credit enhancement in subsequent years so that the pool would no longer be credit enhanced to a level that is consistent with the terms and conditions of the AMA product.⁴⁴

Section 1268.5(c)(1)(ii) of the final rule also will retain the existing requirement that a participating financial institution must secure fully its credit enhancement obligation, and that it do so in the same manner that a member must secure its obligation to repay an advance under part 1266 of the FHFA advances regulations. This provision is intended to prevent a Bank from being exposed to any additional credit risk as a result of a member's failure to comply with its contractual obligation to absorb a specified portion of the credit losses on its AMA loans. While some commenters asked FHFA to delete this requirement so that the Banks could have added flexibility in designing different types of credit enhancement structures, FHFA believes that the collateral requirement provides a necessary level of protection for the Banks should a participating financial institution be unable to fulfill its credit enhancement obligation, and also is consistent with the legal rationale for the AMA programs, which views the acquisition of AMA loans as being functionally equivalent to the extension of credit via an advance, which members must fully secure with eligible collateral.

3. Transfer of Credit Enhancement Obligation

The final rule will carry over, with some modifications, the provisions of the existing regulations that establish alternative means by which a member may provide the credit enhancement for its AMA loans, including a transfer of the enhancement obligation to certain parties, subject to certain limitations. The revised provision would be located at § 1268.5(c)(2) of the final rule. The use of these structures requires the approval of the Bank, which could do so either by establishing the required form of credit enhancement in the terms of a particular AMA product, or by

⁴³ Where the Bank returns the credit enhancement to a participating financial institution, it would only do so if the credit quality of the asset or pool continues to meet the terms and conditions of the AMA product.

⁴⁴ See 2000 Final Rule, 65 FR at 43976.

³⁸ See Proposed Rule, 80 FR at 78693.

³⁹ This requirement replaces 12 CFR 955.3(b) and (c) which state that a Bank had to obtain the NRSRO verifications with regard to the adequacy of the credit enhancement structure and Bank's use of the NRSRO model for estimating the required enhancement in each AMA product. Given that under the amendments made by this final rule, FHFA no longer requires a Bank to use NRSRO models, the NRSRO verification requirements are obsolete, and FHFA has removed them.

providing specific approval for the transfer.

Specifically, § 1268.5(c)(2)(i) authorizes a participating financial institution to transfer its credit enhancement obligation to its insurance affiliate, but only where the insurance provided by the affiliate is positioned after the participating financial institution bears the financial losses on the AMA loan in an amount at least equal to the expected losses. Similarly, the final rule carries over the substance of two provisions of the current regulations, which allow a participating financial institution to transfer its credit enhancement obligation to another participating financial institution, which may be either a member of the same Bank or, subject to certain conditions, a member of another Bank. Those provisions are located at § 1268.5(c)(2)(iv) and (v) of the final rule. These provisions remain consistent with the existing regulations, as well as with current Bank practice with regard to AMA product structures and permissible transfers of the credit enhancement obligations.

As already discussed, FHFA had proposed eliminating provisions of the existing regulation that allow a participating financial institution to meet part of its credit enhancement obligation through the purchase of loan-level SMI or pool insurance. After considering the comments on this issue, however, FHFA has determined to retain those provisions, which are located at § 1268.5(c)(2)(ii) and (iii) of the final rule. Thus, a participating financial institution can continue to provide part of its credit enhancement obligation by purchasing loan-level SMI, but only if the SMI is positioned in the credit enhancement structure to cover losses remaining after the participating financial institution has borne the direct economic consequences of the actual credit losses, as required by § 1268.5(c)(1)(i). Similarly, the participating financial institution can continue to purchase pool insurance, but only where such insurance covers that portion of the credit enhancement obligation attributable to the geographic concentration or size of the pool and is positioned last in the credit enhancement structure.

The provisions pertaining to the use of SMI or pool insurance generally carry over the substance of the existing regulations, with one significant exception related to the rating requirement for insurance providers. The existing AMA regulations require that insurance be maintained at all times with an insurer that has been assigned a rating from an NRSRO that is

at least equal to the second highest investment grade NRSRO rating. Because the Dodd-Frank Act requires that FHFA remove such ratings-based provisions from its regulations, FHFA is replacing this requirement with a requirement that the participating financial institution may obtain its SMI or pool insurance only from an institution that at all times is a “qualified insurer,” as defined by the final rule.⁴⁵ To implement this “qualified insurer” requirement, FHFA is adopting as part of the final rule a new provision, to be located at § 1268.5(e)(1), which directs a Bank to develop and maintain a written financial and operational standards that it will apply in approving an entity as a “qualified insurer.” That provision also makes clear that a Bank can rely on another provision of the final rule, § 1268.8, to delegate to another Bank or group of Banks the responsibility for developing and applying these standards. The provision will allow a group of Banks to develop a common policy and common list of qualified insurers for AMA programs if they choose.

The rule allows a Bank one year to develop these new insurance provider standards. The FHFA expects that Banks will develop the new standards and qualify under these standards any mortgage insurers with which the Banks intend to do business under their AMA programs within this one-year timeframe. Until the end of this one-year grace period, Banks can continue to do business with the insurance counterparties that it currently allows to provide insurance on AMA assets or can add new insurance counterparties based on existing standards that the Banks may have in place.⁴⁶ Once the new standards are in place, § 1268.5(e)(1) also requires that a Bank review qualified insurers at least once every two years and verify that they continue to meet the Bank’s standards.⁴⁷

⁴⁵ FHFA also has adopted in § 1268.1 a definition for “qualified insurer,” which includes any insurance company that a Bank approves in accordance with § 1268.5(e) to provide any form of mortgage insurance on assets and pools purchased under an AMA program. Consistent with suggestions by commenters, this definition does not restrict potential qualified insurers just to mono-line mortgage insurance providers, but could include any insurance company.

⁴⁶ The grandfather provision in § 1268.2(b) allows a Bank to continue to hold loans purchased prior to the end of the phase-in period for adopting the qualified insurer standards even if the PMI or other insurance on those loans is provided by an entity that does not meet the Bank’s new standards.

⁴⁷ Section 1268.8 of the final rule allows a Bank to delegate the administration of its AMA program to another Bank, which would allow a Bank to delegate the responsibility for conducting this

FHFA expects that any standards a Bank adopts under § 1268.5(e)(1) will be rigorous and will set minimum financial and operating standards that an insurer must meet to help ensure that the insurer will have the financial resources to fulfill its obligations under insurance policies on AMA assets. While the rule does not provide specific requirements that the Banks must meet in developing these standards, FHFA notes that the PMIERS recently implemented by the Enterprises represent a good model of the type of analytical approach that FHFA would expect of the Banks’ standards under this provision. FHFA expects to review a Bank’s qualified insurer standards as part of its regular supervisory examination and off-site monitoring of Bank activities. FHFA also expects Banks periodically to review their qualified insurer standards, and to revise them as appropriate.

In order to ensure a degree of uniformity with respect to the financial condition of entities that may provide insurance in connection with the AMA programs, FHFA is also adopting new § 1268.5(e)(2), which will allow only those entities that are “qualified insurers” to provide either the loan-level or pool insurance policies allowed as part of the credit enhancement structure under § 1268.5(c)(2)(ii) and (iii) or the private mortgage insurance on loans purchased as AMA. In proposing this rule, FHFA specifically requested comments on whether any eligibility requirements for providers of SMI or pool insurance should also apply to PMI providers.⁴⁸ Few commenters responded to this request, but the commenters generally expressed the view that FHFA should not impose specific requirements on PMI providers and, instead, should continue to allow Banks to adopt their own standards for those providers. One of the commenters noted, however, that if the FHFA did impose requirements, PMI providers should be required to meet PMIERS. After consideration of these comments, FHFA has determined to apply the “qualified insurer” requirements of § 1268.5(e)(1) to providers of PMI, SMI and pool insurance. By requiring that providers of all types of mortgage insurance used in AMA products meet rigorous financial and operational standards, this provision helps assure that Banks engage in sound counterparty risk management and maintain strong safety and soundness measures for their AMA programs. Moreover, given that § 1268.5(e)

required periodic review to another Bank or Banks should it so wish.

⁴⁸ See Proposed Rule, 80 FR at 78695.

provides the Banks with latitude to develop their own standards for what constitutes a “qualified insurer,” the application of this provision to PMI providers should not represent a significant change from the existing approach.

4. Loans Guaranteed or Insured by a Department or Agency of the U.S. Government

Section 1268.5(d) of the final rule addresses the purchase of federally insured or guaranteed mortgage loans as AMA. The existing regulatory text allows a portion of the credit enhancement to be provided through the purchase of loan-level insurance, including insurance provided by a federal mortgage insurance or guarantee program. Although the federal insurance or guarantee generally eliminates the credit risk to the member selling mortgage loans to its Bank, the Finance Board had determined that the member’s potential liability to bear the unreimbursed servicing expenses on such loans served the same purpose of providing an economic incentive for the member to sell only well-underwritten loans to the Bank. The final rule carries over much of the substance of current agency policy, and simply states that a participating financial institution may provide the required credit enhancement by purchasing loan-level guarantees or insurance from departments or agencies of the U.S. government, provided that the guarantee or insurance remains in effect for however long the Bank owns the loan. The requirement that the guarantee or insurance remain in effect does not require that the Bank member be the party that maintains the guarantee or insurance for that period, which would allow any other entity servicing the loan to maintain the guarantee or insurance. The final rule differs from the existing regulations, however, in that it does not require loans guaranteed or insured by a department or agency of the U.S. government to meet the specific credit enhancement structure requirements, *i.e.*, wherein the member must bear the first dollar of losses for a loan or pool up to the amount of expected losses or must bear losses immediately following the expected losses in an amount that equals or exceeds expected losses.⁴⁹ Even under this new provision, however, the federal guarantee or insurance must be sufficient so that the underlying asset or pool meets the required credit enhancement specified as part of the terms and conditions that

the Bank has established for the relevant AMA product.

As already noted, the Finance Board has described the purpose of the AMA credit enhancement structure requirement as being to ensure that participating financial institutions, “when responsible for such losses, [had] incentive to seek ways to achieve better than expected performance [for the loans sold as AMA].”⁵⁰ As the Finance Board explained, for a participating financial institution to meet this structure requirement with respect to federally guaranteed or insured loans, given that losses eventually would be covered by the guarantee or insurance, the participating financial institution would have to bear the economic responsibility of all unreimbursed servicing expenses associated with those loans, up to the amount of the expected losses.⁵¹ As a result, under the current regulation the member’s credit enhancement obligation for AMA government loans is tied closely to its servicing obligations. An unintended consequence of tying the credit enhancement obligation to the servicing obligation is that such a requirement effectively limits a participating financial institution’s ability to transfer the mortgage-servicing rights for any AMA government loans to non-participating financial institutions. In addition, as FHFA noted in proposing the rule, after having had the opportunity to review the Banks’ AMA programs since 2000, FHFA has come to the conclusion that requiring a member to retain an obligation to cover unreimbursed servicing expenses for AMA government loans provides no meaningful additional incentive to improve underwriting to achieve better than expected loan performance.⁵²

A small number of commenters objected to this proposed revision. These comments noted that the proposed change would have altered one of the key underlying premises for AMA with regard to government loans, namely that the members need to have “skin in the game” to assure high quality underwriting. After considering these comments in light of its own experience in monitoring the Banks’ AMA programs, FHFA has concluded that, with regard to federally guaranteed or insured loans, the underwriting standards imposed by the relevant

government department or agency address the same policy objective of the credit enhancement requirements, which is to encourage the members to underwrite the loans to a high level. Therefore, FHFA finds that requiring the participating financial institution to also remain responsible for unreimbursed servicing expenses would add little, if any, incentive to underwrite its mortgage loans to a materially different level above the already high level required by the federal guarantor or insurer. At the same time, FHFA believes that the ability to transfer the servicing rights on federally insured or guaranteed loans is important in the current marketplace. Thus by carrying over to the final rule a provision that would prevent participating financial institutions from transferring servicing rights on such loans FHFA could negatively affect members’ ability to use the AMA program to obtain liquidity to support this segment of the mortgage market.⁵³ FHFA, therefore, is adopting § 1268.5(d), as proposed.

5. Model and Methodology

Section 1268.5(f) of the final rule addresses the model and methodology that a Bank uses to estimate the required credit enhancement, and has been simplified in response to certain recommendations from the commenters. The final rule requires a Bank to establish a model and methodology for estimating the required member credit enhancements for AMA loans that a participating financial institution sells to a Bank.⁵⁴ The new provision, consistent with the Dodd-Frank Act requirements, no longer requires a Bank to use an NRSRO model.⁵⁵ The final rule does require a Bank to provide to FHFA upon request any information about the Bank’s model and methodology including results of any model runs and testing performed by the Bank. While the final rule does not require that FHFA approve the model

⁴⁹ As FHFA noted when it proposed this rule, the flexibility allowed in transferring mortgage-servicing rights under the amended provision would prove beneficial for many smaller or medium sized members. These members, in particular, might wish to sell their AMA government loans into AMA government products but may lack the ability to perform the servicing obligations, as now required by the AMA regulation. In addition, given changes in the mortgage industry, Banks may find it increasingly difficult to find member institutions willing to take on the servicing obligations for AMA government loans. *Id.*

⁵⁰ The provision was proposed as § 1268.5(e). *See* Proposed Rule, 80 FR at 78698.

⁵¹ Nothing in the final rule, however, prohibits a Bank from continuing to use an NRSRO model to estimate the credit enhancement requirement, provided that the Bank otherwise complies with § 1268.5(f).

⁵² 2000 Final AMA Rule, 65 FR at 43977.

⁵³ *Id.* In the supplementary information section of the original rule, the Finance Board explained how loans guaranteed or insured by a department or agency of the U.S. government would meet the credit enhancement requirements of the original AMA rule.

⁵⁴ Proposed Rule, 80 FR at 78695.

⁴⁹ FHFA is readopting these requirements as § 1268.5(c)(1) of this final rule.

and methodology that a Bank uses to estimate the required credit enhancement, it specifically reserves to FHFA the right to direct a Bank to make changes to its model and methodology and further requires that a Bank promptly implement any such changes once FHFA directs it to do so.

As noted above, FHFA has altered the final version of § 1268.5(f) from what it proposed based on the comments received, a number of which thought that the proposed provision was too prescriptive and would hinder the Banks' ability to adjust their models and methodologies in response to advances in technologies and methods. These commenters believed that it would be more appropriate for the final rule to provide only general guidance relating to the models and methodologies, and rely on advisory bulletins and other forms of supervisory guidance with regard to specific practices on evaluating and monitoring performance. The commenters also noted that FHFA generally follows their suggested approach with regard to Banks' use of models in other areas.

FHFA agrees with the comments, and has note included as part of the final rule the proposed requirements related to a Bank's validation and monitoring of its model, or that requiring a Bank to inform FHFA prior to making any material changes to its model and methodology. Instead, FHFA will address these items through its supervisory process, and will issue guidance to the Banks on these topics as the need arises. FHFA, however, continues to expect a Bank to have risk management policies and procedures commensurate with the complexity of the model and methodology. Effective model risk management should entail a comprehensive approach in identifying risk throughout the model lifecycle and should be consistent with any applicable FHFA guidance.

F. Servicing of AMA Loans—§ 1268.6

Section 1268.6 of the final rule addresses the servicing of AMA loans, which FHFA is adopting as proposed. This provision incorporates current FHFA positions, as set forth in a recent regulatory interpretation, on the rights of the Banks to allow for the transfer of mortgage servicing rights from the participating financial institution that originally sold the AMA loans to the Bank.⁵⁶ FHFA received no comments on this provision.⁵⁷

Thus, § 1268.6 allows for the transfer of servicing rights on AMA loans, including federally guaranteed or insured loans, to any institution, including a non-Bank System member. The provision specifically provides that any such transfer cannot result in the AMA loan failing to meet any other AMA requirement, including the credit enhancement requirement.⁵⁸ Section 1268.6 also requires the approval of each Bank that has any ownership interest in the underlying loans, no matter how small that interest may be, prior to the transfer of the servicing obligation. Finally, § 1268.6 states that the Banks must have policies and procedures that ensure the transfer of servicing would not negatively affect the credit enhancement on the underlying loans or substantially increase the Bank's exposure to risk. As it noted when proposing the rule, FHFA expects such policies and procedures specifically to address transfers to non-Bank System member servicers and provide contingency plans to address a case in which a large servicer fails or is otherwise unable to continue to service a Bank's AMA portfolio.⁵⁹

G. Administrative Arrangements Between Banks—§ 1268.8

Proposed § 1268.8 would have carried over without substantive change the provisions of § 955.5 of the current regulation, which addresses administrative transactions and agreements between Banks involving AMA. This provision allows Banks to delegate to another Bank the administration of its AMA program, but requires the delegating Bank to disclose to a participating financial institution the existence of the delegation or the possibility of such delegation, in its AMA-related agreements with the participating financial institution.

Commenters requested technical changes to the proposed rule to clarify that Banks can contract with third parties, including another Bank, to provide services for their AMA programs separate and apart from the administrative delegation contemplated in this provision without triggering additional disclosure obligations. They

eliminate the requirement that members bear the unreimbursed servicing expenses for U.S. government insured loans as part of their AMA credit enhancement obligation. These comments were addressed in the section above addressing credit enhancement requirements.

⁵⁶ As FHFA noted in proposing the rule, this means that a member cannot transfer any part of the credit enhancement obligation on a non-U.S. government insured loan to a non-member institution as part of the transfer of servicing rights. See Proposed Rule, 80 FR at 78696.

⁵⁹ *Id.*

also suggested a change in wording to make clear that a Bank may, by contract, define specific parameters on its delegation of pricing authority for its AMA program to another Bank. FHFA agrees that the suggested changes appropriately clarify the scope of the requirements in § 1268.8 and raise no safety and soundness or other concerns. Therefore, FHFA has incorporated the Banks' suggested language into the final rule. Otherwise, proposed § 1268.8 is adopted as final without further changes.

H. Other Provisions—§ 1268.7

As proposed, FHFA is carrying over without change the current rule's data reporting requirements for AMA, which would be located at § 1268.7. FHFA received no comments on that provision. Also as proposed, FHFA is deleting from the AMA rule the provision that had established risk-based capital requirements for AMA, which has been superseded by the statutory risk-based capital requirement and thus has no continuing applicability.⁶⁰ FHFA received no comments on its proposal to delete this provision.

III. Consideration of Differences Between the Banks and the Enterprises

When promulgating regulations relating to the Banks, section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director to consider the differences among the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (together, the Enterprises) and the Banks with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability.⁶¹ The amendments made by this rulemaking apply exclusively to the Banks. In preparing the proposed and final rules the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and the proposed rule requested public comments on the extent to which the rule might implicate any of the statutory factors. FHFA received a comment suggesting that the continued use of the conforming loan limit for Bank AMA purchases would not appropriately take into account the differences between the Banks and the Enterprises. As already discussed above, in connection with the section of the

⁶⁰ *Id.*

⁶¹ See 12 U.S.C. 4513(f).

⁵⁶ See Regulatory Interpretation, 2015-RI-01 (June 23, 2015).

⁵⁷ As discussed previously, FHFA received comments objecting to amendments that would

final rule relating to the conforming loan limits, the Director has considered this comment and has determined that it is appropriate to continue to refer to the conforming loan limit as a policy guide for establishing reasonable limits on the use of the Banks' GSE subsidy in connection with their purchase of non-federally insured or guaranteed mortgage loans.

IV. Paperwork Reduction Act

The information collection, entitled "Federal Home Loan Bank Acquired Member Assets, Core Mission Activities, Investments and Advances" contained in current 12 CFR part 955 of the regulations that is transferred to 12 CFR part 1268 by this final rule has been assigned control number 2590-0008 by the Office of Management and Budget (OMB). The final rule does not substantively or materially modify the current, approved information collection.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final rule under the Regulatory Flexibility Act.

FHFA certifies that the final rule will not have a significant economic impact on a substantial number of small entities because the regulation is applicable only to the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 955

Community development, Credit, Federal home loan banks, Housing, Reporting and recordkeeping requirements.

12 CFR Part 1201

Administrative practice and procedure, Federal home loan banks, Government-sponsored enterprises, Office of Finance, Regulated entities.

12 CFR Part 1267

Community development, Credit, Federal home loan bank, Housing, Reporting and recordkeeping requirements.

12 CFR Part 1268

Acquired member assets, Credit, Federal home loan bank, Housing, Nationally recognized statistical rating agency.

12 CFR Part 1281

Credit, Federal home loan banks, Housing, Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For reasons stated in the **SUPPLEMENTARY INFORMATION**, and under the authority of 12 U.S.C. 1430, 1430b, 1431, 4511, 4513, 4526, FHFA is amending subchapter G of chapter IX and subchapters A, D, and E of chapter XII of title 12 of the Code of Federal Regulations as follows:

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

Subchapter G—[Removed and Reserved]

- 1. Subchapter G, consisting of part 955, is removed and reserved.

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Subchapter A—Organization and Operations

PART 1201—GENERAL DEFINITIONS APPLYING TO ALL FEDERAL HOUSING FINANCE AGENCY REGULATIONS

- 2. The authority citation for part 1201 continues to read as follows:

Authority: 12 U.S.C. 4511(b), 4513(a), 4513(b).

- 3. Amend § 1201.1 by revising the definition of "Acquired member assets" to read as follows:

§ 1201.1 Definitions.

* * * * *

Acquired member assets or *AMA* means assets acquired in accordance with, and satisfying the applicable requirements of, part 1268 of this chapter.

* * * * *

Subchapter D—Federal Home Loan Banks

PART 1267—FEDERAL HOME LOAN BANK INVESTMENTS

- 4. The authority citation for part 1267 continues to read as follows:

Authority: 12 U.S.C. 1429, 1430, 1430b, 1431, 1436, 4511, 4513, 4526.

§ 1267.2 [Amended]

- 5. Amend § 1267.2 in paragraph (a) by removing "955 of this title" and adding in its place "1268 of this chapter".

- 6. Part 1268 is added to subchapter D to read as follows:

PART 1268—ACQUIRED MEMBER ASSETS

Sec.

- 1268.1 Definitions.
- 1268.2 Authorization for acquired member assets.
- 1268.3 Asset requirement.
- 1268.4 Member or housing associate nexus requirement.
- 1268.5 Credit risk-sharing requirement.
- 1268.6 Servicing of AMA loans.
- 1268.7 Reporting requirements for acquired member assets.
- 1268.8 Administrative transactions and agreements between Banks.

Authority: 12 U.S.C. 1430, 1430b, 1431, 4511, 4513, 4526.

§ 1268.1 Definitions.

As used in this part:
Affiliate means any business entity that controls, is controlled by, or is under common control with, a member.

AMA investment grade means a determination made by the Bank with respect to an asset or pool, based on documented analysis, including consideration of applicable insurance, credit enhancements, and other sources for repayment on the asset or pool, that the Bank has a high degree of confidence that it will be paid principal and interest in all material respects, even under reasonably likely adverse changes to expected economic conditions.

AMA product means a structure that is defined by a specific set of terms and conditions that comply with this part 1268 and that is established by a Bank for purposes of governing the Bank's purchase of AMA-eligible loans.

AMA program means a Bank-established program to buy mortgage loans that meet the requirements of this part, which may comprise multiple AMA products.

Expected losses means the loss on the asset or pool given the expected future economic and market conditions in the model or methodology used by the Bank under § 1268.5 and applicable to an AMA product.

Participating financial institution means a member or housing associate of a Bank that is authorized to sell, credit enhance, or service mortgage loans to or for its own Bank through an AMA program, or a member or housing associate of another Bank that has been authorized to sell, credit enhance, or service mortgage loans to or for the other Bank pursuant to an agreement between the Bank acquiring the AMA product and the Bank of which the selling institution is a member or housing associate.

Pool means a group of loans acquired under one or more loan funding

commitments, contractual agreements, or similar arrangements.

Qualified insurer means an insurer that a Bank approves in accordance with § 1268.5(e)(1) to provide any form of mortgage insurance coverage on assets and pools purchased under an AMA program.

Residential real property has the meaning set forth in § 1266.1 of this chapter.

§ 1268.2 Authorization for acquired member assets.

(a) *General.* Each Bank is authorized to invest in assets that qualify as AMA, subject to the requirements of this part and part 1272 of this chapter.

(b) *Grandfathered transactions.* Notwithstanding paragraph (a), a Bank may continue to hold as AMA assets that were previously authorized by the Federal Housing Finance Board or FHFA for purchase as AMA, provided that the assets were purchased, and continue to be held, in compliance with that authorization.

§ 1268.3 Asset requirement.

Assets that qualify as AMA shall be limited to the following:

(a) Whole loans that are eligible to secure advances under § 1266.7(a)(1)(i),

(a)(2)(ii), (a)(4), or (b)(1) of this chapter, excluding:

(1) Single-family mortgage loans where the loan amount exceeds the limits established pursuant to 12 U.S.C. 1717(b)(2), unless the loan is guaranteed or insured by an agency or department of the U.S. government, in which case the limits in 12 U.S.C. 1717(b)(2) do not apply; and

(2) Loans made to an entity, or secured by property, not located in a state;

(b) Whole loans secured by manufactured housing, regardless of whether such housing qualifies as residential real property under applicable state law;

(c) State and local housing finance agency bonds; or

(d) Certificates representing interests in whole loans if:

(1) The loans qualify as AMA under paragraphs (a) or (b) of this section and meet the nexus requirement of § 1268.4; and

(2) The certificates:

(i) Meet the credit enhancement requirements of § 1268.5;

(ii) Are issued pursuant to an agreement between the Bank and a participating financial institution to share risks consistent with the requirements of this part; and

(iii) Are acquired substantially by the initiating Bank or Banks.

§ 1268.4 Member or housing associate nexus requirement.

(a) *General provision.* To qualify as AMA, any assets described in § 1268.3 must be acquired in a purchase or funding transaction only from:

(1) A participating financial institution, provided that the asset was:

(i) Originated or issued by, through, or on behalf of the participating financial institution, or an affiliate thereof; or

(ii) Held for a valid business purpose by the participating financial institution, or an affiliate thereof, prior to acquisition by the Bank; or

(2) Another Bank, provided that the asset was originally acquired by the selling Bank consistent with this section.

(b) *Special provision for housing finance agency bonds.* In the case of housing finance agency bonds acquired by a Bank from a housing associate located in the district of another Bank (local Bank), the arrangement required by the definition of “participating financial institution” in § 1268.1 between the acquiring Bank and the local Bank may be reached in accordance with the following process:

(1) The housing finance agency shall first offer the local Bank right of first refusal to purchase, or negotiate the terms of, its proposed bond offering;

(2) If the local Bank indicates, within three business days, it will negotiate in good faith to purchase the bonds, the housing finance agency may not offer to sell or negotiate the terms of a purchase with another Bank; and

(3) If the local Bank declines the offer, or has failed to respond within three business days, the acquiring Bank will be considered to have an arrangement with the local Bank for purposes of this section and may offer to buy or negotiate the terms of a bond sale with the housing finance agency.

§ 1268.5 Credit risk-sharing requirement.

(a) *General credit risk-sharing requirement.* For each AMA product, the Bank shall implement and have in place at all times, a credit risk-sharing structure that:

(1) Requires a participating financial institution to provide the credit enhancement necessary to enhance an eligible asset or pool to the credit quality specified by the terms and conditions of the AMA product, provided, however, that such credit enhancement results in the eligible asset or pool being at least AMA investment grade, as defined in § 1268.1; and

(2) Meets the requirements of this section.

(b) *Determination of necessary credit enhancement.* (1) No later than 30

calendar days after the purchase of the asset or after a pool closes, the Bank shall determine the total credit enhancement necessary to enhance the asset or pool to at least AMA investment grade and to be consistent with the terms and conditions of a specific AMA product. The enhancement shall be for the life of the asset or pool. The Bank shall make this determination for each AMA product using a model and methodology that the Bank deems appropriate, subject to paragraph (f) of this section.

(2) A Bank shall document its basis for concluding that the contractual credit enhancement required from each participating financial institution with regard to a particular asset or pool will equal or exceed the credit enhancement level specified in the terms and conditions of the AMA product and determined in accordance with paragraph (b)(1) of this section.

(c) *Credit risk-sharing structure.* Under any credit risk-sharing structure, the credit enhancement provided by the participating financial institution shall at all times meet the following requirements:

(1) The participating financial institution that is providing the credit enhancement required under this paragraph (c) shall in all cases:

(i) Bear the direct economic consequences of actual credit losses on the asset or pool:

(A) From the first dollar of loss up to the amount of expected losses; or

(B) Immediately following expected losses, but in an amount equal to or exceeding the amount of expected losses; and

(ii) Fully secure its direct credit enhancement obligation in accordance with § 1266.7; and

(2) The participating financial institution also may provide all or a portion of the credit enhancement, with the approval of the Bank, by:

(i) Contracting with an insurance affiliate of that participating financial institution to provide an enhancement, but only where such insurance is positioned in the credit risk-sharing structure so as to cover only losses remaining after the participating financial institution has borne losses as required under paragraph (c)(1)(i) of this section;

(ii) Purchasing loan-level insurance only where:

(A) The participating financial institution is legally obligated at all times to maintain such insurance with a qualified insurer; and

(B) Such insurance is positioned in the credit enhancement structure so as to cover only losses remaining after the

participating financial institution has borne losses as required under paragraph (c)(1)(i) of this section;

(iii) Purchasing pool-level insurance only where:

(A) The participating financial institution is legally obligated at all times to maintain such insurance with a qualified insurer;

(B) Such insurance insures that portion of the required credit enhancement attributable to the geographic concentration and size of the pool; and

(C) Such insurance is positioned last in the credit enhancement structure so as to cover only those losses remaining after all other elements of the credit enhancement structure have been exhausted;

(iv) Contracting with another participating financial institution in the Bank's district to provide a credit enhancement consistent with this section, in return for compensation; or

(v) Contracting with a participating financial institution in another Bank's district, pursuant to an arrangement between the two Banks, to provide a credit enhancement consistent with this section, in return for compensation.

(d) *Loans guaranteed or insured by a department or agency of the U.S. government.* Instead of the structure set forth in paragraph (c) of this section, a participating financial institution also may provide the required credit enhancement through loan-level insurance that is issued by an agency or department of the U.S. government or is a guarantee from an agency or department of the U.S. government, provided that the government insurance or guarantee remains in place for as long as the Bank owns the loan.

(e) *Qualified insurers.* (1) Within one year of January 18, 2017, each Bank must develop, and subsequently maintain, written financial and operational standards that an insurer must meet for the Bank to approve it as a qualified insurer. A Bank shall review qualified insurers at least once every two years to determine whether they still meet the financial and operational standards set by the Bank. A Bank may delegate responsibility for development of these standards and approval of qualified insurers to another Bank or group of Banks pursuant to § 1268.8.

(2) Only qualified insurers may provide private loan insurance on AMA eligible assets or the loan or pool insurance allowed as part of the credit enhancement structure for AMA products under paragraphs (c)(2)(ii) or (iii) of this section.

(f) *Appropriate methodology for calculating credit enhancement.* A Bank

shall use a model and methodology for estimating the amount of credit enhancement for an asset or pool. A Bank shall provide to FHFA upon request information about the model and methodology, including and without limitation results of any model runs and the results of any tests of the model performed by the Bank. FHFA reserves the right to direct a Bank to make changes to its model and methodology, and a Bank promptly shall institute any such FHFA-directed changes.

§ 1268.6 Servicing of AMA loans.

(a) Servicing of AMA loans may be performed by or transferred to any institution, including an institution that is not a member of the Bank System, provided that the loans, after such transfer, continue to meet all requirements to qualify as AMA under §§ 1268.3, 1268.4, and 1268.5.

(b) The transfer of mortgage servicing rights and responsibilities must be approved by the Bank or Banks that own the loan or a participation interest in the loan.

(c) A Bank shall have in place policies and procedures to ensure that the transfer of mortgage servicing rights does not negatively affect the credit enhancement on the loans in question or substantially increase the Bank's exposure to the credit risk for the asset or pool.

§ 1268.7 Reporting requirements for acquired member assets.

Each Bank shall report information related to AMA in accordance with the instructions provided in the Data Reporting Manual issued by FHFA, as amended from time to time.

§ 1268.8 Administrative transactions and agreements between Banks.

(a) *Delegation of administrative duties.* A Bank may delegate the administration of an AMA program to another Bank whose administrative office has been examined and approved by FHFA, or previously examined and approved by the Federal Housing Finance Board, to process AMA transactions. The existence of such a delegation, or the possibility that such a delegation may be made, must be disclosed to any potential participating financial institution as part of any AMA-related agreements signed with that participating financial institution. A Bank may contract with one or more parties, including without limitation another Bank, to provide services related to the administration of its own AMA program or the AMA program of another Bank for which it has been

delegated administrative responsibility, without the necessity for further disclosure to the participating financial institutions.

(b) *Termination of agreements.* Any agreement made between two or more Banks in connection with the administration of any AMA program may be terminated by any party after a reasonable notice period.

(c) *Delegation of pricing authority.* A Bank that has delegated its AMA pricing function to another Bank shall retain a right to refuse to acquire AMA at prices it does not consider appropriate, pursuant to contractual provisions among the parties.

Subchapter E—Housing Goals and Mission

PART 1281—FEDERAL HOME LOAN BANK HOUSING GOALS

■ 7. The authority citation for part 1281 continues to read as follows:

Authority: 12 U.S.C. 1430c.

■ 8. Amend § 1281.1 by revising the definitions of “Acquired Member Assets (AMA) program” and “AMA-approved mortgage” to read as follows:

§ 1281.1 Definitions.

* * * * *

Acquired Member Assets (AMA) program means a program that authorizes a Bank to hold assets acquired from or through Bank members or housing associates by means of either a purchase or funding transaction, subject to the requirements of parts 1268 and 1272 of this chapter.

AMA-approved mortgage means a mortgage that meets the requirements of an AMA program at part 1268 of this chapter, which program has been approved to be implemented under part 1272 of this chapter.

* * * * *

Dated: December 9, 2016.

Melvin L. Watt,
Director, Federal Housing Finance Agency.
 [FR Doc. 2016-30161 Filed 12-16-16; 8:45 am]
BILLING CODE 8070-01-P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1272

RIN 2590-AA84

Federal Home Loan Bank New Business Activities

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is amending its regulations addressing requirements for the Federal Home Loan Banks' (Banks) new business activity (NBA) notices. The final rule reduces the scope of activities requiring submission of an NBA notice, modifies the submission requirements, and establishes new timelines for agency review and approval of such notices. The final rule also reorganizes a part of the regulations to clarify the protocol for FHFA review of NBA notices.

DATES: The final rule is effective on January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Lara Worley, Principal Financial Analyst, Lara.Worley@FHFA.gov, 202-649-3324, Division of Federal Home Loan Bank Regulation; or Winston Sale, Assistant General Counsel, Winston.Sale@FHFA.gov, 202-649-3081 (these are not toll-free numbers), Office of General Counsel, Federal Housing Finance Agency, Constitution Center, 400 Seventh Street SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On August 23, 2016, FHFA published a proposed rule that would have modified FHFA's regulation establishing the process for the submission, review, and agency approval of Bank NBA notices. The proposed rule would have narrowed the scope of activities requiring submission of an NBA notice to those that entail "material risks not previously managed by the Bank" and would have excluded from the definition of "new business activity" the acceptance of new types of advance collateral. The proposed rule would have streamlined the NBA notice content requirements, thereby providing the Banks with greater flexibility to tailor their notices to the nature of the particular activity in which they seek to engage. The proposed rule also would have established new 30 and 80 business-day review timelines, under which FHFA would approve or deny notices. Those time periods could be tolled while FHFA awaited responses from the Banks for additional information, or in the event that the FHFA Director (Director) determined that the notice raised significant policy, supervisory, or legal issues that require additional time to resolve. The proposed rule generally provided that if FHFA were to fail to respond to, approve, or deny the notice, as applicable, within the appropriate timeline, then the notice

would be deemed to have been approved as of the end of the applicable time period. The proposed rule also included an exception to the deemed to be approved concept for those notices for which the Director has elected to extend the review timeline by an additional 60 business days. For such notices, FHFA's affirmative approval would be required before the requesting Bank could commence the proposed activity. The proposed rule also would have delegated to the Deputy Director for Federal Home Loan Bank Regulation (Deputy Director) the authority to approve NBA notices, which delegation is in substance identical to the similar delegations of authority set forth in FHFA's procedures regulations, under which the Deputy Director can grant approvals and issue non-objection letters on behalf of the Director.¹

II. Consideration of Differences Between the Banks and the Enterprises

When promulgating regulations relating to the Banks, section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director to consider the differences among the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (together, the Enterprises) and the Banks with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability.² The changes in this rulemaking apply exclusively to the Banks and generally affect the scope and timing of their NBA notifications. Apart from those changes, the substance of this final rule is substantially similar to that of the existing NBA regulation. In preparing the proposed and final rules the Director has considered the differences between the Banks and the Enterprises as they relate to the above factors and has determined that none of the statutory factors would be implicated by the final rule. The proposed rule requested public comments on the extent to which the rule would implicate any of the statutory factors, but none of the comment letters addressed this requirement.

III. Response to Comment Letters

In response to the proposed rule, FHFA received four substantive comment letters, a joint letter from the Banks and one letter each from the

National Association of Home Builders (NAHB), the Independent Community Bankers of America, and a private citizen. Most of the letters generally supported the proposed rule, but also recommended different ways in which FHFA should revise certain aspects of the rule. In response to these recommendations, FHFA has incorporated two revisions into the final rule, which are discussed below. The following sections of this document describe the issues raised by the commenters, along with FHFA's responses, which are included as part of FHFA's descriptions of the particular provisions of the final rule for which the commenters had suggested revisions. For other provisions of the proposed rule about which the commenters raised no issues, FHFA has adopted them without change.

IV. Final Rule

FHFA has made two revisions to the regulatory text of the final rule in response to comments received on the proposed rule, each of which is discussed below. Apart from those revisions, the regulatory text of the final rule is unchanged from that of the proposed rule. FHFA has declined to make certain revisions recommended by the commenters, which also are discussed below.

A. Comments Incorporated Into the Final Rule

1. Submission Requirements (1272.3)

Section 1272.3 of the rule describes the types of information that a Bank must include as part of its NBA notice. The proposed rule had required that a Bank indicate in its NBA notice whether the contemplated activity had been previously approved by FHFA for any other Bank. FHFA had included this requirement in the proposed rule to help expedite its review of NBA notices in cases in which a Bank is seeking approval of an activity it knows to have been approved for another Bank, and thus should raise no new legal or policy issues. The Banks commented that this requirement should be limited to instances where the requesting Bank actually has knowledge that FHFA has approved the same activity for another Bank. The Banks explained that FHFA should have the most comprehensive information on which Banks have previously been approved for particular activities, and that because NBA notices, and any corresponding FHFA approvals, are not public documents, a Bank would not necessarily know whether FHFA has previously approved a given activity for another Bank. The

¹ See 12 CFR 1211.3 and 1211.4.

² See 12 U.S.C. 4513(f).

Banks offered specific revisions to the regulatory text to address their concern. FHFA agrees with this recommendation and has revised the final rule by adding the language suggested by the Banks to limit the applicability of this provision to instances where the requesting Bank has actual knowledge that FHFA has previously approved the activity for another Bank.

2. Approval Standard (1272.4)

Section 1272.4(e) of the proposed rule would have added a new, explicit standard under which FHFA would approve NBA notices. In substance, that standard would have provided that FHFA would approve an NBA notice only if it determined that the Bank could conduct the proposed activities in a safe and sound manner, and that the activity would be consistent with the housing finance and community investment mission of the Banks, and with the cooperative nature of the Federal Home Loan Bank System (Bank System). The Banks commented that the proposed approval standard failed to reference that portion of the Banks' statutory mission that requires them to be a source of liquidity for their members, and did not encompass certain other services that they are legally authorized to provide to their members. The Banks also objected to the use of the phrase "cooperative nature of the Bank System" as part of the approval standard, contending that it is vague and is not supported by statutory language. FHFA agrees that the Banks' overall mission includes serving as a source of liquidity for their members and has incorporated language into the final rule's approval standard reflecting the same.³ The final rule, however, retains the language referring to the "cooperative nature of the Bank System" as part of the approval standard. By statutory design, the Banks are cooperative institutions, meaning that they provide products and services to their member institutions, and only to their members, and those members collectively own the Bank. Moreover, the very provision of the statute that the Banks cited in support of their request to include a liquidity element as part of the approval standard also refers to the "cooperative ownership structure" of the Banks.⁴

FHFA's intent in including this language in the standard was to ensure that before approving a Bank's request to engage in any new type of activity FHFA would confirm that the proposed activity would in some manner benefit

the members of the Bank. Examples of activities that would be consistent with the cooperative nature of the Bank System, and which have been the subject of prior NBA notice approvals, would include proposals to purchase mortgage loans from Bank members or otherwise facilitate the members' sale of such loans, as well as proposals to allow members to pledge new types of collateral to support their borrowing from the Banks, which would no longer require an NBA notice under the final rule. With respect to the Banks' comment that the proposed standard also should consider certain services the Banks are legally authorized to provide to their members, the intent of this provision of the rule is to articulate a general standard against which FHFA can assess a proposed activity in deciding whether to approve the notice. It is not intended to be a list of all products or services that a Bank may provide to its members or of all investments and activities in which the Banks now engage.

B. Comments Not Incorporated Into the Final Rule

1. Definition of NBA (1272.1)

The proposed rule would have narrowed the scope of the NBA regulation in two ways: (1) By limiting it to activities that introduce new material risks to the Bank; and (2) By eliminating the need to file an NBA notice prior to accepting new types of collateral. The final rule retains both of those provisions. In explaining the rationale for excluding new collateral types from the NBA definition, the supplementary information for the proposed rule stated that "the remaining universe of new types of collateral that might potentially fall into the [other real estate related collateral] category is small."⁵ The Banks commented that this language could be interpreted either to limit the types of assets that qualify as other real estate related collateral to the specific items already approved by FHFA, or to limit the proposed exclusion from the NBA filing requirement to those types of collateral that FHFA has previously approved for other Banks. The Banks asked that FHFA confirm in the final rule that FHFA did not intend the statement in the proposed rule to have either of those effects. The intent of the statement in the proposed rule was simply to acknowledge that, as a practical matter, the Banks and their members likely have already identified most of the types of assets held by the members that

could qualify as "other real estate related collateral," and thus any new types of such collateral would likely not present any materially different risks beyond those that the Banks currently manage with their existing collateral. The language of the final rule is unqualified, meaning that all types of new collateral are excluded from the term "new business activity" and thus would not trigger the requirement to file an NBA notice.

The proposed rule did not specifically address the extent to which the NBA regulations would apply to the Banks' mortgage programs or products, including Acquired Member Asset (AMA) programs or products. Nonetheless, commenters requested that FHFA revise the definition of "new business activity" to exclude: (1) Any new AMA product involving federally-insured or guaranteed loans; (2) any modifications that a Bank proposed to make to its existing AMA programs or products, and; (3) any proposals by one Bank to begin offering a new AMA program or product that FHFA has previously approved for another Bank. The three areas commenters identified for exclusion would likely encompass all activities related to mortgage programs and products. The Banks had raised similar comments in response to a separate proposed rulemaking to amend and relocate the current AMA regulations.⁶ FHFA has not included any of these revisions in the final rule. As noted above, under the final rule any new activity will require the submission of an NBA notice if it entails new material risks to the Bank. To the extent that modifications to a Bank's existing mortgage program or product, or the establishment of new products involving federally-insured or guaranteed loans, would present new material risks to the requesting Bank, they would require the submission of an NBA notice. Similarly, while a request to offer a mortgage program or product that FHFA has already approved for another Bank would not raise new legal or policy issues, it could raise supervisory issues with respect to the requesting Bank, such as with respect to its ability to manage the particular risks associated with the program or product. FHFA believes that a Bank should apply the new material risk standard equally to all types of new activities in which it might engage. FHFA does not believe that it should grant a blanket exclusion from its review of any particular area of the Banks' business.

FHFA expects that there may be instances in which a Bank is unsure

³ See 12 U.S.C. 4513(f)(1)(B).

⁴ See 12 U.S.C. 4513(f)(1)(A).

⁵ See 81 FR 57501 (August 23, 2016).

⁶ See 80 FR 78689 (December 17, 2015).

whether the risks associated with a particular new activity or modification to an existing activity are material, for purposes of the new business activity regulation. As is the case under the current regulation, FHFA is available to consult with the Banks regarding the need to file an NBA notice with respect to a proposed activity, and will make every effort to promptly advise a Bank whether a filing is required. With respect to new activities that the Banks commence after determining that they do not present new material risks, FHFA will assess those risks associated with those activities as part of its regular supervisory process, including examinations.

2. Review Process (1272.4)

The proposed rule had used “business days” for calculating the length of the FHFA review periods. The Banks recommended that replacing that term with “calendar days” would be more convenient and consistent with other regulations. Doing so, however, also would have the effect of reducing the period of time available for FHFA to review and act on an NBA notice. FHFA had proposed the 30 and 80 business-day review periods based on its experience in considering prior NBA notices, some of which are straightforward and others of which present significant policy or legal issues, which require more time to assess. Accordingly, FHFA has decided to retain these time periods in the final rule, and does not believe that either it or the Banks would face any undue difficulty in determining the length of the review period based on business days.

In the Supplementary Information to the proposed rule, FHFA stated that the 30 business-day review period established in § 1272.4(a) would be “generally intended for activities already approved for other Banks[.]”⁷ The NAHB requested that the final rule explicitly provide that all NBA notices pertaining to activities that FHFA has previously approved for other Banks be required to be reviewed under the 30 business-day timeline. Although FHFA believes that in many cases it will in fact process such NBA notices within 30 business days, it declines to incorporate this request into the regulation because of the possibility that Bank-specific conditions could raise supervisory issues necessitating review under the 80 business-day timeline.

The proposed rule included provisions that would deem any NBA notice to be approved if FHFA did not

respond within the applicable 30 or 80 business-day timeline. The proposed rule, however, did not include such an automatic approval provision for those notices for which the Director extended the review period for an additional 60 business days, beyond the 80 business-day period. For those notices, the Banks could commence the activities only upon affirmative approval from FHFA. The Banks requested that FHFA revise the final rule so that even those notices that were subject to the Director’s 60 business-day extended review period would also be subject to a deemed approved provision if the Director did not act by the end of the extended period. The Banks commented that the 80-day review period offers sufficient time for FHFA to act on a notice without the Director’s 60-day extension and that it is unclear what regulatory or public policy benefit would be served by extending the proposed time frame. FHFA declines to accept the Banks’ suggestion, principally because notices for which the Director has extended the review period will most likely involve significant policy or legal issues, in which the Director will be directly involved. Such matters may present issues of first impression for the agency that require an extended period to fully vet, and thus do not lend themselves to being approved automatically by the passage of time. Moreover, such an automatic approval provision could inappropriately conflict with the Director’s statutory oversight authority, which provides the Director with broad latitude to exercise such incidental powers necessary in the supervision and regulation of the Banks.⁸

3. Approval of Notices (1272.7)

The proposed rule included a provision delegating authority to the Deputy Director to approve NBA notices for the agency. That provision mirrored existing regulatory delegations of authority to the Deputy Director for determining whether to grant “approvals” and to issue “non-objection letters” under FHFA’s procedures regulations.⁹ The delegation in the proposed rule, like those in the other regulations, included language to the effect that the Director reserved the right to modify, rescind, or supersede any approval granted by the Deputy Director under the delegation of authority. Commenters expressed concern that this reservation of authority to the Director would create uncertainty for Banks, which may have committed substantial resources to implement approved

activities, as to the possibility that the Director might rescind the delegated approval well after the fact. To eliminate this uncertainty, commenters requested that the final rule require that the Director grant all NBA approvals. FHFA declines to accept the commenters’ requests and has adopted the delegation of authority provision as proposed. FHFA included the delegation of authority provision within the proposed rule in large part to expedite the approval process for those NBA notices that do not raise significant policy, supervisory, or legal issues. This delegation of authority for the NBA notices is nearly identical to the existing delegations under which the Deputy Director has granted approvals for other transactions or issued non-objection letters to the Banks, and thus should create no greater uncertainty for the Banks than already exists with respect to approvals and non-objections letters. Further, as a matter of agency practice, the Deputy Director generally consults with the Director before granting any delegated authority approvals, particularly those raising significant supervisory, policy, or legal issues, and should continue to do so under the final rule.

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from the Office of Management and Budget (OMB). The final rule contains no such collection of information requiring OMB approval under the PRA. Consequently, no information has been submitted to OMB for review.

VI. Regulatory Flexibility Act

The final rule applies only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, FHFA certifies that this final rule is not likely to have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 1272

Federal home loan banks, Reporting and recordkeeping requirements.

Authority and Issuance

■ Accordingly, for reasons stated in the preamble and under the authority of 12 U.S.C. 1431(a), 1432(a), 4511(b), 4513, 4526(a), FHFA hereby amends subchapter D of chapter XII of title 12 of the Code of Federal Regulations by revising part 1272 to read as follows:

⁸ See 12 U.S.C. 4513(a)(2)(B).

⁹ See 12 CFR 1211.3(a) and 1211.4(a).

⁷ 81 FR 57502 (August 23, 2016).

PART 1272—NEW BUSINESS ACTIVITIES

Sec.

- 1272.1 Definitions.
 1272.2 Limitation on Bank authority to undertake new business activities.
 1272.3 New business activity notice requirement.
 1272.4 Review process.
 1272.5 Additional information.
 1272.6 Examinations.
 1272.7 Approval of notices.

Authority: 12 U.S.C. 1431(a), 1432(a), 4511(b), 4513, 4526(a).

§ 1272.1 Definitions.

As used in this part:

Business Day means any calendar day other than a Saturday, Sunday, or legal public holiday listed in 5 U.S.C. 6103.

NBA Notice Date means the date on which FHFA receives a new business activity notice.

New business activity (NBA) means any business activity undertaken, transacted, conducted, or engaged in by a Bank that entails material risks not previously managed by the Bank. A Bank's acceptance of a new type of advance collateral does not constitute an NBA.

§ 1272.2 Limitation on Bank authority to undertake new business activities.

No Bank shall undertake an NBA except in accordance with the procedures set forth in this part.

§ 1272.3 New business activity notice requirement.

Prior to undertaking an NBA, a Bank shall submit a written notice of the proposed NBA that provides a thorough, meaningful, complete, and specific description of the activity such that FHFA will be able to make an informed decision regarding the proposed activity. At a minimum, the notice should include the following information:

(a) A written opinion of counsel identifying the specific statutory, regulatory, or other legal authorities under which the NBA is authorized and, for submissions raising legal questions of first impression, a reasoned analysis explaining how the cited authorities can be construed to authorize the new activity;

(b) A full description of the proposed activity, including, when applicable, infographics and definitions of key terms. In addition, the Bank shall indicate whether the proposed activity represents a modification to a previously approved activity in which the Bank is engaged or is an activity that FHFA has approved for any other Banks, if known to the requesting Bank, and if applicable;

(c) A discussion of why the Bank proposes to engage in the new activity and how the activity supports the housing finance and community investment mission of the Bank;

(d) A discussion of the risks presented by the new activity and how the Bank will manage these risks; and

(e) A good faith estimate of the anticipated dollar volume of the activity, and the income and expenses associated with implementing and operating the new activity, over the initial three years of operation.

§ 1272.4 Review process.

(a) Within 30 business days of the NBA Notice Date, FHFA will take one of the following actions:

- (1) Approve the proposed NBA;
- (2) Deny the proposed activity; or
- (3) Inform the Bank that the activity raises policy, legal, or supervisory issues that require further evaluation.

If FHFA fails to take any of those actions by the 30th business day following the NBA Notice Date, the NBA notice shall be deemed to have been approved and the Bank may commence the activity for which the notice was submitted.

(b) In the case of any notice that FHFA has determined requires further evaluation, FHFA will approve or deny the notice by no later than the 80th business day following the NBA Notice Date. If FHFA fails to approve or deny a NBA notice by that date, and the Director has not extended the review period, the NBA notice shall be deemed to have been approved and the Bank may commence the activity for which the notice was submitted.

(c) For purposes of calculating the review period, no days will be counted between the date that FHFA has requested additional information from the Bank pursuant to § 1272.5 and the date that the Bank responds to all questions communicated.

(d) Notwithstanding anything contained in this part, the Director may extend the 80 business-day review period by an additional 60 business days if the Director determines that additional time is required to consider the notice. In such a case, FHFA will inform the Bank of any such extension before the 80th business day following the NBA Notice Date, and the Bank may not commence the NBA until FHFA has affirmatively approved the notice.

(e) In considering any NBA notice, FHFA will assess whether the proposed activity will be conducted in a safe and sound manner and is consistent with the housing finance, community investment, and liquidity missions of the Banks and the cooperative nature of the Bank System. FHFA may deny an

NBA notice or may approve the notice, which approval may be made subject to the Bank's compliance with any conditions that FHFA determines are appropriate to ensure that the Bank conducts the new activity in a safe and sound manner and in compliance with applicable laws or regulations and the Bank's mission.

§ 1272.5 Additional information.

FHFA may request additional information from a Bank necessary to issue a determination regarding an NBA. After an initial request for information, FHFA may make subsequent requests for information only to the extent that the information provided by the Bank does not fully respond to a previous request, the subsequent request seeks information needed to clarify the Bank's previous response, or the information provided by the Bank raises new legal, policy, or supervisory issues not evident based on the Bank's NBA notice or responses to previous requests for information. Nothing contained in this paragraph shall limit the Director's authority to request additional information from a Bank regarding an NBA for which the Director has extended the review period.

§ 1272.6 Examinations.

Nothing in this part shall limit in any manner the right of FHFA to conduct any examination of any Bank relating to its implementation of an NBA, including pre- or post-implementation safety and soundness examinations, or review of contracts or other agreements between the Bank and any other party.

§ 1272.7 Approval of notices.

The Deputy Director for Federal Home Loan Bank Regulation may approve requests from a Bank seeking approval of any NBA notice submitted in accordance with this part. The Director reserves the right to modify, rescind, or supersede any such approval granted by the Deputy Director, with such action being effective only on a prospective basis.

Dated: December 12, 2016.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

[FR Doc. 2016-30245 Filed 12-16-16; 8:45 am]

BILLING CODE 8070-01-P

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

[Docket No. FAA-2016-7425; Directorate Identifier 2014-NM-244-AD; Amendment 39-18741; AD 2016-25-15]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding Airworthiness Directive (AD) 2011-17-05, for certain Airbus Model A300 B2-1C, A300 B2-203, A300 B2K-3C, A300-B4-103, A300 B4-203, and A300 B4-2C airplanes. AD 2011-17-05 required repetitive inspections in sections 13 through 18 of the fuselage between rivets of the longitudinal lap joints between frames (FRs) 18 and 80 for cracking, and repair or modification if necessary. This new AD requires a revised repetitive inspection program of all longitudinal lap joints and repairs between FRs 18 and 80 to address widespread fatigue damage (WFD). This AD was prompted by an evaluation done by the design approval holder indicating that certain sections of the longitudinal lap joints are subject to WFD; therefore, a revised inspection program is necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 23, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 16, 2011 (76 FR 63177, October 12, 2011).

ADDRESSES: For service information identified in this final rule, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-7425.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-7425; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800-647-5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-2125; fax 425-227-1149.

SUPPLEMENTARY INFORMATION:**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2011-17-05, Amendment 39-16769 (76 FR 63177, October 12, 2011) (“AD 2011-17-05”). AD 2011-17-05 applied to certain Airbus Model A300 B2-1C, A300 B2-203, A300 B2K-3C, A300-B4-103, A300 B4-203, and A300 B4-2C airplanes. The NPRM published in the **Federal Register** on July 7, 2016 (81 FR 44232). The NPRM was prompted by an evaluation done by the design approval holder indicating that certain sections of the longitudinal lap joints are subject to WFD. The NPRM proposed to continue to require repetitive inspections in sections 13 through 18 of the fuselage between rivets of the longitudinal lap joints between FRs 18 and 80 for cracking, and repair or modification if necessary. The NPRM also proposed to require a revised repetitive inspection program of all longitudinal lap joints and repairs between FRs 18 and 80 to address this WFD. We are issuing this AD to detect and correct fatigue cracking of the longitudinal lap joints of the fuselage, which could result in reduced structural integrity of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2014-0265, dated December 9, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the

MCAI”), to correct an unsafe condition for the specified products.

The MCAI states:

Cracks were found on in-service aeroplanes in sections 13 to 18 of the fuselage between rivets of longitudinal lap joints between frames (FR) 18 and FR80.

This condition, if not detected and corrected, could affect the structural integrity of the aeroplane.

To address this unsafe condition, Airbus developed an inspection programme for the longitudinal lap joints and repairs between FR18 and FR80, and EASA issued AD 2007-0091 [which corresponds to FAA AD 2011-17-05] to require the implementation of that programme.

Since EASA AD 2007-0091 was issued, [a] new Widespread Fatigue Damage regulation has been issued. This new regulation led to the revision of the maintenance programme for the longitudinal lap joints and repairs between FR18 and FR80.

For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2007-0091, which is superseded, and requires implementation of the revised inspection programme.

Required actions include repetitive inspections of the bonded inner doublers of the longitudinal lap joints in sections 13 through 18 for disbonding or corrosion, and repairing any disbonding and corrosion; a follow-on rototest or ultrasonic inspection to verify cracking, and repair of any cracking. The repetitive inspection interval ranges from 3,000 flight cycles up to 8,000 flight cycles, depending on airplane configuration. You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating it in Docket No. FAA-2016-7425.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting this AD as proposed, except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 4 airplanes of U.S. registry.

ESTIMATED COSTS

Action	Labor cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2011–17–05	3,735 work-hours × \$85 per hour = \$317,475	\$317,475	\$1,269,900
New inspections	140 work-hours × \$85 per hour = \$11,900	\$11,900	\$47,600

We have received no definitive data that enables us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a “significant regulatory action” under Executive Order 12866;
2. Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2011–17–05, Amendment 39–16769 (76 FR 63177, October 12, 2011), and adding the following new AD:

2016–25–15 Airbus: Amendment 39–18741; Docket No. FAA–2016–7425; Directorate Identifier 2014–NM–244–AD.

(a) Effective Date

This AD is effective January 23, 2017.

(b) Affected ADs

This AD replaces AD 2011–17–05, Amendment 39–16769 (76 FR 63177, October 12, 2011) (“AD 2011–17–05”).

(c) Applicability

This AD applies to Airbus Model A300 B2–1C, A300 B2–203, A300 B2K–3C, A300–B4–103, A300 B4–203, and A300 B4–2C airplanes; certificated in any category; all manufacturer serial numbers, except those on which Airbus Modification 2611 has been embodied in production.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by an evaluation done by the design approval holder indicating that certain sections of the longitudinal lap joints are subject to widespread fatigue damage. We are issuing this AD to detect and correct fatigue cracking of the longitudinal lap joints of the fuselage, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Fuselage Inner Doubler Inspections and Repair, With Revised Formatting

This paragraph restates the requirements of paragraph (l) of AD 2011–17–05, with revised

formatting. For airplanes on which any inspections of the fuselage bonded inner doublers of the longitudinal lap joints in sections 13 through 18 (except sections 16 and 17 at stringer 31 left-hand and right-hand) for disbonding and cracking have not been done as of November 16, 2011 (the effective date of AD 2011–17–05), as specified by Airbus Service Bulletin A300–53–229: Prior to the accumulation of 24,000 total flight cycles or within 15 years since new, whichever occurs first; or within 60 days after November 16, 2011; whichever occurs later; do a detailed inspection of the fuselage bonded inner doublers of the longitudinal lap joints in sections 13 through 18 (except sections 16 and 17 at stringer 31 left-hand and right-hand) for disbonding and cracking, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997. If no disbonding and no cracking are found, repeat the inspection thereafter at the applicable intervals specified in paragraph (h) of this AD.

(1) If no cracking is found, and “minor” disbonding, as defined in Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997, is found: Repeat the inspection thereafter at intervals not to exceed 1 year for areas below stringer 22, and at intervals not to exceed 2 years for areas above and including stringer 22.

(2) If no cracking is found, and “major” disbonding, as defined in Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997, is found: Within 1,000 flight cycles after doing the inspection, repair, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997.

(3) If any cracking is found, repair prior to further flight, in accordance with Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997.

(h) Retained Repetitive Intervals for Inspections for Disbonding and Cracking, With No Changes

This paragraph restates the repetitive intervals specified in table 1 of AD 2011–17–05, with no changes. At the applicable time specified in paragraph (h)(1) or (h)(2) of this AD, repeat the inspection required by paragraph (g) of this AD.

(1) For sections 13 and 14 as specified in Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997: Repeat the inspection at intervals not to exceed 7 years or 12,000 flight cycles, whichever occurs first.

(2) For sections 15 through 18 as specified in Airbus Service Bulletin A300–53–229, Revision 5, dated April 8, 1997: Repeat the inspection within 8.5 years or 12,000 flight cycles, whichever occurs first.

(i) Retained Fuselage Inner Doubler Inspections and Repair, With No Changes

This paragraph restates the requirements of paragraph (m) of AD 2011-17-05, with no changes. For airplanes on which any inspections of the fuselage bonded inner doublers of the longitudinal lap joints in sections 13 through 18 (except sections 16 and 17 at stringer 31 left-hand and right-hand) for disbonding and cracking have been done as of November 16, 2011 (the effective date of AD 2011-17-05), as specified in Airbus Service Bulletin A300-53-229; except for airplanes on which a repair of that area has been done as specified in Airbus Service Bulletin A300-53-229: Within 7 years or 12,000 flight cycles (for sections 13 and 14), or within 8.5 years or 12,000 flight cycles (for sections 15 and 18), after doing the inspection, whichever occurs first; or within 60 days after November 16, 2011, whichever occurs later, do a detailed inspection of the fuselage bonded inner doublers of the longitudinal lap joints in sections 13 through 18 (except sections 16 and 17 at stringer 31 left-hand and right-hand) for disbonding and cracking, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997. If no disbonding and no cracking are found, repeat the inspection at the applicable time specified in paragraph (h) of this AD.

(1) If no cracking is found, and "minor" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Repeat the inspection thereafter at intervals not to exceed 1 year for areas below stringer 22, and at intervals not to exceed 2 years for areas above and including stringer 22.

(2) If no cracking is found, and "major" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Within 1,000 flight cycles after doing the inspection, repair, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(3) If any cracking is found, repair prior to further flight, in accordance with Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(j) Retained Fuselage Inner Doubler Inspections and Repair, With No Changes

This paragraph restates the requirements of paragraph (n) of AD 2011-17-05, with no changes. For airplanes on which any inspections of the fuselage bonded inner doublers of the longitudinal lap joints in sections 16 and 17 at stringer 31 left-hand and right-hand for disbonding and cracking have not been done as of November 16, 2011 (the effective date of AD 2011-17-05), as specified in Airbus Service Bulletin A300-53-229: Prior to the accumulation of 24,000 total flight cycles or within 12 years since new, whichever occurs first; or within 60 days after November 16, 2011, whichever occurs later, do a detailed inspection of the fuselage bonded inner doublers of the longitudinal lap joints in sections 16 and 17 at stringer 31 left-hand and right-hand for disbonding and cracking, in accordance with the Accomplishment Instructions of Airbus

Service Bulletin A300-53-229, Revision 5, dated April 8, 1997. If no disbonding and no cracking are found, repeat the inspection thereafter at intervals not to exceed 7 years or 12,000 flight cycles, whichever occurs first.

(1) If no cracking is found, and "minor" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Repeat the inspection thereafter at intervals not to exceed 1 year for areas below stringer 22, and at intervals not to exceed 2 years for areas above and including stringer 22. Doing a repair in accordance with Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, terminates the repetitive inspections required by this paragraph for that area.

(2) If no cracking is found, and "major" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Within 1,000 flight cycles after doing the inspection, repair, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(3) If any cracking is found, repair prior to further flight, in accordance with Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(k) Retained Fuselage Inner Doubler Inspections and Repair, With No Changes

This paragraph restates the requirements of paragraph (o) of AD 2011-17-05, with no changes. For airplanes on which any inspections of the fuselage bonded inner doublers of the longitudinal lap joints in sections 16 and 17 at stringer 31 left-hand and right-hand for disbonding and cracking have been done as of November 16, 2011, as specified in Airbus Service Bulletin A300-53-229; except airplanes on which a repair of that area has been done as specified in Airbus Service Bulletin A300-53-229: Within 7 years or 12,000 flight cycles after doing the inspection, whichever occurs first; or within 60 days after November 16, 2011; whichever occurs later; do a detailed inspection of the fuselage bonded inner doublers of the longitudinal lap joints in sections 16 and 17 at stringer 31 left-hand and right-hand for disbonding and cracking, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997. If no disbonding and no corrosion are found, repeat the inspection thereafter at intervals not to exceed 7 years or 12,000 flight cycles, whichever occurs first.

(1) If no cracking is found, and "minor" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Repeat the inspection thereafter at intervals not to exceed 1 year for areas below stringer 22, and at intervals not to exceed 2 years for areas above and including stringer 22. Doing a repair, in accordance with Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, terminates the repetitive inspections required by this paragraph for that area.

(2) If no cracking is found, and "major" disbonding, as defined in Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, is found: Within 1,000 flight

cycles after doing the inspection, repair, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(3) If any cracking is found, repair prior to further flight, in accordance with Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997.

(l) New Repetitive Inspections and Repair

Within 180 days after the effective date of this AD, do rototest and ultrasonic inspections, as applicable, for cracking of all longitudinal lap joints and repairs between frames 18 and 80; and repair any cracking before further flight; using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). Repeat the applicable inspection, including post-repair inspections, thereafter at intervals approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. Accomplishing the initial inspection and applicable repairs required by this paragraph terminates the actions required by paragraphs (g) through (k) of this AD.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-2125; fax 425-227-1149. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer*: As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2014-0265, dated December 9, 2014, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-7425.

(o) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on November 16, 2011 (76 FR 63177, October 12, 2011).

(i) Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, including Appendix A300SB/53-229, dated April 10, 1989. Only pages 1, 2, 5, 11, and 12 of Airbus Service Bulletin A300-53-229, Revision 5, dated April 8, 1997, show revision level 5 and issue date April 8, 1997; pages 3, 4-10, and 13-17 show revision level 4 and issue date March 30, 1994; and pages 1-17 of Appendix A300SB/53-229 show issue date April 10, 1989.

(ii) Reserved.

(4) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>.

(5) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

(6) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on December 1, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016-29511 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 97**

[Docket No. 31107; Amdt. No. 3723]

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff

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

DATES: This rule is effective December 19, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 19, 2016.

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

For Examination

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

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

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

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal-register/code_of_federal_regulations/ibr_locations.html.

Availability

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

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS-420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box

25082, Oklahoma City, OK 73125) Telephone: (405) 954-4164.

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

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

Availability and Summary of Material Incorporated by Reference

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

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

The Rule

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

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may

require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

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

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

List of Subjects in 14 CFR part 97:

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on November 18, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

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

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

Effective 5 January 2017

Ambler, AK, Ambler, NDB RWY 36, Amdt 2B, CANCELED
 Ambler, AK, Ambler, RNAV (GPS) RWY 1, Amdt 1
 Ambler, AK, Ambler, Takeoff Minimums and Obstacle DP, Amdt 1
 Deering, AK, Deering, RNAV (GPS) RWY 3, Amdt 1
 Deering, AK, Deering, RNAV (GPS) RWY 12, Amdt 1
 Deering, AK, Deering, RNAV (GPS) RWY 21, Amdt 1
 Deering, AK, Deering, RNAV (GPS) RWY 30, Amdt 1
 Deering, AK, Deering, Takeoff Minimums and Obstacle DP, Amdt 2
 Fort Yukon, AK, Fort Yukon, RNAV (GPS) RWY 4, Amdt 2
 Fort Yukon, AK, Fort Yukon, RNAV (GPS) RWY 22, Amdt 2
 Nulato, AK, Nulato, RNAV (GPS) RWY 3, Amdt 1
 Nulato, AK, Nulato, RNAV (GPS) RWY 21, Amdt 1
 Nulato, AK, Nulato, Takeoff Minimums and Obstacle DP, Amdt 1
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, Takeoff Minimums and Obstacle DP, Amdt 4
 Denver, CO, Denver Intl, ILS OR LOC RWY 7, Amdt 3B
 Tampa, FL, Tampa Intl, ILS OR LOC RWY 1L, ILS RWY 1L (SA CAT I), ILS RWY 1L (CAT II), ILS RWY 1L (CAT III), Amdt 18
 Tampa, FL, Tampa Intl, ILS OR LOC RWY 19R, Amdt 6
 West Palm Beach, FL, Palm Beach Intl, ILS OR LOC RWY 10L, Amdt 27
 Alma, GA, Bacon County, RNAV (GPS) RWY 15, Amdt 2A
 Alma, GA, Bacon County, RNAV (GPS) RWY 33, Amdt 1A
 Dawson, GA, Dawson Muni, RNAV (GPS) RWY 31, Orig-C
 Dawson, GA, Dawson Muni, VOR/DME RWY 31, Orig-C
 Lafayette, GA, Barwick Lafayette, RNAV (GPS) RWY 2, Amdt 2
 Lafayette, GA, Barwick Lafayette, RNAV (GPS) RWY 20, Amdt 2
 Lewiston, ID, Lewiston-Nez Pearce County, Takeoff Minimums and Obstacle DP, Amdt 4
 Paris, IL, Edgar County, RNAV (GPS) RWY 27, Amdt 1A
 Greencastle, IN, Putnam County Rgnl, RNAV (GPS) RWY 18, Amdt 2
 Greencastle, IN, Putnam County Rgnl, RNAV (GPS) RWY 36, Amdt 2
 Greencastle, IN, Putnam County Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1

Greencastle, IN, Putnam County Rgnl, VOR-A, Amdt 7
 Indianapolis, IN, Indianapolis Rgnl, ILS OR LOC RWY 25, Amdt 2E
 Indianapolis, IN, Indianapolis Rgnl, RNAV (GPS) RWY 25, Orig-B
 Fort Leavenworth, KS, Sherman AAF, NDB RWY 34, Amdt 4A, CANCELED
 Topeka, KS, Topeka Rgnl, TACAN RWY 13, Amdt 4A
 Topeka, KS, Topeka Rgnl, TACAN RWY 31, Amdt 4A
 Reserve, LA, Port of South Louisiana Executive Rgnl, RNAV (GPS) RWY 17, Amdt 1A
 Reserve, LA, Port of South Louisiana Executive Rgnl, RNAV (GPS) RWY 35, Amdt 1A
 Reserve, LA, Port of South Louisiana Executive Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1A
 Reserve, LA, Port of South Louisiana Executive Rgnl, VOR RWY 35, Amdt 1A
 Stevensville, MD, Bay Bridge, RNAV (GPS) RWY 11, Amdt 1
 Stevensville, MD, Bay Bridge, RNAV (GPS) RWY 29, Amdt 1
 Bois Blanc Island, MI, Bois Blanc Island, RNAV (GPS) RWY 10, Amdt 1
 Hancock, MI, Houghton County Memorial, ILS OR LOC RWY 31, Amdt 15
 Hancock, MI, Houghton County Memorial, RNAV (GPS) RWY 7, Amdt 1B
 Albert Lea, MN, Albert Lea Muni, RNAV (GPS) RWY 35, Amdt 1B
 Austin, MN, Austin Muni, ILS OR LOC RWY 35, Amdt 1B
 Silver City, NM, Grant County, SILVER CITY TWO, Graphic DP
 Zanesville, OH, Zanesville Muni, RNAV (GPS) RWY 4, Orig
 Zanesville, OH, Zanesville Muni, RNAV (GPS) RWY 22, Orig
 Zanesville, OH, Zanesville Muni, VOR RWY 4, Amdt 7
 Zanesville, OH, Zanesville Muni, VOR RWY 22, Amdt 4
 Oneida, TN, Scott Muni, VOR/DME-A, Amdt 5D
 Abilene, TX, Abilene Rgnl, ILS OR LOC RWY 35R, Amdt 7A
 Abilene, TX, Abilene Rgnl, LOC RWY 17R, Orig-A
 Abilene, TX, Abilene Rgnl, RADAR-1, Amdt 10
 Abilene, TX, Abilene Rgnl, RNAV (GPS) RWY 17L, Amdt 1A
 Abilene, TX, Abilene Rgnl, RNAV (GPS) RWY 22, Orig-A
 Abilene, TX, Abilene Rgnl, RNAV (GPS) RWY 35R, Amdt 1A
 Abilene, TX, Abilene Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
 Lago Vista, TX, Lago Vista TX—Rusty Allen, RNAV (GPS) RWY 15, Amdt 1
 Lubbock, TX, Lubbock Preston Smith Intl, ILS OR LOC RWY 17R, Amdt 18
 Lubbock, TX, Lubbock Preston Smith Intl, ILS OR LOC RWY 26, Amdt 4B
 Lubbock, TX, Lubbock Preston Smith Intl, LOC BC RWY 35L, Amdt 19
 Lubbock, TX, Lubbock Preston Smith Intl, RNAV (GPS) RWY 8, Amdt 2B
 Lubbock, TX, Lubbock Preston Smith Intl, RNAV (GPS) RWY 26, Amdt 2B
 Lubbock, TX, Lubbock Preston Smith Intl, RNAV (GPS) Y RWY 17R, Amdt 2A

Lubbock, TX, Lubbock Preston Smith Intl, RNAV (GPS) Y RWY 35L, Amdt 2A
 Lubbock, TX, Lubbock Preston Smith Intl, RNAV (RNP) Z RWY 17R, Orig-B
 Lubbock, TX, Lubbock Preston Smith Intl, RNAV (RNP) Z RWY 35L, Orig-B
 Slaton, TX, Slaton Muni, RNAV (GPS) RWY 18, Orig
 Slaton, TX, Slaton Muni, RNAV (GPS) RWY 36, Orig
 Slaton, TX, Slaton Muni, Takeoff Minimums and Obstacle Orig
 Tyler, TX, Tyler Pounds Rgnl, VOR/DME RWY 22, AMDT 4A, CANCELED
 St George, UT, St George Rgnl, LDA RWY 19, Orig-D
 St George, UT, St George Rgnl, RNAV (GPS) RWY 19, Orig-D
 Suffolk, VA, Suffolk Executive, RNAV (GPS) RWY 22, Amdt 2
 Wallops Island, VA, Wallops Flight Facility, RNAV (GPS) RWY 10, Amdt 2
 Clarksburg, WV, North Central West Virginia, RNAV (GPS) RWY 3, Amdt 2
 Rock Springs, WY, Rock Springs-Sweetwater County, ILS OR LOC RWY 27, Amdt 2
 Rock Springs, WY, Rock Springs-Sweetwater County, RNAV (GPS) RWY 27, Amdt 1A
 [FR Doc. 2016-30001 Filed 12-16-16; 8:45 am]
BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31109; Amdt. No. 3725]

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

DATES: This rule is effective December 19, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 19, 2016.

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

For Examination

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

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

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

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Availability

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

FOR FURTHER INFORMATION CONTACT:

Thomas J. Nichols, Flight Procedure Standards Branch (AFS-420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954-4164.

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

The large number of SIAPs, Takeoff Minimums and ODPs, their complex

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

Availability and Summary of Material Incorporated by Reference

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

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

The Rule

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

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

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

contrary to the public interest and, where applicable, under 5 U.S.C 553(d), good cause exists for making some SIAPs effective in less than 30 days.

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

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on December 2, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

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

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

Effective 5 January 2017

Ambler, AK, Ambler, RNAV (GPS) Y RWY 36, Orig, CANCELED
 St Michael, AK, St Michael, Takeoff Minimums and Obstacle DP, Amdt 2
 Aliceville, AL, George Downer, RNAV (GPS) RWY 24, Orig-A
 Camden, AL, Camden Muni, RNAV (GPS) RWY 18, Orig
 Camden, AL, Camden Muni, RNAV (GPS) RWY 36, Orig
 Camden, AL, Camden Muni, Takeoff Minimums and Obstacle DP, Orig

Cullman, AL, Cullman Rgnl-Folsom Field, RNAV (GPS) RWY 2, Amdt 1A
 Cullman, AL, Cullman Rgnl-Folsom Field, RNAV (GPS) RWY 20, Amdt 1A
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, ILS OR LOC RWY 16, Amdt 4
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, ILS OR LOC RWY 34, Amdt 3
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, ILS OR LOC/DME RWY 35, Orig-C, CANCELED
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, RNAV (GPS) RWY 16, Amdt 4
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, RNAV (GPS) RWY 17, Orig-C, CANCELED
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, RNAV (GPS) RWY 34, Amdt 2
 Fayetteville/Springdale/Rogers, AR, Northwest Arkansas Rgnl, RNAV (GPS) RWY 35, Orig-C, CANCELED
 Horseshoe Bend, AR, Horseshoe Bend, RNAV (GPS)-A, Orig
 Horseshoe Bend, AR, Horseshoe Bend, Takeoff Minimums and Obstacle DP, Orig
 Monterey, CA, Monterey Rgnl, LOC RWY 28L, Amdt 4
 Ankeny, IA, Ankeny Rgnl, ILS OR LOC RWY 36, Amdt 3
 Ankeny, IA, Ankeny Rgnl, RNAV (GPS) RWY 18, Amdt 2
 Ankeny, IA, Ankeny Rgnl, RNAV (GPS) RWY 22, Amdt 1
 Ankeny, IA, Ankeny Rgnl, RNAV (GPS) RWY 36, Amdt 2
 Ankeny, IA, Ankeny Rgnl, Takeoff Minimums and Obstacle DP, Amdt 2
 Burlington, IA, Southeast Iowa Rgnl, VOR RWY 30, Amdt 13C
 Burlington, IA, Southeast Iowa Rgnl, VOR/DME RWY 12, Amdt 6C
 Storm Lake, IA, Storm Lake Muni, NDB RWY 17, Orig-A, CANCELED
 Storm Lake, IA, Storm Lake Muni, NDB RWY 35, Amdt 1C, CANCELED
 Columbus, IN, Columbus Muni, RNAV (GPS) RWY 14, Amdt 1A
 Columbus, IN, Columbus Muni, RNAV (GPS) RWY 23, Orig-A
 Phillipsburg, KS, Phillipsburg Muni, NDB-A, Amdt 1A, CANCELED
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS OR LOC RWY 12L, ILS RWY 12L (SA CAT I), ILS RWY 12L (CAT II), ILS RWY 12L (CAT III), Amdt 11
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS OR LOC RWY 12R, ILS RWY 12R (SA CAT I), ILS RWY 12R (CAT II), ILS RWY 12R (CAT III), Amdt 12
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS OR LOC RWY 30L, ILS RWY 30L (CAT II), Amdt 47
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS OR LOC RWY 30R, Amdt 16
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS V RWY 30L (CONVERGING), Amdt 2A, CANCELED
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS V RWY 30R (CONVERGING), Amdt 3B, CANCELED

Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS V RWY 35 (CONVERGING), Amdt 5
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, ILS Z OR LOC RWY 35, ILS RWY 35 (SA CAT I), ILS RWY 35 (CAT II), ILS RWY 35 (CAT III), Amdt 5
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (GPS) Z RWY 12L, Amdt 5
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (GPS) Z RWY 12R, Amdt 4
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (GPS) Z RWY 30L, Amdt 5
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (GPS) Z RWY 35, Amdt 4
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (RNP) Y RWY 12R, Amdt 1
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (RNP) Y RWY 30L, Amdt 1
 Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (RNP) Y RWY 30R, Amdt 1
 Bay St Louis, MS, Stennis Intl, ILS Z OR LOC Z RWY 18, Amdt 3
 Lisbon, ND, Lisbon Muni, RNAV (GPS) RWY 14, Orig
 Lisbon, ND, Lisbon Muni, RNAV (GPS) RWY 32, Orig
 Lisbon, ND, Lisbon Muni, Takeoff Minimums and Obstacle DP, Orig
 New York, NY, LaGuardia, ILS OR LOC RWY 22, ILS RWY 22 (SA CAT I), ILS RWY 22 (SA CAT II), Amdt 20E
 New York, NY, Stewart Intl, VOR RWY 27, Amdt 5B, CANCELED
 Lebanon, OH, Warren County/John Lane Field, RNAV (GPS) RWY 1, Amdt 3
 Fort Worth, TX, Kenneth Copeland, RNAV (GPS) RWY 17, Orig
 Fort Worth, TX, Kenneth Copeland, RNAV (GPS) RWY 35, Orig
 Fort Worth, TX, Kenneth Copeland, Takeoff Minimums and Obstacle DP, Orig
 Cedar City, UT, Cedar City Rgnl, ILS OR LOC RWY 20, Amdt 4
 Cedar City, UT, Cedar City Rgnl, RNAV (GPS) RWY 20, Amdt 1
 Cedar City, UT, Cedar City Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
 Cedar City, UT, Cedar City Rgnl, VOR RWY 20, Amdt 7
 South Boston, VA, William M Tuck, RNAV (GPS) RWY 1, Amdt 1
 South Boston, VA, William M Tuck, RNAV (GPS) RWY 19, Orig-A, SUSPENDED
 South Boston, VA, William M Tuck, VOR-A, Amdt 9

[FR Doc. 2016–30003 Filed 12–16–16; 8:45 am]

BILLING CODE 4910-13-P

SOCIAL SECURITY ADMINISTRATION**20 CFR Part 421**

[Docket No. SSA-2016-0011]

RIN 0960-AH95

Implementation of the NICS Improvement Amendments Act of 2007**AGENCY:** Social Security Administration.
ACTION: Final rules.

SUMMARY: These final rules implement provisions of the NICS Improvement Amendments Act of 2007 (NIAA) that require Federal agencies to provide relevant records to the Attorney General for inclusion in the National Instant Criminal Background Check System (NICS). Under these final rules, we will identify, on a prospective basis, individuals who receive Disability Insurance benefits under title II of the Social Security Act (Act) or Supplemental Security Income (SSI) payments under title XVI of the Act and who also meet certain other criteria, including an award of benefits based on a finding that the individual's mental impairment meets or medically equals the requirements of section 12.00 of the Listing of Impairments (Listings) and receipt of benefits through a representative payee. We will provide pertinent information about these individuals to the Attorney General on not less than a quarterly basis. As required by the NIAA, at the commencement of the adjudication process we will also notify individuals, both orally and in writing, of their possible Federal prohibition on possessing or receiving firearms, the consequences of such prohibition, the criminal penalties for violating the Gun Control Act, and the availability of relief from the prohibition on the receipt or possession of firearms imposed by Federal law. Finally, we also establish a program that permits individuals to request relief from the Federal firearms prohibitions based on our adjudication. These changes will allow us to fulfill responsibilities that we have under the NIAA.

DATES: This final rule will be effective on January 18, 2017. However, compliance is not required until December 19, 2017.

SUPPLEMENTARY INFORMATION:**Background**

On May 5, 2016, we published a notice of proposed rulemaking (NPRM) in the *Federal Register* (81 FR 27059) in which we proposed adding part 421 to our regulations in order to implement our obligations under the NIAA. We

proposed rules under which we would identify and report to the Attorney General, on a prospective basis, information about any title II or title XVI beneficiary whom we are required to report for inclusion in the NICS because that person is subject to the Federal mental health prohibitor as a result of our adjudication.¹ Under our proposed rules, we would: (1) Identify relevant records and report pertinent information to the NICS, (2) provide oral and written notification to our title II and title XVI beneficiaries who meet the requisite criteria, and (3) permit our beneficiaries who meet the requisite criteria to apply to us for relief from the firearms prohibition imposed by 18 U.S.C. 922(d)(4) or (g)(4) by virtue of our adjudication. We provided additional information and discussion of the reasons we issued our proposed rules in the preamble to those rules at 81 FR 27059.

We adopt the proposed rules as final rules, with several changes outlined in the discussion of the public comments and our responses. The final rules allow a person to apply for relief any time after our adjudication that the person meets the requirements of the Federal mental health prohibitor has become final. The final rules also set out several circumstances in which we will notify the Attorney General to remove a person's name from the NICS. We also made minor changes to the definition of the term "affected individual" in section 421.105 and to section 421.110(b)(2). The changes in both of these sections are for clarity, and do not substantively change the rules.

Public Comments and Discussion

In our NPRM, we provided a 62-day comment period, which ended July 5, 2016. As we stated in our proposed rules, the NIAA, the President's January 2013 Memorandum to Federal agencies, and the Department of Justice's (DOJ) March 2013 guidance require Federal agencies with any record demonstrating that a person falls within one of the categories in 18 U.S.C. 922(g) or (n) to provide the pertinent information contained in the record to the Attorney General, not less frequently than quarterly, for inclusion in the NICS.²

¹ As part of our responsibilities under the NIAA, we will also provide the Attorney General with copies of court orders that we receive, beginning on or after the compliance date of these final rules, regarding adult title II and title XVI disability claimants and beneficiaries who have been declared legally incompetent by a State or Federal court. The FBI will identify those court orders that meet the requirements of the Federal mental health prohibitor.

² NIAA, sec. 101(a)(4), 121 Stat. at 2161; Memorandum for the Heads of Executive

Departments and Agencies, *Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System*, 78 FR 4297 (2013); Department of Justice, *Guidance to Agencies Regarding Submission of Relevant Records to the NICS* (March 2013) ("DOJ Guidance"). We included the relevant portion of the DOJ Guidance in the preamble to our proposed rules (81 FR at 27060-27061).

Because our proposed rules were limited to our process for satisfying our mandated reporting and relief requirements, comments about issues that do not pertain to our proposed rules are outside of the scope of our rulemaking authority. We have not responded here to comments outside of the scope of our proposed rules. We received 91,243 timely submitted comments that addressed issues within the scope of our proposed rules. We carefully considered the concerns expressed in these comments. Due to the high volume of the comments submitted, we summarized and grouped them by main issue expressed. We present the views received, and address the relevant and significant issues raised by the commenters. Of the timely-submitted comments, 86,860 were identical letters from different members of one advocacy group, and 324 were signatures on one comment letter. These letters urged us to withdraw the proposed rules, which the commenters thought would adversely affect individuals' Second Amendment rights. We address that comment below.

Various advocacy groups and individuals submitted the remaining 4,059 comments. Many of these commenters questioned our legal authority to provide the names of Social Security beneficiaries to DOJ for inclusion in the NICS. The majority of these comments focused on how DOJ would use the information we provide—*i.e.*, what the effect would be on the Second Amendment rights of individuals whose names would be included in the NICS. Other legal issues raised included due process and equal protection concerns. Many commenters questioned the criteria we proposed to use to identify names for inclusion in the NICS. Some of these comments were based on an incorrect understanding of the information we provided in the NPRM. We also address those misunderstandings below. Several commenters appeared to misunderstand the process we would need to follow to revise these criteria in the future.

Some commenters cautioned about the potential for stigmatization of those with mental health disorders, and questioned why we did not provide evidence demonstrating the correlation between mental health and gun-related

Departments and Agencies, *Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System*, 78 FR 4297 (2013); Department of Justice, *Guidance to Agencies Regarding Submission of Relevant Records to the NICS* (March 2013) ("DOJ Guidance"). We included the relevant portion of the DOJ Guidance in the preamble to our proposed rules (81 FR at 27060-27061).

violence. Commenters also expressed apprehension about the potential violation of privacy rights, including rights under the Health Insurance Portability and Accountability Act (HIPAA). Commenters also questioned our existing processes for determining the presence of a disability based on a mental impairment and our process for appointing representative payees. Multiple commenters asked about our process for seeking relief and the removal of names from the NICS. Several commenters expressed that the policy we proposed was an unnecessary expenditure of Federal Government funds.

We also received multiple comments in support of the rules. These individuals and advocacy group commenters spoke as appointed representatives of Social Security beneficiaries with mental illness or as proponents of greater gun control efforts.

We respond in greater detail below to the relevant comments submitted in response to the proposed rule. We organize the comments and our responses by category for ease of review.

Legal Authority

Comment: Multiple individuals questioned our authority to report any information to the NICS database. Some commenters opined that NIAA section 101(c)(1)(C) prohibited us from reporting information to DOJ that is “based solely on a medical finding of disability. . . .” Another commenter suggested that we should not be able to submit any medical information to the NICS without a court order.

Response: Our authority to report the information we include in these final rules stems from section 101(a)(4) of the NIAA, which requires that we provide to the Attorney General for inclusion in the NICS pertinent information included in any record demonstrating that a person falls within one of the categories in 18 U.S.C. 922(g) or (n).³ NIAA section 101(c)(1)(C) does not prohibit us from reporting this information to the NICS. The commenters who relied on section 101(c)(1)(C) only cited part of the section in their comments. In its entirety, section 101(c)(1)(C) of the NIAA states: “No department or agency of the Federal Government may provide to the Attorney General any record of an adjudication related to the mental health of a person or any commitment of a person to a mental institution if . . . (C) the adjudication or commitment, respectively, is based

solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority, and the person has not been adjudicated as a mental defective consistent with section 922(g)(4) of title 18, United States Code, except that nothing in this section or any other provision of law shall prevent a Federal department or agency from providing to the Attorney General any record demonstrating that a person was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.”

We are not reporting information in records based solely on a medical finding of disability without the person being adjudicated as subject to the Federal mental health prohibitor “consistent with 18 U.S.C. 922(g)(4).” The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has clarified through regulations that this prohibition covers individuals who have been determined by a court, board, commission or other lawful authority as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease to be a danger to himself or to others, or who lacks the mental capacity to contract or manage his or her own affairs.⁴

The DOJ Guidance specifically indicates that records relevant to the NICS include “agency records of adjudications of an individual’s inability to manage his or her own affairs if such adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease.” The DOJ further indicated that this category of records “includes certain agency designations of representative or alternate payees for program beneficiaries.”⁵

As we explained in the NPRM, our adjudication is an adjudication by a lawful authority, by virtue of the authority granted to the Commissioner of Social Security under the Social Security Act. We also are not basing our reporting of records to the NICS solely on a medical finding of disability. Rather, consistent with section 101(a)(4) of the NIAA and the ATF’s implementing regulation, we are basing our report on the individual’s inability to manage his or her affairs as a result of his or her mental impairment. However, we will not include medical information in our reports to the NICS—

we will report only the beneficiary’s name, full date of birth, sex, and Social Security number. In addition, we will only inform the FBI of the fact that the individual meets the criteria for inclusion in the NICS under the NIAA due to a mental health prohibitor, but we will not provide any details on the individual’s specific diagnosis.

Comment: Multiple commenters questioned our authority to declare an individual to be subject to the Federal mental health prohibitor, and argued that only a court can make that decision.

Response: By these rules, we are complying with the requirements of the NIAA by identifying individuals in our records who meet the criteria of the mental health prohibitor in 18 U.S.C. 922(g). As we noted previously, our authority to do so derives from section 101(a)(4) of the NIAA. DOJ’s guidance indicates that relevant records under the mental health prohibitor category include not only court adjudications but also agency records of adjudications of an individual’s inability to manage his or her own affairs, including the agency’s designation of a representative payee because of his or her mental impairment. As we noted above and in the proposed rules, the ATF’s regulations require that the individual be found to be subject to the Federal mental health prohibitor “by a court, board, commission or other lawful authority. . . .”⁶ Consequently, neither the NIAA nor the ATF’s implementing regulations require an agency to report information to the NICS based only on a court order, as some of the commenters suggested.

Comment: One commenter asked if the determinations would be secret or open, and if there are safeguards in place to ensure that the people making the designations are free of bias or prejudice.

Response: We will use our regular program rules to determine whether an individual is disabled due to a mental impairment that is severe enough to meet the requirements of our mental disorder listings, and to determine if that person also requires a representative payee because of his or her mental impairment. We apply our program rules to *all* claimants *equally*, regardless of whether or not one meets the NICS criteria. We expect all of our adjudicators to fulfill their duties with fairness and impartiality, and we have existing procedures in place that allow us to address claims of bias or prejudice in our administrative process.

By “open” we assume that the commenter’s concern was over the

³ NIAA 101(a)(4), 121 Stat. at 2161.

⁴ 27 CFR 478.11(a)(1)–(2).

⁵ 81 FR at 27061.

⁶ 27 CFR 478.11(a).

privacy of the information that we would report to the NICS. A determination regarding inclusion in the NICS would be open to the individual affected, and we will apply the safeguards set out in these rules, such as oral and written notification to the individual at the commencement of the adjudication, to ensure that the individual who may be subject to reporting has adequate information about the reporting process, the effect of our reporting, and options for relief.

In addition, we will apply the protections against unauthorized disclosure in the Privacy Act of 1974, 5 U.S.C. 552a; our regulations, 20 CFR part 401; and the Social Security Act, 42 U.S.C. 1306(a). Thus, we may only disclose information in accordance with these laws and regulations. We also provide claim information to individuals upon request of the claimant. Under the Privacy Act of 1974 and our regulations, an individual may request access to his or her records maintained in agency Privacy Act systems of records, including those under which we maintain diagnosis information.⁷

Constitutional Issues: Second Amendment and Equal Protection

Comment: Many commenters expressed concern that these rules would violate the affected individuals' rights under the Second Amendment to the Constitution, and would also violate their equal protection rights under the Constitution. Most of these comments were provided in largely identical letters, and they asserted that our rules would take firearms away from elderly recipients of Social Security retirement benefits.

Response: With these rules, we are seeking to satisfy our obligations under the NIAA, which requires Federal agencies to provide relevant records to the Attorney General for inclusion in the NICS. While the rule addresses reporting requirements, it is the Federal Gun Control Act, not the Social Security Act, that governs when a person can possess a firearm. The criteria we will use under these rules do not focus on one age group, such as the elderly or recipients of Social Security retirement benefits, nor do they categorize and treat individuals who are similarly situated differently. Consequently, these final rules do not violate principles of equal protection. In addition, as we stated in the preamble to our NPRM and in the requirements listed in section 421.110(b)(4) of our rules, we will identify certain individuals who have

attained age 18, but have not yet attained full retirement age. We do not intend under these rules to report to the NICS any individual for whom we appoint a representative payee based solely on the individual's application for and receipt of Social Security retirement benefits.

With regard to the broader point the commenters raised about the constitutionality of our actions under the Second Amendment, we note that the Supreme Court recognized in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), "that the Second Amendment conferred an individual right to keep and bear arms." The Court emphasized, however, that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," *id.*, at 626, and that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* Our actions, taken in accordance with the Congress' directives in the NIAA, the President's January 2013 memorandum to Executive agencies, and DOJ's March 2013 guidance, are fully consistent with the Supreme Court's recognition in *Heller* of the validity "of longstanding prohibitions on the possession of firearms by . . . the mentally ill." Nothing in the rules we are issuing today is inconsistent with the scope of the Second Amendment as interpreted in *Heller*. Accordingly, we have not made any changes to the rule in response to comments asserting that our actions were inconsistent with an individual's Second Amendment right.

Due Process

Comment: Multiple commenters also stated that the rules as written would violate beneficiaries' right to due process, particularly because they do not allow affected individuals to appeal the inclusion of their names in the NICS before we submit them to the DOJ. One commenter suggested that we should obtain a beneficiary's written permission before submitting information to the DOJ.

Response: Affected individuals will have the opportunity to apply for relief from the Federal firearms prohibitions imposed by 18 U.S.C. 922(g)(4) at any time after our adjudication has become final. We have clarified our rules to make that point. We will follow the requirements of the NIAA and apply principles of due process in determining applicants' entitlement to relief from the burdens imposed by inclusion in the NICS. Under these rules, we will provide individuals with advance notice at the commencement of the

adjudication that we may report their information to NICS if we find they meet the criteria for reporting when the adjudication is final. An individual can request relief any time after the adjudication is final but we cannot delay fulfilling our obligations under the NIAA to provide relevant records to the Attorney General while the person decides whether to request relief.

When an individual requests relief, we provide an opportunity for the individual to submit evidence in support of the request, which will be reviewed by an impartial decisionmaker who was not involved in making the finding that the applicant's benefit payments be made through a representative payee. We will notify the applicant in writing of our action regarding the request for relief and explain the reasons for our action. We will also inform the applicant that if he or she is dissatisfied with our action, he or she has 60 days from the date he or she receives the notice of our action to file a petition seeking judicial review in Federal district court. And, of course, judicial review of our action denying an applicant's request for relief is available in accordance with the standards prescribed in 18 U.S.C. 925(c). These procedures provide a beneficiary with ample due process protections. In response to the other commenter's concern, we note that nothing in the NIAA or any other provision of law requires us to obtain a beneficiary's written permission to disclose information to the DOJ for the NICS. We will publish a system of records notice (SORN) that will explain the purposes for which information will be maintained and disclosed, and the public will have an opportunity to comment on the SORN.

Comment: Several commenters questioned whether individuals who meet our criteria would receive adequate notice or be given the opportunity to appeal before we share their information with the DOJ. One commenter expressed concern that, "[m]any people will not be informed of the action." Other commenters asked whether "an existing beneficiary with a representative payee [would] be notified and given the opportunity to appeal before they are reported to NICS" or if we would "allow the person a reasonable amount of time to appeal that action."

Response: Consistent with the NIAA, we will provide oral and written notice to the beneficiary at the commencement of the adjudication, which we define as after we have determined that he or she meets the medical requirements for disability based on a finding that his or

⁷ 5 U.S.C. 552a(d); 20 CFR 401.35–401.40.

her impairment(s) meets or medically equals the requirements of the mental disorders listings, but before we find that he or she requires a representative payee. Under these final rules, we will provide individuals with the opportunity to apply for relief from the Federal firearms prohibitions once the adjudication becomes final and those prohibitions are imposed.

Because we will only identify individuals for reporting on a prospective basis, existing beneficiaries with representative payees will not be affected by these final rules. Individuals who currently receive benefits but who would not qualify for reporting to the NICS because they do not currently satisfy all five requirements will be reported should a continuing disability review or other disability review, such as an age-18 redetermination, demonstrate a change in status that would satisfy all five requirements. In that circumstance, we would provide the beneficiary oral and written notice of his or her potential reporting to the NICS under the regular notice requirements established by these rules before we take any action to determine capability. In addition, under our regulations, our determination to appoint a representative payee for a beneficiary is subject to our administrative review process and, ultimately, to judicial review after the individual receives our final decision.

Comment: Several commenters expressed the belief that pursuing relief would be a highly expensive process for beneficiaries, and thus beneficiaries who could not afford what might be prohibitively expensive activities, would effectively be denied due process.

Response: We will not impose a fee in connection with the filing of a request for relief. We anticipate that the cost for acquiring the evidence that we require and providing it to us directly will be reasonable. In addition to providing us with a completed relief application form, consistent with the requirements set forth in section 421.151(b) of this final rule, an applicant for relief will only be required to provide us with: (1) A current statement from his or her primary mental health provider that assesses the applicant's current mental health status and mental status for the 5 years preceding the date of the relief request; and (2) written statements and any other evidence regarding the applicant's reputation. We will obtain the applicant's criminal history report.

The requirement that the individual provide us with medical evidence, in the form of a current statement from the applicant's primary mental health

provider assessing the applicant's current mental health status and mental health status for the 5 years preceding the date of the request for relief, stems from the requirements of the NIAA. Section 101(c)(2)(A)(iii) of the NIAA⁸ provides that "[r]elief and judicial review with respect to" an agency's relief program "shall be available according to the standards prescribed in" 18 U.S.C. 925(c). Section 925(c), in turn, provides that relief may be granted "if it is established to [an agency's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." In order for us to determine whether "the applicant will not be likely to act in a manner dangerous to public safety," we must necessarily have evidence assessing the individual's mental status. The evidentiary requirements we are including in final section 421.151(c) will allow us to make the determination the NIAA and section 925(c) require us to make.

Reporting Criteria

Comment: Multiple individuals commented on the criteria we proposed for identifying individuals whose names we would report to the DOJ. Many questioned how we selected these criteria for inclusion. One commenter suggested that, "there should be a more specific review of these criteria." Another individual asked why we did not propose to send information on individuals who, among other things, are felons, domestic abusers, or unlawful users of controlled substances. Another commenter suggested that we conduct a criminal background history as an additional step prior to reporting an individual's information to the DOJ. One commenter suggested that we include an additional factor to consider an individual's propensity for violence, aggressive behavior, or self-destructive behavior.⁹

⁸ 121 Stat. at 2563.

⁹ One commenter raised the issue of our reporting felons to the NICS database. This issue is outside the scope of this final rule. However, we note that our Office of the Inspector General (OIG) has independent statutory obligations under the Inspector General Act of 1978 (Pub. L. 95-452; 92 Stat. 1101), as amended. Our OIG reports that it provides records to the NICS for individuals on whom it has opened an investigation and who are subsequently prosecuted in a State or local court. The OIG provides information on individuals who fall into the following categories: (1) Certain felons (with judgment and conviction orders from a court); certain fugitive felons; and (3) certain persons under indictment. The OIG does not provide information from their investigations prosecuted in

Response: As we explained in the NPRM, in choosing the criteria we sought to find the best fit between our adjudication regarding a claimant's entitlement to benefits and the decision to designate a representative payee and the regulatory definition of an individual who is subject to the Federal mental health prohibitor. For the reasons we discussed in the NPRM,¹⁰ we believe that there is a reasonable and appropriate fit between the criteria we use to decide whether some of our beneficiaries are disabled (*e.g.*, a primary diagnosis of a mental impairment and meeting or equaling the requirements of one of the Mental Disorders Listing of Impairments (Listings) and requiring a representative payee because of that mental impairment) and the Federal mental health prohibitor.

We have not adopted the comment that we conduct a criminal background history in advance, because it does not comport with the criteria we are using to identify individuals for referral to NICS and, within that framework, a criminal background check is unnecessary. To reiterate, we will report an individual's record to the NICS based on his or her inability to manage his or her affairs due to a disabling mental impairment that meets or equals the criteria found in one of the Mental Disorders Listings. A criminal background check is not necessary for us to make a determination on that issue. However, we will obtain a criminal background check as part of the relief process. The relief inquiry focuses on whether the applicant will be likely to act in a manner dangerous to public safety, and whether the granting of the relief would be contrary to the public interest. The distinction we have made in these rules, under which we will obtain a criminal background check as part of the relief process, but not as part of the referral process, is consistent with the NIAA.

With respect to the commenters' questions about other categories of individuals, such as domestic abusers or unlawful users of controlled substances, we note that we do not have records regarding individuals who are domestic abusers. In addition, in adjudicating disability claims, we do not determine whether a claimant has "lost the power of self-control with reference to the use of a controlled substance," as contemplated by the ATF regulation. 27 CFR 478.11. Rather, our focus is on whether the claimant is capable of

Federal courts, because this information is already provided to NICS.

¹⁰ 81 FR at 27062.

engaging in substantial gainful activity despite his or her impairments. Even where our records identify a claim as involving either drugs only or both drugs and alcohol, our electronic records do not include structured data on the type of drug use, the extent of the use, or on how recently the controlled substance was used. Consequently, we have determined that we do not have records that meet DOJ's criteria for reporting individuals in this category to the NICS.

Regarding the suggestion that we consider an individual's propensity for violence, aggressive behavior or self-destructive behavior before we refer an individual's record to the NICS, the relevant Federal law and implementing regulation do not require us to find that a beneficiary has a propensity for violence, aggressive behavior, or self-destructive behavior before we report his or her name to the NICS. The governing ATF regulation defines the Federal mental health prohibitor as involving a determination by a court, board, commission or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease, is a danger to himself or to others; or lacks the mental capacity to contract or manage his own affairs.¹¹

The regulation distinguishes between (1) the requirements of being a danger to one's self or others; and (2) the lacking of mental capacity to contract or manage one's affairs. The DOJ Guidance specifically notes that records relevant to the Federal mental health prohibitor include agency adjudications of an individual's inability to manage his or her own affairs, if the adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease, and it includes certain agency designations of representative or alternate payees for program beneficiaries.¹² Accordingly, in light of the ATF regulation and DOJ Guidance, we believe that we are required to find that an individual meets the requirements for the Federal mental health prohibitor if he or she meets either of the two factors set out in the ATF regulation.

Comment: Several commenters protested against what they thought would be our evaluation of all Social Security beneficiaries for potential inclusion in the NICS.

Response: The comment reflects a misunderstanding of our proposed rules. We will not evaluate all Social Security beneficiaries for potential

inclusion in the NICS. As we indicate in section 421.110(b) of our rules, the beneficiaries whose names we would submit to the NICS must meet five well-defined criteria. The criteria are that the individual must have: (1) Filed a claim based on disability; (2) been determined by us to be disabled based on a finding at step three of our sequential evaluation process that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listings; (3) a primary diagnosis code in our records that is based on a mental impairment; (4) attained age 18, but have not yet attained full retirement age; and (5) benefit payments made through a representative payee because we have found him or her incapable of managing benefit payments. We will not include any beneficiary who does not meet all of those criteria in our reporting to the NICS.

Comment: We received a significant number of comments expressing the view that we should not report certain categories of people to the DOJ for inclusion in the NICS based solely on one qualifier. Commenters erroneously expressed the belief that we would report names to the NICS if they belonged to any one of the following categories: (1) Recipients of any type of Social Security benefits; (2) recipients of Supplemental Security Income (SSI) payments or Disability Insurance (DI) beneficiaries under the Social Security Act; (3) senior citizens; (4) DI beneficiaries for other physical, non-mental disabilities; (5) DI beneficiaries based on a mental impairment, but who do not have a representative payee; (6) have a representative payee for retirement benefits but do not receive DI benefits; (7) have a representative payee but do not receive DI benefits because of a listing-level mental impairment; or (8) no longer receive any type of Social Security benefits.

Response: As we noted in our response to the previous comment, this comment reflects a misunderstanding of our rules. As we indicate in section 421.110(b) of our rules, the beneficiaries whose names we would submit to the NICS must meet *all five* well-defined criteria. We will not report any beneficiary who does not satisfy *all five* criteria to the NICS.

Comment: One commenter stated that, because we do not make medical determinations about Social Security retirement beneficiaries' health, we do not have the right to make decisions concerning their mental status.

Response: We agree that we do not make a medical determination when an individual files a claim for Social

Security retirement benefits. For that reason, our proposed rules and these final rules provide that in order for us to refer an individual's record to the NICS, he or she must, among other things, have filed a claim for disability insurance benefits under title II of the Act or supplemental security income payments based on disability under title XVI of the Act. We do not and will not review the medical records of individuals simply because they file a claim for retirement benefits. Our authority to make a determination regarding an individual's capacity and the appointment of a representative payee is in accordance with the authority granted to the Commissioner under the Act.¹³

When we appoint a representative payee, we base our determination on available medical or other evidence, such as statements from relatives, friends, or people in positions to observe the beneficiary.¹⁴ This process includes gathering medical evidence from the disability folder or a treating physician, obtaining information from family members or friends about the person's ability to manage finances, and asking the individual how he or she handles monthly expenses and financial decisions.¹⁵

Comment: Multiple commenters expressed the belief that we would report beneficiaries to the NICS solely based on their having a representative payee. Further, commenters opined that having an alternate payee, or requiring some help with financial arrangements such as receipt of Social Security benefits, does not demonstrate mental incompetence.

Response: As noted in our responses to previous comments, this comment reflects a misunderstanding of our rules. As we indicate in section 421.110(b) of our rules, the beneficiaries whose names we would submit to the NICS must meet *all five* well-defined criteria. We will not report to the NICS any beneficiary who does not satisfy *all five* of those criteria. We will not report a person to the NICS simply because the person has a representative payee if they do not meet all of the other criteria.

The DOJ Guidance, with which we are complying, specifically indicates that records relevant to the NICS include "agency records of adjudications of an individual's inability to manage his or her own affairs if such adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease." The DOJ further

¹³ 42 U.S.C. 405(b)(1), and (j).

¹⁴ 20 CFR 404.2015(b) and (c); 416.615(b) and (c).

¹⁵ Id.

¹¹ 27 CFR 478.11(a)(1)-(2).

¹² 81 FR at 27061.

indicated that this category of records includes certain agency designations of representative or alternate payees for program beneficiaries.¹⁶

Comment: Several individuals expressed concern that we would decide to expand the categories of names to submit to the NICS beyond the scope of the current rules without justification or prior notice.

Response: Prior to making any changes that would revise or otherwise substantively change the scope of the current rules, we would follow the Administrative Procedure Act's procedures of notice and comment rulemaking, similar to the process we followed in publishing these rules.

Mental Illness

Connection to Violence, Potential for Stigmatization

Comment: Commenters questioned the decision to add beneficiaries' names to the NICS based on mental illness, stating we had not provided data indicating that mental illness was a precursor for violence (particularly gun violence).

Response: We are not attempting to imply a connection between mental illness and a propensity for violence, particularly gun violence. Rather, we are complying with our obligations under the NIAA, which require us to provide information from our records when an individual falls within one of the categories identified in 18 U.S.C. 922(g). As we have noted previously, the ATF has clarified through regulation that the prohibitor referenced in 18 U.S.C. 922(g)(4) covers an individual determined by a court, board, commission or other lawful authority to be a danger to himself or others or to lack the mental capacity to contract or manage his or her own affairs as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease.¹⁷ A finding regarding an individual's ability to manage his or her own affairs does not require us to find that an individual has a propensity for violence before we report his or her name to the NICS. For that reason, the studies that the commenters cited regarding the relationship between mental illness and gun violence do not require us to make any changes to these rules.

Comment: Multiple commenters opined that these rules would unfairly stigmatize those with mental illness.

Response: We are committed to treating all beneficiaries with dignity

and respect. To that end, we regularly collaborate and consult with mental health and other advocacy groups and organizations to stay informed and responsive to the needs of beneficiaries with mental health issues. Our collaboration with these organizations includes, among other activities, hosting regular meetings, soliciting input on agency initiatives, and participating in national and regional conferences. We are not attempting to stigmatize individuals who have a mental illness, but are simply following the requirements imposed by Congress in the NIAA.

We would also like to highlight that when we report a beneficiary for inclusion in the NICS, we will disclose directly to the FBI a beneficiary's name, full date of birth, sex, and Social Security number. We will not include specific medical information with our report. We will inform the FBI only of the fact that the individual meets the criteria for inclusion in the NICS due to a mental health prohibitor, but we will not provide any details on the individual's specific diagnosis. The information will not be made public, and will be used solely for the purposes of the NICS program. Moreover, a Federal Firearms Licensee (FFL) who submits a NICS request when an individual attempts to purchase a firearm from the FFL would not know the reason for the individual's inclusion, or even which Federal agency had reported the individual's name to NICS. FFLs only receive a transaction number and a status of Delay, Deny, or Proceed (for the firearm purchase), which will avoid embarrassment or stigmatization for Social Security beneficiaries whose names we refer for inclusion in NICS.

Comment: Some commenters expressed concern that individuals might choose not to seek mental health treatment or apply for Social Security benefits out of fear that we would submit their information to the DOJ for inclusion in the NICS. One commenter stated that, "[t]he end result of this will be many will be very reluctant to seek help, and will refuse the help of a payee, if that is to be automatically reported in this way." Another commenter suggested that, "[o]ne unintended consequence of the proposed action will be to introduce a tremendous disincentive to those who would seek medical assistance."

Response: It is not our intent to discourage individuals from seeking disability benefits or appropriate mental health services. While the outcome of our decision may mean that some beneficiaries will meet the criteria for

inclusion in the NICS as detailed in section 421.110(b)(1)–(5) of our rules, our disability process will remain the same. It is also important to note that an FFL who submits a NICS request when an individual attempts to purchase a firearm from the FFL would not know the reason for the individual's inclusion, or even which Federal agency had reported the individual's name to NICS. FFLs only receive a transaction number and a status of Delay, Deny, or Proceed (for the firearm purchase), avoiding embarrassment or stigmatization for Social Security beneficiaries whose names we refer for inclusion in NICS.

Mental Illness Determination

Comment: We received several comments questioning how we determine whether individuals are disabled based on their diagnosed mental disorders. One commenter stated that, "[t]he parameters established within this rule are entirely too vague." The commenter went on to opine that the proposed rules rely on factors that are "severely error-prone," suggesting that our system " 'red flags' too many claims based simply on the mentioning of certain terms (*i.e.* 'red flagging' claims as 'suicidal' based solely on the term 'suicide' within a person's records . . . even if the actual reference is 'claimant states he does not have any suicidal ideations.' ") Another commenter stated that we do not explain the severity required to satisfy a mental disability listing.

Response: The Act and our implementing regulations set out the rules we apply for deciding whether an individual is disabled. The Act defines "disability" as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. A medically determinable physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities, which are demonstrated by medically acceptable clinical and laboratory diagnostic techniques. The medical evidence must establish a physical or mental impairment consisting of signs, symptoms, and laboratory findings. An individual's statement of symptoms is not sufficient basis for a determination of disability.

Our rules for evaluating mental disorders can be found in 20 CFR 404.1520a and 416.920a. We consider the medical severity of mental

¹⁶ 81 FR at 27061.

¹⁷ 27 CFR 478.11(a)(1)–(2).

disorder(s) using the mental disorders listings in appendix 1 of 20 CFR part 404, subpart P. We describe the severity required to satisfy a mental disorders listing in sections 404.1525 and 416.925 of our rules. For adults, the Listings describe impairments that we consider severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience. Most of the listed impairments are permanent or expected to result in death, or the listing includes a specific statement of duration. For all other listings, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months. Our criteria for deciding disability may differ from the criteria applied in other government and private disability programs.

When we make an initial determination whether an individual has a severe medical impairment or an impairment that meets or equals the severity of an impairment in the Listings, a team consisting of a doctor and disability examiner reviews the claimant's statements and the relevant evidence together. We base a determination on a thorough review and evaluation of an individual's record and not solely on the use of one term or "flag." The criteria that we use to determine disability for individuals with mental impairments is well-known and is published in the Act, our regulations, and our sub-regulatory instructions, all of which are available to the public on our Internet site.

Comment: Multiple commenters stated that, because our adjudication of an individual as disabled under our mental disorders listings causes the individual's name to be included in the NICS, commenters' perceived flaws in the adjudication process could lead to unfair inclusion in the NICS. Concerns were raised about the ability of our employees to participate in what seems to be a medical decision. Commenters also discussed the possible lack of input by medical professionals during the determination process. Multiple commenters raised the idea that it is difficult to properly diagnose mental illness at all.

Response: Our disability determination process for adults includes making medical determinations and evaluating claimants' mental impairments based on medical and other evidence. We follow a required sequential evaluation process in order and stop as soon as we can make a determination or decision. The steps are:

1. Is the individual working, and is the work substantial gainful activity? If

the answer is yes, we will find him or her not disabled. If the answer is no, we will move on to step 2.

2. Does the individual have a severe impairment? If the individual does not have an impairment or combination of impairments that significantly limits his or her physical or mental ability to do basic work activities, we will find him or her not disabled. If the individual does, we will go on to step 3.

3. Does the individual have an impairment(s) that meets or medically equals the severity of an impairment in the Listings? The Listings are examples of impairments that we consider severe enough to prevent an adult from doing any gainful activity. If the individual has an impairment(s) that meets or medically equals the severity of an impairment in the Listings, and the impairment(s) meets the duration requirement, we will find him or her disabled.¹⁸

When we evaluate whether an individual has a severe medical impairment or whether an impairment meets or equals the severity of an impairment in the Listings at the third step of our sequential evaluation, a team consisting of a doctor and disability examiner reviews the claimant's statements and the relevant evidence together. Our team will ask the claimant's doctors about the claimant's medical impairments, when the impairments began, how the impairments limit the claimant's activities, what the results of medical tests were, and what treatment the claimant received. They will also ask the claimant's doctors for information about the claimant's ability to perform work-related activities, such as walking, lifting, carrying, and remembering instructions.

Although mental impairments are qualitatively different from impairments that affect physical body systems, such as the cardiovascular or musculoskeletal body systems, mental impairments can and do prevent people from working. Our mental disorders listing criteria, which we recently updated effective January 17, 2017, accurately and reliably identify the mental impairments that prevent claimants from engaging in any gainful activity. Additionally, section 221(h)(1) of the Act requires us to make reasonable efforts to ensure that a qualified psychiatrist or psychologist completes the medical review of cases involving mental impairments before we

make a determination on a claim for benefits.¹⁹

Comment: Multiple commenters focused on our classification and diagnosis of mental disorders in general. One commenter asked which mental disorders would be included in the criteria under section 421.110 of our rules. One commenter stated that the term "mental impairment" itself is unclear and asked "[h]ow and who will define this impairment and to what degree will be considered worthy to report? If I have a panic attack is that worthy?" Another wondered if, "[f]or purposes of this rule, anxiety, abnormal sleep/appetite, inflated self-esteem, or decreased energy, combined with alleged difficulty in managing money, are sufficiently disabling to disqualify a person from possessing firearms." Hundreds of commenters asked if Post Traumatic Stress Disorder (PTSD) was an included impairment. Multiple commenters expressed concern that the disorders included in section 12.00 of the Listings are too broad, and equate "severe mental issues the same as other issues" such as "eating and anxiety disorders."

Response: As we explained in the NPRM, we will report an individual's record only if we have determined the individual to be disabled based on a finding that his or her impairment(s) meets or medically equals the requirements of one of the mental disorder listings and if he or she meets all the other four criteria. If any of these criteria are not met, we will not submit the individual's name to the NICS.

For an impairment to meet or medically equal a listing, an individual's symptoms must establish that he or she has a medically determinable mental impairment. A medically determinable mental impairment results from anatomical, physiological, or psychological abnormalities demonstrated by medically acceptable clinical and laboratory diagnostic techniques. The impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the claimant's statement of symptoms alone.²⁰ Specific signs or symptoms of a mental impairment combined with an alleged difficulty in managing money, alone, will not meet or equal one of the mental disorders listings. The claimant's mental impairment must also result in limitations in the claimant's ability to

¹⁸ We will not report to the NICS individuals whom we find disabled at step 5 of the sequential evaluation process.

¹⁹ 42 U.S.C. 421(h)(1), as amended by section 832(a) of the Bipartisan Budget Act of 2015, Public Law 114-74, 129 Stat. 584, 613.

²⁰ 20 CFR 404.1508 and 416.908.

function to the degree required by the listing criteria.

The Listings cover many categories of mental impairments to ensure that we can evaluate the types of impairments with which claimants are diagnosed. The Listings include criteria that, when satisfied, indicate that a person has a mental impairment that is disabling under our rules. PTSD is an example of an impairment that could meet or equal one of the Listings, if the claimant's signs, symptoms, and functional limitations rise to the level of severity required in the listing for PTSD.

On September 26, 2016, we published a comprehensive update to our mental disorders Listings, ensuring that the criteria we use to determine the presence of disability based on a mental impairment—and, by extension, the criteria that underlie our referrals to NICS—reflect the most modern medical standards in this area.²¹

Privacy and Confidentiality

Comment: Several commenters stated that our sending information to the NICS would violate beneficiaries' right to privacy, both generally and with regard to their medical information.

Response: We have stringent privacy and disclosure policies that protect our beneficiaries' right to privacy. We will not report any specific medical information when we report to the NICS. To meet the NIAA's requirement to report relevant records to the NICS, we will report only the name, full date of birth, sex, and Social Security number for each beneficiary who meets the criteria for inclusion in the NICS. The FBI will only be informed of the fact that the individual meets the criteria for inclusion in the NICS due to a mental health prohibitor, but we will not provide any details on the individual's specific diagnosis. Moreover, FFLs submitting a NICS request when an individual attempts to purchase a firearm from the FFL would not know the reason for the individual's inclusion, or even which Federal agency had reported the individual's name to NICS. FFLs only receive a transaction number and a status of Delay, Deny, or Proceed (for the firearm purchase), further protecting the privacy of Social Security beneficiaries whose names we refer for inclusion in NICS.

Our disclosure of individual information to the DOJ for the NICS

complies with the Privacy Act of 1974, 5 U.S.C. 552a; our privacy regulations, 20 CFR part 401; and all other applicable Federal law. We are publishing a new Privacy Act systems of records notice and, as appropriate, we will amend existing systems of records notices to cover the maintenance and disclosure of information for reporting individuals to the NICS.²² The systems of records notices will describe how we will report data to the NICS and the permitted uses of the data. Any systems of records from which we disclose information to the DOJ for the NICS will contain routine uses authorizing the disclosure of the information, without the consent of the individuals to whom the information pertains.²³

Comment: We received multiple comments from individuals stating that our proposed rules conflicted with HIPAA privacy rights or doctor-patient confidentiality.

Response: Our rules do not conflict with HIPAA because we will not share any specific medical information with the NICS. When we report an individual's record to the NICS, we will provide only his or her name, full date of birth, sex, and Social Security number. Moreover, HIPAA and any laws governing doctor-patient confidentiality do not apply to our disclosure of information from information maintained in agency systems of records to the DOJ for the NICS.

Representative Payee Appointment

Comment: We received many comments expressing concern about the manner in which we appoint representative payees. Some comments expressed the belief that we may force the appointment of representative payees for certain beneficiaries who do not require their services. Other commenters conveyed that perceived flaws in the representative payee appointment process would result in the unnecessary appointment of a representative payee and, consequently, unfair inclusion of names in the NICS. Multiple commenters questioned the manner in which we appoint representative payees. One individual questioned the thoroughness of our representative payee evaluation process, while others suggested that we should require direct medical evidence to support the need for a representative payee.

Response: Congress first authorized us to direct the payment of an individual's benefits to a representative payee as part of the Social Security Act Amendments

of 1939, so we have over 75 years of experience making capability findings and appointing payees for individuals. Under our policy, we presume that a legally competent adult beneficiary can manage or direct the management of his or her benefits unless there are indicators to the contrary. We will appoint a representative payee for a beneficiary who is under age 18 or a beneficiary who is age 18 or older and is legally incompetent or unable to manage or direct management of his or her benefits due to a physical or mental condition.²⁴ When we appoint a representative payee because a beneficiary is legally incompetent, we base our determination to do so on a court order.²⁵

We do not appoint a payee for an individual unless we determine this is necessary because the individual's interests would be better served by the appointment of a payee. We do not, and under these rules we will not, appoint a payee for any individual who does not need one. When we appoint a representative payee for reasons other than the beneficiary's legal incompetency, we base our determination on the available medical or other evidence, such as statements from relatives, friends, or people in positions to observe the beneficiary.²⁶ This process includes gathering medical evidence from the disability folder or a treating medical source, obtaining information from family members or friends about the person's ability to manage finances, and asking the individual how they handle monthly expenses and financial decisions.²⁷ We then identify an individual or organization to serve as representative payee.

When we propose to appoint a representative payee because of incapability, we provide the beneficiary with the right to protest and appeal the capability determination prior to the appointment. The beneficiary can also protest our choice of payee.²⁸

We are committed to continuous improvement of the representative payee program. Our goal is to ensure that beneficiaries who cannot manage or direct the management of their benefits have representative payees who will serve their best interests. When selecting payees, we look for any factors that could disqualify a person from

²⁴ We will not appoint a representative payee for a beneficiary who is age 15 to 17 and is emancipated under State law, unless we determine the beneficiary is incapable.

²⁵ 20 CFR 404.2015(a) and 416.615(a).

²⁶ 20 CFR 404.2015(b) and (c); 416.615(b) and (c).

²⁷ Id.

²⁸ 20 CFR 404.902 and 416.1402.

²¹ 81 FR 66138. The revised mental impairment listings will become effective on January 17, 2017. *Id.* at 66138. We based this revision to our mental impairment listings on the American Psychiatric Association's latest revision to the *Diagnostic and Statistical Manual of Mental Disorders*, the fifth edition, published in May 2013. *Id.*, at 66139.

²² 5 U.S.C. 552a(e)(4).

²³ 5 U.S.C. 552a(b)(3).

serving as a payee. For example, a person who has committed Social Security fraud may not be a payee. In addition, we conduct criminal background checks on certain representative payee applicants. We also bar representative payee applicants who have been convicted of serious felonies from serving as a representative payee.

The Social Security Protection Act of 2004 (SSPA) expanded our monitoring program by requiring us to conduct periodic reviews for any organizational payee that serves 50 or more beneficiaries, and individual payees serving 15 or more beneficiaries. In addition to these required reviews, we also conduct additional reviews of organizational and individual payees.

The SSPA provided us with additional methods to penalize representative payees found to have misused benefits, including: Making payees forfeit fee for service monies; enhancing our ability to hold payees liable for misused benefits; and granting us authority to impose civil monetary penalties when a payee misuses benefits.

In response to the SSPA, we developed an online misuse tracking system that we use to store and track all allegations of misuse of benefits. To help prevent misuse, we improved our training materials for individual and organizational representative payees. We also published revised instructions for our technicians, providing them with clarified and streamlined policies and procedures for processing misuse cases.

We also have sought recommendations for representative payee program improvement from external entities such as the National Academy of Sciences and National Academy of Medicine.

Comment: Several commenters questioned beneficiaries' ability to remove a representative payee once we appoint one. One commenter asked how we determine if an individual no longer needs a representative payee, and another opined that it is much more difficult to remove a representative payee than it is to obtain one.

Response: Our general policy starts with a presumption that every beneficiary has the right to direct payment.²⁹ At any time, a beneficiary whom we have determined to be incapable may request a capability determination. We may also conduct a capability determination if we have reason to believe that an incapable beneficiary may have become capable of managing or directing management of

his or her own benefits. We apply the same standards for the appointment or removal of a representative payee—ability or inability to manage or direct the management of benefits due to a physical or mental condition. If the beneficiary proves that he or she is capable, he or she will receive direct payment.³⁰ However, in response to these comments, we have clarified in these final rules that we will notify the Attorney General, or his or her designate, that an individual's record should be removed from the NICS when we find that an individual whom we previously required to have benefit payments made through a representative payee is now capable of managing his or her benefit payments without the need for a representative payee. We also have clarified several other situations in which we will notify the Attorney General to remove an individual's name from the NICS.

Comment: One commenter stated, "Presumably, a current recipient who can manage his/her own financial affairs and is in fact receiving benefits directly (e.g., direct deposit to bank account) would not fall under the above-mentioned phrase, and would retain the right to own, possess, etc., firearms. If this is true, I would recommend making that clearer in the [final] Rule." Another asked, "If disability benefits under Title II or Title XVI of the Social Security Act are NOT received through a representative payee (i.e., a third party), does the proposed rule to the NIAA still apply?" Many commenters expressed concern that an individual who assigns a representative payee for a temporary period or for convenience would be unfairly reported for inclusion in the NICS. A common scenario described by commenters was that of retired individuals who asked their children to pay their bills during an extended vacation. Another scenario described was that of a mentally capable individual with a physical disability who, due to an inability to write checks or drive, was assigned a representative payee.

Response: We clearly state in section 421.110(b) of our rules that the beneficiaries whose names we will submit to the NICS must meet *all five* well-defined criteria. We will not include any beneficiary who does not meet *all of these* criteria. We will not report a person to the NICS simply because the person has a representative payee if he or she does not meet *all* of the other criteria. Conversely, we will not report information regarding an individual who has a mental

impairment if we have not appointed a representative payee for the individual, because that individual would not meet all of the criteria for NICS reporting in our rules.

Beneficiaries cannot appoint a representative payee, nor can we name a representative payee without evidence indicating that the individual is legally incompetent or unable to manage or direct management of his or her benefits due to a physical or mental condition.³¹ We presume that a legally competent adult beneficiary can manage or direct the management of his benefits unless there are indicators to the contrary. Therefore, we do not appoint a representative payee for beneficiaries solely because they require assistance with financial matters or as a matter of convenience for the beneficiary.

Relief Process

Comment: Multiple commenters asked for specific information about the relief process, including when and at what points in the NICS inclusion decision process a request for relief could be submitted and reviewed, what documentation and evidence would be required to request relief, and who would review the evidence and make relief decisions.

Response: As we explained in the NPRM, consistent with section 101(a)(2)(A) of the NIAA, we will allow a person who is subject to the Federal mental health prohibitor to apply for relief from the Federal firearms prohibitions as a result of our adjudication. In section 421.150(a) of our rules, we indicate that an individual may apply for relief once our adjudication has become final.

In addition to providing us with a completed relief application form, consistent with the requirements set forth in section 421.151(b) of this final rule, we require the individual who requests relief to provide us with evidence from his or her primary mental health provider regarding his or her current mental health status and mental health status for the past 5 years, including a statement addressing whether the applicant has ever been a danger to himself or others and whether the applicant would pose a danger to himself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm and ammunition. We also require an applicant for relief to submit written statements and any other evidence regarding the applicant's reputation including a statement addressing whether the applicant would

²⁹ 20 CFR 404.2001 and 416.601.

³⁰ 20 CFR 404.2055 and 416.655.

³¹ 20 CFR 404.2001; 416.601.

pose a danger to himself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm and ammunition. We will obtain and consider a relief applicant's criminal history report as part of the relief process. We specify the details of the evidentiary requirements in section 421.151 of our rules.

We have not yet determined the details regarding who in our agency would review the evidence and issue relief decisions. We will publish this information in the **Federal Register** as part of the Paperwork Reduction Act process once we have finalized our business process, and the public will have an opportunity to review and respond to more relief details, including what information will be required and who will review the request.

Comment: Commenters suggested that we simplify the relief process for beneficiaries and representatives. Many expressed their disapproval that affected individuals would be required to request that their names be removed from the list and to provide evidence to our satisfaction to be removed from the list. Many highlighted the fact that the burden of proof for non-inclusion would lie with the individual. Other commenters found it problematic that our relief process does not make provision for a formal hearing before an adjudicative authority or allow the examination of witnesses. Several others suggested that we should provide legal counsel to those individuals whom we report to the DOJ.

Response: We have established a simple and direct process that satisfies the requirements of the NIAA. In addition to providing us with a completed relief application form, consistent with the requirements set forth in section 421.151(b) of this final rule, an applicant for relief will only be required to provide us with: (1) A current statement from his or her primary mental health provider assessing the applicant's current mental health status and mental status for the 5 years preceding the date of the relief request; and (2) written statements and any other evidence regarding the applicant's reputation. We will not impose a fee in connection with the filing of a request for relief. We anticipate that the cost for acquiring the evidence that we require and providing it to us directly will be reasonable. Moreover, the required evidence is more easily attained by the applicant directly. We will obtain the applicant's criminal history report on his or her behalf.

Section 101(a)(2)(A) of the NIAA provides that relief shall be available according to the standards prescribed in

18 U.S.C. 925(c). Section 925(c) states that relief may be granted if it is established that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest. It is generally appropriate under the law to place the burden of production and proof on the proponent of an order. In this case, that means the person who applies for relief must demonstrate his or her entitlement to relief, and there is no indication in the NIAA or any other provision of law that Congress intended to alter that normal rule. Similarly, the NIAA does not provide for the appointment of legal counsel for those seeking relief, nor is the appointment of counsel generally required under civil law.

Finally, in addition to the successful pursuit of relief from the NICS prohibitions, in new section 421.130 of the final rules, we have added three additional bases for removal of an individual's information from the NICS database. These bases apply when: (1) We find that an individual whom we previously required to have benefit payments made through a representative payee is now capable of managing his or her benefit payments without the need for a representative payee; (2) We are notified that the individual has died; or (3) We receive information that we reported an individual's record to the NICS in error (e.g., we reported to the NICS the record of an individual who does not have a primary diagnosis code in our records that is based on a mental impairment, or we reported the record of an individual who does not have a representative payee).

Comment: Multiple commenters sought clarification about what evidence we would consider when we review a request for relief. One commenter specifically asked about issues relating to documents attesting to a person's character and 5 years of mental health records, such as the availability of these records and who would be required or allowed to provide them. The commenter questioned whether a "clean" criminal record or State background check would qualify as documentation attesting to a person's character. Another commenter questioned the specifics of how we would propose that relief "may" be granted if an individual could establish to our "satisfaction" that the applicant will not be likely to act in a manner dangerous to public safety.

Response: The relief process that we outlined in the NPRM is based on the

NIAA, which indicates that relief and judicial review "shall be available according to the standards prescribed in section 925(c) of title 18, United States Code." That section of the law states that relief may be granted "if it is established to [an agency's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Section 421.151 of our rules specifies the evidence we will consider when we decide whether to grant an application for relief. It indicates that we will consider the applicant's record, which must include the applicant's mental health records and a criminal history report, and written statements regarding the applicant's character. We will obtain a criminal history report on the applicant's behalf. The rule states that the applicant must provide evidence from his or her primary mental health provider and written statements regarding the applicant's character. This evidence must include statements addressing (1) whether the applicant would pose a danger to himself or others if we granted the applicant's request for relief, and the applicant then purchased and possessed a firearm and ammunition, and (2) whether the applicant has a reputation for violence in the community.

We will provide other procedural details of our relief process in sub-regulatory guidance, as well as in the **Federal Register** as part of the Paperwork Reduction Act process, once we have finalized our business process. The public will have an opportunity to review and respond to additional details about the relief process, including what information will be required, in response to the Paperwork Reduction Act process.

Comment: One commenter questioned how beneficiaries could find out what their specific primary diagnosis was in order to best seek relief from inclusion in the NICS. The commenter also asked about the possibility of disputing the diagnosis, particularly when a secondary diagnosis is also involved in the adjudication of being disabled.

Response: We provide claim information to individuals upon their request. Under the Privacy Act of 1974 and our regulations, an individual may request access to his or her records maintained in agency Privacy Act systems of records, including those under which we maintain diagnosis

information.³² Our regulations require individuals to verify their identity when making an access request.³³ A beneficiary who proves his or her identity has the right to access his or her disability file in accordance with our rules.³⁴ The medical records include information about the beneficiary's primary and secondary diagnosis, if applicable.

Criteria for inclusion in the NICS include that an individual is disabled based on a finding at step three of our sequential evaluation process that the individual's impairment(s) meets or medically equals the requirements of one of the mental disorders listings.³⁵ These listings consist of medical conditions that we consider severe enough to prevent a person from doing any gainful activity, regardless of age, education, or work experience. Individuals whose impairments meet a listing are the most severely disabled individuals we serve. If we find an individual to be disabled based on a listing-level mental impairment, and he or she satisfies all of the remaining four requirements, we are required to report them to the NICS. If we do not find an individual to be disabled based on a mental impairment, he or she has not met the reporting requirements and we will not report them to the NICS.

Our administrative review process and the request for relief process are two different processes. If an individual wishes to appeal our disability determination or decision they may do so within the appeal period, which is generally 60 days after being notified of our determination or decision.

However, appealing a disability decision is not part of the NICS relief process. It is important to note that the qualifications for inclusion in the NICS are not the same as the qualifications for relief prescribed by 18 U.S.C. 925(c); that is, proof that he or she is not likely to act in a manner dangerous to public safety and that granting relief from the prohibitions will not be contrary to the public interest.

Comment: Several individuals expressed concern over the anticipated length of time for the processing of a request for relief, stating that 30 days was insufficient time to gather and submit all of the required information, particularly as it involved actions by other government agencies or individuals. One individual expressed

concern about the 30-day deadline for the submission of evidence supporting a beneficiary's request for relief in contrast to our 365-day response time. Several other commenters also questioned our ability to respond within the 365-day period, given current delays in the NICS-related relief programs run by other Federal agencies.

Response: In response to the comments we received expressing concerns about the 30-day deadline, we have revised the rules to eliminate this timeframe. Under the final rules, an individual may request relief at any time after our adjudication that the individual is subject to the Federal mental health prohibitor has become final. We will accept an individual's request for relief once he or she has compiled all of the evidence that we require, as set forth in section 421.151 of this final rule. We believe that this revised process for requiring that the applicant submit his or her evidence along with a request for relief comports with due process and allows us to process the application for relief no later than 365 days after receipt of the complete application and all required supporting documentation and evidence, as required under the NIAA. We will work in good faith to respond to all requests for relief promptly and within the 365-day period. Finally, there is no limit to the number of times a person can apply for relief.

Comment: One commenter suggested that we should not report to the DOJ individuals awaiting a response to their petition for relief unless a judge deems it appropriate.

Response: This suggestion is contrary to the language of the NIAA, which permits a person to apply for relief from the firearms prohibitions imposed by 18 U.S.C. 922(g)(4) and does not require judicial review prior to reporting. Further, as noted under section 421.170 of our rules, if we deny the applicant's request for relief, he or she may then seek judicial review of our action.

Comment: Multiple commenters asked if we would develop a procedure other than seeking relief to request the removal of individuals' names from the NICS for individuals who no longer meet the criteria that were the cause of their original inclusion in the NICS.

Response: As we noted in response to a prior comment, in addition to the successful pursuit of relief from the NICS prohibitions, in section 421.130 to the final rules, we have added three additional bases for removal of an individual's information from the NICS database. Specifically, we will notify the Attorney General to remove an individual's name from the NICS when:

(1) We find that an individual whom we previously required to have benefit payments made through a representative payee is now capable of managing his or her benefit payments without the need for a representative payee; (2) We are notified that the individual has died; or (3) We receive information that we reported an individual's record to the NICS in error (e.g., we reported to the NICS the record of an individual who does not have a primary diagnosis code in our records that is based on a mental impairment, or we reported the record of an individual who does not have a representative payee).

Comment: One commenter stated that, "there is no guarantee that the same prejudices that the rule creates in the first place won't reassert themselves" in the relief process.

Response: We use the same process to determine disability and to determine whether the individual needs a representative payee for each individual who applies for disability benefits. We determine whether a beneficiary is eligible for inclusion in the NICS after the disability process is complete. Therefore, there will be no opportunity for prejudice or bias concerning whether a beneficiary should be included in the NICS, because it is not a consideration during the disability determination process.

In addition, there will be no opportunity for bias or prejudice when we process a request for relief because, under 20 CFR 421.165, a different decision maker who was not involved in the beneficiary's disability or capability determinations, will review the evidence and act on the request for relief. We will follow the requirements of the NIAA and apply principles of due process in determining applicants' entitlement to relief from the Federal firearms prohibitions imposed as a result of our adjudication. Judicial review of our action denying an applicant's request for relief is available according to the standards set forth in 18 U.S.C. 925(c).

Resources Concerns

Comment: Several commenters expressed that this policy would be an unnecessary waste of the Government's time and resources. One commenter opined that implementing the proposed rules would add to the workload of SSI cases and risk additional backlogs, without any offsetting improvement to public safety.

Response: While we note the commenters' concerns, in issuing these rules we are satisfying our legal obligations under the NIAA that require Federal agencies to provide relevant

³² 5 U.S.C. 552a(d); 20 CFR 401.35–401.40.

³³ 20 CFR 401.45.

³⁴ 20 CFR 401.50, 401.55.

³⁵ See 20 CFR 404.1520(a)(4)(iii); 404.1520(d); 404.1525; 404.1526; 416.920(a)(4)(iii); 416.920(d); 416.925; 416.926. The Listings are found in 20 CFR part 404, subpart P, appendix 1.

records to the Attorney General for inclusion in the NICS.

Comments in Support of the Rule

Multiple commenters expressed support for the rule. Several individual commenters were in favor of our reporting certain individuals to the NICS database based on their expressed belief that some persons with mental illness should not be allowed to own firearms, because they could pose a danger to themselves or others. Some commenters spoke in their capacity as relatives and representative payees for Social Security beneficiaries with mental illness. One such commenter stated that if “someone does not have enough mental capacity to handle personal finances, he certainly does not have enough mental capacity to have access to guns.” Another commenter opined that medical professionals should support the rules, because clinicians would not want to authorize anyone to possess a firearm for legal liability reasons.

Several advocacy groups also articulated support for the rules. One group supported the rules as written. One group suggested we should expand the criteria used to identify names for inclusion in the NICS, stating that, “One issue not addressed by the proposed rule is the NICS status of future applicants for benefits who are dangerous due to severe mental illness, but who do not have third party representatives who receive payments on their behalf.” This commenter encouraged us to consider ways to expand the rule to include those beneficiaries who pose a danger to themselves or others, regardless of whether their payments are made to a representative payee.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the requirements for a significant regulatory action under Executive Order 12866 and were subject to OMB review.

Regulatory Flexibility Act

We certify that these final rules would not have a significant economic impact on a substantial number of small entities because they only affect individuals. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain new public reporting burdens in sections § 421.150(b), 421.151(b)(1) and (2),

421.151(c)(1), (2) and (3), 421.152, and 421.165(b) that require OMB approval under the Paperwork Reduction Act of 1995 (PRA). Since we will create new forms for these requirements, we will solicit public comment for them in a separate future notice in the **Federal Register** as part of the PRA process, and we will submit a separate information collection request to OMB. We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance, and 96.006, Supplemental Security Income)

List of Subjects 20 CFR Part 421

Administrative practice and procedure, Freedom of information, Privacy, Reporting and recordkeeping requirements.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we add part 421 to chapter III of title 20 of the Code of Federal Regulations to read as follows:

PART 421—NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)

Sec.

- 421.100 What is this part about?
- 421.105 Definitions of terms used in this part.
- 421.110 Identifying records relevant to the NICS.
- 421.120 NICS reporting requirements.
- 421.130 Removal of an individual's record from the NICS.
- 421.140 Notice requirements for an affected individual.
- 421.150 Requesting relief from the Federal firearms prohibitions.
- 421.151 Evidentiary requirements and processing a request for relief.
- 421.152 Timing of processing a request for relief.
- 421.155 Burden of proof in requests for relief.
- 421.160 Granting a request for relief.
- 421.165 Actions on a request for relief.
- 421.170 Judicial review following a denial of a request for relief.

Authority: 42 U.S.C. 902(a)(5); sec. 101, Pub. L. 110–180, 121 Stat. 2559, 2561 (18 U.S.C. 922 note).

§ 421.100 What is this part about?

The rules in this part relate to the Brady Handgun Violence Prevention Act (Brady Act), as amended by the NICS Improvement Amendments Act of 2007 (NIAA) (Pub. L. 110–180). The Brady Act required the Attorney General to establish the National Instant

Criminal Background Check System (NICS), which allows a Federal firearms licensee to determine whether the law prohibits a potential buyer from possessing or receiving a firearm. Among other things, the NIAA requires a Federal agency that has any records demonstrating that a person falls within one of the categories in 18 U.S.C. 922(g) or (n) to report the pertinent information contained in the record to the Attorney General for inclusion in the NICS. The rules in this part define key terms and explain which records we will report to the NICS. They also explain how we will provide oral and written notification to our title II and title XVI beneficiaries who meet the requisite criteria. Finally, the rules in this part explain how beneficiaries who meet the requisite criteria may apply for relief from the Federal firearms prohibitions, and how we will process a request for relief.

§ 421.105 Definitions of terms used in this part.

For the purposes of this part:

Adjudicated as a mental defective, in accordance with 18 U.S.C. 922(g)(4), as amended, means a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: Is a danger to himself or others; or lacks the mental capacity to contract or manage his own affairs.

Affected individual means an individual:

(1) Who has been found disabled based on a finding that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments (section 12.00 of appendix 1 to subpart P of part 404 of this chapter) under the rules in part 404, subpart P, of this chapter, or under the rules in part 416, subpart I, of this chapter; and

(2) For whom we need to make a capability finding under the rules in part 404, subpart U, of this chapter, or under the rules in part 416, subpart F, of this chapter, as a result of a mental impairment.

Commencement of the adjudication process means, with respect to an affected individual, the beginning of the process we use to determine whether, as a result of a mental impairment:

- (1) An individual is capable of managing his or her own benefits; or
- (2) Whether his or her interests would be better served if we certified benefit payments to another person as a representative payee, under the rules in part 404, subpart U, of this chapter, or

the rules in part 416, subpart F, of this chapter.

Full retirement age has the meaning used in § 404.409 of this chapter.

NICS means the National Instant Criminal Background Check System established by the Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (codified at 18 U.S.C. 922 note), as amended.

Primary diagnosis code means the code we use to identify an individual's primary medical diagnosis in our records. The primary diagnosis refers to the basic condition that renders an individual disabled under the rules in part 404, subpart P, of this chapter, or under the rules in part 416, subpart I, of this chapter.

Us or *We* means the Social Security Administration.

§ 421.110 Identifying records relevant to the NICS.

(a) In accordance with the requirements of the NIAA, we will identify the records of individuals whom we have “adjudicated as a mental defective.” For purposes of the Social Security programs established under titles II and XVI of the Social Security Act, we have “adjudicated as a mental defective” any individual who meets the criteria in paragraphs (b)(1) through (5) of this section.

(b) During our claim development and adjudication process, or when we take certain post-entitlement or post-eligibility actions, we will identify any individual who:

(1) Has filed a claim based on disability;

(2) Has been determined to be disabled based on a finding that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments (section 12.00 of appendix 1 to subpart P of part 404 of this chapter) under the rules in part 404, subpart P, of this chapter, or under the rules in part 416, subpart I, of this chapter;

(3) Has a primary diagnosis code in our records based on a mental impairment;

(4) Has attained age 18, but has not attained full retirement age; and

(5) Requires that his or her benefit payments be made through a representative payee because we have determined, under the rules in part 404, subpart U, of this chapter, or the rules in part 416, subpart F, of this chapter, that he or she is mentally incapable of managing benefit payments.

(c) We will apply the provisions of this section to:

(1) Capability findings that we make in connection with initial claims on or

after December 19, 2017 under the rules in part 404, subpart U, of this chapter or the rules in part 416, subpart F, of this chapter; or

(2) Capability findings that we make in connection with continuing disability reviews (including age-18 disability redeterminations under § 416.987 of this chapter) on or after December 19, 2017 under the rules in part 404, subpart U, of this chapter, or the rules in part 416, subpart F, of this chapter. We will apply the provisions of this paragraph (c)(2) only with respect to capability findings in which we appoint a representative payee for an individual in connection with a continuing disability review.

§ 421.120 NICS reporting requirements.

On not less than a quarterly calendar basis, we will provide information about any individual who meets the criteria in § 421.110 to the Attorney General, or his or her designate, for inclusion in the NICS. The information we will report includes the name of the individual, his or her full date of birth, his or her sex, and his or her Social Security number. We will also report any other information that the Attorney General determines Federal agencies should report to the NICS.

§ 421.130 Removal of an individual's record from the NICS.

(a) *General.* We will identify when the record of an individual that we previously identified for submission to the NICS under § 421.110 should be removed from the NICS database. We will notify the Attorney General, or his or her designate, that an individual's record should be removed from the NICS database only in the circumstances in paragraphs (b)(1) through (4) of this section.

(b) We will notify the Attorney General, or his or her designate, that an individual's record should be removed from the NICS when:

(1) We find that an individual whom we previously required to have benefit payments made through a representative payee is now capable of managing his or her benefit payments without the need for a representative payee;

(2) We are notified that the individual has died;

(3) We receive information that we reported an individual's record to the NICS in error (e.g., we reported to the NICS the record of an individual who does not have a primary diagnosis code in our records that is based on a mental impairment, or we reported the record of an individual who does not have a representative payee); or

(4) We grant the individual's request for relief under the rules in §§ 421.150

through 421.165, or a Federal court grants the individual's request for relief under the rules in § 421.170.

§ 421.140 Notice requirements for an affected individual.

At the commencement of the adjudication process, we will provide both oral and written notice to an affected individual that:

(a) A finding that he or she meets the criteria in § 421.110(b)(1) through (5), when final, will prohibit the individual from purchasing, possessing, receiving, shipping, or transporting firearms and ammunition, pursuant to 18 U.S.C. 922(d)(4) and (g)(4);

(b) Any person who knowingly violates the prohibitions in 18 U.S.C. 922(d)(4) or (g)(4) may be imprisoned for up to 10 years or fined up to \$250,000, or both, pursuant to 18 U.S.C. 924(a)(2); and

(c) Relief from the Federal firearms prohibitions imposed by 18 U.S.C. 922(d)(4) and (g)(4) by virtue of our adjudication is available under the NIAA.

§ 421.150 Requesting relief from the Federal firearms prohibitions.

(a) When our adjudication that an individual meets the criteria in § 421.110(b)(1) through (5) becomes final, he or she may apply for relief from the Federal firearms prohibitions imposed by Federal law as a result of our adjudication. If such an individual requests relief from us, we will apply the rules in §§ 421.150 through 421.165.

(b) An application for relief filed under this section must be in writing and include the information required by § 421.151. It may also include any other supporting data that we or the applicant deem appropriate. When an individual requests relief under this section, we will also obtain a criminal history report on the individual before deciding whether to grant the request for relief.

§ 421.151 Evidentiary requirements and processing a request for relief.

(a) When we decide whether to grant an application for relief, we will consider:

(1) The circumstances regarding the firearms prohibitions imposed;

(2) The applicant's record, which must include the applicant's mental health records and a criminal history report; and

(3) The applicant's reputation, developed through witness statements or other evidence.

(b) *Evidence.* The applicant must provide the following evidence to us in support of a request for relief:

(1) A current statement from the applicant's primary mental health

provider assessing the applicant's current mental health status and mental health status for the 5 years preceding the date of the request for relief; and

(2) Written statements and any other evidence regarding the applicant's reputation.

(c) *Evidentiary requirements*—(1) *A current statement from the applicant's primary mental health provider submitted under paragraph (b)(1) of this section.* We will consider a statement from the applicant's primary mental health provider to be current if it is based on a complete mental health assessment that was conducted during the 90-day period immediately preceding the date we received the applicant's request for relief under paragraph (b)(1) of this section. The statement must specifically address:

(i) Whether the applicant has ever been a danger to himself or herself or others; and

(ii) Whether the applicant would pose a danger to himself or herself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm or ammunition.

(2) *Written statements regarding the applicant's character submitted under paragraph (b)(2) of this section.* The statements must specifically:

(i) Identify the person supplying the information;

(ii) Provide the person's current address and telephone number;

(iii) Describe the person's relationship with and frequency of contact with the applicant;

(iv) Indicate whether the applicant has a reputation for violence in the community; and

(v) Indicate whether the applicant would pose a danger to himself or herself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm or ammunition.

(3) The applicant may obtain written statements from anyone who knows the applicant, including but not limited to clergy, law enforcement officials, employers, friends, and family members, as long as the person providing the statement has known the applicant for a sufficient period, has had recent and frequent contact with the beneficiary, and can attest to the beneficiary's good reputation. The individual submitting the written statement must describe his or her relationship with the applicant and provide information concerning the length of time he or she has known the applicant and the frequency of his or her contact with the applicant. The applicant must submit at least one statement from an individual who is not

related to the applicant by blood or marriage.

§ 421.152 Timing of processing a request for relief.

(a) An individual may request relief at any time after our adjudication that results in that person becoming prohibited by 18 U.S.C. 922(d)(4) or (g)(4) becomes final.

(b) We will process an application for relief under § 421.150 when the applicant has provided us with all the necessary evidence required under § 421.151(b)(1) through (3).

§ 421.155 Burden of proof in requests for relief.

An applicant who requests relief under § 421.150 must prove that he or she is not likely to act in a manner dangerous to public safety and that granting relief from the prohibitions imposed by 18 U.S.C. 922(d)(4) and (g)(4) will not be contrary to the public interest.

§ 421.160 Granting a request for relief.

(a) We may grant an applicant's request for relief if the applicant establishes, to our satisfaction, that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest.

(b) We will not grant an applicant's request for relief if the applicant is prohibited from possessing firearms by the law of the State in which the applicant resides.

§ 421.165 Actions on a request for relief.

(a) After the applicant submits the evidence required under § 421.151 and any other evidence he or she wants us to consider, we will review the evidence, which will include any evidence from our records that we determine is appropriate. A decision maker who was not involved in making the finding that the applicant's benefit payments be made through a representative payee will review the evidence and act on the request for relief. We will notify the applicant in writing of our action regarding the request for relief.

(b) If we deny an applicant's request for relief, we will send the applicant a written notice that explains the reasons for our action. We will also inform the applicant that if he or she is dissatisfied with our action, he or she has 60 days from the date he or she receives the notice of our action to file a petition seeking judicial review in Federal district court.

(c) If we grant an applicant's request for relief, we will send the applicant a written notice that explains the reasons for our action. We will inform the applicant that we will notify the Attorney General, or his or her delegate, that the individual's record should be removed from the NICS database. We will also notify the applicant that he or she is no longer prohibited under 18 U.S.C. 922(g)(4) from purchasing, possessing, receiving, shipping, or transporting firearms or ammunition based on the prohibition that we granted the applicant relief from. We will notify the Attorney General, or his or her delegate, that the applicant's record should be removed from the NICS database after we grant the applicant's request for relief.

(d)(1) The NIAA requires us to process each application for relief not later than 365 days after the date we receive it. We consider the application date for the request for relief to be the date on which all evidence required under § 421.151(a) is submitted.

(2) If we fail to resolve an application for relief within that period for any reason, including a lack of appropriated funds, we will be deemed to have denied the relief request without cause. In accordance with the NIAA, judicial review of any petition brought under this paragraph (d) shall be de novo.

§ 421.170 Judicial review following a denial of a request for relief.

(a) Judicial review of our action denying an applicant's request for relief is available according to the standards contained in 18 U.S.C. 925(c). An individual for whom we have denied an application for relief may file a petition for judicial review with the United States district court for the district in which he or she resides.

(b) If, on judicial review, a Federal court grants an applicant's request for relief, we will notify the Attorney General that the individual's record should be removed from the NICS database.

[FR Doc. 2016-30407 Filed 12-16-16; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration****21 CFR Part 101**

[Docket No. FDA-2013-P-0047]

RIN 0910-AH43

Food Labeling: Health Claims; Dietary Saturated Fat and Cholesterol and Risk of Coronary Heart Disease**AGENCY:** Food and Drug Administration, HHS.**ACTION:** Interim final rule; request for comments.

SUMMARY: The Food and Drug Administration (FDA or we) is amending the regulation authorizing a health claim on the relationship between dietary saturated fat and cholesterol and risk of coronary heart disease (CHD) to permit raw fruits and vegetables that fail to comply with the “low fat” definition and/or the minimum nutrient content requirement to be eligible to bear the claim. We are taking this action in response to a petition submitted by the American Heart Association (the petitioner). The amendment expands the use of this health claim to certain fruits and vegetables that are currently ineligible for the health claim.

DATES: This interim final rule is effective December 19, 2016. Interested persons may submit either electronic or written comments by March 6, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://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 <http://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):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA-2013-P-0047 for “Food Labeling: Health Claims; Dietary Saturated Fat and Cholesterol and Risk of Coronary Heart Disease.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” We will review this copy, including the claimed confidential information, in our 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 <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. 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: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Vincent de Jesus, Center for Food Safety and Applied Nutrition (HFS-830), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740-3835, 240-402-1450.

SUPPLEMENTARY INFORMATION:**Executive Summary****Purpose of the Regulatory Action**

This interim final rule amends the regulation authorizing a health claim on the relationship between dietary saturated fat and cholesterol and risk of coronary heart disease (CHD). The interim final rule permits raw fruits and vegetables that fail to comply with the “low fat” definition and/or the minimum nutrient content requirement to be eligible to bear the claim. Health claims, in general, must meet certain nutrient requirements that we establish to ensure that health claims are used on foods with nutritional value. For example, except where provided for in other regulations, foods bearing a health claim must contain one or more of vitamin A, vitamin C, iron, calcium, protein, or fiber at or above 10 percent of the Reference Daily Intake (RDI) or Daily Reference Value (DRV), before any nutrient addition (§ 101.14(e)(6) (21 CFR 101.14(e)(6)). Additionally, for foods bearing health claims related to CHD, the food often must be a “low fat” food (see e.g., §§ 101.75(c)(2)(ii) and 101.81(c)(2)(iii)(D)). An unintended consequence of these general requirements is that some foods that are generally considered to contribute to a healthy diet are ineligible to bear certain health claims. A small number of fruits and vegetables, for example, are ineligible to bear the dietary saturated fat and cholesterol and risk of CHD health claim because they do not meet the requirement to have 10 percent of the RDI or DRV of certain nutrients and/or they do not meet the definition of a “low fat” food. However, consumption of fruits and vegetables is encouraged by dietary recommendations, and low saturated fat and low cholesterol fruits and vegetables should not be excluded

from bearing this health claim. To address this unintended consequence, this interim final rule includes provisions that exempt raw fruits and vegetables from:

(1) Needing to meet the 10 percent nutrient content requirement in § 101.14(e)(6).

(2) Needing to meet the definition for a “low fat” food in § 101.62.

The Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Pub. L. 101–535) amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) by clarifying, among other things, FDA’s authority to regulate health claims on food labels and in food labeling. Using that authority, in 1993 we issued § 101.75, which authorizes a health claim about the relationship between diets low in saturated fat and cholesterol and a reduced risk of CHD (58 FR 2739, January 6, 1993).

Section 403(r)(4) of the FD&C Act (21 U.S.C. 343(r)(4)) establishes a mechanism for any person to petition us to issue a regulation relating to a claim that characterizes the level of any nutrient or the relationship of any nutrient to a disease or a health-related condition. We received a petition, under section 403(r)(4) of the FD&C Act, requesting that we amend the dietary saturated fat and cholesterol and risk of CHD health claim to permit raw fruits and vegetables, as well as single-ingredient or mixtures of frozen or canned fruits and vegetables that contain no added fat or sugars, which fail to comply with the “low fat” definition and/or the minimum nutrient content requirement, to be eligible to bear the claim. This interim final rule responds to that petition.

Summary of the Major Provisions of the Regulatory Action in Question

Under the interim final rule, raw fruits and vegetables are exempt from needing to meet the minimum nutrient content requirement of the general principles for health claims and from the requirement specifically included in the dietary saturated fat and cholesterol and risk of CHD health claim that a food meet the definition for “low fat” to be eligible to bear the claim. Current FDA regulations, at § 101.75(c)(1), state that all requirements set forth in § 101.14 must be met. The interim final rule revises § 101.75(c)(1) to provide an exemption for raw fruits or vegetables from meeting the minimum nutrient content requirement in § 101.14(e)(6).

Current FDA regulations, at § 101.75(c)(2)(ii), establish requirements regarding the nature of the food, except for fish and game meats; the food must meet all nutrient content requirements

of § 101.62 for a “low saturated fat,” “low cholesterol,” and “low fat” food. We are amending § 101.75(c)(2)(ii) to provide an exemption from meeting the nutrient content requirements of § 101.62 for “low fat” if the food is a raw fruit or vegetable.

I. Background

A. The Nutrition Labeling and Education Act of 1990

The 1990 amendments amended the FD&C Act in a number of important ways. Among other changes, the 1990 amendments clarified our authority to regulate health claims on food labels and in food labeling. Under this authority, we issued several regulations, including § 101.14, *Health claims: General requirements* (58 FR 2478 at 2533), which sets forth general principles for the authorization and use of health claims, and § 101.70, *Petitions for health claims* (58 FR 2478 at 2534), which sets forth a process for petitioning us to authorize health claims about substance-disease relationships, and sets out the types of information that any such petition must include. Among other provisions, the general principles for health claims include requirements for determining the eligibility of a food to bear a health claim. Examples include disqualifying nutrient levels (§ 101.14(a)(4)), which are specific nutrient thresholds not to be exceeded by a food bearing a health claim as required by § 101.14(e)(3), and also a minimum nutrient content requirement (§ 101.14(e)(6)) to ensure that a food bearing a health claim provide meaningful nutritive value as determined by meeting specific nutrient content levels.

B. Dietary Saturated Fat and Cholesterol and Risk of Coronary Heart Disease Health Claim

When implementing the 1990 amendments, we also conducted a review of evidence for a relationship between dietary saturated fat and cholesterol and risk of CHD. Based on the totality of the publicly available scientific evidence, we concluded that there was significant scientific agreement among qualified experts that diets low in saturated fat and cholesterol may reduce the risk of CHD. Therefore, we authorized a health claim about the relationship between diets low in saturated fat and cholesterol and a reduced risk of CHD (§ 101.75; 58 FR 2739 at 2757, January 6, 1993). Among the specific requirements included in § 101.75 are requirements that, in addition to the general requirements set forth in § 101.14, foods must meet all of

the nutrient content requirements in § 101.62 for a “low saturated fat,” “low cholesterol,” and “low fat” food in order to be eligible to bear the health claim, except that fish and game meats (*i.e.*, deer, bison, rabbit, quail, wild turkey, geese, and ostrich) may meet the requirements for “extra lean” in § 101.62.

II. Petition and Grounds

We received a petition from the American Heart Association (Docket No. FDA–2013–P–0047) on October 1, 2012, under section of 403(r)(4) of the FD&C Act. The petition requested that we amend the dietary saturated fat and cholesterol and risk of CHD health claim (§ 101.75) to permit raw fruits and vegetables, as well as single-ingredient or mixtures of frozen or canned fruits and vegetables that contain no added fat or sugars, which fail to comply with the “low fat” definition and/or the minimum nutrient content requirement, to be eligible to bear the claim. In addition, the petition requested that we issue an interim final rule by which fruits and vegetables that fail to comply with the “low fat” definition and/or the minimum nutrient content requirement could be eligible to bear the claim before publication of a final rule. Section 403(r)(4) of the FD&C Act establishes a mechanism for any person to petition us to issue a regulation relating to a claim that characterizes the level of any nutrient or the relationship of any nutrient to a disease or a health-related condition. On January 10, 2013, we notified the petitioner that we had completed our initial review of the petition, that the petition had been filed for further action in accordance with section 403(r)(4) of the FD&C Act, and that the filing date was January 9, 2013. Under the FD&C Act, if we do not act, by either denying the petition or issuing a proposed regulation to authorize the health claim, within 90 days of the date of filing for further action, the petition is deemed to be denied unless an extension is mutually agreed upon by us and the petitioner (21 U.S.C. 343(r)(4)(A)(i) and § 101.70(j)(3)(iii)). On April 9, 2013, we mutually agreed with the petitioner to extend the deadline to October 7, 2013. Later, through subsequent agreements, we mutually agreed to extend the deadlines several times, with the last deadline being March 17, 2017.

The petitioner explained that some of our requirements for the dietary saturated fat and cholesterol and risk of CHD health claim prevent a number of fruits and vegetables from being eligible to bear the claim. The minimum nutrient content requirement for all

health claims requires that, to be eligible to bear a health claim, a food contains 10 percent or more of the Reference Daily Intake or the Daily Reference Value for vitamin A, vitamin C, iron, calcium, protein, or fiber per reference amount customarily consumed (RACC) prior to any nutrient addition (see § 101.14(e)(6)). Although most fruits and vegetables meet this minimum requirement for one or more of the described nutrients, a small number of fruits and vegetables do not meet the minimum nutrient content requirement. For example, grapes, plums, beets, and cucumbers do not contain 10 percent of the RDI or DRV of vitamin A, vitamin C, iron, calcium, protein, or fiber per RACC. Additionally, the dietary saturated fat and cholesterol and risk of CHD health claim requires that a food bearing the claim meet all of the nutrient content requirements of § 101.62 for “low saturated fat,” “low cholesterol,” and “low fat” (§ 101.75(c)(2)(ii)). Again, most fruits and vegetables meet the requirement for “low fat,” but at least one fruit, avocados, does not meet the requirement and therefore is not eligible to bear the claim, even though the fruit meets the requirements for “low saturated fat” and “low cholesterol.”

The petition requested that fruits and vegetables, as a category of foods, be exempted from meeting the minimum nutrient content requirement and the “low fat” requirement for the dietary saturated fat and cholesterol and risk of CHD health claim. The petition asserted that, based on the scientific evidence, fruits and vegetables as a group contribute to reduced risk of CHD regardless of their inherent fat content or their ability to meet 10 percent of the RDI or DRV of vitamin A, vitamin C, iron, calcium, protein, or fiber per RACC. The petition described the scientific evidence relating consumption of fruits and vegetables and risk of CHD, including large observational studies (*e.g.*, the Women’s Health Study) (Ref. 1) and intervention studies on fruit and vegetable intake and surrogate endpoints for CHD risk (*e.g.*, low-density lipoprotein concentration) (Ref. 2). Additionally, the petition detailed the numerous current public health recommendations, such as the Dietary Guidelines for Americans (DGA) 2010, published by the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA) (Ref. 3) and the National Cholesterol Education Program (NCEP) of the National Heart Lung and Blood Institute (NHLBI) of the National Institutes of Health (NIH) (Ref. 4), which

consistently encourage fruit and vegetable consumption as an integral part of a healthful diet, regardless of the specific nutrient contents of individual fruits and vegetables.

The petition requested the following specific changes in the regulation governing the dietary saturated fat and cholesterol and risk of CHD health claim:

- Modify § 101.75(c)(2)(ii) to create a new paragraph (A) and remove “low fat” food from the list of nutrient content requirements in § 101.62 a food must meet.
- Modify § 101.75(c)(2)(ii) to create a new paragraph (B) that provides an exemption to the nutrient content requirements of § 101.62 for a “low fat” food if it is a raw fruit or vegetable, or is a single-ingredient or mixture of frozen or canned fruits and vegetables that contains no fats or sugars in addition to the fats or sugars inherently present in the fruit or vegetable product.
- Modify § 101.75(c)(1) to exempt raw fruits and vegetables, or single-ingredient or mixtures of frozen or canned fruits and vegetables from meeting the requirement of § 101.14(e)(6).

In addition, the petition requested that we issue an interim final rule under section 403(r)(7)(A) of the FD&C Act, stating that the evidence is compelling and the potential to encourage fruit and vegetable consumption is important for public health and that issuing an interim final rule would allow affected fruit and vegetable products to become eligible to bear these health claims as expeditiously as possible.

III. Decision To Amend the Health Claim

A. Current Dietary Recommendations for Fruit and Vegetable Intake

The DGA, issued every 5 years by USDA and HHS, sets forth the Federal Government’s official recommendations regarding healthy eating and construction of a healthful diet (Ref. 5). The 2015–2020 DGA is the most recent version. At the core of the 2015–2020 DGA, as stated in Chapter 1 (“Key Elements of Healthy Eating Patterns”), “is the importance of consuming overall healthy eating patterns, including vegetables, fruits, grains, dairy, protein foods, and oils—eaten within an appropriate calorie level and in forms with limited amounts of saturated fats, added sugars, and sodium.” Key recommendations of the 2015–2020 DGA are to “Shift to consume more vegetables” and “Shift to consume more fruits.” For example, Chapter 2 (“Shifts Needed to Align With Healthy Eating

Patterns”) of the 2015–2020 DGA discusses intakes and states that “For most individuals, following a healthy eating pattern would include an increase in total vegetable intake from all vegetable subgroups, in nutrient-dense forms, and an increase in the variety of different vegetables consumed over time.” Chapter 2 likewise states that “To help support healthy eating patterns, most individuals in the United States would benefit from increasing their intake of fruits, mostly whole fruits, in nutrient-dense forms.”

We note that the recommendations in the 2015–2020 DGA regarding fruits and vegetables are directed at intakes of fruit and vegetables as a group. Particularly, in the discussions on fruit and vegetable intake throughout the report, the 2015–2020 DGA considers fruits and vegetables as a category of foods when discussing the associations between fruit and vegetable intake and reduced risk of cardiovascular disease or other chronic diseases (Ref. 5). Our reliance on dietary recommendations in this rulemaking and in previous health claim regulations is based on provisions of the 1990 amendments that direct us to issue health claim regulations that take into account the role of the nutrients in food in a way that will enhance the chances of consumers maintaining healthy dietary practices (see section 403(r)(3)(A) and (r)(3)(B) of the FD&C Act and previous health claim regulations for plant sterol/stanol esters and reduced risk of CHD (§ 101.83) and soluble fiber from certain foods and risk of CHD (§ 101.81)). Thus, general eligibility requirements that establish which types of foods are able to bear health claims have been typically determined based on the current dietary recommendations and guidelines at the time. The requirements are established to include foods and categories of foods that are encouraged to be consumed for their benefits to health, while restricting foods whose consumption is not encouraged from bearing health claims (*see* 58 FR 2478 at 2490).

B. Low Fat

Our regulations authorizing CHD-related health claims (§§ 101.75, 101.81, 101.82, and 101.83) require, with a few exceptions, that foods bearing such claims meet: (1) The “low fat” criterion defined by § 101.62(b)(2); (2) the “low saturated fat” criterion defined by § 101.62(c)(2); and (3) the “low cholesterol” criterion defined by § 101.62(d)(2).

The term “low fat” may be used on the label or in the labeling of food, except meal products as defined in § 101.13(l) and main dish products as

defined in § 101.13(m), provided that the food has a reference amount customarily consumed greater than 30 grams (g) or greater than 2 tablespoons and contains 3 g or less of fat per reference amount customarily consumed; or the food has a reference amount customarily consumed of 30 g or less or 2 tablespoons or less and contains 3 g or less of fat per reference amount customarily consumed and per 50 g of food (for dehydrated foods that must be reconstituted before typical consumption with water or a diluent containing an insignificant amount, as defined in § 101.9(f)(1), of all nutrients per reference amount customarily consumed, the per 50-g criterion refers to the “as prepared” form) (§ 101.62(b)(2)).

The term “low saturated fat” may be used on the label or labeling of foods, except meal products as defined in § 101.13(1) and main dish products as defined in § 101.13(m), provided that the food contains 1 g or less of saturated fatty acids per reference amount customarily consumed and not more than 15 percent of calories from saturated fatty acids (§ 101.62(c)(2)).

The term “low cholesterol,” under § 101.62(d)(2), may be used on the label or in the labeling of foods, except meal products as defined in § 101.13(l) and main dish products as defined in § 101.13(m), provided that, for foods that have a reference amount customarily consumed greater than 30 g or greater than 2 tablespoons and contain 13 g or less of total fat per reference amount customarily consumed and per labeled serving, the food contains 20 milligrams or less of cholesterol per reference amount customarily consumed or the food contains 2 g or less of saturated fatty acids per reference amount customarily consumed.

The petition noted that a fruit such as an avocado exceeds the 3 g total fat per RACC criterion of the “low fat” definition and therefore would never be able to bear the health claim for diets low in saturated fat and cholesterol and reduced risk of CHD. According to our nutrient data on the 20 most frequently consumed fruits (§§ 101.42 through 101.45 and appendix C to part 101), avocados contain 4.5 g total fat per RACC and do, indeed, exceed 3 g total fat per RACC. Barring an exemption to the “low fat” requirement, avocados (and any other fruit or vegetable with a total fat content in excess of the criteria for “low fat”) are not eligible to bear the dietary saturated fat and cholesterol and risk of CHD health claim.

In the 1993 final rule authorizing the dietary saturated fat and cholesterol and

risk of CHD health claim (58 FR 2739), we established “low fat” as a qualifying criterion for eligibility for the claim asserting that “while total fat is not as strongly or directly linked to increased risk of CHD . . . it may have significant indirect effects.” We discussed how “low fat foods generally help individuals in reducing their intake of saturated fat and cholesterol” and how excess calories, of which fat contributes more per gram than the other energy nutrients, is associated with two health-related conditions (obesity and diabetes) that are risk factors for heart disease (58 FR 2739 at 2742). In support of these determinations, we noted that, “Low fat diets are recommended in all Federal Government and National Academy of Sciences’ dietary guidelines for reducing the risk of heart disease” (58 FR 2739 at 2742).

Since we published the final rule for the dietary saturated fat and cholesterol and risk of CHD health claim in 1993, the science related to intake of total fat has evolved, and the current dietary recommendations no longer contain a recommendation encouraging the consumption of diets low in total fat. Beginning with the 2000 DGA, recommendations for total fat intake shifted from recommending diets low in fat to diets moderate in total fat (Ref. 6). The recommendations reflected a shift in focus to types of fat consumed (*i.e.*, saturated versus unsaturated fat) and their relation to effects on blood cholesterol concentrations. The recommendations for moderate fat intake continued through the 2005 DGA (Ref. 7) with even more discussion on types of fat in the diet (*e.g.*, polyunsaturated and monounsaturated fats) and their influence on cardiovascular disease. The discussion on total fat intake in the 2010 DGA (Ref. 3) focused on the importance of staying within the Institute of Medicine (IOM) of the National Academies of Science Acceptable Macronutrient Distribution Range (AMDR) for total fat intake of 20 to 35 percent of energy for adults and an AMDR of 25 to 35 percent of energy for children age 4 to 18 years (Ref. 8). The AMDRs are associated with reduced risk of chronic diseases, such as cardiovascular disease, while providing for adequate intake of essential nutrients (Ref. 8).

The 2015–2020 DGA does not focus on total fat intake, but instead makes recommendations about types of fat. Chapter 1 (“Key Elements of Healthy Eating Patterns”) states that “[a] healthy eating pattern limits . . . [s]aturated fats and *trans* fats . . .” and contains a key recommendation to “[c]onsume less than 10 percent of calories per day from

saturated fats. . . .” In this same chapter, the 2015–2020 DGA notes that “[t]he recommendation to limit intake of calories from saturated fats to less than 10 percent per day is a target based on evidence that replacing saturated fats with unsaturated fats is associated with reduced risk of cardiovascular disease” (Ref. 5, page 15).

As a result of the modifications in the dietary recommendations for total fat intake over the years, we have exempted certain foods at times from needing to meet the “low fat” requirement to be eligible to make a health claim related to CHD if those foods are consistent with dietary recommendations. For example, whole oats are exempt from meeting the “low fat” requirement to be eligible for “Soluble Fiber from Certain Foods and Risk of Coronary Heart Disease” health claim (§ 101.81). In providing the exemption, we discussed that consumption of whole oats was consistent with the recommendations regarding fat intake in the 2005 DGA and that consumption of foods such as whole oats was helpful in reducing the risk of CHD (73 FR 23947 at 23951, May 1, 2008).

We find that not imposing a “low fat” requirement for raw fruits and vegetables is consistent with the 2015–2020 DGA recommendations to increase intake of fruits and vegetables to help support healthy eating patterns (Ref. 5), as well as the 2015–2020 DGA emphasis on types of fat rather than total fat when discussing CHD risk (Refs. 5 and 7). We note that the fruits and vegetables that we are exempting from meeting the definition of “low fat” must still comply with general health claim requirements in order to be eligible to bear the claim, including, but not limited to, the requirement in § 101.14(e)(3) that the level of fat must not exceed the disqualifying nutrient level for total fat in § 101.14(a)(4).

C. Minimum Nutrient Content

In the 1993 final rule on the general requirements for health claims (58 FR 2478), we established the minimum nutrient content requirement for eligibility of foods to bear health claims. We stated that foods bearing health claims should be those consistent with dietary guidelines and that the value of health claims should not be trivialized or compromised by their use on foods of little or no nutritional value. We also stated that claims intended to promote the consumption of food that is incompatible with dietary guidelines would be misleading to consumers (58 FR 2478 at 2521). We developed an approach that would limit health claims to foods that contribute certain nutrients

to the diet and, thus, are sources of more than calories (58 FR 2478 at 2521). We concluded that a food must contain one or more of vitamin A, vitamin C, iron, calcium, protein, or fiber at or above 10 percent of the RDI or DRV, prior to any nutrient addition, noting that most foods consistent with dietary guidelines met this criterion. Therefore, we added § 101.14(e)(6) to state that, except for dietary supplements that are not in conventional food form, the food must contain 10 percent or more of the Reference Daily Intake or the Daily Reference Value for vitamin A, vitamin C, iron, calcium, protein, or fiber per reference amount customarily consumed before any nutrients are added. We adopted this requirement in light of Congressional intent that health claims be used to help Americans maintain a balanced and healthful diet consistent with dietary guidelines (58 FR 2478 at 2521).

We later published technical amendments to the health claim regulations acknowledging that certain food products that had limited nutritional value may be determined to be appropriate foods to bear a health claim (58 FR 44036, August 18, 1993). We noted that we intended to address such situations in the regulations authorizing specific health claims, such as through an exception to the general requirements expressed in § 101.14(e)(6) (58 FR 44036).

Thus, we have recognized that exemptions to the minimum nutrient content requirement may be necessary in certain situations to help consumers construct overall daily diets that conform to current dietary guidelines and that otherwise promote good health. Multiple such exemptions have already been granted. For example, on August 23, 1996, we exempted noncariogenic carbohydrate sweeteners (carbohydrate sweeteners that do not promote the development of tooth decay) from the minimum nutrient content requirement to be eligible for the “dietary noncariogenic carbohydrate sweeteners and dental caries” health claim (§ 101.80) (61 FR 43433 at 43436). We reiterate that the minimum nutrient content requirements of § 101.14(e)(6) are important, but that an exemption from the minimum nutrient content requirements for fruits and vegetables as a group is warranted for these products to be eligible to bear the health claims authorized in § 101.75, given current dietary guideline recommendations. The value of these health claims will not be trivialized or compromised by their use on fruits and vegetables because current dietary guidelines emphasize that increased intake of fruits and vegetables

is an integral part of creating healthful diets and reducing the risk of chronic disease.

D. Conclusion

We agree with the petitioner that some current requirements for the dietary saturated fat and cholesterol and risk of CHD health claim prevent a number of fruits and vegetables from being eligible to bear the claim. We also agree that fruits and vegetables as a group appear to contribute to a reduced risk of CHD regardless of their inherent fat content or their ability to meet 10 percent of the RDI or DRV of vitamin A, vitamin C, iron, calcium, protein, or fiber per RACC. We previously have exempted foods from needing to meet individual requirements for health claim eligibility when, as here, consumption of the foods is consistent with contemporary science-based dietary recommendations. We conclude that raw fruits and vegetables should be exempt from needing to meet the minimum nutrient content requirement of the general principles for health claims and from the requirement specifically included in the dietary saturated fat and cholesterol and risk of CHD health claim that a food meet the definition for “low fat” to be eligible to bear the claim.

Although the petition requested that a “single-ingredient or mixture of frozen or canned fruits and vegetables that contains no fats or sugars in addition to the fats or sugars inherently present in the fruit or vegetable product” also be exempt from the low fat and minimum nutrient content requirements, we are not including these types of products in the exemptions at this time. We are able to easily determine which foods fall into the category of raw fruits and vegetables. With single-ingredient or mixtures of canned or frozen fruit and vegetable products, however, the categories are very broadly described, and it is difficult to know all of the types of products that may become included in an exemption. There are many food products that could conceivably be considered “fruit or vegetable products,” including products with varying degrees of processing, with numerous possibilities of ingredients in a “mixture,” or with a number of packaging variations. We determine that providing an exemption for raw fruits and vegetables will affect the public health positively, but it is unclear if all single-ingredient and mixtures of frozen or canned fruits and vegetables that contain no fats or sugars in addition to the fats or sugars inherently present in the fruit or vegetable product would have similar effects. Therefore, we

decline to extend any exemptions to this category of fruit and vegetable products at this time. However, we invite comments on this issue. If we receive information related to the possible iterations of canned and frozen fruit and vegetable products and also on their effects on health, we may consider expanding the foods included in the exemption in the future. Indeed, the petition encouraged FDA to proceed with exemptions solely for raw fruits and vegetables if the canned and frozen products required additional consideration.

IV. Description of Amendments to § 101.75

We are revising § 101.75(c) to: (1) Provide an exemption at § 101.75(c)(1) for raw fruits or vegetables from meeting the minimum nutrient content requirement in § 101.14(e)(6), and (2) revise § 101.75(c)(2)(ii) to provide an exemption from meeting the nutrient content requirements of “low fat” if the food is a raw fruit or vegetable.

V. Economic Analysis of Impacts

A. Introduction

We have examined the impacts of the interim final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the interim final rule. We believe that this interim final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this interim final rule concerns voluntary claims, we certify that the interim final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in

the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This interim final rule would not result in an expenditure in any year that meets or exceeds this amount.

B. Summary of Benefits and Costs of the Interim Final Rule

This interim final rule amends the regulation authorizing a health claim on the relationship between dietary saturated fat and cholesterol and risk of CHD by expanding its use to raw fruits and vegetables that do not meet the “low fat” definition (§ 101.62(b)(2)) and/or the minimum nutrient content requirement (§ 101.14(e)(6)). We believe that a business will only incur the additional costs of analyzing the health claim requirements and relabeling a previously ineligible product if the additional revenue it anticipates to generate by attracting more customers to its products is greater than these additional costs. This implies zero net costs from this interim final rule to such businesses, as well as to any businesses that decide not to include new CHD health claims on previously ineligible and now eligible fruits and vegetables.

We have very little data on the current consumer usage of CHD claims on labels and labeling, how these practices would change in response to this interim final rule, or how the consumers will respond to new CHD claims on raw fruits and vegetables that were previously ineligible for such claims. Because of this data gap, we acknowledge that we do not have sufficient evidence at this point to quantify the benefits and the administrative and labeling costs of this interim final rule. Industry will only use a new CHD health claim on the label and labeling of a previously ineligible product if it believes consumers are willing to pay more for such product or buy more of it due to the new CHD claim. If consumers value such new CHD health information, we expect there to be changes in consumer behavior that would result in public health benefits from the reduced annual number of CHD cases. The benefits therefore will only be realized, and labels will only be changed, if the new CHD information on labels and labeling increases consumer demand for the previously ineligible and now eligible for a CHD health claim fruits and vegetables. Otherwise, the firms will not use the CHD health claim on their labels for these fruits and vegetables.

The full analysis of economic impacts is available in the docket for this interim final rule (Ref. 9) and at <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

VI. The Paperwork Reduction Act of 1995

This interim final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Analysis of Environmental Impact

We have determined under § 25.32(p) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Federalism

We analyzed this interim final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the interim final rule will have a preemptive effect on State law. Section 4(a) of the Executive order requires Agencies to “construe . . . a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State law conflicts with the exercise of Federal authority under the Federal statute.” Section 403A(a) of the FD&C Act provides that no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement respecting any claim of the type described in section 403(r)(1) of the FD&C Act made in the label or labeling of food that is not identical to the requirement of section 403(r) of the FD&C Act.

This interim final rule amends the existing food labeling regulations on health claims for dietary saturated fat and cholesterol and risk of CHD (§ 101.75) in the label or labeling of food under section 403(r) of the FD&C Act. Although this interim final rule has a preemptive effect in that it precludes States from issuing any health claim labeling requirements for dietary saturated fat and cholesterol and the risk of CHD, this preemptive effect is consistent with what Congress set forth in section 403A(a) of the FD&C Act. Section 403A(a)(5) of the FD&C Act displaces both State legislative

requirements and State common law duties.

We have complied with all of the applicable requirements under Executive Order 13132 and have determined that the preemptive effects of this interim final rule are consistent with Executive Order 13132.

IX. Issuance of an Interim Final Rule and Immediate Effective Date

We are issuing this rule as an interim final rule, effective immediately, with an opportunity for public comment. Section 403(r)(7) of the FD&C Act authorizes us to make proposed regulations issued under section 403(r) of the FD&C Act effective upon publication pending consideration of public comment and publication of a final regulation, if the Agency determines that such action is necessary for public health reasons. This authority enables us to act promptly on petitions that provide for information that is necessary to: (1) Enable consumers to develop and maintain healthy dietary practices; (2) enable consumers to be informed promptly and effectively of important new knowledge regarding nutritional and health benefits of food; or (3) ensure that scientifically sound nutritional and health information is provided to consumers as soon as possible. Proposed regulations made effective upon publication under this authority are deemed to be final Agency action for purposes of judicial review. The legislative history indicates that such regulations should be issued as interim final rules (H. Conf. Rept. No. 105–399, at 98 (1997)).

The petition requested that we issue an interim final rule amending § 101.75 to indicate that the evidence is compelling and the potential to encourage fruit and vegetable consumption is important for public health. It noted that we have used this authority to issue interim final rules for health claims a number of times (e.g., 65 FR 54685, September 8, 2000) and using an interim final rule would be consistent with our past practices.

We are satisfied that all three criteria in section 403(r)(7)(A) of the FD&C Act have been met for the amendment to the dietary saturated fat and cholesterol and risk of CHD health claim to permit raw fruits and vegetables that fail to comply with the “low fat” definition and/or the minimum nutrient content requirement, to be eligible to bear the claim. First, we conclude that these amendments for eligibility for foods to bear these health claims could help enable consumers to develop and maintain healthy dietary practices. Second, these amendments to this health claim will enable consumers

to be informed promptly and effectively of important new knowledge regarding nutritional and health benefits of food. Third, these amendments to this health claim will ensure that scientifically sound nutritional and health information regarding the benefits of fruit and vegetable intake and reduction of CHD risk can be provided to consumers as soon as possible. The past few editions of the DGA have been moving away from a focus on total fat and have instead communicated to consumers the need to focus on type of fat consumed instead of total amount of fat. Recent editions of the DGA have also encouraged increased intake of fruits and vegetables for a healthful diet. Prompt issuance of an interim final rule that reflects the current recommendations is necessary for consumers to be able to have the most current information on nutrition and diet. Consumers will be better able to construct healthful diets if they have prompt access to information that is consistent with the current recommendations on fat content and on consumption of fruits and vegetables. Therefore, we are using the authority in section 403(r)(7)(A) of the FD&C Act to issue an interim final rule amending the general requirements for the health claim for dietary saturated fat and cholesterol and risk of CHD and to make the interim final rule effective immediately.

This regulation is effective upon publication in the **Federal Register**. We invite public comment on this interim final rule. We will consider modifications to this interim final rule based on comments made during the comment period. We will address comments and confirm or amend the interim final rule in a final rule.

X. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <http://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. Liu, S., J.E. Manson, I.M. Lee, et al. "Fruit and Vegetable Intake and Risk of Cardiovascular Disease: The Women's Health Study." *The American Journal of Clinical Nutrition*, 72: 922–928, 2000.
2. Appel, L.J., T.J. Moore, E. Obarzanek, et al. "A Clinical Trial of the Effects of Dietary Patterns on Blood Pressure." DASH Collaborative Research

Group. *The New England Journal of Medicine*, 336: 1117–1124, 1997.

3. U.S. Department of Health and Human Services and U.S. Department of Agriculture. "Dietary Guidelines for Americans, 2010. 7th Edition," 2010. Available at <http://health.gov/dietaryguidelines/2010/>.

4. "Third Report of the National Cholesterol Education Program (NCEP) Expert Panel on Detection, Evaluation, and Treatment of High Blood Cholesterol in Adults (Adult Treatment Panel III) final report." *Circulation*, 106: 3143–3421, 2002.

5. U.S. Department of Health and Human Services and U.S. Department of Agriculture. "2015–2020 Dietary Guidelines for Americans, 8th Edition," December 2015. Available at <http://health.gov/dietaryguidelines/2015/guidelines/>.

6. U.S. Department of Health and Human Services and U.S. Department of Agriculture. "Nutrition and Your Health, Dietary Guidelines for Americans," 2000. Available at <http://health.gov/dietaryguidelines/2000.asp>.

7. U.S. Department of Health and Human Services and U.S. Department of Agriculture. "Dietary Guidelines for Americans, 2005. 6th Edition," 2005. Available at <http://health.gov/dietaryguidelines/dga2005/document/default.htm>.

8. Institute of Medicine (IOM) of the National Academies. "Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients)." Chapter 8, "Dietary Fats: Total Fat and Fatty Acids," 2002.

9. FDA/CFSAN, Food Labeling: Health Claims; Dietary Saturated Fat and Cholesterol and Risk of Coronary Heart Disease, Regulatory Impact Analysis, FDA–2013–P–0047.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 101 is amended as follows:

PART 101—FOOD LABELING

- 1. The authority citation for part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

- 2. Section 101.75 is amended by revising paragraphs (c)(1) and (c)(2)(ii) to read as follows:

§ 101.75 Health claims: dietary saturated fat and cholesterol and risk of coronary heart disease.

* * * * *

(c) * * *

(1) All requirements set forth in § 101.14 shall be met, except § 101.14(e)(6) with respect to a raw fruit or vegetable.

(2) * * *

(ii) *Nature of the food.* (A) The food shall meet all of the nutrient content requirements of § 101.62 for a "low saturated fat" and "low cholesterol" food.

(B) The food shall meet the nutrient content requirements of § 101.62 for a "low fat" food, unless it is a raw fruit or vegetable; except that fish and game meats (*i.e.*, deer, bison, rabbit, quail, wild turkey, geese, and ostrich) may meet the requirements for "extra lean" in § 101.62.

* * * * *

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–29997 Filed 12–16–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 878, 880, and 895

[Docket No. FDA–2015–N–5017]

RIN 0910–AH02

Banned Devices; Powdered Surgeon's Gloves, Powdered Patient Examination Gloves, and Absorbable Powder for Lubricating a Surgeon's Glove

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that Powdered Surgeon's Gloves, Powdered Patient Examination Gloves, and Absorbable Powder for Lubricating a Surgeon's Glove present an unreasonable and substantial risk of illness or injury and that the risk cannot be corrected or eliminated by labeling or a change in labeling. Consequently, FDA is banning these devices.

DATES: This rule is effective on January 18, 2017.

ADDRESSES: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and insert the docket number found in brackets in the

heading of this final rule into the "Search" box and follow the prompts, and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Michael J. Ryan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1615, Silver Spring, MD 20993, 301-796-6283, email: michael.ryan@fda.hhs.gov.

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I. Executive Summary

A. Purpose and Coverage of the Final Rule

Medical gloves play a significant role in the protection of both patients and health care personnel in the United States. Health care personnel rely on medical gloves as barriers against transmission of infectious diseases and contaminants when conducting surgery, as well as when conducting more limited interactions with patients. Various types of powder have been used to lubricate gloves so that wearers could don the gloves more easily. However, the use of powder on medical gloves presents numerous risks to patients and health care workers, including inflammation, granulomas, and respiratory allergic reactions.

A thorough review of all currently available information supports FDA's

conclusion that powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove should be banned. FDA has concluded that the risks posed by powdered gloves, including health care worker and patient sensitization to natural rubber latex (NRL) allergens, surgical complications related to peritoneal adhesions, and other adverse health events not necessarily related to surgery, such as inflammatory responses to glove powder, are important, material, and significant in relation to the benefit to public health from their continued marketing. FDA has carefully evaluated the risks and benefits of powdered gloves and the risks and benefits of the state of the art, which includes viable non-powdered alternatives that do not carry any of the risks associated with glove powder, and has determined that the risk of illness or injury posed by powdered gloves is unreasonable and substantial. Further, FDA believes that this ban would likely have minimal economic and shortage impact on the health care industry. Thus, a transition to alternatives in the marketplace should not result in any detriment to public health.

This rule applies to powdered patient examination gloves, powdered surgeon's gloves, and absorbable powder for lubricating a surgeon's glove. This includes all powdered medical gloves except powdered radiographic protection gloves. Because we are not aware of any powdered radiographic protection gloves that are currently on the market, FDA lacks the evidence to determine whether the banning standard would be met for this particular device. The ban does not apply to powder used in the manufacturing process (*e.g.*, former-release powder) of non-powdered gloves, where that powder is not intended to be part of the final finished glove. Finished non-powdered gloves are expected to include no more than trace amounts of residual powder from these processes, and the Agency encourages manufacturers to ensure finished non-powdered gloves have as little powder as possible. In our 2008 Medical Glove Guidance Manual (Ref. 1), we recommended that non-powdered gloves have no more than 2 milligrams (mg) of residual powder and debris per glove, as determined by the Association for Testing and Materials (ASTM) D6124 test method (Ref. 2). The Agency continues to believe this amount is an appropriate maximum level of residual powder. The ban also does not apply to powder intended for use in or on other

medical devices, such as condoms. FDA has not seen evidence that powder intended for use in or on other medical devices, such as condoms, presents the same public health risks as that on powdered medical gloves.

B. Summary of the Major Provisions of the Final Rule

In this final rule, FDA is banning the following devices: (1) Powdered surgeon's gloves, (2) powdered patient examination gloves, and (3) absorbable powder for lubricating a surgeon's glove. Because the classification regulations for these device types do not distinguish between powdered and non-powdered versions, FDA is amending the descriptions of these devices in the regulations to specify that the regulations for patient examination and surgeon's gloves will apply only to non-powdered gloves while the powdered version of each type of glove will be added to the listing of banned devices in the regulations.

Many comments requested that FDA revise the scope of the ban to include all NRL gloves. Many comments from industry requested that the proposed effective date be extended beyond 30 days after the date of publication of the final rule. Of the comments that do not support the ban, commenters noted the need for powdered gloves to aid in donning gloves and tactile sense and the reduced risks associated with current powdered gloves that have less powder. The remaining comments are not clearly in support or opposition to the proposal.

C. Legal Authority

Powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove are defined as devices under section 201(h) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321(h)). Section 516 of the FD&C Act (21 U.S.C. 360f) authorizes FDA to ban a device if it finds, on the basis of all available data and information, that the device presents substantial deception or unreasonable and substantial risks of illness or injury, which cannot be corrected by labeling or a change in labeling. This rule amends 21 CFR 878.4460, 878.4480, 880.6250, 895.102, 895.103, and 895.104. FDA's legal authority to modify §§ 878.4460, 878.4480, 880.6250, 895.102, 895.103, and 895.104 arises from the device and general administrative provisions of the FD&C Act (21 U.S.C. 352, 360f, 360h, 360i, and 371).

D. Costs and Benefits

The final rule is expected to provide a positive net benefit (estimated benefits minus estimated costs) to society. Banning powdered glove products is not expected to impose any costs to society, but is expected to reduce the number of adverse events associated with using powdered gloves. The primary public health benefit from adoption of the rule would be the value of the reduction in adverse events associated with using powdered gloves. The Agency estimates maximum total annual net benefits to range between \$26.8 million and \$31.8 million.

II. Background

A. Need for the Regulation/History of the Rulemaking

On March 22, 2016, FDA issued a proposed rule to ban powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove (81 FR 15173). Section 516(a)(1) of the FD&C Act authorizes FDA to ban a device intended for human use by regulation if it finds, on the basis of all available data and information, that such a device "presents substantial deception or an unreasonable and substantial risk of illness or injury." For a more detailed discussion of the banning standard, we refer you to the preamble of the proposed rule. FDA issued the proposed regulation because it determined that powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove present an unreasonable and substantial risk of illness or injury and that the risk cannot be corrected or eliminated by labeling or a change in labeling.

The preamble to the proposed rule describes the history of powdered gloves and the citizen petitions received by the Agency that request a ban on powdered gloves. We refer readers to that preamble for information about the development of the proposed rule. The level and types of risk presented by powdered gloves varies depending on the composition and intended use of the glove. In aggregate, the risks of powdered gloves include severe airway inflammation, hypersensitivity reactions, allergic reactions (including asthma), allergic rhinitis, conjunctivitis, dyspnea, as well as granuloma and adhesion formation when exposed to internal tissue. We refer readers to the preamble of the proposed rule for details on the level and types of risks presented by powdered gloves. The benefits of powdered gloves appear to only include greater ease of donning

and doffing, decreased tackiness, and a degree of added comfort, which FDA believes are nominal when compared to the risks posed by these devices.

The state of the art of both surgeon's and patient examination gloves includes non-powdered alternatives that provide similar performance as the various powdered glove types do. That is, there are many non-powdered gloves available that have the same level of protection, dexterity, and performance. Thus, based on a careful evaluation of the risks and benefits of powdered gloves and the risks and benefits of the current state of the art, which includes readily available alternatives that carry none of the risks posed by powdered gloves, FDA has determined that the standard to ban powdered gloves has been met, and that it is appropriate to issue this ban.

Finally, as discussed in the proposed rule, FDA also determined the ban should apply to devices already in commercial distribution and devices already sold to the ultimate user, as well as to devices that would be sold or distributed in the future (see 21 CFR 895.21(d)(7)). This means that powdered gloves currently being used in the marketplace would be subject to this ban and adulterated under section 501(g) of the FD&C Act (21 U.S.C. 351(g)), and thus subject to enforcement action.

B. Summary of Comments to the Proposed Rule

The Agency requested public comments on the proposed rule, and the comment period closed on June 20, 2016. The Agency received approximately 100 comment letters on the proposed rule by the close of the comment period, each containing one or more comments on one or more issues. We received comments from a cross-section of patients and consumers, medical professionals, device manufacturers, and professional and trade associations. A majority of the comments supported the objectives of the rule in whole or in part, while a minority of the comments opposed the objectives of the rule. Some comments suggested changes to specific elements of the proposed rule or requested clarification of matters discussed in the proposed rule. See Section IV for the description of comments on the proposed rule and FDA's responses.

C. General Overview of the Final Rule

FDA published a proposed rule to ban powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove, because FDA

determined that these devices present an unreasonable and substantial risk of illness or injury and that the risk cannot be corrected or eliminated by labeling or a change in labeling (81 FR 15173).

In this final rule, FDA is banning the following devices: (1) Powdered surgeon's gloves (21 CFR 878.4460), (2) powdered patient examination gloves (21 CFR 880.6250), and (3) absorbable powder for lubricating a surgeon's glove (21 CFR 878.4480). Because the classification regulations for these device types do not distinguish between powdered and non-powdered versions, FDA is amending the descriptions of these devices in the regulations to specify that the regulations for surgeon's gloves (21 CFR 878.4460) and patient examination gloves (21 CFR 880.6250) will apply only to non-powdered gloves while the powdered version of each type of glove will be added to 21 CFR part 895, subpart B—Listing of Banned Devices.

D. Clarifying Changes to the Rule

While FDA believes that the preamble to the proposed rule was clear that the proposed ban would apply to all powdered surgeon's gloves and all powdered patient examination gloves, in reviewing the terminology used in the proposed additions to 21 CFR part 895, FDA determined that term "synthetic latex" would not cover every type of non-NRL material that is used to manufacture powdered gloves. It was not FDA's intent to limit the ban to only powdered NRL and powdered synthetic latex gloves, and we believe that this intent was clear from the content of the preamble to the proposed rule, which stated that the ban "would apply to all powdered gloves except powdered radiographic protection gloves." As such, FDA has now revised the identification in this final rule to clarify that the ban applies to all powdered surgeon's gloves and powdered patient examination gloves without reference to the type of material from which they are made. Additionally, the identification of non-powdered surgeon's gloves and non-powdered patient examination gloves is also being revised to remove reference to material.

III. Legal Authority

Powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove are defined as medical devices under section 201(h) of the FD&C Act (21 U.S.C. 321). Section 516 of the FD&C Act (21 U.S.C. 360f) authorizes FDA to ban a device if it finds, on the basis of all available data and information, that the device

presents substantial deception or unreasonable and substantial risks of illness or injury, which cannot be corrected by labeling or a change in labeling. This rule amends §§ 878.4460, 878.4480, 880.6250, 895.102, 895.103, and 895.104. FDA's legal authority to modify §§ 878.4460, 878.4480, 880.6250, 895.102, 895.103, and 895.104 arises from the device and general administrative provisions of the FD&C Act (21 U.S.C. 352, 360f, 360h, 360i, and 371).

IV. Comments on the Proposed Rule and FDA's Responses

A. Introduction

We received approximately 100 comment letters on the proposed rule by the close of the comment period, each containing one or more comments on one or more issues. We received comments from a cross-section of patients and consumers, medical professionals, device manufacturers, and professional and trade associations. A majority of the comments supported the objectives of the rule in whole or in part, while a minority of the comments opposed the objectives of the rule. Some comments suggested changes to specific elements of the proposed rule or requested clarification of matters discussed in the proposed rule.

We describe and respond to the comments in section IV.B through E. We have numbered each comment to help distinguish between different comments. We have grouped similar comments together under the same number, and, in some cases, we have separated different issues discussed in the same comment and designated them as distinct comments for purposes of our responses. The number assigned to each comment or comment topic is purely for organizational purposes and does not signify the comment's value or importance or the order in which comments were received.

B. Description of General Comments and FDA Response

Many comments made general remarks supporting or opposing the proposed rule without focusing on a particular proposed provision. In the following paragraphs, we discuss and respond to such general comments.

(Comment 1) Many comments support the proposed ban on powdered patient examination gloves and powdered surgeon's gloves. These comments from individual consumers, health care professionals, academia, and industry highlight several risks of the continued use of powdered gloves, including, among others, allergic reactions, post-

operative adhesions, and delayed wound healing.

(Response 1) FDA agrees with these comments. After further review of all available information and the comments submitted to the proposed rule, FDA has concluded that the public's exposure to the risks of powdered gloves is unreasonable and substantial in relation to the nominal public health benefit derived from the continued marketing of these devices, especially when considering the benefits and risks posed by readily available alternative devices. Therefore, FDA has determined that the standard for a ban on these devices has been met.

C. Description of Comments That Oppose the Regulation and FDA Response

FDA received some comments that oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves for various reasons. We address each of these reasons for opposition in this section. After reviewing these comments, FDA has determined that the standard to ban powdered gloves has been met, and that it is appropriate to issue this ban. We are finalizing the ban with only clarifying changes.

(Comment 2) Comments oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves because of difficulty donning or doffing non-powdered gloves. Two commenters specifically discuss hyperhidrosis with claims that it can add to the difficulty donning and doffing non-powdered gloves. One commenter has asserted that double-gloving is more difficult when using non-powdered gloves.

(Response 2) As described in the preamble of the proposed rule, we have concluded that the benefit of ease of donning or doffing powdered gloves is generally nominal (Ref. 3) in comparison to the risks posed by the continued marketing of powdered gloves, which, among others, include severe airway inflammation, hypersensitivity reactions, and allergic reactions (including asthma). Also, as noted in the proposed rule, a study of various brands of powdered and non-powdered NRL gloves by Cote et al. found that there are non-powdered latex gloves that are easily donned with wet or dry hands with relatively low force compared to the forces required to don powdered latex examination gloves (Ref. 3). Thus, FDA has considered ease of donning and doffing as a benefit as it applies within the banning standard, and has determined that the standard is met.

(Comment 3) Comments oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves because of difficulty donning non-powdered gloves, leading to greater propensity of non-powdered gloves to tear. Some of these comments express concern that the reduced ability to separate the opening of a non-powdered glove or the greater propensity of non-powdered gloves to tear could potentially lead to a higher degree of contamination and post-procedure infections.

(Response 3) FDA disagrees with the assertion that non-powdered gloves have a higher propensity to tear and thus disagrees that use of non-powdered gloves presents a greater risk of contamination, post-procedure infections, or exposure of the user to blood. FDA does not believe there is compelling evidence to support the assertion that non-powdered gloves have a higher propensity to tear. Korniewicz, et al., determined that the presence of powder did not affect the durability of gloves or enhance glove donning (Ref. 4). Although Kerr, et al., identified a statistically significant difference in the durability of non-powdered vinyl gloves compared to powdered vinyl gloves, this difference may be attributed to glove type, manufacturer, and the fingernail length of users rather than the presence or absence of powder (Ref. 5). This study also found that vinyl gloves in general are less durable and have a greater propensity to tear compared to nitrile, neoprene, and latex gloves. Furthermore, as discussed in the response to comment 4, several studies have found that alternatives to non-powdered NRL gloves, such as nitrile and neoprene gloves, offer the same level of protection against contamination and exposure to blood as powdered NRL gloves (Refs. 5, 6, 7, 8, 9, and 10). Therefore, FDA has determined that suitable alternatives to powdered gloves are readily available in the marketplace.

(Comment 4) Commenters oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves because the fit of powdered gloves is more comfortable than non-powdered gloves. Some of these comments assert that the reduced fit of non-powdered gloves inhibits the tactile sensation necessary to perform medical procedures.

(Response 4) FDA disagrees with the assertion that non-powdered gloves inhibit the tactile sensation necessary to perform medical procedures. The ban does not include non-powdered NRL gloves, which offer the same

performance characteristics of powdered NRL gloves, and several studies have found that alternatives, such as nitrile and neoprene gloves, offer the same level of protection, dexterity, and performance as NRL gloves (Refs. 5, 6, 7, 8, 9, and 10). Furthermore, the numerous risks posed by the continued marketing of powdered gloves outweigh the benefit of whatever additional level of comfort is provided from using powdered gloves instead of the non-powdered alternatives that carry none of these risks.

(Comment 5) Some comments oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves, citing a lack of scientific evidence that gloves with reduced powder content, as those in use today, have the same risks as previously used gloves that had higher powder content.

(Response 5) FDA agrees that the maximum residual level of powder on powdered gloves is less than earlier types of powdered gloves. Historically, powdered medical gloves contained powder levels ranging from 50 to over 400 mg of powder per glove. Effective in 2002, the ASTM International recommended limits on powder levels is 15 mg per square decimeter for surgical gloves (ASTM D3577–2001) (Ref. 11) and 10 mg per square decimeter for patient examination gloves (ASTM D3578) (Ref. 12). As a result, FDA believes that gloves in use after 2002 follow these recommended limits and generally have lower powder content than earlier types of powdered gloves. Even so, several studies indicate that gloves with reduced powder levels continue to present unreasonable and substantial risks to patients and health care workers. For instance, a study conducted on the incidence of skin reactions for Greek endodontists from 2006 to 2012 found that glove powder accounted for the majority of skin reactions, and the replacement of powdered NRL gloves with non-powdered gloves resolved the majority of the adverse reactions (Ref. 13). Similarly, the risks of powdered gloves persist in non-clinical studies using gloves with reduced powder content, as demonstrated by the 2013 finding that surgeries performed with powdered gloves increased the number, density, and fibrotic properties of peritoneal adhesions in rats compared with surgeries performed with non-powdered gloves (Ref. 14). Also, the reduction in cases of NRL-induced occupational contact urticaria coincided with French hospitals transitioning to non-powdered gloves after 2004–2005 (Ref. 13).

Finally, FDA is not aware of any report in the literature that supports the assertion that currently marketed powdered gloves with lower powder content reduce the risks presented by powdered gloves (Ref. 15). In summary, FDA concludes that the risks of powder continue to be unreasonable and substantial for currently marketed powdered gloves despite lower powder content than previous generations of powdered gloves.

(Comment 6) Two comments oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves, because the commenters believe a warning on the risks of powdered gloves is sufficient to mitigate the risks posed by these devices.

(Response 6) As described in Section IV of the proposed rule, FDA has determined that no change in labeling could correct the risk of illness or injury presented by the continued use of these devices. Powdered gloves have additional or increased risks to health compared to non-powdered gloves related to the spread of powder, and the fact that powder-transported contaminants such as NRL allergens can become aerosolized. Exposure to powder or latex allergens presents significant risks to health care workers and patients when inhaled or when exposed to internal tissue during oral, vaginal, gynecological, and rectal exams. Although labeling can raise awareness of these risks, we conclude that labeling cannot effectively mitigate these risks because it cannot prohibit the spread of glove powder or powder-transported contaminants. In addition, an important aspect of these devices is their ability to affect persons other than the individual who decides to wear or use them. For example, patients often do not know the type of gloves being worn by the health care professional treating them, but are still exposed to the potential dangers. Similarly, glove powder's ability to aerosolize and carry NRL proteins exposes individuals to harm via inhalation or surface contact. Thus, some of the risks posed by glove powder can impact persons completely unaware or unassociated with its employment and without the opportunity to consider the devices' labeling. Because of this inherent quality, adequate directions for use or warnings cannot be written that would provide reasonable assurance of the safe and effective use of these devices for all persons that might come in contact with them.

Due to the ability of powder to affect people who would not have an opportunity to read warning labels, and

because potential warning labels would raise awareness of the risks, but would not eliminate the risks posed by glove powder, FDA has determined no label or warning can correct the risks posed by these devices.

(Comment 7) One comment opposes the proposed ban on powdered patient examination gloves and powdered surgeon's gloves, because the solvent used to remove powder during the manufacture of non-powdered gloves may cause adverse reactions to the glove user.

(Response 7) FDA is not aware of any report in the literature that supports the assertion of widespread adverse reactions to solvent used in the manufacturing process. Non-powdered patient examination and surgeon's gloves require premarket notification (510(k)) submissions prior to marketing. During the review of these submissions, FDA evaluates the final finished glove, including manufacturing solvents that are present on the final glove. FDA recommends that manufacturers conduct and submit skin irritation and dermal sensitization studies in these submissions to evaluate potential issues with components, including manufacturing solvents (Ref. 1). Although individual hypersensitivity reactions to different materials may occur, FDA has been unable to find evidence in the literature of hypersensitivity to typical glove manufacturing materials other than glove powder or NRL. However, Palosuo, et al., reports that the use of hand sanitizers containing isopropyl alcohol prior to donning gloves could cause dermatitis reaction if the gloves are donned before the alcohol dries (Ref. 16). The occurrence of this reaction is unrelated to the manufacture of non-powdered gloves and unrelated to the use of non-powdered gloves as an alternative to powdered gloves. Given the lack of evidence of adverse reactions to solvents used in the manufacturing of non-powdered gloves, and the established evidence demonstrating the risks of powdered glove use, FDA continues to believe that powdered gloves and glove powder meet the banning standard.

(Comment 8) Several comments oppose the proposed ban on powdered patient examination gloves and powdered surgeon's gloves due to the expectation that users will ultimately have to pay more for medical gloves once the ban is finalized, because the cost of non-powdered gloves is currently higher than the cost of powdered gloves.

(Response 8) We do not find any evidence to support the claims that

current prices of non-powdered gloves are significantly higher than powdered gloves. As we stated in the preliminary regulatory impact analysis (PRIA), extensive searches of glove distributor pricing indicate that non-powdered gloves have become as affordable as powdered gloves. Our searches also revealed that the market is saturated with alternatives to powdered gloves, resulting in downward pressure on the prices of non-powdered gloves. In addition, the share of powdered medical gloves sales has been declining since at least 2000 while total sales of all disposable medical gloves have increased (Ref. 17). We would not expect this trend to be occurring without regulatory action if users of disposable medical gloves faced significantly higher prices for switching to non-powdered gloves. We therefore do not find it necessary to update our analysis based on these comments.

(Comment 9) We received one comment that disagrees with our determination that the availability of examination and surgical gloves would not be reduced.

(Response 9) We do not find any evidence to support these claims. As we stated in the PRIA, research shows only 7 percent of total sales of examination and surgical gloves to medical workers were projected to be from powdered gloves in 2010 (Ref. 17). Global Industry Analysts (GIA) projected the share of powdered disposable medical gloves sales to decrease to 2 percent in 2015, while total sales of all disposable medical gloves continue to increase (Ref. 17). We would not expect this trend to be occurring without regulatory action if there were a reduction in the availability of disposable examination and surgical gloves. We therefore do not find it necessary to update our analysis based on these comments.

(Comment 10) Commenters suggest there would be a loss in consumer utility due to the preference some medical workers may have for powdered gloves due to comfort and ease of use.

(Response 10) We stated in the PRIA that the remaining 7 percent continuing to use these powdered gloves may experience utility loss from the removal of powdered gloves from the market (Ref. 17). The potential loss in consumer utility would be due to the perceived loss in comfort from powdered gloves users switching to non-powdered gloves. However, as the GIA report shows, there has been a downward trend in total sales of powdered gloves since at least the year 2000 while total sales of all disposable medical gloves has increased (Ref. 17). We would not

expect this trend to be occurring without regulatory action if the loss in consumer utility to current medical workers were substantial. Korniewicz et al. reported no loss in consumer satisfaction in a sample of operating room staff switching to non-powdered surgical gloves (Ref. 4). We have not estimated this potential burden, but the evidence described here suggests that any burden would not be substantial. Further, even having considered that some degree of consumer comfort may be lost by banning powdered gloves, FDA continues to believe that this benefit is considerably outweighed by the numerous risks posed by powdered gloves.

(Comment 11) One comment opposes the proposed ban on powdered patient examination gloves and powdered surgeon's gloves, because the risks identified for powdered gloves are due to contaminants, such as pesticides and herbicides, in the powder that would not be present if the powder were manufactured in the United States.

(Response 11) FDA disagrees with the assertion that contaminated powder is the source of the risks identified for powdered gloves. FDA's proposal to ban powdered gloves and glove powder is based on various studies on the risks of powdered gloves due to the properties of the powder itself. Powdered gloves have additional or increased risks to health compared to non-powdered gloves. For example, powder on NRL gloves can aerosolize latex allergens, resulting in sensitization to latex and allergic reactions. Latex sensitization and allergic reactions are unrelated to any potential presence of manufacturing contaminants, such as pesticides and herbicides. Additional risks of powdered gloves include severe airway inflammation, conjunctivitis, dyspnea, as well as granuloma and adhesion formation when exposed to internal tissue. FDA's assessment of the available literature and information indicates that these risks are attributable to the powder itself, as opposed to any potential presence of manufacturing contaminants, such as pesticides and herbicides.

In addition, the powder used on powdered gloves is required to comply with FDA's Quality System regulation, which includes requirements for quality and inspection for the final finished gloves that protect against the introduction of contaminated devices into commerce. Among other requirements, device manufacturers must establish and maintain procedures to prevent contamination of equipment or product by substances that could reasonably be expected to have an

adverse effect on product quality (21 CFR 820.70(e)). FDA's Quality System regulation applies to gloves and glove powder sold in the United States, regardless of the manufacturing location.

D. Description of Comments on Scope of Ban and FDA Response

FDA received several comments requesting revision of the scope of the ban. The scope of the proposed ban includes powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove. The glove types include all powdered patient examination and surgeon's gloves, including NRL and synthetic latex gloves. In the following paragraphs, we discuss and respond to comments requesting revision of the scope of the ban. We are finalizing the ban without change to the scope, but clarifying that all powdered patient examination gloves and powder surgical gloves are banned, regardless of the material from which they are made.

(Comment 12) Several comments identify risks that result from the use of powdered and non-powdered NRL gloves. These comments request FDA to extend the ban to all NRL gloves, both powdered and non-powdered.

(Response 12) Unlike with powdered latex gloves, which have the ability to aerosolize glove powder and carry allergenic proteins, FDA believes the risk of allergic reaction to non-powdered NRL gloves, which affects the user and patients in direct contact with the glove, is adequately mitigated through already-required labeling that alerts users to this risk. NRL gloves must include a statement to alert users to the risk of allergic reactions caused by NRL (21 CFR 801.437). Further, several studies have indicated that the use of non-powdered NRL gloves reduces the risk of sensitization to allergenic NRL proteins and the number of allergic reactions experienced by those who are already sensitized (Refs. 18, 19, and 20). FDA believes that these study results, when considered alongside the risk mitigation that follows from FDA's required labeling for NRL products, demonstrates that non-powdered latex gloves can be safely used with appropriate caution for latex-sensitive patients and health care workers. Therefore, FDA has determined not to ban the use of all NRL gloves.

(Comment 13) Several comments raise the issue of life threatening latex allergy events that result from various uses of NRL gloves including food preparation and food service. Several of these comments assert that the Agency should broaden the scope of the ban to cover all

NRL gloves for all uses including food preparation and food service.

(Response 13) We have concluded that it is not appropriate to address a proposal to ban gloves used for food preparation because these gloves do not meet the definition of a device under section 201(h) of the FD&C Act and are thus not subject to section 516 of the FD&C Act (21 U.S.C. 360f), which provides the statutory authority to ban devices within FDA's authority to regulate such products.

(Comment 14) One comment asserts that the ban on powdered gloves should not apply to dental practice, because the risks are not applicable to dental practice.

(Response 14) FDA disagrees with the assertion that the risks of powdered gloves are not applicable to dental practice. Dentists and dental patients face the same risks as other medical practices in terms of the potential for powder exposure to open cavities or open wounds, and for powder, if used with NRL gloves, to carry protein allergens. Several studies documenting the risks of powdered gloves in dental practices have been conducted, including Saary, et al., which identified that changing to low-protein and non-powdered NRL gloves reduced NRL allergy in dental students (Ref. 18). In addition, Charous et al., reported in 2000 that a dental office was able to reduce airborne NRL antigen levels to undetectable levels with the exclusive use of non-powdered NRL gloves, permitting a highly sensitized staff member to continue to work there (Ref. 21). These studies, among others (Refs. 13 and 22), indicate that the risks of powdered medical gloves apply to dental practice. Therefore, FDA has determined that the scope of the ban on powdered medical gloves should continue to include powdered gloves used in dental practice.

E. Description of Other Specific Comments and FDA Response

Many comments made specific remarks requesting clarification or revision to the proposed rule. In the following paragraphs, we discuss and respond to such specific comments.

(Comment 15) A number of comments request extension of the effective date of the ban. The proposed rule included a proposed effective date of 30 days after publication of the final rule for all devices, including those already in commercial distribution. The comments suggest a range of effective dates of 90 days to 18 months after publication of the final rule and assert that a longer transition period is necessary to allow

existing inventory to flow through the supply chain to providers and patients.

(Response 15) FDA is not extending the effective date of the ban for devices already in commercial distribution. We have concluded that powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's glove present an unreasonable and substantial risk of illness or injury and that the risk cannot be corrected or eliminated by labeling or a change in labeling. The continued marketing of these devices beyond the 30 day effective date would allow for the continued sale and purchase of devices that FDA has determined present an unreasonable and substantial risk to patients and health care workers. Therefore, FDA does not believe that it is in the best interest of the public health to extend the effective date for devices already in commercial distribution. In order to minimize the risk of continued exposure of health care workers and patients to these devices, the effective date for devices remains 30 days after the date of publication of this final rule.

(Comment 16) One comment requests that FDA not extend the effective date of the ban to allow companies to deplete their inventory of the devices.

(Response 16) As described in the response to comment 15, FDA agrees that it is in the best interest of the public health to not extend the effective date of the ban for devices already in commercial distribution. Therefore, the effective date of the ban for devices already in commercial distribution remains at 30 days after the date of publication of the final rule.

(Comment 17) A few comments request recommendations on the means of disposal or recycling of powdered gloves.

(Response 17) FDA recommends that unused inventories of powdered medical gloves remaining at domestic manufacturing and distribution locations be disposed of in accordance with standard industry practices. Unused supplies at hospitals, outpatient centers, clinics, medical and dental offices, other service delivery points (nursing homes, etc.), and in the possession of end users, will need to be disposed of according to established procedures of the local community's solid waste management system. Established procedures for these materials typically involve disposal in landfills or incineration. FDA has concluded that this final rule will not have a significant impact on the human environment. (See Section VII. Analysis of Environmental Impact.)

(Comment 18) One comment requests clarification on whether after the effective date of the ban the Agency will permit a manufacturer to export powdered medical gloves that are already physically located at distribution centers in the United States.

(Response 18) After the effective date of this final rule, manufacturers will not be allowed to import powdered medical gloves. However, while powdered medical gloves will be banned in the United States on the effective date of this final rule, manufacturers may export existing inventory of powdered gloves to a foreign country if the device complies with the laws of that country and has valid marketing authorization by the appropriate authority, as described in section 802 of the FD&C Act (21 U.S.C. 382)). If eligible for export under section 802 of the FD&C Act, a device intended for export will not be deemed adulterated or misbranded if it

(A) accords to the specifications of the foreign purchaser,

(B) is not in conflict with the laws of the country to which it is intended for export,

(C) is labeled on the outside of the shipping package that it is intended for export, and

(D) is not sold or offered for sale in domestic commerce.

V. Effective Date

This rule is effective January 18, 2017. The effective date of this rule applies to devices already in commercial distribution and those already sold to the ultimate user, as well as to devices that would be sold or distributed in the future. All powdered surgeon's gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon's gloves must be removed from the market upon the effective date of this final rule. Section 501(g) of the FD&C Act (21 U.S.C. 351(g)) deems a device to be adulterated if it is a banned device.

VI. Economic Analysis of Impacts

A. Introduction

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety,

and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule imposes no new burdens, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

B. Summary of Costs and Benefits

The final rule prohibits marketing of powdered surgeon’s gloves, powdered patient examination gloves, and absorbable powder for lubricating surgeon’s gloves. The rule does not cover or include powdered radiographic gloves.

The final rule is expected to provide a positive net benefit (estimated benefits minus estimated costs) to society. Banning powdered glove products is not expected to impose any costs to society. Extensive searches of glove distributor pricing indicate that improvements to non-powdered gloves have made these products as affordable as powdered gloves. The ban is expected to reduce the adverse events associated with using powdered gloves. The Agency estimates maximum total annual net benefits to range between \$26.8 million and \$31.8 million. The present discounted value of the estimated benefits over 10 years ranges from \$228.9 million to \$270.8 million at a 3 percent discount rate and from \$188.5 million to \$223 million at a 7 percent discount rate.

FDA has examined the economic implications of the rule as required by the Regulatory Flexibility Act. If a rule will have a significant economic impact on a substantial number of small

entities, the Regulatory Flexibility Act requires us to analyze regulatory options that would lessen the economic effect of the rule on small entities. This rule will not impose any new burdens on small entities, and thus will not impose a significant economic impact on a substantial number of small entities.

The full discussion of the economic impacts of the rule, which includes a list of changes made in the final regulatory impact analysis, in accordance with Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act is available at <https://www.regulations.gov> under the docket number (FDA–2015–N–5017) for this rule and at <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm#> (Ref. 23).

VII. Analysis of Environmental Impact

FDA has carefully considered the potential environmental effects of this final rule and of possible alternative actions. In doing so, the Agency focused on the environmental impacts of its action as a result of disposal of unused powdered surgeon’s gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon’s glove that will need to be handled after the rule is finalized.

The environmental assessment (EA) considered each of the alternatives in terms of the need to provide maximum reasonable protection of human health without resulting in a significant impact on the environment. The EA considered environmental impacts related to landfill and incineration of solid waste at municipal solid waste (MSW) facilities nationwide. The selected action, if finalized, will result in an initial batch disposal of unused powdered surgeon’s gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon’s glove from user facilities to MSW facilities nationwide, followed by a rapid decrease in the rate of disposal of these devices, as supplies are depleted. The selected action does not change the ultimate disposition of these devices but expedites their rate of disposal and ceases future production. Overall, given the limited number of powdered surgeon’s gloves, powdered patient examination gloves, and absorbable powder for lubricating a surgeon’s glove, currently in commercial distribution, the selected action is expected to have no significant impact on MSW and landfill facilities and the environment in affected communities.

The Agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The Agency’s finding of no significant impact and the evidence supporting that finding, contained in an EA, may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday (Ref. 24).

VIII. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, FDA is not required to seek clearance by Office of Management and Budget under the Paperwork Reduction Act of 1995.

IX. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that 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. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

X. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <https://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

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List of Subjects

21 CFR Parts 878 and 880

Medical devices.

21 CFR Part 895

Administrative practice and procedure, Labeling, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 878, 880, and 895 are amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Amend § 878.4460 by revising the section heading and paragraph (a) to read as follows:

§ 878.4460 Non-powdered surgeon's glove.

(a) *Identification.* A non-powdered surgeon's glove is a device intended to be worn on the hands of operating room personnel to protect a surgical wound from contamination. A non-powdered surgeon's glove does not incorporate powder for purposes other than manufacturing. The final finished glove includes only residual powder from manufacturing.

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§ 878.4480 [Removed]

■ 3. Remove § 878.4480.

PART 880—GENERAL HOSPITAL AND PERSONAL USE DEVICES

■ 4. The authority citation for part 880 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 5. Amend § 880.6250 by revising the section heading and paragraph (a) to read as follows:

§ 880.6250 Non-powdered patient examination glove.

(a) *Identification.* A non-powdered patient examination glove is a disposable device intended for medical purposes that is worn on the examiner's hand or finger to prevent contamination between patient and examiner. A non-powdered patient examination glove does not incorporate powder for purposes other than manufacturing. The final finished glove includes only residual powder from manufacturing.

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PART 895—BANNED DEVICES

■ 6. The authority citation for part 895 continues to read as follows:

Authority: 21 U.S.C. 352, 360f, 360h, 360i, 371.

■ 7. Add § 895.102 to read as follows:

§ 895.102 Powdered surgeon's glove.

(a) *Identification.* A powdered surgeon's glove is a device intended to be worn on the hands of operating room personnel to protect a surgical wound from contamination. A powdered surgeon's glove incorporates powder for purposes other than manufacturing.

(b) [Reserved]

■ 8. Add § 895.103 to read as follows:

§ 895.103 Powdered patient examination glove.

(a) *Identification.* A powdered patient examination glove is a disposable device intended for medical purposes that is worn on the examiner's hand or finger to prevent contamination between patient and examiner. A powdered patient examination glove incorporates powder for purposes other than manufacturing.

(b) [Reserved]

■ 9. Add § 895.104 to read as follows:

§ 895.104 Absorbable powder for lubricating a surgeon's glove.

Absorbable powder for lubricating a surgeon's glove is a powder made from cornstarch that meets the specifications for absorbable powder in the United States Pharmacopeia (U.S.P.) and that is intended to be used to lubricate the surgeon's hand before putting on a surgeon's glove. The device is absorbable through biological degradation.

Dated: December 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016-30382 Filed 12-16-16; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration****21 CFR Part 880**

[Docket No. FDA-2015-N-0701]

General Hospital and Personal Use Devices: Renaming of Pediatric Hospital Bed Classification and Designation of Special Controls for Pediatric Medical Crib; Classification of Medical Bassinet

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule to rename pediatric hospital beds as pediatric medical cribs and establish special controls for these devices. FDA is also establishing a separate classification regulation for medical bassinets, previously under the pediatric hospital bed classification regulation, as a class II (special controls) device. In addition, this rule continues to allow both devices to be exempt from premarket notification and use of the device in traditional health care settings and permits prescription use of pediatric medical cribs and bassinets outside of traditional health care settings.

DATES: This order is effective on January 18, 2017.

FOR FURTHER INFORMATION CONTACT:

Michael J. Ryan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1615, Silver Spring, MD 20993-0002, 301-796-6283.

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I. Executive Summary**A. Purpose and Coverage of the Final Rule**

Pediatric medical cribs that meet the definition of a device in section 201(h) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321(h)) (referred to as pediatric medical cribs or cribs intended for medical purposes) (product code FMS) are regulated by FDA and will have to comply with the special controls identified in this rule for pediatric medical cribs. Cribs that do not meet the device definition (referred

to as cribs for non-medical purposes) must meet the Consumer Product Safety Commission's (CPSC's) regulations and guidelines.

In the **Federal Register** of December 28, 2010 (75 FR 81766), the CPSC issued a final rule prohibiting the use of the drop-side rail design for non-medical cribs in consumer households as of June 28, 2011. CPSC's rule established new standards for full-size and non-full-size cribs intended for non-medical purposes, which effectively prohibited the manufacture or sale of cribs intended for non-medical purposes with a drop-side rail design in households, child care facilities, family child care homes, and places of public accommodation. This rule did not affect pediatric medical cribs regulated by FDA, which typically contain a drop-side rail design that includes movable and latchable side and end rails. Although drop-side cribs intended for non-medical purposes are now prohibited, there is still a need for pediatric medical cribs with drop-side rails inside and outside of traditional health care settings. Pediatric medical cribs with drop-side rails are extremely helpful for patient care in hospital settings and even outside of traditional health care settings, such as day care centers caring for infants and children with disabilities, because they allow parents and care givers easy access to children to perform routine and emergency medical procedures, including, but not limited to, cardiopulmonary resuscitation (CPR), blood collection, intravenous (IV) insertion, respiratory care, and skin care. These drop-side rail cribs also make it easier for hospital staff to facilitate safe patient transport and reduce the chance of care giver injury.

Over the last 5 years, FDA has received over 500 adverse event reports, or Medical Device Reports (MDRs), associated with open pediatric medical cribs, through the Agency's Manufacturer and User Facility Device Experience (MAUDE) database. There were adverse event reports of serious injuries, including reports of entrapment, which were predominantly entrapments of extremities (legs or arms). The majority of MDRs for medical cribs were for malfunctions such as drop-side rails not latching or lowering, brakes not holding, wheels or casters breaking, and where applicable, scales not reading correct weights. As a result of the risks to health and need for continued use of pediatric medical cribs in traditional health care settings and non-traditional settings, FDA is revising the identification for § 880.5140 (21 CFR 880.5140) to include only pediatric

medical cribs, establishing special controls for these devices, and changing the name of the classification regulation.

In addition, FDA has received adverse event reports from hospitals regarding incidents of medical bassinet tipping and improper cleaning of the basket or bed component that caused cracks and crazing, which have resulted in patient injury. Historically, medical bassinets have been regulated as pediatric hospital beds (§ 880.5140, product code NZG). As a result, this rule creates a separate regulation for medical bassinets and establishes special controls for this device type to provide a reasonable assurance of safety and effectiveness.

B. Summary of the Major Provisions of the Final Rule

In this final rule, FDA is amending the classification “pediatric hospital bed” in § 880.5140 to change the name of the classification regulation from “pediatric hospital bed” to “pediatric medical crib” and imposing special controls for pediatric medical cribs to provide a reasonable assurance of safety and effectiveness for these devices. This rule also creates a separate regulation, under § 880.5145, for medical bassinets and imposes special controls for this device type to provide a reasonable assurance of safety and effectiveness. In addition, use of pediatric medical cribs and medical bassinets outside of traditional health care settings will be limited to prescription use in accordance with § 801.109 (21 CFR 801.109). The Agency believes that the applicable special controls established and imposed by this final rule, together with the general controls, will provide reasonable assurance of the safety and effectiveness of these devices. Also, once this rule is effective, the Agency will move the following medical devices listed under § 880.5140 to classification regulations of other class II devices with similar intended uses and premarket notification requirements: Pediatric cribs with integrated air mattresses; youth beds; pediatric stretchers; and crib enclosure beds as identified in section II.C of this final rule.

C. Legal Authority

Pediatric medical cribs and medical bassinets are medical devices under section 201(h) of the FD&C Act. For devices, FDA has the authority under section 513(a)(1)(B) of the FD&C Act (21 U.S.C. 360c(a)(1)(B)) to issue a regulation to establish special controls for class II devices for which general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish

special controls to provide such assurance. Under this authority, FDA is establishing special controls for the class II pediatric medical cribs and medical bassinets (§§ 880.5140 and 880.5145).

D. Costs and Benefits

This rule establishes special controls for medical bassinets and pediatric medical cribs, and permits use of these devices outside of traditional health care settings for prescription use only. This regulation will also change the name of the classification regulation for “pediatric hospital beds” to “pediatric medical cribs” and establish a separate classification regulation for medical bassinets as a class II device. The special control requirements set forth in this rule will clarify safety standards and minimize the risk of injury to pediatric patients, providing reasonable assurance of safety and effectiveness. The special control requirements that are definitely not currently practiced are the warning labeling requirements for both devices. The special controls will clarify for manufacturers the safety standards and help minimize the risk of injury to pediatric patients. The benefits of the new warning label are not readily quantifiable, but it is expected to reduce the risk of the bassinet from tipping or other user error and thus, reduce potential injury to pediatric patients. Additionally, the provision permitting prescription use of medical bassinets and pediatric medical cribs outside of traditional health care settings will benefit pediatric patients who require the specialized care provided by these devices. Costs estimated in this analysis include costs related to the new warning labeling requirements, the prescription use and performance testing for medical bassinets and pediatric medical cribs, as well as physical modification of pediatric cribs. The annual costs are \$2,379,400, and include the costs of the warning labels and prescription provision. The cost of performance testing is \$3,360 per unit and the cost of modifying a pediatric crib is \$1,125 per unit.

II. Background

The FD&C Act (21 U.S.C. 301 *et seq.*), as amended, establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act establishes three categories (classes) of devices, based on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls),

class II (special controls), and class III (premarket approval).

Most generic types of devices that were on the market before May 28, 1976, the date of the 1976 amendments (generally referred to as preamendments devices), have been classified by FDA through the issuance of regulations in accordance with the procedures set forth in section 513(c) and (d) of the FD&C Act into one of these three regulatory classes. Devices introduced into interstate commerce for the first time on or after May 28, 1976 (generally referred to as post-amendments devices), are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless FDA initiates one of the following procedures: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the FD&C Act; or (3) FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act, to a predicate device that is already legally marketed. The Agency determines whether new devices are substantially equivalent to predicate devices through review of premarket notifications under section 510(k) of the FD&C Act (21 U.S.C. 360(k)). Section 510(k) of the FD&C Act and its implementing regulations, codified in title 21 of the Code of Federal Regulations (21 CFR) part 807, subpart E, require persons who intend to market a new device that does not require a premarket approval application under section 515 of the FD&C Act (21 U.S.C. 360e) to submit a premarket notification (510(k)) containing information that allows FDA to determine whether the new device is “substantially equivalent” within the meaning of section 513(i) of the FD&C Act to a legally marketed device that does not require premarket approval.

Section 513(a)(1)(B) of the FD&C Act defines class II devices as those devices for which the general controls in section 513(a)(1)(A) by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls to provide such assurance, including the issuance of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and any other appropriate actions the Agency deems necessary to provide such assurance (see also 21 CFR 860.3(c)(2)).

Section 510(m)(2) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements on its own initiative or upon petition of an interested person, if FDA determines that a 510(k) is not necessary to provide reasonable assurance of the safety and effectiveness of the device. Devices under the pediatric hospital bed classification regulation, including pediatric cribs and medical bassinets, were made exempt from premarket notification, subject to certain limitations, in accordance with section 510(m) of the FD&C Act (63 FR 59222 at 59229, November 3, 1998).

A. Need for the Regulation/History of This Rulemaking

Pediatric medical cribs are medical devices intended for the treatment, cure, or mitigation of diseases or illnesses of pediatric patients. Prior to the issuance of this final rule, a pediatric hospital bed was defined as “a device intended for medical purposes that consists of a bed or crib designed for the use of a pediatric patient, with fixed end rails and movable and latchable side rails. The contour of the bed surface may be adjustable.” FDA classified pediatric medical cribs in 1980 as pediatric hospital beds (§ 880.5140, product code FMS), class II devices (45 FR 69678 at 69695, October 21, 1980), and exempted them in 1998 from premarket notification (510(k)) under section 510(m) of the FD&C Act in the final rule (63 FR 59222 at 59229). Pediatric medical cribs with drop-side rails are extremely helpful for patient care in hospital settings and even outside of traditional health care settings, such as day care centers caring for infants and children with disabilities, because they allow parents and care givers easy access to children in order to perform routine and emergency medical procedures, including, but not limited to, CPR, blood collection, IV insertion, respiratory care, and skin care.

FDA published a proposed rule in the **Federal Register** of October 8, 2015 (80 FR 60809), proposing to (1) change the identification and name of § 880.5140, *Pediatric hospital bed* to *Pediatric medical crib*, and remove references to “beds” within the regulation, as appropriate, (2) establish special controls for pediatric medical cribs, (3) rearrange the devices within § 880.5140 so that it includes only pediatric medical cribs and move other devices that were within the prior hospital bed regulation to more appropriate classification regulations, and (4) create a separate regulation for medical

bassinets with special controls. This rule finalizes those proposals.

Pediatric medical cribs that meet the definition of a device in section 201(h) of the FD&C Act are regulated by FDA. Cribs that do not meet the definition of device must meet the CPSC’s regulations and guidelines. Because drop-side rail cribs for non-medical purposes and pediatric medical cribs are regulated by different agencies, CPSC consulted with FDA about the impact their final rule (75 FR 81766) could have on settings, such as nursery schools and day care centers, where pediatric medical cribs with drop-side rails are often used for pediatric patients after they have been discharged from a health care facility. In comparison to CPSC’s experience with drop-side rail cribs for non-medical purposes, FDA received fewer and less severe adverse event reports for pediatric medical cribs with the drop-side design. In addition, FDA determined that there is a need for continued access to pediatric medical cribs with drop-side rails inside and outside of traditional health care settings because of the utility of the drop-side design (Ref. 1). Based on the consultation with CPSC, FDA determined that it should establish special controls to provide reasonable assurance of the safety and effectiveness of pediatric medical cribs and permit continued use of these devices outside of traditional health care settings.

This rule also creates a separate classification regulation for medical bassinets, § 880.5145. Historically, medical bassinets have also been regulated as pediatric hospital beds (§ 880.5140, product code NZG). A medical bassinet is a non-powered device that consists of two components: (1) A basket, the sleep or bed component, which is typically made of plastic and (2) a frame with wheels, which holds the basket or bed component (FDA refers to this component as a “basket or bed component” interchangeably in this rule). The basket or bed component is a box-like structure, generally made of a clear, high-impact resistant plastic material, with an open top and four walls to keep the infant in place. Medical bassinets are typically used in hospital settings for infants up to 5 months in age. The beneficial features of medical bassinets are portability, ease of cleaning, and, when it is made of a clear material, the ability to see the infant from all sides.

Based on the risks to health identified in FDA’s proposed rule for pediatric medical cribs and bassinets, along with MDRs the Agency received from January 2005 to September 2015, FDA

determined that general controls alone are insufficient to provide a reasonable assurance of safety and effectiveness for these devices for their intended use. Thus, with this rule, FDA is imposing special controls on these devices, which along with general controls, will provide reasonable assurance of safety and effectiveness of these devices and will permit their continued use in traditional health care settings. FDA will also permit the use of pediatric medical cribs with drop-side rail designs and bassinets outside of traditional health care settings through prescription use only. The special controls are designed to address the adverse event reports for pediatric medical cribs and bassinets. For pediatric medical cribs, there were adverse event reports of serious injuries including reports of entrapment, which were predominantly extremity entrapments of legs or arms. The majority of these reports were for malfunctions such as drop-side rails not latching or lowering, brakes not holding, wheels or casters breaking, and where applicable, scales not reading correct weights. For medical bassinets, hospitals have reported to FDA incidents of tipping and improper cleaning of the basket or bed component that caused cracks and crazing, which have resulted in patient injury.

B. Summary of Comments to the Proposed Rule

FDA requested comments on the proposed rule (80 FR 60809), and the comment period closed on December 7, 2015. The Agency received 11 comments on the proposed rule by the close of the comment period; some of the comments contained comments on more than one issue. We received comments from a cross-section of consumers, device manufacturers, and professional and trade associations. All of the comments supported the changes identified in the proposed rule in whole or in part; however, some comments suggested changes to the proposed special controls or requested clarification of matters discussed in the proposed rule. See section IV for the description of comments on the proposed rule and FDA’s responses.

C. General Overview of Final Rule

FDA is amending the classification pediatric hospital bed in § 880.5140 to change the name of the classification regulation from “pediatric hospital bed” to “pediatric medical crib” and to establish special controls for pediatric medical cribs to provide a reasonable assurance of safety and effectiveness. This rule also creates a separate regulation, under § 880.5145, for

medical bassinets and establishes special controls for this device type to provide a reasonable assurance of safety and effectiveness. In addition, use of pediatric medical cribs and medical bassinets outside of traditional health care settings will be limited to prescription use in accordance with § 801.109. The Agency believes that the applicable special controls, together with the general controls, will provide reasonable assurance of the safety and effectiveness of these devices.

Devices that do not meet the final identification under § 880.5140 for

“pediatric medical crib” will be administratively moved to more appropriate class II regulations for devices with more similar intended uses that are also class II, 510(k) exempt, and will not be located under the final pediatric medical crib classification regulation. Shortly after the effective date of this final rule, FDA will send manufacturers of the remaining pediatric hospital beds notices identifying the new classification regulation and product code under which the device will be classified. These devices include: Open pediatric

medical cribs, medical bassinets, pediatric cribs with integrated air mattresses, youth beds, pediatric stretchers, and crib enclosure beds. A more complete list of the devices from § 880.5140 and to where they are being moved is provided in table 1.

This action will not have any substantive effect on the current marketing status of the devices. However, manufacturers of these devices will need to refer to the new regulation classification and product code provided by the Agency in future interactions with FDA.

TABLE 1—MEDICAL DEVICES REMOVED FROM § 880.5140

New CFR regulation	Classification name	Device class
21 CFR 890.5170	Pediatric cribs with integrated air mattresses	II
21 CFR 880.5100 or 21 CFR 880.5120 (depending on whether they are powered).	Youth Beds	II
21 CFR 880.6910	Pediatric Stretchers	II
21 CFR 880.6760	Crib Enclosure Beds	II

III. Legal Authority

Pediatric medical cribs and medical bassinets are defined as medical devices under section 201(h) of the FD&C Act. For devices, FDA has the authority under section 513(a)(1)(B) of the FD&C Act to issue a regulation to establish special controls for class II devices for which general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide such assurance. Under this authority, FDA is establishing special controls for the class II pediatric medical cribs and bassinets (§§ 880.5140 and 880.5145).

IV. Comments on the Proposed Rule and FDA’s Responses

A. Introduction

In response to the proposed rule (80 FR 60809) to revise § 880.5140 to specify that it will only be for regulation of pediatric medical cribs, with proposed special controls and to create a separate regulation for medical bassinets, also with proposed special controls, FDA received 11 comments to Docket No. FDA–2015–N–0701. The comments and FDA’s responses to the comments are summarized in this document. Certain comments are grouped together under a single number because the subject matter of the comments is similar. The number assigned to each comment is purely for organizational purposes and does not signify the comment’s value or importance or the order in which it was submitted.

B. Specific Comments and FDA Response

(Comment 1) Multiple comments made recommendations that we revise the requirements for medical bassinet warning labels. One comment suggested that the warning label be affixed in a prominent location; another comment recommended that the warning label be required to be permanently affixed on all sides of the bassinet. One comment also recommended that the special control require 9 point font for visibility.

(Response 1) FDA believes that a warning label for medical bassinets should be readable, prominent, and in the same location on each device. While the proposed rule required the warning label to be placed on the bassinet cabinet, FDA has determined that some medical bassinets do not include a “cabinet,” but all of the devices do have a plastic basket or bed component. As a result, FDA has revised the special control requiring a warning label to specify that the label will need to be affixed to at least two sides of the plastic basket or bed component of the bassinet with the language in text of at least 9 millimeters in height.

(Comment 2) FDA received a comment requesting that FDA require warning labels for pediatric medical cribs.

(Response 2) Based on the adverse event reports received on pediatric medical cribs, FDA agrees that a warning label is warranted for pediatric medical cribs. These devices have a number of moving parts that can present a risk of head and limb entrapment,

crushing, pinching, and lacerations to a pediatric patient. FDA has therefore revised the special controls for pediatric medical cribs to include a labeling requirement that mandates that a warning label be affixed to the medical crib that states that pediatric patients must be attended at all times whenever a movable side of the crib is in its lowest, or most open, position when accessing the child. This will serve as a mitigation for the risks of physical harm, such as falling out of the crib and possible pinching or lacerations to pediatric patients and help provide a reasonable assurance of safety and effectiveness of the device.

(Comment 3) Multiple comments requested clarification of the scope of the rule and the applicability of the special controls. One comment requested that the special controls identified in this rule apply to devices that have already been sold in interstate commerce.

(Response 3) After the effective date of this rule, manufacturers of pediatric medical cribs or medical bassinets, whether or not they have been legally marketed prior to January 18, 2017, must comply with the special controls identified in this rule to provide a reasonable assurance of safety and effectiveness of these devices. However, FDA does not intend to enforce the special controls for devices legally marketed prior to this date due to the logistical issues associated with requiring manufacturers to locate devices that have been sold.

(Comment 4) One comment suggested that we provide educational material for

users of prescription medical pediatric cribs in non-traditional health care settings that address use errors.

(Response 4) The FD&C Act and its implementing regulations require all devices to be accompanied by adequate instructions for use (see section 502(f) of the FD&C Act (21 U.S.C. 352(f)) and § 801.5). In addition, the special controls identified in this rule include a requirement for “adequate instructions for users to care for, maintain, and clean the crib” and for warning labels alerting users to risks associated with crib use. The Agency believes these requirements sufficiently address the commenter’s concern regarding use error.

(Comment 5) One comment stated that this rule should not affect contractors or business owners who provide a unique service or product.

(Response 5) To the extent the unique product referred to in the comment is a pediatric medical crib or medical bassinet that meets the definition of a custom device in section 520(b) of the FD&C Act (21 U.S.C. 360j(b)), these devices are exempt from, among other things, premarket approval requirements and conformance to mandatory performance standards (sections 514 and 515 of the FD&C Act (21 U.S.C. 360d and 360e)). However, the definition of custom device is narrow and requires a fact specific analysis. FDA expects that few “unique” pediatric medical cribs or bassinets will qualify as custom devices. FDA notes that patient-specific or patient-matched devices—those that have ranges of different specifications on one general design—are not generally regarded as custom devices. Manufacturers should see FDA’s “Custom Device Exemption” guidance document for more information (Ref. 2). It is important that this rule apply to all pediatric medical cribs and bassinets that do not meet the custom device exemption to provide the broadest protection to users.

(Comment 6) One comment requested that we expand the device identification for pediatric medical cribs to include specialty cribs that allow parents who are disabled to access their children.

(Response 6) This rule establishes an identification and special controls specific to pediatric medical cribs intended for medical purposes and use with a pediatric patient. FDA developed the special controls only after considering the manufacture, use, and risks to health specific to these cribs. The special controls were not developed with other cribs, such as the specialty cribs described in the comment, in mind. As a result, FDA disagrees with including specialty cribs used by

disabled parents for access to their children under this regulation classification.

(Comment 7) One comment requested that FDA make the following changes to the proposed rule regarding pediatric medical crib dimensions: (1) Citing FDA’s reference of ASTM F1169–13 (formerly the American Society for Testing and Materials), section 5.7.2.1, in relation to rail height requirement, the commenter stated that, “Based on user need we believe that this reference should be removed to allow for full access to the patient without interference from the siderail [sic] in the lowest height position.” The commenter stated that they believe dimensions should be determined through the design process and should balance risks and benefits. (2) The proposed rule suggested that “no gap shall exist between the edge of the bottom rail and the top of the mattress surface,” based on ASTM F1169–13. The commenter proposed instead that, based on International Electrotechnical Commission (IEC) 60601–2–52, a maximum gap of 2³/₈ inches be allowed. The commenter stated that a requirement for “no gap” would be practically difficult to design. (3) The commenter also pointed out that the proposed requirement for the height of the side rail is inconsistent with the requirement provided by ASTM F1169–13, section 5.7.2.2, and recommended harmonization with ASTM F1169–13.

(Response 7) FDA agrees that clarification of dimensional requirements is needed for the special controls to mitigate entrapment, pinching, lacerations, and other risks associated with pediatric medical cribs. The Agency responds to the previous comments as follows: (1) Given the many potential differences in crib designs, including different mattress heights, a specific requirement for the height of a pediatric medical crib’s side rail at the lowest position is unnecessary and may not mitigate the risk of falls as effectively in all designs. As a result, FDA has removed the specific height requirement when side rails are in their lowest position, but revised the height requirement when the rail is in the highest position (as described as follows in this response). Also, FDA has added a requirement for a warning label that states that pediatric patients should be attended to whenever a rail is in its lowest, or most open, position, regardless of design, to monitor and mitigate the risk of the patient falling out of the medical crib.

(2) FDA agrees that it may be difficult to design for “no gap”; however, the Agency does not agree that 2³/₈ inches

is an appropriate maximum dimension, as this may leave room for entrapment or impingement. FDA has revised the special controls to eliminate the requirement for “no gap,” but is retaining the requirement that crib mattresses must fit tightly around all four sides of the crib, such that the occurrence of entrapment and impingement is prevented.

(3) FDA agrees that the proposed requirement height of 20 inches was incorrect because the measurement failed to include the CPSC standard as required in CPSC’s guidance entitled “Full-Size Baby Crib Business Guidance” for a pediatric medical crib mattress that requires the height measurement for the mattress to be 6 inches thick (Ref. 3). As a result, FDA is revising the special control requirement to be consistent with that standard. The height of the rail and end panel as measured from the top of the rail or panel in its highest position to the top of the mattress support in its lowest position shall be at least 26 inches (66 centimeters). The mattress will also be required to not exceed 6 inches in thickness. This requirement is to ensure that high mattresses do not create a hazard by reducing the rail height.

(Comment 8) One comment opposed the proposed rule because it did not require any safety testing data be reviewed by FDA. According to the commenter, testing was especially important given the lack of scientific evidence that drop-side rail cribs provide important benefits in hospital settings.

(Response 8) Section 510(m)(2) of the FD&C Act permits FDA to exempt a class II device from the premarket notification requirements on its own initiative or upon petition of an interested person, if FDA determines that a 510(k) is not necessary to provide reasonable assurance of the safety and effectiveness of the device. Pediatric medical cribs have been exempt from premarket notification since 1998 and they have been essential to the provision of efficient medical care to pediatric patients since they entered the market. FDA reviewed the MedSun Survey (Ref. 1) and analyzed the MDRs submitted to the MAUDE database for medical cribs to identify the relevant risks to health associated with these devices (section IV of the proposed rule) and determined that, based on these risks, the number of MDRs received, and FDA’s experience with these devices, there is sufficient information available to establish special controls that in combination with the general controls will provide a reasonable assurance of

safety and effectiveness by mitigating the risks to health associated with these devices (section VI of the proposed rule) without the need to reinstate the requirement for 510(k) review. The special controls require manufacturers to perform appropriate testing to demonstrate the mechanical and structural stability of their pediatric medical cribs, among other things. As a result, FDA does not agree that it needs to review the testing data through review of a manufacturer's premarket notification (510(k)) to provide reasonable assurance of the safety and effectiveness.

(Comment 9) One comment suggested that FDA make the effective date 120 days after the publication of this rule to allow manufacturers of devices legally on the market to have time to conduct gap analysis, plan for design changes, and comply with other special controls.

(Response 9) FDA does not intend to extend the effective date to 120 days for the established special controls in this rule for both pediatric medical cribs and bassinets because many of the special controls in this rule are consistent with current industry practice among many manufacturers of products currently on the market. As stated earlier, due to the CPSC rule prohibiting the use of cribs with a drop-side rail design for non-medical purposes, FDA believes it is necessary to allow consumers to use pediatric medical cribs and bassinets in non-traditional health care facilities as soon as possible if they are prescribed by a health care professional. As a result, FDA has decided to change the effective date from the proposed 60 days stated in the proposed rule to now being 30 days after its publication in the **Federal Register** as stated in this final rule to provide a reasonable assurance of safety and effectiveness of these devices.

Also, FDA is unaware of a possible shortage of devices entering the market due to manufacturers having to comply with the new special controls; however, FDA does not intend to enforce compliance with the special controls for manufacturers of new devices until they have been brought onto the market.

C. Clarifying Changes to the Rule

In addition to the revisions made to the special controls for pediatric medical cribs and bassinets based on the comments submitted for the proposed rule, FDA is making additional clarifying changes to the special controls. FDA has determined that CPSC's Standard for the Flammability of Mattresses and Mattress Pads (FF 4-72, Amended) and Standard for the Flammability (Open Flame) of Mattress

Sets (16 CFR parts 1632 and 1633) are inapplicable to medical bassinets because the mattresses for medical bassinets do not meet the measurements required for CPSC's mattress flammability standards. FDA is therefore removing this special control.

In addition, FDA has revised the labeling special control for both medical cribs and medical bassinets to include adequate instructions for cleaning of the device. The labeling for adequate maintenance of a bassinet should include the use of proper cleaning materials to allow safe and continuous use of these devices for both pediatric patients and personnel in traditional health care settings.

FDA believes that the special controls, listed in the revised regulations § 880.5140 and new regulation § 880.5145, in combination with the general controls, will provide a reasonable assurance of safety and effectiveness for pediatric medical cribs and medical bassinets for their intended use.

V. Effective/Compliance Dates

This final rule will become effective 30 days after its publication in the **Federal Register**.

VI. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the expected costs associated with this rule are expected to be modest, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing "any

rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is \$146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

This rule establishes special controls for medical bassinets and pediatric medical cribs, and permits prescription use of these devices outside of traditional health care settings. This regulation will also change the name of the classification regulation for "pediatric hospital beds" to "pediatric medical cribs" and establish a separate classification regulation for medical bassinets as a class II device. The special control requirements set forth in this rule will clarify safety standards to help minimize the risk of injury to pediatric patients posed by these devices. Additionally, permitting use of pediatric medical cribs by prescription outside of traditional health care settings will benefit pediatric patients who require the specialized care provided by these devices. Costs estimated in this analysis include costs related to the new warning labeling requirements, the prescription and performance testing for medical bassinets and pediatric medical cribs, along with physical modification of pediatric medical crib design. The annual costs are \$2,379,400, and include the costs of the warning labels and prescription provision. The cost of performance testing is \$3,360 per unit and the cost of modifying a pediatric crib is \$1,125 per unit.

The full discussion of economic impacts is available in Docket No. FDA-2015-N-0701 and at <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm> (Ref. 4).

VII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

The final rule refers to previously approved collections of information found in FDA regulations. These collections of information are subject to

review by the Office of Management and Budget (OMB) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information regarding premarket notification submissions (part 807, subpart E), are approved under OMB control number 0910–0120. The collections of information regarding labeling (21 CFR part 801), including prescription device labeling and adequate directions for use, are approved under OMB control number 0910–0485. The collections of information regarding current good manufacturing practice quality systems (21 CFR part 820), including design controls (as referenced in §§ 880.5140(b)(1) and 880.5145(b)(1) and (3) of this document), are approved under OMB control number 0910–0073. The collections of information in 16 CFR parts 1632 and 1633, regarding mattress flammability, are approved under OMB control number 3041–0014.

In addition, FDA concludes that the warning labels for pediatric medical cribs and medical bassinets are not subject to review by OMB because they do not constitute a “collection of information” under the PRA. Rather, the labeling statements are “public disclosure(s) of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public” (5 CFR 1320.3(c)(2)).

IX. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that would 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. Accordingly, the Agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

X. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <http://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal**

Register, but Web sites are subject to change over time.

1. MedSun Newsletter #66, “Pediatric Hospital Cribs: MedSun Small Sample Survey Summary” (November 2011), available at <http://www.fda.gov/downloads/MedicalDevices/Safety/MedSunMedicalProductSafetyNetwork/Newsletters/UCM422131.pdf>.
2. FDA, “Custom Device Exemption: Guidance for Industry and Food and Drug Administration Staff,” (September 24, 2014), available at <http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM415799.pdf>.
3. Consumer Product Safety Commission, “Full-Size Baby Cribs Business Guidance,” available at <http://www.cpsc.gov/en/Business—Manufacturing/Business-Education/Business-Guidance/Full-Size-Baby-Cribs/>.
4. Final Regulatory Impact Analysis, Final Regulatory Flexibility Analysis, and Unfunded Mandates Reform Act Analysis for Requirements for General Hospital and Personal Use Devices: Renaming of Pediatric Hospital Bed Classification and Designation of Special Controls for Pediatric Medical Crib; Classification of Medical Bassinet, available at <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

List of Subjects in 21 CFR Part 880

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 880 is amended as follows:

PART 880—GENERAL HOSPITAL AND PERSONAL USE DEVICES

- 1. The authority citation for part 880 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

- 2. Revise § 880.5140 to read as follows:

§ 880.5140 Pediatric medical crib.

(a) *Identification.* A pediatric medical crib is a prescription device intended for medical purposes for use with a pediatric patient that consists of an open crib, fixed end rails, movable and latchable side rail components, and possibly an accompanying mattress. The contour of the crib surface may be adjustable.

(b) *Classification.* Class II (special controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 880.9. The special controls for this device are:

- (1) Crib design and performance testing shall demonstrate the

mechanical and structural stability of the crib under expected conditions of use, including the security of latches and other locking mechanisms when engaged;

(2) Materials used shall be appropriate for the conditions of use, allow for proper sanitation, and be free from surface defects that could result in injuries;

(3) The height of the rail and end panel as measured from the top of the rail or panel in its highest position to the top of the mattress support in its lowest position shall be at least 26 inches (66 centimeters). Any mattress used in this crib must not exceed a thickness of 6 inches;

(4) Hardware and fasteners shall be designed and constructed to eliminate mechanical hazards to the patient;

(5) The distance between components of the side rail (*i.e.*, slats, spindles, and corner posts) shall not be greater than 2³/₈ inches (6 centimeters) apart at any point;

(6) The mattress must fit tightly around all four sides of the crib base, such that entrapment or impingement of occupant is prevented;

(7) The mattress for the crib shall meet the Consumer Product Safety Commission (CPSC) Standard for the flammability of mattresses and mattress pads (FF 4–72, amended) and Standard for the flammability (open flame) of mattress sets, 16 CFR parts 1632 and 1633, respectively; and

(8) Each device must have the following label(s) affixed:

(i) Adequate instructions for users to care for, maintain, and clean the crib; and

(ii) A warning label on at least two sides of the medical crib with the following language in text of at least 9 millimeters in height:

WARNING: Never leave a child unsupervised when the moveable side is open or not secured.

- 3. Add § 880.5145 to subpart F to read as follows:

§ 880.5145 Medical bassinet.

(a) *Identification.* A medical bassinet is a prescription device that is a small bed intended for use with pediatric patients, generally from birth to approximately 5 months of age. It is intended for medical purposes for use in a nursery, labor and delivery unit, or patient room, but may also be used outside of traditional health care settings. A medical bassinet is a non-powered device that consists of two components: The plastic basket or bed component and a durable frame with wheels, which holds the basket or bed

component. The basket or bed component is a box-like structure, generally made of a clear, high impact-resistant plastic material, with an open top and four stationary walls to hold the pediatric patient. The frame can include drawers, shelving, or cabinetry that provides space to hold infant care items. The wheels or casters allow the bassinet to transport the infant throughout the care setting.

(b) *Classification.* Class II (special controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 880.9. The special controls for this device are:

(1) The manufacturer must conduct performance testing to determine material compatibility with cleansing products labeled to clean the device. Testing must demonstrate that the cleaning instructions provided by the manufacturer do not cause crazing, cracking, or deterioration of the device;

(2) Manufacturers shall conduct performance testing to ensure the mechanical and structural stability of the bassinet under expected conditions of use, including transport of patients in the bassinet. Testing must demonstrate that failures such as wheel or caster breakage do not occur and that the device does not present a tipping hazard due to any mechanical failures under expected conditions of use; and

(3) Each device must have the following label(s) affixed:

(i) Adequate instructions for users to care for, maintain, and clean the bassinet; and

(ii) A warning label on at least two sides of the plastic basket or bed component with the following language in text of at least 9 millimeters in height:

WARNING: To avoid tipping hazards of this device, make sure that the basket or bed component sits firmly in the base and that all doors, drawers, and casters are secure.

Dated: December 12, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016-30193 Filed 12-16-16; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9805]

RIN 1545-BN18

Guidance Under Section 355(e) Regarding Predecessors, Successors, and Limitation on Gain Recognition; Guidance Under Section 355(f)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that provide guidance regarding the distribution by a distributing corporation of stock or securities of a controlled corporation without the recognition of income, gain, or loss. The temporary regulations provide guidance in determining whether a corporation is a predecessor or successor of a distributing or controlled corporation for purposes of the exception under section 355(e) of the Internal Revenue Code (Code) to the nonrecognition treatment afforded qualifying distributions, and they provide certain limitations on the recognition of gain in certain cases involving a predecessor of a distributing corporation. The temporary regulations also provide rules regarding the extent to which section 355(f) of the Code causes a distributing corporation (and in certain cases its shareholders) to recognize income or gain on the distribution of stock or securities of a controlled corporation. These temporary regulations affect corporations that distribute the stock or securities of controlled corporations and the shareholders or security holders of those distributing corporations. The text of these temporary regulations also serves as the text of the proposed regulations in the related notice of proposed rulemaking (REG-140328-15) set forth in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective date:* These temporary regulations are effective on December 19, 2016.

Applicability date: For dates of applicability see § 1.355-8T(i) and (j).

FOR FURTHER INFORMATION CONTACT: Richard K. Passales, (202) 317-5024 or Marie C. Milnes-Vasquez, (202) 317-7700 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

1. Overview

On November 22, 2004, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (69 FR 67873) a notice of proposed rulemaking (REG-145535-02) containing proposed regulations under section 355(e)(4)(D) of the Code (the proposed regulations). After considering the comments received on the proposed regulations and taking into account subsequently issued guidance as described in part 3. of this preamble, the Treasury Department and the IRS are issuing temporary regulations that adopt the proposed regulations with significant modifications based on the comments received on the proposed regulations. The temporary regulations also serve as the text of new proposed regulations in the related notice of proposed rulemaking (REG-140328-15) published in the Proposed Rules section in this issue of the **Federal Register**.

The temporary regulations amend 26 CFR part 1 under section 355 to provide necessary guidance under section 355(e)(4)(D) regarding the identity of predecessor and successor corporations of distributing and controlled corporations and to enable taxpayers to utilize the benefit of certain gain limitation rules. The temporary regulations also provide guidance regarding the extent to which section 355(f) precludes the application of section 355 to certain distributions and exchanges between members of an affiliated group. Finally, the regulations provide guidance regarding the application of section 336(e) to certain distributions of controlled stock to which section 355(e) applies.

A. Section 355 in General

Section 355(a) generally provides that if a distributing corporation (Distributing) distributes stock or securities of a controlled corporation (Controlled) to Distributing's shareholders or security holders and certain requirements are met, then no gain or loss is recognized by (and no amount is includible in the income of) Distributing's shareholders or security holders upon their receipt of the Controlled stock. Section 355(c) generally provides that Distributing does not recognize gain or loss on any distribution of qualified property to which section 355 (or so much of section 356 as relates to section 355) applies. Similar rules under section 361(c) apply in the case of a divisive reorganization under section

368(a)(1)(D) (a divisive D reorganization). Controlled stock or securities are qualified property under section 355(c)(2)(B) (or section 361(c)(2)(B)(ii) in the case of a divisive D reorganization), unless certain exceptions apply.

B. Sections 355(e) and (f)

One exception to treating Controlled stock or securities as qualified property is provided under section 355(e), which was enacted as part of the Taxpayer Relief Act of 1997, Public Law 105–34, section 1012(a), 111 Stat. 788. Under section 355(e), stock or securities of Controlled generally will not be treated as qualified property under sections 355(c)(2) or 361(c)(2) if the stock or securities are distributed as part of a plan or series of related transactions (a *Plan*) pursuant to which one or more persons acquire directly or indirectly stock representing a 50-percent or greater interest in the stock of Distributing or Controlled (a Planned 50-percent Acquisition). Section 1.355–7 of the Income Tax Regulations provides additional guidance on the meaning of a Plan.

Under section 355(e)(2)(C), the existence of a purported Plan that includes a Planned 50-percent Acquisition will not prevent Controlled stock or securities from being treated as qualified property for purposes of section 355(c)(2) or section 361(c)(2) if, immediately after the completion of such Plan, Distributing and each Controlled are members of a single affiliated group, as defined in section 1504 without regard to section 1504(b) (an Expanded Affiliated Group or EAG). As a result, section 355(e) generally does not apply to a distribution between members of the same EAG unless the distribution precedes a distribution of Controlled stock or securities outside of the EAG (an External Distribution) so that Controlled and Distributing are not members of the same EAG after completion of the Plan.

Section 355(f) provides a special rule that applies to certain distributions between certain related corporations that do not qualify for the exception from section 355(e) under section 355(e)(2)(C). In particular, section 355(f) provides that, except as provided in regulations, section 355 (or so much of section 356 as relates to section 355) does not apply to the distribution of stock from one member of an affiliated group (as defined in section 1504(a)) to another member of the group if the distribution is part of a Plan that includes a Planned 50-percent Acquisition and is not described in section 355(e)(2)(C). For example,

assume that a Planned 50-percent Acquisition of stock of a corporation (a Higher-Tier Distributing) that is the common parent of an affiliated group, as defined in section 1504(a), occurs when the Higher-Tier Distributing owns all of the stock of a subsidiary member (a Lower-Tier Distributing), which in turn owns all of the stock of Controlled (also a member of the affiliated group). Under the Plan, the Lower-Tier Distributing distributes Controlled stock to the Higher-Tier Distributing (an Internal Distribution), and the Higher-Tier Distributing then distributes the Controlled stock in an External Distribution. Under these facts, section 355(e) would apply to the Internal Distribution of all of Controlled's stock by the Lower-Tier Distributing to the Higher-Tier Distributing because the distribution is part of a Plan (after application of any exceptions to section 355(e), including section 355(e)(2)(C)). However, section 355(f) provides that section 355 (or so much of section 356 as applies to section 355) would not apply to such an Internal Distribution. Therefore, the Internal Distribution would be taxable to the Lower-Tier Distributing under section 311 and to the Higher-Tier Distributing under section 301 (subject to any available dividends received deduction and section 1059) or subject to the special rules of § 1.1502–13(f) for distributions between members of the same consolidated group.

Without the application of section 355(f), the Lower-Tier Distributing would recognize any gain in the Controlled stock by reason of section 355(e) (section 355(e) gain) in the Internal Distribution, but the Higher-Tier Distributing would be afforded nonrecognition treatment under section 355(a) on the receipt of Controlled stock. As a result, the Higher-Tier Distributing would not take a fair market value basis in the Controlled stock under section 301(d), but a basis determined under section 358(g), despite the Lower-Tier Distributing's recognition of section 355(e) gain. The Higher-Tier Distributing would also likely recognize additional section 355(e) gain on the subsequent External Distribution of the Controlled stock. Section 355(f) is intended to provide a benefit to such an affiliated group by effectively ensuring that the group recognizes section 355(e) gain only once at the lowest-tier Distributing, rather than at multiple levels. In addition, application of section 355(f) may eliminate duplicated loss, in some cases.

Section 355(e)(3)(B) provides that, if the assets of Distributing or any

Controlled are acquired by a successor corporation in a reorganization under section 368(a)(1)(A), (C), or (D), or any other transaction specified in regulations by the Secretary, the shareholders (immediately before the acquisition) of the corporation acquiring such assets are treated as acquiring stock in the corporation from which the assets were acquired.

Section 355(e)(4)(D) provides that, for purposes of section 355(e), any reference to Controlled or Distributing includes a reference to any predecessor or successor of such corporation. As a result, Controlled stock or securities generally will not be treated as qualified property under section 355(c)(2) or 361(c)(2) if there is a Planned 50-percent Acquisition of the stock of a predecessor or successor of Distributing or Controlled.

2. Summary of Proposed Regulations

Section 355(e) does not provide a definition of a predecessor or successor of Distributing or Controlled. The proposed regulations generally defined the terms *predecessor* and *successor* for purposes of section 355(e) and provided guidance regarding the acquisition or deemed acquisition of the stock of predecessors of Distributing and certain other acquisitions. As more fully described in part 2.E. of this preamble, the proposed regulations also limited Distributing's recognition of gain in two cases and provided an overall gain limitation. Parts 2.A. through 2.F. of this preamble describe the proposed regulations, which the temporary regulations largely adopt with the modifications described in part 3. of this preamble.

A. Predecessor of Distributing

The preamble to the proposed regulations stated that the definition of a *Predecessor of Distributing* (a POD) in those regulations was intended to reflect the fact that section 355(e) generally denies tax-free treatment under sections 355(c)(1) and 361(c)(1) if there is a division of Distributing's assets to which section 355(a) applies that is coupled with a Planned 50-percent Acquisition of Distributing or Controlled. The proposed regulations attempted to provide a similar result in cases in which the ownership of a POD's assets (rather than those of Distributing) would otherwise be divided tax-free as part of a Plan that included a Planned 50-percent Acquisition of a POD or Distributing.

The proposed regulations generally defined a POD as a corporation that transferred its property in a transaction to which section 381(a) applies (section

381 transaction) to Distributing (a combining transfer) but only if Distributing then transferred some, but not all, of the property acquired in the combining transfer to Controlled in a transferred basis transaction before the distribution (a separating transfer). The definition was slightly different if Controlled stock was an asset transferred in the combining transfer. In addition, under the proposed regulations, no corporation could have been a predecessor of a POD.

In addition, the proposed regulations provided three operating rules relating to the determination of predecessor status. The first was a substitute asset rule that prevented a corporation from avoiding treatment as a POD simply because property received by Distributing in a combining transfer (or by Controlled in a separating transfer) was transferred by Distributing before the separating transfer (or by Controlled before the distribution) in exchange for other property in a nonrecognition transaction. The second rule provided that the transferor corporation and resulting corporation in a reorganization under section 368(a)(1)(F) (an F reorganization) would be treated as the same entity for purposes of determining whether a corporation is a POD or a *Predecessor of Controlled* (POC), as described in part 2.B. of this preamble. Without such a rule, a corporation could circumvent the proposed regulations by engaging in an F reorganization, because the proposed regulations did not take into account predecessors of a POD or POC. The third rule provided that there may be more than one POD, for example, if multiple corporations merged directly with and into Distributing in distinct transactions to which section 381 applied.

Under the proposed regulations, the definition of a POD was not tied to the existence of a Plan. Accordingly, a combining transfer and a separating transfer would be taken into account in identifying a POD even if neither transfer was part of a Plan; as a result, taxpayers would have been required to track the assets of any potential POD for an unlimited period prior to the distribution. In addition, once a POD had been identified, it would have been necessary to determine whether the distribution and any acquisitions (deemed or actual) of stock of the POD were part of a Plan, although the proposed regulations included no guidance relating to whether acquisitions of the stock of a POD and the distribution were part of a Plan.

B. Predecessor of Controlled

The proposed regulations defined a POC as a corporation that transferred its assets to Controlled in a section 381 transaction before the distribution. However, whether a corporation was a POC was only taken into account for very limited purposes: (1) The definition of a POD, (2) the gain limitation rules described in part 2.E. of this preamble, and (3) the application of section 355(e)(2)(C), which is described in part 2.F. of this preamble. Other than for those limited purposes, a corporation would not be a POC under the proposed regulations. Further, no corporation could have been a predecessor of a POC.

C. Successor of Distributing and Controlled

The proposed regulations defined a *Successor* of Distributing or Controlled as a corporation to which Distributing or Controlled, respectively, transferred its assets in a section 381 transaction after the distribution (a *Successor Transaction*). If, after the distribution, Distributing transferred its assets to a Successor in a *Successor Transaction*, the proposed regulations provided that the shareholders of the Successor immediately before the transaction would be deemed to acquire Distributing stock (and stock of any POD) in the Successor Transaction. Subsequent acquisitions of stock of the Successor would be treated as acquisitions of Distributing (and any PODs).

D. Special Rules for Measuring Acquisitions

Under the proposed regulations, the determination of whether there was a Planned 50-percent Acquisition was made separately with respect to Distributing and the POD. Therefore, Distributing may have been required to recognize section 355(e) gain if there was a Planned 50-percent Acquisition of a POD, but not of Distributing, and vice versa.

The proposed regulations provided special rules to determine whether there had been an acquisition of the stock of a POD in connection with and after a combining transfer from a POD to Distributing. Consistent with section 355(e)(3)(B), the proposed regulations provided that each person that owned an interest in Distributing immediately before the combining transfer would be treated as acquiring stock of the POD in the transaction. For example, if Distributing acquired the assets of a POD in a statutory merger qualifying as a reorganization under section

368(a)(1)(A) (an A reorganization), and individual A owned stock of Distributing immediately before the merger, A would be treated as acquiring stock of the POD in the transaction. In addition, an acquisition of Distributing that occurred after Distributing's combination with a POD would be treated not only as an acquisition of Distributing, but also as an acquisition of the POD. For example, if Distributing acquired the assets of a POD in a statutory merger qualifying as an A reorganization and, after the merger, individual B acquired stock of Distributing, B would be treated as acquiring not only stock of Distributing, but also stock of the POD. Similar rules applied with respect to Controlled except that there was no provision for a deemed acquisition of the stock of a POC because such acquisitions were of no consequence under the proposed regulations.

In addition, the proposed regulations provided that acquisitions of the stock of a corporation and its Successors would be combined to determine whether there had been a Planned 50-percent Acquisition of the corporation. For example, planned acquisitions of the stock of a POD, Distributing, and Distributing's Successors would be combined to determine whether there had been a Planned 50-percent Acquisition of the POD. Similarly, planned acquisitions of the stock of Distributing and its Successors would be combined to determine whether there had been a Planned 50-percent Acquisition of Distributing. In addition, planned acquisitions of the stock of Controlled and its Successors would be combined to determine whether there had been a Planned 50-percent Acquisition of Controlled.

E. Limitations on Gain Recognition

Generally, if there is a Planned 50-percent Acquisition of Distributing (or a POD), Controlled, or their Successors, then section 355(e) requires Distributing to recognize the full amount of the built-in gain in the Controlled stock on the date of the distribution under section 355(c)(2) or section 361(c)(2), as applicable. The proposed regulations provided two gain limitation rules limiting the amount of gain that Distributing must recognize in certain cases in which there was a POD and a third gain limitation rule providing an overall limitation on Distributing's gain.

The first gain limitation rule applied when there was a Planned 50-percent Acquisition of one or more PODs. In those cases, the calculation of the section 355(e) gain focused on assets of the POD(s) that were transferred to

Controlled and any Controlled stock transferred by the POD(s) to Distributing. Specifically, the proposed regulations limited the section 355(e) gain recognized by Distributing to the amount of gain, if any, that any PODs would have recognized if, immediately before the distribution each POD had (1) transferred the property that was transferred to Controlled (and any stock of Controlled that the POD transferred to Distributing) to a newly-formed, wholly-owned corporation solely for stock of such corporation in an exchange to which section 351 applied (section 351 exchange), and (2) then sold the stock of that corporation to an unrelated person in exchange for cash equal to its fair market value. In applying this first gain limitation rule, the proposed regulations provided four operating rules. The first operating rule was a substitute asset rule (similar to that described in part 2.A. of this preamble) that applied if property received by Distributing in a combining transfer had been exchanged tax-free. In such case, the property Distributing received in the exchange would be treated as property received in the combining transfer. The second operating rule provided that (other than Controlled stock) the only property taken into account for purposes of the first gain limitation rule would be property that was transferred to Controlled in the separating transfer (or a substitute asset received in a tax-free exchange for property received in the separating transfer) and held by Controlled at the time of the distribution. Under the third operating rule, the basis and value of the property (other than Controlled stock) would be determined as of the date of the distribution. The fourth operating rule provided that the basis and value of any Controlled stock that the POD transferred to Distributing would be measured on the date of the combining transfer.

The second gain limitation rule applied if a section 381 transaction (for example, an A reorganization of a POD into Distributing) caused a Planned 50-percent Acquisition of Distributing stock. Under those circumstances, the second gain limitation rule effectively limited the amount of section 355(e) gain that Distributing would recognize to the excess of the amount described in section 355(c)(2) or section 361(c)(2), as applicable, over any section 355(e) gain that Distributing would have been required to recognize if there had been a Planned 50-percent Acquisition of one or more PODs (but not Distributing). The section 355(e) gain computed on the hypothetical Planned 50-percent

Acquisition of Distributing would take into account the first gain limitation rule.

The third gain limitation rule was an overall limitation on gain recognition. This rule limited the total amount of section 355(e) gain that could be recognized by Distributing as a result of the distribution to the amount of the built-in gain in the Controlled stock that, without regard to the first and second gain limitation rules, would be taken into account under section 355(c)(2) or section 361(c)(2).

F. Special Rule for Affiliated Groups

As described in part 1.B. of this preamble, section 355(e)(2)(C) provides that section 355(e) does not apply to a distribution between members of an EAG if, immediately after completion of the Plan, Distributing and Controlled both remain members of the same EAG. The proposed regulations included a special rule that would rationalize the application of section 355(e)(2)(C) within an EAG, following a section 381 transaction. The proposed regulations provided that, for purposes of section 355(e)(2)(C), a POD or POC that was a member of the same EAG as Distributing or Controlled (as relevant) at the time of the section 381 transaction would be treated as continuing in existence within the EAG following its transfer of property to Distributing or Controlled in the section 381 transaction. Similarly, Distributing or Controlled would be treated as continuing in existence following a transfer of property to a Successor that was a member of the same EAG. Without this rule, for example, because a POD that was a historic member of the EAG would not continue to exist for Federal income tax purposes after transferring property to Distributing in a combining transfer, section 355(e)(2)(C) would not prevent section 355(e) from applying to a Planned 50-percent Acquisition of the stock of a POD, even if Distributing and Controlled remained members of the same EAG immediately after completion of the Plan.

3. Summary of Comments and Modifications Adopted in the Temporary Regulations

The Treasury Department and the IRS received formal and informal comments regarding the proposed regulations. The comments and modifications to the proposed regulations adopted in the temporary regulations are discussed here. The temporary regulations retain many of the rules of the proposed regulations; however, in response to comments, the temporary regulations modify some provisions and add new

provisions, as discussed in parts 3.A. through 3.D. of this preamble. In addition, the temporary regulations include certain non-substantive modifications to the organization of the rules of the proposed regulations.

A. Comments Regarding Definition of POD

i. Scope of Definition of a POD and Application of § 1.355-7 Plan Rules

The Treasury Department and the IRS received a comment regarding the narrow scope of the definition of a POD in the proposed regulations, the definition of a POD was limited to a corporation that, before the distribution, transferred property to Distributing in a section 381 transaction. Further, following the transfer from a POD, Distributing must have transferred some (but not all) of the acquired property to Controlled (or to a POC, as described below), and the basis of such property immediately after the transfer to Controlled (or a POC) must have been determined in whole or in part by reference to the basis of the property in the hands of Distributing immediately before the transfer. The commenter noted that the results contemplated by the definition of a POD of the proposed regulations (the tax-free separation of the POD's assets in the distribution, coupled with a potential 50-percent acquisition of the POD's stock) could be effectively replicated in a manner that would circumvent that definition and thereby avoid the application of section 355(e) in substantially similar transactions. For example, assume that corporation D2 owns 100 percent of both classes (voting class A and voting class B) of corporation D1's stock, and D1 owns all of the stock of corporation C. The three corporations together file a consolidated return (the D2 group). Assume that the following steps occur as part of a Plan: D2 acquires all of the stock of unrelated corporation P in exchange for 10 percent of D2's only class of outstanding stock in a reorganization under section 368(a)(1)(B). After joining the D2 group, P transfers an asset to D1 for less than 20 percent of D1's voting class A stock in a section 351 exchange by application of § 1.1502-34. D1 then transfers the asset to C and distributes all the C stock with respect to its voting class B stock to D2 in a transaction qualifying under section 355(a). D2 in turn distributes all the C stock to its shareholders in a transaction qualifying under section 355(a). In such a case, P's assets have been divided tax-free as a result of the distribution of C stock, and P has undergone a 50-percent acquisition of

its stock, but section 355(e) would not apply because P did not engage in a section 381 transaction, although all steps occurred under a Plan.

Commenters also expressed concern that the definition of a POD in the proposed regulations would apply without regard to whether the combining transfer or separating transfer were part of a Plan. These commenters further noted that the Plan rules of § 1.355-7, which were published after the proposed regulations, did not provide express guidance regarding their application in cases involving an acquisition of a POD's stock that could implicate section 355(e). The commenters recommended that the proposed regulations be modified to include: (1) A rule stating that a corporation can satisfy the definition of a POD only if both the combining transfer and the separating transfer are part of a Plan, and (2) express guidance regarding the application of the § 1.355-7 Plan rules in cases involving an acquisition of a POD's stock. The comments indicated that, absent the requirement that the combining transfer and the separating transfer both be part of a Plan, there could be uncertainty as to whether section 355(e) would apply to the acquisition of a potential POD if there is no Plan in existence at the time of the section 381 transaction. Further, this uncertainty would burden taxpayers by requiring assets acquired by Distributing in any section 381 transaction at any time to be tracked through the date of the distribution without knowing whether section 355(e) would apply.

The Treasury Department and the IRS have determined that the normal construct of the Plan rules in § 1.355-7 generally should apply to acquisitions of POD stock (as well as to acquisitions of the stock of Distributing, Controlled, and their Successors). Accordingly, the temporary regulations provide a general rule that references in § 1.355-7 to Distributing or Controlled are treated as references to a POD, POC, or Successor of Distributing or Controlled, as the context may require. Further, a reference to a distribution generally includes a reference to a distribution and other related pre-distribution transactions that together effect a division of the assets of a POD. However, special rules apply with regard to the actions taken into account in determining whether a 50-percent acquisition of a POD occurs as part of a Plan. Although a 50-percent acquisition of a POD may occur contemporaneously with a distribution made by Distributing, the acquisition and distribution might occur as part of a

Plan of the POD, but without the participation (or even the knowledge) of Distributing. Because Distributing would be the corporation that could recognize section 355(e) gain, the Treasury Department and the IRS have determined that it is not appropriate to apply the rules of § 1.355-7 by imputing to Distributing the actions of a POD or its shareholders. Accordingly, these temporary regulations provide that any agreement, understanding, arrangement, or substantial negotiations with regard to the acquisition of a POD is analyzed under § 1.355-7 by taking into account the actions of officers or directors of Distributing or Controlled, controlling shareholders (as defined in § 1.355-7(h)(3)) of Distributing or Controlled, or a person acting with the implicit or explicit permission of one of those parties. The actions of officers or directors of a POD and other parties that might be relevant with regard to an analysis under § 1.355-7 if the POD were an actual Distributing are not considered unless those actions otherwise would be examined under the preceding sentence (for example, if a POD or its shareholder is a controlling shareholder of Distributing).

In addition, the Treasury Department and the IRS agree with the comment that the definition of a POD in the proposed regulations, with its exclusive application to transferors in section 381 transactions, did not adequately address section 355(e) policy concerns regarding the use of section 355 to facilitate tax-free dispositions of assets. The Treasury Department and the IRS also agree with commenters that the existence of a Plan should be relevant to the determination of whether a corporation is a POD, to minimize the burden of tracking a corporation's assets prior to the distribution. Therefore, as described in the following paragraphs, the modified definition of a POD contained in the temporary regulations takes into account both of these comments.

ii. Modifications to Definition of a POD

a. Synthetic Spin-Off Analysis

Study by the Treasury Department and the IRS arising from consideration of the comments received on the proposed regulations has led to the identification of a variety of pre-distribution transactions that taxpayers could use to achieve results substantially similar to a combining transfer and separating transfer. For example, as described in part 3.A.i. of this preamble, a corporation could transfer some, but not all, of its assets to Distributing in a section 351 exchange, with those assets ultimately

being held by Controlled when its stock is distributed by Distributing. However, under the proposed regulations, POD status would not attach to the transferor because the division of the transferor's assets would be accomplished using a section 351 exchange and not in a section 381 transaction (that is, a combining transfer).

The Treasury Department and the IRS have reviewed the major goal of the proposed regulations, as discussed at part 2.A. of this preamble: To apply section 355(e) in cases in which, as part of a Plan, a tax-free division of the ownership of the POD's assets would otherwise be achieved through the use of a section 355 distribution. Although not discussed in depth in the preamble of the proposed regulations, the overarching theory was to apply section 355(e) to a section 355 distribution if, as part of a Plan, some of the assets of a POD were transferred to Controlled without full recognition of gain, and the distribution accomplished a division of the POD's assets. The Treasury Department and the IRS viewed (and continue to view) this type of transaction as a vehicle for achieving, as a result of the distribution of Controlled stock, the tax-free separation of the assets that the POD transferred to Distributing that are further transferred to Controlled (a synthetic spin-off). The POD might have separated those assets in a divisive D reorganization, without the intervention of Distributing. However, in that case, section 355(e) may have applied to the section 355 distribution, whereas, absent treatment as a POD, a synthetic spin-off of the POD's assets would not be subject to section 355(e).

The proposed regulations defined a POD narrowly, so that a corporation that transferred some of its assets to Controlled would be a POD only if it first transferred those assets to Distributing in a section 381 transaction. To achieve the goal of applying section 355(e) to synthetic spin-offs more effectively, these temporary regulations have both broadened and limited the scope of the definition of a POD. As discussed in greater detail in part 3.A.ii.b. of this preamble, the temporary regulations eliminate the formalistic requirements of a combining transfer followed by a separating transfer and generally identify as a POD any corporation whose assets are divided as part of a Plan as a result of some but not all of those assets being transferred to Controlled without the recognition of all of the built-in gain on the transferred assets before the distribution. No specific transactional form is required with regard to the transfer(s) of assets to

Controlled, although such transfers must be made as part of a Plan. Thus, Distributing may recognize section 355(e) gain on a distribution of Controlled stock if Controlled acquired assets of any corporation identified as a POD, and the POD experiences a Planned 50-percent Acquisition of its stock.

b. Definition of a POD in the Temporary Regulations

Consistent with the synthetic spin-off analysis described in part 3.A.ii.a. of this preamble, the temporary regulations focus in a more conceptual manner on the division of property of any corporation other than Distributing or Controlled (a *Potential Predecessor*) as part of a Plan. Certain property of a Potential Predecessor (Relevant Property) is required to be tracked for the purpose of determining whether a division of the Potential Predecessor's property has occurred. *Relevant Property* is defined as any property held, directly or indirectly, by the Potential Predecessor at any point during the Plan Period. The *Plan Period*, in turn, is defined as the period that ends immediately after the distribution and begins on the earliest date on which any pre-distribution step that is part of the Plan is agreed to or understood, arranged, or substantially negotiated by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. The temporary regulations generally do not treat as Relevant Property any property of a Potential Predecessor that was held directly or indirectly by Distributing or Controlled before a Plan existed. Rather, the definition of Relevant Property of a Potential Predecessor excludes any property held directly or indirectly by Distributing unless that property was directly or indirectly transferred to Distributing as part of a Plan, and it was Relevant Property of the Potential Predecessor before the transfer.

Because POD status under the temporary regulations depends in large part upon the division of the Relevant Property of a Potential Predecessor, Relevant Property must be carefully defined and transfers of Relevant Property as part of a Plan must be tracked to achieve the goals of the temporary regulations. Thus, although the modified definition of a POD is conceptual in nature, it is implemented through application of a set of defined terms. In addition to Relevant Property

and Plan Period, the following defined terms are integral to applying the modified definition of a POD:

Relevant Stock—Stock that is a Potential Predecessor's Relevant Property.

Substitute Asset—In general, any property that is held directly or indirectly by Distributing during the Plan Period and that was received in exchange for Relevant Property that was acquired directly or indirectly by Distributing if all gain on the transferred Relevant Property is not recognized in the exchange. In addition, stock received by Distributing in a distribution qualifying under section 305(a) or section 355(a) on Relevant Stock is a Substitute Asset.

Separated Property—Each item of Relevant Property that is transferred to Controlled as part of a Plan and is held by Controlled immediately before the distribution. Also, Controlled stock that is Relevant Property and that is transferred to, and distributed by, Distributing as part of a Plan.

Underlying Property—Property directly or indirectly held by a corporation that is the issuer of Relevant Stock.

The definition of a POD, which focuses on the division of Relevant Property as part of a Plan, requires the satisfaction of both pre-distribution and post-distribution requirements. There are two pre-distribution requirements: A Relevant Property requirement and a reflection of basis requirement. The Relevant Property requirement may be satisfied in two ways. The Relevant Property requirement may be satisfied if, before the distribution and as part of a Plan, Distributing directly or indirectly acquires Controlled stock in exchange for a direct or indirect interest in Relevant Property. In addition, Controlled must directly or indirectly hold Relevant Property immediately before the distribution, and the gain in the Relevant Property must not have been fully recognized as part of the Plan. The Relevant Property requirement also may be satisfied if any Controlled stock that is distributed as part of the Plan is Relevant Property, and the full amount of gain on that Controlled stock is not recognized as part of the Plan. In either case and as discussed earlier in this part 3.A.ii.b., for purposes of determining POD status, a Potential Predecessor will not be treated as an indirect owner of property that is directly or indirectly held by Distributing unless that property was transferred to Distributing as part of a Plan.

The reflection of basis requirement is satisfied only if any Controlled stock

distributed in the distribution reflects the basis of any Separated Property. This requirement ensures that there is a connection between the gain in the property of a POD and the gain that would be included under an application of section 355(e) and these temporary regulations. For example, under this rule, if section 355(e) applies to each of two sequential distributions of Controlled stock, the Controlled stock that is distributed in the second distribution might not reflect any gain in Separated Property of a Potential Predecessor of the first Distributing. In that case, the Potential Predecessor will not be treated as a POD for purposes of the second distribution, even though that Potential Predecessor may have been a POD for purposes of the first distribution.

In addition to the two pre-distribution requirements, a single post-distribution requirement applies: Immediately after the distribution, direct or indirect ownership of Relevant Property must have been divided between Controlled on the one hand, and Distributing or the Potential Predecessor (or a successor of a Potential Predecessor) on the other hand. For purposes of the preceding sentence, if a Potential Predecessor transfers property in a section 381 transaction to a corporation (other than Distributing or Controlled) during the Plan Period, the corporation is a successor to the Potential Predecessor. If all of the Relevant Property of a Potential Predecessor is transferred to Controlled before the distribution, that Potential Predecessor is not a POD because its assets have not been divided.

Special rules apply to ensure that the occurrence of a reorganization under section 368(a)(1)(E) or (F) to which Distributing is a party does not affect the analysis of whether Distributing stock or Distributing's direct and indirect assets are treated as Relevant Property.

The definition of a POD under the temporary regulations captures many of the same transactions that would have been captured under the proposed regulations without modification. For example, the merger of a Potential Predecessor into Distributing as part of a Plan, followed by the transfer of some (but not all) of the assets of the Potential Predecessor to Controlled as part of the Plan would result in the Potential Predecessor being treated as a POD under both regulations. However, the definition of a POD under the temporary regulations will reach a number of other Potential Predecessors, including indirect transferors, particularly because, under the modified definition, Relevant Property expressly includes

both the directly and indirectly-held property of a Potential Predecessor. Therefore, in determining whether Relevant Property has been divided (and, thus, whether a POD exists), the temporary regulations consider an expanded pool of Potential Predecessors. For example, if a Potential Predecessor transfers Relevant Property to Distributing in a section 351 exchange as part of a Plan, the Potential Predecessor may be a POD, as may be a direct or indirect corporate shareholder of the Potential Predecessor (an indirect owner of the Relevant Property during the Plan Period), if the Potential Predecessor's Relevant Property (directly or indirectly held) is ultimately divided, as part of the Plan, as a result of the distribution. As another example, a Potential Predecessor that merges into Distributing in a forward triangular merger as part of a Plan may be a POD, as well as a direct or indirect corporate shareholder of the Potential Predecessor during the Plan Period. However, as discussed earlier in this part 3.A.ii.b., in either case, the Potential Predecessor's Relevant Property ultimately must be divided as part of the Plan to satisfy the post-distribution requirement.

As discussed earlier in this part 3.A.ii.b., the temporary regulations require the tracking of assets for purposes of identifying PODs; as discussed further in part 3.B. of this preamble, the temporary regulations also require asset tracking for purposes of application of the gain limitation rules. However, to alleviate this burden (as identified in the comments received on the proposed regulations), the temporary regulations provide that only direct or indirect transfers of Relevant Property (including Controlled stock) by a Potential Predecessor to Distributing (or to a POD (see discussion in part 3.A.iii. of this preamble)) that occur as part of a Plan are relevant in determining whether a Potential Predecessor is treated as a POD or a predecessor of a POD (the Plan Limitation). Similarly, only assets transferred as part of a Plan are relevant for application of the gain limitation rules. If no transfer of property of a Potential Predecessor to Distributing or Controlled occurs as part of a Plan, there is no requirement for taxpayers to track assets of any Potential Predecessor under the temporary regulations.

The Treasury Department and the IRS recognize that there may be potential difficulties in applying section 355(e) to a POD that does not cease to exist as a result of the transaction in which it becomes a POD. However, it is expected that in many (if not most) cases, a POD

will cease to exist as a result of the transaction in which it becomes a POD. Further, under the first gain limitation rule of the temporary regulations, Distributing will recognize section 355(e) gain on the division of Relevant Property only if there has been a Planned 50-percent Acquisition of a POD. Because only acquisitions of a POD's stock that occur as part of a Plan are relevant to these inquiries, Distributing should be in possession of the necessary information to determine whether section 355(e) will apply. The Treasury Department and the IRS request comments regarding the integration of the Plan Limitation rule and the definition of a POD under the temporary regulations.

iii. Substitute Assets and POCs

As discussed in part 3.A.ii.b. of this preamble, the POD status under these temporary regulations depends in large part upon the division of Relevant Property of a Potential Predecessor as part of a Plan. Therefore, to better effectuate the tracking of Relevant Property (and, by extension, Separated Property), these temporary regulations broaden the definition of a Substitute Asset, which is treated as Relevant Property. Under these temporary regulations, a Substitute Asset is any property that is held directly or indirectly by Distributing during the Plan Period and was received in exchange for Relevant Property that was acquired directly or indirectly by Distributing if all gain on the transferred Relevant Property is not recognized on the exchange. Controlled stock may constitute a Substitute Asset (and thus, Relevant Property) only if that Controlled stock received (or deemed received) in the exchange reflects the basis of Relevant Stock and the issuer of that Relevant Stock ceases to exist for Federal income tax purposes under the Plan. Treatment of this type of Controlled stock as Relevant Property eliminates the need for application of the POC concept for purposes of determining POD status and computing gain limitations. Accordingly, these temporary regulations reduce the scope of the POC rule to apply solely for purposes of applying the affiliated group rule of section 355(e)(2)(C).

iv. Successive Predecessors

The Treasury Department and the IRS have determined that the Plan Limitation rule described in part 3.A.ii.b. of this preamble mitigates much of the burden associated with tracking successive PODs. Thus, the temporary regulations treat a predecessor of a POD as a POD. A

corporation is a predecessor of a POD if it transfers assets to the POD as part of a Plan, and all additional pre- and post-distribution requirements are satisfied with respect to its assets. The temporary regulations include a similar rule with respect to a predecessor of a POC. Because the temporary regulations recognize successive predecessors of Distributing and Controlled, it is no longer necessary to include the general operating rule contained in the proposed regulations that would have treated the resulting corporation in an F reorganization as the same corporation that engaged in the reorganization. Accordingly, the temporary regulations eliminate this operating rule.

B. Special Rules for Gain Recognition

The gain limitation rules of the proposed regulations are incorporated in the temporary regulations, with modifications to address certain concerns of commenters. Commenters expressed three main concerns with respect to the first gain limitation in the proposed regulations, which applies if there is a Planned 50-percent Acquisition of a POD.

First, commenters stated that the hypothetical section 351 exchange construct used in the first gain limitation rule to determine Distributing's section 355(e) gain on a Planned 50-percent Acquisition of a POD was unnecessarily complicated because of its reliance on rules ancillary to section 351. Specifically, commenters were uncertain as to whether (or how) the loss importation rules under then-recently-enacted section 362(e) would apply to the hypothetical section 351 exchange. Commenters requested that, in lieu of the hypothetical section 351 exchange, gain be limited to the difference between the aggregate basis in the POD's assets actually transferred to Controlled and the aggregate fair market value of those assets immediately before the distribution.

The second main concern of commenters was that the proposed regulations imposed a tracking burden with respect to a POD's assets. Third, commenters noted that measuring the value of Controlled stock acquired by Distributing from a POD at the time of the combining transfer (as opposed to at the time of the distribution, as is the case with other property) could be burdensome.

With regard to the first concern, the Treasury Department and the IRS do not agree with the commenters' suggestion that the first gain limitation rule applicable to a Planned 50-percent Acquisition of a POD should be measured solely by reference to the

difference between the aggregate basis and the aggregate fair market value in a POD's assets transferred to Controlled. Outside of the POD context, application of section 355(e) results in the recognition of gain on Controlled stock, rather than on assets held by Controlled. As discussed in part 3.A.ii.a. of this preamble, the policy underlying the proposed regulations was to apply section 355(e) to result in section 355(e) gain equivalent to that obtained if some of the assets of a POD had been transferred to a hypothetical Controlled without full recognition of gain, and a division of the POD's assets were accomplished through a hypothetical distribution to which section 355(e) applied. That theory continues to underlie these temporary regulations. Therefore, the Treasury Department and the IRS have determined that a limitation on section 355(e) gain equal to the gain in the stock of a hypothetical Controlled following a transfer of POD assets is appropriate. In addition, the commenters' concerns regarding the possible application of section 362(e), highlighted by the use of a hypothetical section 351 and sale construct in the proposed regulations, should be eased by the intervening promulgation of final regulations under section 362(e)(1) and (2). See §§ 1.362-3 and 1.362-4. However, to avoid confusion regarding the applicable Code provisions to be applied in determining the appropriate amount of section 355(e) gain to be recognized by Distributing, these temporary regulations modify the first and second gain limitation rules to result in section 355(e) gain that would have been present in hypothetical Controlled stock, had Distributing transferred assets to a hypothetical Controlled and distributed its stock in a hypothetical reorganization under section 368(a)(1)(D) and section 355(e) (a *Hypothetical D/355(e) Reorganization*), rather than a section 351 exchange followed by a hypothetical sale. This formulation will more closely reflect the policy underlying the proposed regulations and these temporary regulations.

With regard to the second concern, as discussed in part 3.A.ii.b. of this preamble, these temporary regulations mitigate the burden of tracking assets by providing that a Potential Predecessor can be a POD only if the assets of the Potential Predecessor are transferred as part of a Plan. If such a transfer occurs as part of a Plan, the required tracking burden is knowable by Distributing; if there is no Plan, there is no requirement to track any assets of a Potential Predecessor under the temporary

regulations. In addition, the Treasury Department and the IRS continue to view the burden of tracking a POD's assets imposed by the first gain limitation rule as preferable to requiring Distributing to recognize the full amount of section 355(e) gain that Distributing would otherwise recognize under section 355(c)(2) or 361(c)(2) (the Statutory Recognition Amount) in the absence of such a rule. Nevertheless, the temporary regulations provide that Distributing may choose not to apply the first or second gain limitation rules to a distribution, and instead may recognize the Statutory Recognition Amount, by reporting the Statutory Recognition Amount on its original or amended Federal income tax return for the year of the distribution.

With regard to the measurement of gain on Controlled stock that is Separated Property, the Treasury Department and the IRS agree that it is preferable to measure this gain as of the time of the distribution. Using the date of the distribution to measure the gain attributable to the POD's Controlled stock allows for investment adjustments to be made with respect to such stock if Distributing is a member of a consolidated group. Such adjustments often will mitigate the effect of multiple layers of taxation on the same economic gain. Accordingly, these temporary regulations include modifications to the proposed regulations that address the commenters' concerns.

The temporary regulations implement the modifications discussed using terminology that is consistent with the modification of the definition of a POD. Thus, the temporary regulations provide that the first gain limitation rule applicable to a Planned 50-percent Acquisition of a POD equals the amount of section 355(e) gain Distributing would have recognized if, immediately before the distribution, Distributing had transferred all the Separated Property received from the POD to a newly-formed corporation in exchange solely for stock of such corporation in a Hypothetical D/355(e) Reorganization.

With regard to situations in which there is a Planned 50-percent Acquisition of Distributing, the temporary regulations modify the language of the second gain limitation rule to conform to the modified definition of a POD. However, the substance of the rule remains: If the Planned 50-percent Acquisition of Distributing stock occurs in a section 381 transaction in which a POD transfers its assets to Distributing, the amount of section 355(e) gain recognized is limited. This rule is intended to minimize the Federal

income tax impact of directionality between economically equivalent section 381 transactions. That is, the same result should obtain under the temporary regulations regardless of which party to the section 381 transaction is the transferor corporation and which is the acquiring corporation.

Because the temporary regulations require the tracking of both the direct and indirect assets of PODs, the Treasury Department and the IRS have determined that certain additional limitations on the recognition of gain are appropriate. First, the definition of Separated Property excludes property indirectly held by a POD if the stock of the corporation that directly owns the property is Separated Property (and thus is already taken into account for gain recognition purposes). Thus, a corporation's Underlying Property is excluded from the gain recognition computation if the corporation's stock is Relevant Stock transferred to Controlled as part of a Plan and held by Controlled immediately before the distribution. The temporary regulations also provide a prohibition on counting the same asset as Relevant Property of successive PODs, as well as a more general anti-duplication rule, which ensures that the same economic gain is not captured multiple times under section 355(e) and these regulations.

C. Section 336(e) Election

Effective for certain sales, exchanges, or distributions of stock made by a domestic corporation on or after May 15, 2013, regulations under section 336(e) permit, in certain circumstances, a domestic corporation to elect to treat a sale, exchange, or distribution of the stock of a corporation as an asset sale. See §§ 1.336-1 through 1.336-5. The temporary regulations clarify that Distributing may elect to apply the regulations under section 336(e) to a distribution of Controlled stock to which the temporary regulations apply, provided that the transaction otherwise satisfies the requirements of the regulations under section 336(e), and Distributing would otherwise be required under these temporary regulations to recognize the Statutory Recognition Amount with respect to the Controlled stock it distributes.

D. Successors

In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments regarding whether transferees of the property of Distributing or Controlled in transactions other than section 381 transactions should be considered Successors. One comment on the

proposed regulations endorsed treating a transferee in a section 351 or section 721 transaction as a Successor, but only in limited circumstances. Although the Treasury Department and the IRS continue to study this issue, the temporary regulations treat as a Successor for section 355(e) purposes only a transferee to which Distributing or Controlled transferred its assets in a section 381 transaction after a distribution.

E. Section 355(f)

As described in part 1.B. of this preamble, by operation of section 355(e)(2)(C), section 355(e) does not apply to an Internal Distribution if immediately after the Plan Distributing and each Controlled remain members of the same Expanded Affiliated Group. Also, as described in part 1.B. of this preamble, section 355(f) prevents section 355 from applying to an Internal Distribution if section 355(e) would otherwise apply to such distribution (that is, if after the Plan, Controlled or the Lower-Tier Distributing is not a member of the affiliated group as a result of an External Distribution). Because section 355 would not apply, the Internal Distribution would be taxable, and the shareholder or security holder would take the Controlled stock or securities with a fair market value basis under section 301(d). Upon the subsequent External Distribution, there typically no longer would be built-in gain in the Controlled stock or securities to result in additional section 355(e) gain.

The Treasury Department and the IRS have determined that the application of section 355(f) may frustrate the policy underlying the first and second gain limitation rules of these temporary regulations in certain cases. Specifically, if there is a Planned 50-percent Acquisition of only a predecessor of the Lower-Tier Distributing (and not of Controlled or the Lower-Tier Distributing), the stock or securities of Controlled are distributed in an Internal Distribution by the Lower-Tier Distributing, and each of the acquisition(s) and the Internal Distribution precedes an External Distribution of Controlled as part of the same Plan, then section 355(f) would be expected to apply to the Internal Distribution. If section 355(f) were to apply, no part of section 355 would apply (including the gain limitation rules under these temporary regulations). Without application of the first and second gain limitation rules, the full amount of built-in gain in the Controlled stock or securities would be recognized by the Lower-Tier

Distributing under section 311 on its distribution of Controlled stock, even though section 355(f) would have applied only as a result of a Planned 50-percent Acquisition of a predecessor of the Lower-Tier Distributing (and not of Controlled or the Lower-Tier Distributing). However, there may be circumstances under which taxpayers wish to apply section 355(f) to such distributions instead of the first or second gain limitation rules provided by these temporary regulations.

Accordingly, these temporary regulations provide that section 355(f) does not apply if there is a Planned 50-percent Acquisition of the stock of a predecessor of a Lower-Tier Distributing but not of the stock of the Lower-Tier Distributing or Controlled. As a result, section 355(e), including the first and second gain limitation rules in these temporary regulations, applies to the Internal Distribution. However, the temporary regulations provide that a Lower-Tier Distributing may choose to apply section 355(f) to an Internal Distribution it makes without any limitation on the gain it recognizes, but only if each member of the affiliated group (as defined in section 1504(a)) of which the Lower-Tier Distributing is a member reports the Federal income tax consequences of the Internal Distribution consistent with the application of section 355(f).

Effective/Applicability Date

These temporary regulations apply to distributions that occur after January 18, 2017. However, these regulations do not apply to a distribution that is: (1) Made pursuant to a binding agreement in effect on or before December 16, 2016, and at all times thereafter, (2) described in a ruling request submitted to the IRS on or before December 16, 2016 for a transaction that is not modified after such date, or (3) described on or before December 16, 2016 in a public announcement or in a filing with the Securities and Exchange Commission. In addition, Distributing and any affiliated group of which it is a member may consistently apply these regulations in their entirety to any distribution occurring after November 22, 2004. If so, taxpayers must consistently apply this section in its entirety to all distributions occurring after November 22, 2004, that are part of the same Plan.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a

regulatory impact assessment is not required. These temporary regulations are necessary to provide necessary guidance regarding the identity of predecessor and successor corporations of distributing and controlled corporations, to enable taxpayers to utilize the benefit of certain gain limitation rules with respect to certain section 355(e) transactions, and to enable taxpayers to choose to apply or not to apply section 355(f). These subjects were framed for discussion in a prior notice of proposed rulemaking (REG-145535-02) and modifications to the proposed regulations in these temporary regulations either flow directly from comments received relating to the definition of a Predecessor of Distributing set forth in that notice of proposed rulemaking or permit taxpayers to effectively elect the tax consequences of transactions subject to the proposed regulations. For this reason, it has been determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for dispensing with the notice and public comment procedures. However, to minimize their effect on pending transactions, these regulations apply only to distributions occurring 30 days or more after the date this Treasury decision is published in the **Federal Register**. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble of the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Lynlee C. Baker, formerly of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.355-8T also issued under 26 U.S.C. 336(e) and 355(e)(5).

■ **Par. 2.** Section 1.355-0 is amended by revising the introductory text and adding an entry for § 1.355-8T to read as follows:

§ 1.355-0 Outline of sections.

In order to facilitate the use of §§ 1.355-1 through 1.355-8T, this section lists the major paragraphs in those sections as follows:

* * * * *

§ 1.355-8T *Definition of predecessor and successor and limitations on gain recognition under section 355(e) and section 355(f).*

- (a) In general.
 - (1) Scope.
 - (2) Purpose.
 - (3) Overview.
 - (4) References.
 - (i) References to Distributing or Controlled.
 - (ii) References to Plan or distribution.
 - (iii) Plan Period.
 - (b) Predecessor of Distributing.
 - (1) Definition.
 - (i) In general.
 - (ii) Pre-distribution requirements.
 - (A) Relevant Property.
 - (B) Reflection of basis.
 - (iii) Post-distribution requirement.
 - (2) Additional definitions and rules related to paragraph (b)(1) of this section.
 - (i) References to Distributing and Controlled.
 - (ii) Potential Predecessor.
 - (iii) Successors of Potential Predecessors.
 - (iv) Relevant Property; Relevant Stock.
 - (A) In general.
 - (B) Property held by Distributing.
 - (C) Certain reorganizations.
 - (v) Stock of Distributing as Relevant Property.
 - (A) In general.
 - (B) Certain reorganizations.
 - (vi) Substitute Asset.
 - (vii) Separated Property.
 - (viii) Underlying Property.
 - (ix) Scope of definition of Predecessor of Distributing.
 - (x) Deemed exchanges.
 - (c) Additional definitions.
 - (1) Predecessor of Controlled.
 - (2) Successors.
 - (i) In general.
 - (ii) Determination of Successor status.
 - (3) Section 381 transaction.
 - (d) Special acquisition rules.
 - (1) Deemed acquisitions of stock in section 381 transactions.
 - (2) Deemed acquisitions of stock after section 381 transactions.
 - (3) Separate counting for Distributing and each Predecessor of Distributing.
 - (e) Special rules for gain recognition.
 - (1) In general.
 - (2) Planned 50-percent or greater acquisitions of a Predecessor of Distributing.
 - (i) In general.
 - (ii) Operating rules.
 - (A) Separated Property other than Controlled stock.

(B) Controlled stock that is Separated Property.

- (C) Anti-duplication rule.
- (3) Planned 50-percent Acquisition of Distributing in a section 381 transaction.
- (4) Overall gain recognition.
- (5) Section 336(e) election.
- (f) Predecessor or Successor as a member of the affiliated group.
 - (g) Inapplicability of section 355(f) to certain intra-group distributions.
 - (1) In general.
 - (2) Alternative application of section 355(f).
 - (h) Examples.
 - (i) Effective/applicability date.
 - (1) In general.
 - (2) Transition rule.
 - (i) In general.
 - (ii) Definition of distribution.
 - (3) Exception.

■ **Par. 3.** Section 1.355-8T is added to read as follows:

§ 1.355-8T Definition of predecessor and successor and limitations on gain recognition under section 355(e) and section 355(f) (temporary).

(a) *In general*—(1) *Scope.* This section provides rules under section 355(e)(4)(D) to determine whether a corporation is treated as a predecessor or successor of a distributing corporation (Distributing) or a controlled corporation (Controlled) for purposes of section 355(e). This section also provides rules limiting the amount of Distributing's gain recognized under section 355(e) on the distribution of Controlled stock if section 355(e) applies to an acquisition by one or more persons, as part of a Plan (within the meaning of § 1.355-7 as modified by paragraph (a)(3) of this section), of stock that in the aggregate represents a 50-percent or greater interest (a Planned 50-percent Acquisition) of a Predecessor of Distributing (as defined in paragraph (b) of this section), or of Distributing. In addition, this section provides rules regarding the application of section 336(e) to a distribution to which this section applies and the application of section 355(f) to a distribution of Controlled stock in certain cases.

(2) *Purpose.* The rules in this section have two principal purposes. The first is to ensure that section 355(e) applies to a section 355 distribution if, as part of a Plan, some of the assets of a Predecessor of Distributing (as defined in paragraph (b)(1) of this section) are transferred directly or indirectly to Controlled without full recognition of gain, and the distribution accomplishes a division of the assets of the Predecessor of Distributing. The second is to ensure that section 355(e) applies when there is a Planned 50-percent Acquisition of a Successor of Distributing or Successor of Controlled

(as defined in paragraph (c)(2) of this section). The rules of this section must be interpreted and applied in a manner that is consistent with and reasonably carries out the purposes of this section.

(3) *Overview.* This section applies if a distribution of Controlled stock (or stock and securities) is part of the same Plan that includes a Planned 50-percent Acquisition of a Predecessor of Distributing, Distributing, Controlled, a Successor of Distributing, or a Successor of Controlled. Paragraph (a)(4) of this section provides rules regarding references to the terms Distributing, Controlled, distribution, Plan, and Plan Period for purposes of section 355(e), § 1.355-7, and this section. Paragraph (b) of this section defines the term Predecessor of Distributing and several related terms. A corporation generally will be a Predecessor of Distributing if: As part of a Plan, the distribution accomplishes a division of the assets that the corporation directly and indirectly held during the Plan Period; that division occurs through transfers, as part of a Plan, resulting in Controlled directly or indirectly holding some but not all of those assets immediately after the distribution; and all of the gain on that corporation's assets directly or indirectly held by Controlled is not recognized before the distribution. In addition, a corporation generally will be a Predecessor of Distributing if: As part of a Plan, the distribution accomplishes a division of the assets that it directly and indirectly held during the Plan Period; that division occurs as a result of the direct or indirect transfer of Controlled stock by that corporation to Distributing without the transfer of all of the corporation's other assets to Controlled; and all of the gain on the corporation's assets (including the Controlled stock) directly or indirectly held by Controlled is not recognized before the distribution. In both cases, Controlled stock distributed in the distribution must reflect the basis of any Separated Property (as defined in paragraph (b)(2)(vii) of this section). Paragraph (c) of this section defines other terms, including Predecessor of Controlled and Successor (of Distributing or Controlled). Paragraph (d) of this section provides guidance with regard to acquisitions and deemed acquisitions of stock if there is a Predecessor of Distributing or a Successor of either Distributing or Controlled. Paragraph (e) of this section provides two rules that may limit the amount of Distributing's gain on the distribution of Controlled stock if there is a Predecessor of Distributing, as well as an overall gain limitation. Paragraph

(e) of this section also provides guidance with respect to the application of section 336(e). Regardless of whether there is a predecessor or successor of Distributing or Controlled, paragraph (f) of this section provides a special rule relating to section 355(e)(2)(C), which provides that section 355(e) does not apply to certain transactions within an affiliated group (as defined in section 1504(a) without regard to section 1504(b)). Paragraph (g) of this section provides rules coordinating the application of section 355(f) with the rules of this section. Paragraph (h) of this section contains examples that illustrate the rules of this section.

(4) *References*—(i) *References to Distributing or Controlled*. For purposes of section 355(e) and the regulations thereunder, except as otherwise provided in this section, any reference to Distributing or Controlled includes, as the context may require, a reference to any Predecessor of Distributing (as defined in paragraph (b)(1) of this section) or Predecessor of Controlled (as defined in paragraph (c)(1) of this section), respectively, or any Successor (as defined in paragraph (c)(2) of this section) of Distributing or Controlled, respectively. However, except as otherwise provided in this section, a reference to a Predecessor of Distributing or to a Successor of Distributing does not include a reference to a Predecessor of Controlled or to a Successor of Controlled does not include a reference to Controlled.

(ii) *References to Plan or distribution*. Except as otherwise provided in this section, references to a *Plan* in this section are references to a plan within the meaning of § 1.355–7. References to a distribution in § 1.355–7 include a reference to a distribution and other related pre-distribution transactions that together effect a division of the assets of a Predecessor of Distributing. In determining whether a distribution and a Planned 50-percent Acquisition of a predecessor or successor of Distributing or Controlled are part of a Plan, the rules of § 1.355–7 apply. In those cases, references to Distributing or Controlled in § 1.355–7 generally include references to a predecessor or successor of Distributing or Controlled. However, with regard to any possible Planned 50-percent Acquisition of a Predecessor of Distributing, any agreement, understanding, arrangement, or substantial negotiations with regard to the acquisition of the stock of the Predecessor of Distributing is analyzed under § 1.355–7 with regard to the actions of officers or directors of Distributing or Controlled, controlling

shareholders (as defined in § 1.355–7(h)(3)) of Distributing or Controlled, or a person acting with permission of one of those parties. For that purpose, references in § 1.355–7 to Distributing do not include references to a Predecessor of Distributing. Therefore, the actions of officers or directors, or controlling shareholders of a Predecessor of Distributing, or a person acting with the implicit or explicit permission of one of those parties are not considered unless those parties otherwise would be treated as acting on behalf of Distributing or Controlled under § 1.355–7 (for example, if a Predecessor of Distributing is a controlling shareholder of Distributing).

(iii) *Plan Period*. For purposes of this section, the term *Plan Period* means the period that ends immediately after the distribution and begins on the earliest date on which any pre-distribution step that is part of the Plan is agreed to or understood, arranged, or substantially negotiated by one or more officers or directors acting on behalf of Distributing or Controlled, by controlling shareholders of Distributing or Controlled, or by another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. For purposes of the preceding sentence, references to Distributing and Controlled do not include references to any predecessor or successor of Distributing or Controlled.

(b) *Predecessor of Distributing*—(1) *Definition*—(i) *In general*. A Potential Predecessor (as defined in paragraph (b)(2)(ii) of this section) is a Predecessor of Distributing if, taking into account the special rules of paragraph (b)(2) of this section, the pre-distribution requirements of paragraph (b)(1)(ii) of this section and the post-distribution requirements of paragraph (b)(1)(iii) of this section are satisfied.

(ii) *Pre-distribution requirements*—(A) *Relevant Property*. Before the distribution, and as part of a Plan, either—

(1) Any Controlled stock distributed in the distribution was directly or indirectly acquired (or deemed acquired under paragraph (b)(2)(x) of this section) by Distributing in exchange for any direct or indirect interest in Relevant Property (as defined in paragraph (b)(2)(iv) of this section)—

(i) That is held directly or indirectly by Controlled immediately before the distribution; and

(ii) The gain on which was not recognized in full as part of a Plan; or

(2) Any Controlled stock that is distributed in the distribution is Relevant Property of the Potential

Predecessor, and the gain on that Controlled stock was not recognized in full as part of a Plan.

(B) *Reflection of basis*. Any Controlled stock distributed in the distribution reflects the basis of any Separated Property (as defined in paragraph (b)(2)(vii) of this section).

(iii) *Post-distribution requirement*. Immediately after the distribution, direct or indirect ownership of Relevant Property has been divided between Controlled on the one hand, and Distributing or the Potential Predecessor (or a successor of a Potential Predecessor) on the other hand. For purposes of this paragraph (b)(1)(iii), if Controlled stock that is distributed in the distribution is Relevant Property of a Potential Predecessor, then Controlled is deemed to have received Relevant Property of the Potential Predecessor.

(2) *Additional definitions and rules related to paragraph (b)(1) of this section*—(i) *References to Distributing and Controlled*. For purposes of paragraphs (b)(1)(ii) and (b)(1)(iii) of this section, references to Distributing and Controlled do not include references to any predecessor or successor of Distributing or Controlled.

(ii) *Potential Predecessor*. The term *Potential Predecessor* means a corporation other than Distributing or Controlled.

(iii) *Successors of Potential Predecessors*. For purposes of paragraph (b)(1)(iii) of this section, if a Potential Predecessor transfers property in a section 381 transaction to a corporation (other than Distributing or Controlled) during the Plan Period, the corporation is a successor to the Potential Predecessor.

(iv) *Relevant Property; Relevant Stock*—(A) *In general*. Except as otherwise provided in this paragraph (b)(2)(iv), the term *Relevant Property* means any property that was held, directly or indirectly, by the Potential Predecessor during the Plan Period. The term *Relevant Stock* means stock of a corporation if that stock is a Potential Predecessor's Relevant Property.

(B) *Property held by Distributing*. Except as provided in paragraph (b)(2)(iv)(C) of this section, property held directly or indirectly by Distributing (including Controlled stock) is Relevant Property of a Potential Predecessor only to the extent that the property was transferred directly or indirectly to Distributing during the Plan Period, and it was Relevant Property of the Potential Predecessor before the direct or indirect transfers. For example, if during the Plan Period a subsidiary corporation of a Potential Predecessor merges into Controlled in a

reorganization under section 368(a)(1)(A) and (2)(D), and, as a result, the Potential Predecessor directly or indirectly owns Distributing stock received in the merger, the subsidiary's assets held by Controlled will be Relevant Property of that Potential Predecessor.

(C) *Certain reorganizations.* For purposes of paragraph (b)(2)(iv)(B) of this section, the transferor and transferee in any reorganization described in section 368(a)(1)(F) (F reorganization) are treated as a single corporation. Therefore, for example, Relevant Property acquired during the Plan Period by a corporation that is a transferor (as to a later F reorganization) is treated as having been acquired directly (and from the same source) by the transferee (as to the later F reorganization) during the Plan Period. In addition, any transfer (or deemed transfer) of assets to Distributing in an F reorganization will not cause the transferred assets to be treated as Relevant Property.

(v) *Stock of Distributing as Relevant Property—(A) In general.* For purposes of paragraph (b)(1)(ii) of this section, except as provided in paragraph (b)(2)(v)(B) of this section, stock of Distributing is not Relevant Stock (and thus not Relevant Property) to the extent that the Potential Predecessor becomes, as part of a Plan, the direct or indirect owner of that stock as the result of the transfer to Distributing of direct or indirect interests in the Potential Predecessor's Relevant Property. For example, stock of Distributing is not Relevant Stock if it is acquired by a Potential Predecessor as part of a Plan in an exchange to which section 351(a) applies.

(B) *Certain reorganizations.* For purposes of paragraph (b)(1)(ii) of this section, stock of Distributing is Relevant Stock (and thus Relevant Property) to the extent that the Potential Predecessor becomes, as part of the Plan, the direct or indirect owner of that stock as the result of a transaction described in section 368(a)(1)(E).

(vi) *Substitute Asset.* The term *Substitute Asset* means any property that is held directly or indirectly by Distributing during the Plan Period and was received, during the Plan Period, in exchange for Relevant Property that was acquired directly or indirectly by Distributing if all gain on the transferred Relevant Property is not recognized on the exchange. For example, property received by Controlled in exchange for Relevant Property in a transaction qualifying under section 1031 is a Substitute Asset. Irrespective of the general rule of this paragraph (b)(2)(vi),

stock of Controlled received in exchange for a direct or indirect transfer of Relevant Property by Distributing generally is not a Substitute Asset. However, if Controlled stock received or deemed received in an exchange reflects in whole or in part the basis of Relevant Stock the issuer of which ceases to exist for Federal income tax purposes under the Plan, then that Controlled stock will constitute a Substitute Asset. See paragraph (b)(2)(x) of this section. In addition, stock received by Distributing in a distribution qualifying under section 305(a) or section 355(a) on Relevant Stock is a Substitute Asset. For purposes of this section, a Substitute Asset is treated as Relevant Property with the same ownership and transfer history as the Relevant Property for which (or on which) it was received.

(vii) *Separated Property.* The term *Separated Property* means each item of Relevant Property that is described in paragraph (b)(1)(ii)(A) of this section. However, if Relevant Stock is Separated Property, Underlying Property (as defined in paragraph (b)(2)(viii) of this section) associated with that stock is not treated as Separated Property. In addition, if Distributing directly or indirectly acquires Relevant Stock in a transaction in which gain is recognized in full, Underlying Property associated with that stock is not treated as Separated Property.

(viii) *Underlying Property.* The term *Underlying Property* means property directly or indirectly held by a corporation that is the issuer of Relevant Stock.

(ix) *Scope of definition of Predecessor of Distributing.* If there are multiple Potential Predecessors that satisfy the requirements of paragraph (b)(1) of this section, each of those Potential Predecessors will be a Predecessor of Distributing. For example, a Potential Predecessor that transfers property to a Predecessor of Distributing without full recognition of gain (and that otherwise meets the requirements of paragraph (b)(1) of this section) is also a Predecessor of Distributing if the applicable transfer occurred as part of a Plan that existed at the time of such transfer.

(x) *Deemed exchanges.* For purposes of paragraph (b)(1)(ii) and (b)(2)(vi) of this section, Distributing is treated as acquiring Controlled stock in exchange for a direct or indirect interest in Relevant Property if the basis of Distributing in that Controlled stock reflects the basis of the Relevant Property in whole or in part.

(c) *Additional definitions—(1) Predecessor of Controlled.* Solely for purposes of applying paragraph (f) of

this section, a corporation is a *Predecessor of Controlled* if, before the distribution, it transfers property to Controlled in a section 381 transaction as part of a Plan. Other than for the purpose described in the preceding sentence, no corporation can be a Predecessor of Controlled. For purposes of this paragraph (c)(1), a reference to Controlled includes a reference to a Predecessor of Controlled. If multiple corporations satisfy the requirements of this paragraph (c)(1), each of those corporations will be a Predecessor of Controlled. For example, a corporation that transfers property to a Predecessor of Controlled in a section 381 transaction is also a Predecessor of Controlled if the section 381 transaction occurred as part of a Plan that existed at the time of such transaction.

(2) *Successors—(i) In general.* A *Successor* of Distributing or Controlled, respectively, is a corporation to which Distributing or Controlled transfers property in a section 381 transaction after the distribution (a *Successor Transaction*).

(ii) *Determination of Successor status.* More than one corporation may be a Successor of Distributing or Controlled. Therefore, if Distributing transfers property to another corporation (X) in a section 381 transaction, and X transfers property to another corporation (Y) in a section 381 transaction, then each of X and Y may be a Successor of Distributing. In this case, the determination of whether Y is a Successor of Distributing is made after the determination of whether X is a Successor of Distributing.

(3) *Section 381 transaction.* The term *section 381 transaction* means a transaction to which section 381 applies.

(d) *Special acquisition rules—(1) Deemed acquisitions of stock in section 381 transactions.* Each person that owned an interest in the acquiring corporation immediately before a section 381 transaction (an *Acquiring Owner*) is treated for purposes of this section as acquiring, in the section 381 transaction, stock representing an interest in the distributor or transferor corporation, to the extent that the *Acquiring Owner* did not hold an equivalent direct or indirect interest in the distributor or transferor corporation before the section 381 transaction. For example, if Distributing held a 25-percent interest in a Predecessor of Distributing before a section 381 transaction in which the Predecessor of Distributing transfers its assets to Distributing, each person that owns an interest in Distributing is treated as acquiring in the section 381 transaction

a proportionate share of the remaining 75-percent interest in the Predecessor of Distributing. Similarly, each Acquiring Owner of a Successor of Distributing is treated as acquiring, in the Successor Transaction, stock of Distributing, to the extent that the Acquiring Owner did not hold an equivalent direct or indirect interest in Distributing before the section 381 transaction.

(2) *Deemed acquisitions of stock after section 381 transactions.* For purposes of this section, after a section 381 transaction (including a Successor Transaction), an acquisition of stock of an acquiring corporation (including a deemed stock acquisition under paragraph (d)(1) of this section) is treated also as an acquisition of an interest in the stock of the distributor or transferor corporation. For example, an acquisition of the stock of Distributing that occurs after a section 381 transaction is treated not only as an acquisition of the stock of Distributing, but also as an acquisition of the stock of any Predecessor of Distributing whose assets were acquired by Distributing in a prior section 381 transaction. Similarly, an acquisition of the stock of a Successor of Distributing that occurs after the Successor Transaction is treated not only as an acquisition of the stock of the Successor of Distributing, but also as an acquisition of the stock of Distributing.

(3) *Separate counting for Distributing and each Predecessor of Distributing.* The measurement of whether one or more persons have acquired stock of any specific corporation in a Planned 50-percent Acquisition is made separately from the measurement of any potential Planned 50-percent Acquisition of any other corporation. Therefore, there may be a Planned 50-percent Acquisition of a Predecessor of Distributing even if there is no Planned 50-percent Acquisition of Distributing. Similarly, there may be a Planned 50-percent Acquisition of Distributing even if there is no Planned 50-percent Acquisition of a Predecessor of Distributing.

(e) *Special rules for gain recognition—*
 (1) *In general.* If there are Planned 50-percent Acquisitions of multiple corporations (for example, two Predecessors of Distributing), Distributing must recognize gain in the amount described in section 355(c)(2) or 361(c)(2) (the Statutory Recognition Amount), as applicable, with respect to each such corporation, subject to the limitations in paragraph (e)(2) of this section (relating to the Planned 50-percent Acquisition of a Predecessor of Distributing) and paragraph (e)(3) of this section (relating to the Planned 50-percent Acquisition of Distributing), if

applicable. The limitations in paragraphs (e)(2) and (e)(3) of this section are applied separately to the Planned 50-percent Acquisition of each such corporation to determine the amount of gain required to be recognized. Paragraph (e)(4) of this section sets forth an overall limitation based on the full amount of gain otherwise required to be recognized by Distributing by reason of section 355(e). Paragraph (e)(5) of this section clarifies the availability of an election under section 336(e) with regard to certain distributions.

(2) *Planned 50-percent or greater acquisitions of a Predecessor of Distributing—(i) In general.* If there is a Planned 50-percent Acquisition of a Predecessor of Distributing, the amount of gain recognized by Distributing by reason of section 355(e) as a result of the Planned 50-percent Acquisition is limited to the amount of gain, if any, that Distributing would have recognized if, immediately before the distribution, Distributing had engaged in the following transaction: Distributing transferred all Separated Property received from the Predecessor of Distributing to a newly-formed corporation in exchange solely for stock of such corporation in a reorganization under section 368(a)(1)(D) and then distributed the stock of such corporation to the shareholders of Distributing in a transaction to which section 355(e) applied (a Hypothetical D/355(e) Reorganization). This computation is applied regardless of whether Distributing actually directly held the Separated Property.

(ii) *Operating rules.* For purposes of applying paragraph (e)(2)(i) of this section, the following rules apply:

(A) *Separated Property other than Controlled stock.* The basis and fair market value of Separated Property other than stock of Controlled treated as transferred by Distributing to a hypothetical Controlled in a Hypothetical D/355(e) Reorganization equal the basis and fair market value, respectively, of such property in the hands of Controlled immediately before the distribution of Controlled stock.

(B) *Controlled stock that is Separated Property.* The basis and fair market value of the stock of Controlled that is Separated Property treated as transferred by Distributing to a hypothetical Controlled in a Hypothetical D/355(e) Reorganization equal the basis and fair market value, respectively, of such stock in the hands of Distributing immediately before the distribution of Controlled stock.

(C) *Anti-duplication rule.* A Predecessor of Distributing's Separated

Property is taken into account for purposes of applying this paragraph (e)(2) only to the extent such property was not taken into account by Distributing in a Hypothetical D/355(e) Reorganization with respect to another Predecessor of Distributing. Further, appropriate adjustments must be made to prevent other duplicative inclusions of section 355(e) gain under this paragraph (e) reflecting the same economic gain.

(3) *Planned 50-percent Acquisition of Distributing in a section 381 transaction.* This paragraph (e)(3) applies if there is a Planned 50-percent Acquisition of Distributing (by application of paragraph (d)(1) of this section) that occurs as part of a Plan as the result of a transfer by a Predecessor of Distributing to Distributing in a section 381 transaction. In that case, the amount of gain recognized by Distributing by reason of section 355(e) as a result of the acquisition is the excess, if any, of the Statutory Recognition Amount, as applicable, over the amount of gain, if any, that Distributing would have been required to recognize under paragraph (e)(2) of this section if there had been a Planned 50-percent Acquisition of the Predecessor of Distributing, but not of Distributing, in the section 381 transaction. For purposes of this paragraph (e)(3), references to a Predecessor of Distributing are not references to a Predecessor of Distributing.

(4) *Overall gain recognition.* The sum of the amounts required to be recognized by Distributing under section 355(e) and the regulations thereunder (taking into account paragraphs (e)(2) and (3) of this section) with regard to a single distribution will not exceed the Statutory Recognition Amount, as applicable. In addition, Distributing may choose not to apply the limitations of paragraph (e)(2) and (3) of this section to a distribution, and instead may recognize the Statutory Recognition Amount. Distributing indicates its choice to apply the preceding sentence by reporting the Statutory Recognition Amount on its original or amended Federal income tax return for the year of the distribution.

(5) *Section 336(e) election.* Distributing is not eligible to make a section 336(e) election with respect to a distribution to which this section applies unless Distributing would, absent the making of a section 336(e) election (as defined in § 1.336-1(b)(11)), recognize the Statutory Recognition Amount with respect to a distribution of Controlled stock under paragraph (e)(2), (e)(3), and (e)(4) (without regard to the final two sentences thereof) of this

section. See §§ 1.336–1 through 1.336–5 for additional requirements with regard to a section 336(e) election.

(f) *Predecessor or Successor as a member of the affiliated group.* For purposes of section 355(e)(2)(C), if a corporation transfers its assets to a member of the same affiliated group (as defined in section 1504 without regard to section 1504(b)) in a section 381 transaction, the transferor will be treated as continuing in existence within the same affiliated group.

(g) *Inapplicability of section 355(f) to certain intra-group distributions—(1) In general.* Section 355(f) does not apply to a distribution if there is a Planned 50-percent Acquisition of a Predecessor of Distributing (but not of Distributing, Controlled, or their Successors), except as provided in paragraph (g)(2) of this section. Therefore, except as provided in paragraph (g)(2) of this section, section 355 (or so much of section 356 as relates to section 355) and the regulations thereunder, including the gain limitation rules of paragraph (e)(2) of this section, apply, without regard to section 355(f), to the distribution of Controlled within an affiliated group if the distribution and the Planned 50-percent Acquisition of the Predecessor of Distributing are part of a Plan. For purposes of this paragraph (g)(1), references to the distribution (and Distributing and Controlled) include references to a distribution (and Distributing and Controlled) to which section 355 would apply but for the application of section 355(f).

(2) *Alternative application of section 355(f).* Distributing may choose not to apply paragraph (g)(1) of this section to each distribution (that occurs under a single Plan) to which section 355(f) would otherwise apply absent paragraph (g)(1) of this section and may instead apply section 355(f) to all such distributions according to its terms, but only if all members of the same affiliated group (as defined in section 1504(a) without regard to section 1504(b)) report consistently the Federal income tax consequences of the distributions that are part of the Plan (determined without regard to section 355(f)). In such a case, no gain limitation under paragraph (e)(2) or (3) of this section is available with regard to any applicable distribution. Distributing indicates its choice to apply section 355(f) consistently to all applicable distributions by reporting the Federal income tax consequences of each distribution in accordance with section 355(f) on its Federal income tax return for the year of the distribution.

(h) *Examples.* The following examples illustrate the principles of this section.

Unless the facts indicate otherwise, assume throughout these examples that: Distributing (D) owns all the stock of Controlled (C), and none of the shares of C held by D has a built-in loss; D distributes the stock of C in a distribution to which section 355 applies, but to which section 355(d) does not apply; X, Y, and Z are individuals; each of D, D1, D2, C, P, P1, P2, and R is a corporation having one class of stock outstanding, and none is a member of a consolidated group; and each transaction that is part of a Plan defined in this section is respected as a separate transaction under general Federal income tax principles. No inference should be drawn from any example concerning whether any requirements of section 355 are satisfied other than those of section 355(e):

Example 1. Predecessor of Distributing—(i) Facts. X owns 100% of the stock of P, which holds multiple assets. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of D. D then contributes to C one of the assets (Asset 1) acquired from P in the merger. At the time of the contribution, Asset 1 has a basis of \$40x and a fair market value of \$110x. In exchange for Asset 1, D receives additional C stock and \$10x. D distributes the stock of C (but not the cash) to X and Y, pro rata. The contribution and distribution constitute a reorganization under section 368(a)(1)(D), and D recognizes \$10x of gain under section 361(b) on the contribution. Immediately before the distribution, taking into account the \$10x of gain recognized by D on the contribution, Asset 1 has an adjusted basis of \$50x under section 362(b) and a fair market value of \$110x, and the stock of C held by D has a basis of \$100x and a fair market value of \$200x.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D. Immediately before the distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full as part of a Plan. Further, some of the C stock distributed in the distribution was acquired by D in exchange for Asset 1, and it reflects the basis of Separated Property (Asset 1). In addition, immediately after the distribution, D continues to hold Relevant Property of P. Therefore, P's Relevant Property has been divided between C and D.

(B) *Acquisition of predecessor stock.* Under paragraph (d)(1) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P as a result of the merger of P into D. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$100x of gain (\$200x of aggregate fair market value minus \$100x of aggregate basis of the C stock held by D), the Statutory Recognition Amount

described in section 361(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of the deemed acquisition of P stock will not exceed \$60x, an amount equal to the amount of gain D would have recognized had D transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for C1 stock and distributed the C1 stock to D's shareholders in a Hypothetical D/355(e) Reorganization. For purposes of this computation, the basis and fair market value of Asset 1 equal the basis and fair market value of Asset 1 in the hands of C immediately before the distribution of C stock. Under section 361(c)(2), D would recognize \$60x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the \$110x fair market value over the \$50x basis). Therefore, D recognizes \$60x of gain.

(iii) *Plan not in existence at time of acquisition of Potential Predecessor's Property.* The facts are the same as in paragraph (i) of this Example 1 except that the merger of P into D occurred before the existence of a Plan. Even though D transferred P property (Asset 1) to C, Asset 1 was not Relevant Property of P because P did not hold Asset 1 during the Plan Period. See paragraphs (b)(2)(iv) and (a)(4)(iii) of this section. Because Asset 1 is not Relevant Property, D did not receive C stock distributed in the distribution in exchange for Relevant Property when it contributed Asset 1 to C, none of the distributed stock reflects the basis of Separated Property, and C does not hold Relevant Property immediately before the distribution. Further, Relevant Property of P has not been divided. Therefore, P is not a Predecessor of D.

Example 2. Planned acquisition of Distributing, but not Predecessor of Distributing—(i) Facts. X owns 100% of the stock of P, which holds multiple assets. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A). Immediately after the merger, X and Y own 90% and 10%, respectively, of the stock of D. D then contributes to C one of the assets (Asset 1) acquired from P in the merger. In exchange for Asset 1, D receives additional C stock. D distributes the stock of C to X and Y, pro rata. The contribution and distribution constitute a reorganization under section 368(a)(1)(D). Immediately before the distribution, Asset 1 has a basis of \$50x and a fair market value of \$110x, and the stock of C held by D has a basis of \$120x and a fair market value of \$200x.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D. Immediately before the distribution and as part of a Plan, C holds P Relevant Property (Asset 1) the gain on which was not recognized in full as part of a Plan. Further, some of the C stock distributed in the distribution was acquired by D in exchange for Asset 1, and it reflects the basis of Separated Property (Asset 1). In addition, immediately after the distribution, D continues to hold Relevant Property of P. Therefore, P's Relevant Property has been divided between C and D.

(B) *Acquisition of predecessor stock.* Under paragraph (d)(1) of this section, Y is treated

as acquiring stock representing 10% of the voting power and value of P as a result of the merger of P into D. The 10% acquisition of P stock does not cause section 355(e) gain recognition or cause application of paragraph (e)(2) of this section because there has not been a Planned 50-percent Acquisition of P. X acquires 90% of the voting power and value of D as a result of the merger of P into D. The acquisition of greater than 50% of the D stock implicates section 355(e) and results in gain recognition, subject to the rules of paragraph (e) of this section.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$80x of gain (\$200x of fair market value minus \$120x of basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2). However, under paragraph (e)(3) of this section, D's gain recognized by reason of X's acquisition of D stock will not exceed \$20x, the excess of the Statutory Recognition Amount (\$80x) over the amount of gain that D would have been required to recognize under paragraph (e)(2) of this section if there had been a Planned 50-percent Acquisition of the Predecessor of D but not D in the section 381 transaction (\$60x). The hypothetical gain under paragraph (e)(2) of this section equals the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed the C1 stock in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D would recognize \$60x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the \$110x fair market value over the \$50x basis). Therefore, D recognizes \$20x of gain (\$80x – \$60x).

Example 3. Predecessor of Distributing owns Controlled stock; gain duplication—(i) Facts. X owns 100% of the stock of P, which holds multiple assets, including Asset 2. Y owns 100% of the stock of D. P owns 35% of the stock of C (Block 1), and D owns the remaining 65% of the C stock (Block 2). The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A), and D immediately thereafter distributes all of the C stock to X and Y pro rata. Immediately after the merger, X and Y own 10% and 90%, respectively, of the D stock, and, prior to the distribution, D owns Block 1 with a basis of \$40x and a fair market value of \$45x, and Block 2 with a basis of \$10x and a fair market value of \$65x. D continues to hold Asset 2.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D. Some of the Controlled stock distributed in the distribution was Relevant Property of P, the gain on which was not recognized in full as part of a Plan. See paragraph (b)(1)(ii)(A)(2) of this section. This Controlled stock is Separated Property. See paragraph (b)(2)(vii) of this section. Because the gain on the P Controlled stock was not recognized in full, this stock reflects the basis of Separated Property. See paragraph (b)(1)(ii)(B) of this section. Because some of the Controlled stock distributed in the distribution was Relevant Property of P, C is deemed to have received Relevant Property of P. See paragraph (b)(1)(iii) of this

section. Further, D continues to hold Relevant Property of P immediately after the distribution. Therefore, P's Relevant Property has been divided between C and D.

(B) *Acquisition of predecessor stock.* Under paragraph (d)(1) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P, as a result of the merger of P into D. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$60x of gain (\$110x of fair market value minus \$50x of basis of the C stock held by D), the Statutory Recognition Amount under section 355(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of the deemed acquisition of P stock will not exceed \$5x, an amount equal to the amount D would have recognized had it transferred Block 1 of the C stock (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. For purposes of this computation, the basis and fair market value of the Block 1 C stock equal their basis and fair market value in the hands of D immediately before the distribution of C stock. Under section 361(c)(2), D would recognize \$5x of gain, an amount equal to the gain in the hypothetical C1 stock (\$45x – \$40x). Therefore, D recognizes \$5x of gain.

Example 4. Controlled stock as Substitute Asset—(i) Facts. X owns 100% of the stock of P, which owns multiple assets, including 100% of the stock of R and Asset 2. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P merges into D in a reorganization under section 368(a)(1)(A) (the P–D reorganization). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of D. D then causes R to transfer all of its assets to C in a reorganization under section 368(a)(1) (the R–C reorganization). At the time of the P–D reorganization, the R stock has a basis of \$40x and a fair market value of \$110x. D distributes the stock of C to X and Y, pro rata. D continues to directly hold Asset 2. Immediately before the distribution, the C stock held by D that was deemed received in the R–C reorganization has a basis of \$40x and a fair market value of \$110x, and all of the stock of C held by D has a basis of \$100x and a fair market value of \$200x.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D. D is treated as acquiring a block of C stock in exchange for a direct or indirect interest in R stock (Relevant Stock) in the R–C reorganization because the basis of D in that C stock reflects the basis of the R stock. See paragraph (b)(2)(x) of this section. Further, because the block of C stock is treated as received in exchange for R stock, that block of C stock is a Substitute Asset, which is treated as Relevant Property. See paragraph (b)(2)(vi) of this section. Therefore, some of the C stock distributed in the distribution was Relevant Property of P, gain on which was not recognized in full as part of a Plan. This C stock is Separated Property. See paragraph (b)(2)(vii) of this section.

Because the gain on P's R Stock (for which C stock is substituted) was not recognized in full, this C stock reflects the basis of Separated Property. See paragraph (b)(1)(ii)(B) of this section. Finally, under paragraph (b)(1)(iii) of this section, C is deemed to have received Relevant Property of P, and, immediately after the distribution, D continues to hold Asset 2, which is Relevant Property of P. Therefore, P's Relevant Property has been divided between C and D.

(B) *Acquisition of predecessor stock.* Under paragraph (d)(1) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P, as a result of the P–D reorganization. Accordingly, there has been a Planned 50-percent Acquisition of P.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$100x of gain (\$200x of fair market value minus \$100x of basis of all C stock held by D), the Statutory Recognition Amount described in section 355(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of the deemed acquisition of P stock will not exceed \$70x, an amount equal to the amount D would have recognized had it transferred the C stock deemed received in the R–C reorganization under section (b)(2)(x) of this section (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D would recognize \$70x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the \$110x fair market value over the \$40x basis). Therefore, D recognizes \$70x of gain.

Example 5. Predecessor of Distributing; section 351 transaction—(i) Facts. X owns 100% of the stock of P, which holds multiple assets, including Asset 1, Asset 2, and Asset 3. Y owns 100% of the stock of D. The following steps occur as part of a Plan: P transfers Asset 1 and Asset 2 to D and Y transfers property to D in an exchange qualifying under section 351. Immediately after the exchange, P and Y own 10% and 90%, respectively, of the stock of D. D then contributes Asset 1 to C in exchange for additional C stock. D distributes all of the stock of C to P and Y, pro rata. D continues to directly hold Asset 2, and P continues to directly hold Asset 3. The contribution and distribution constitute a reorganization under section 368(a)(1)(D). Immediately before the distribution, Asset 1 has a basis of \$40x and a fair market value of \$110x, and the stock of C held by D has a basis of \$100x and a fair market value of \$200x. Following the distribution, and as part of the same Plan, Z acquires 51% of the P stock.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D. Immediately before the distribution, and as part of a Plan, C holds P Relevant Property (Asset 1), the gain on which was not recognized in full as part of a Plan. Further, the C stock distributed in the distribution was acquired by D in exchange for an interest in P Relevant Property transferred to C, and the basis of the C stock reflects the basis of Separated Property (Asset

1). In addition, immediately after the distribution, each of P and D holds Relevant Property of P. Therefore, P's Relevant Property has been divided between C, on the one hand, and P and D on the other hand.

(B) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$100x of gain (\$200x of fair market value minus \$100x of basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of Z's acquisition of P stock will not exceed \$70x, an amount equal to the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for voting stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D would recognize \$70x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the \$110x fair market value over the \$40x basis). Therefore, D recognizes \$70x of gain.

Example 6. Predecessor of Distributing; forward triangular merger—(i) Facts. X owns 100% of the stock of P, which owns multiple assets, including 100% of the stock of R and Asset 2. Y owns 100% of the stock of D. The following steps occur as part of a Plan: R merges into C in a reorganization under section 368(a)(1)(A) and (2)(D). Immediately after the merger P and Y own 10% and 90%, respectively, of the stock of D. D distributes the stock of C to P and Y pro rata. Immediately before the distribution, R's directly-held assets have a basis of \$40x and a fair market value of \$110x. Immediately before the distribution, D has a basis in the C stock of \$60x and a fair market value of \$200x. Pursuant to the same Plan, Z acquires 51% of P stock. P continues to hold Asset 2.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, P is a Predecessor of D because immediately before the distribution, and as part of a Plan, C holds directly P Relevant Property (Underlying Property of R) the gain on which was not recognized in full as part of a Plan. Further, the C stock distributed in the distribution was acquired by D, in part, in deemed exchange for P Relevant Property (see paragraph (b)(2)(x) of this section), and the C stock reflects the basis of Separated Property (Underlying Property of R). See § 1.358-6(c)(1). In addition, immediately after the distribution, P's Relevant Property has been divided between C, on the one hand, and P and D on the other hand.

(B) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$140x of gain (\$200x of fair market value minus \$60x of basis of the C stock held by D), the Statutory Recognition Amount under section 355(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of the 51% acquisition of P stock by Z will not exceed \$70x, an amount equal to the amount D would have recognized had it transferred the Underlying Property of R to a newly-formed corporation (C1) solely in exchange for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e)

Reorganization. Under section 361(c)(2), D would recognize \$70x of gain, an amount equal to the gain in hypothetical C1 stock (excess of the \$110x aggregate fair market value of the Underlying Property of R over the \$40x basis). Therefore, D recognizes \$70x of gain.

Example 7. Potential Predecessor in sequential distributions—(i) Facts. X owns 100% of P, which owns multiple assets, including Asset 1 and Asset 2. Y owns 100% of the stock of D, D owns 100% of the stock of D1, and D1 owns 100% of the stock of C. The following steps occur as part of a Plan: P merges into D1 in a reorganization under section 368(a)(1)(A). Immediately after the merger, X and D own 10% and 90%, respectively, of the stock of D1. D1 contributes Asset 1 to C in exchange for additional C stock, but D1 continues to hold Asset 2. D1 distributes the stock of C to D and X, pro rata in a distribution to which section 355 applies (First Distribution), and D distributes to Y all of the stock of C that it received from D1 in a distribution to which section 355 applies (Second Distribution). The contribution of Asset 1 by D1 to C and the First Distribution constitute a reorganization under section 368(a)(1)(D). Immediately before the First Distribution and the Second Distribution, Asset 1 has a basis of \$10x and a fair market value of \$60x, and the stock of C has a fair market value of \$200x. Immediately before the First Distribution, the stock of C held by D1 has a basis of \$100x. The stock of C held by D immediately before the Second Distribution has a basis of \$80x.

(ii) *Analysis—(A) Predecessor in First Distribution.* Under paragraph (b)(1) of this section, P is a Predecessor of D1. Immediately before the First Distribution, and as part of a Plan, C holds P Relevant Property (Asset 1), the gain on which was not recognized in full as part of a Plan. Further, the C stock distributed in the First Distribution was directly acquired by D1 in exchange for P Relevant Property, and it reflects the basis of Separated Property (Asset 1). In addition, immediately after the First Distribution, each of C and D1 continues to hold Relevant Property of P. Therefore, P's Relevant Property has been divided between C and D1.

(B) *Predecessor in Second Distribution.* Under paragraph (b)(1) of this section, P is not a Predecessor of D. Immediately before the Second Distribution, the stock of C distributed does not reflect the basis of Separated Property (Asset 1). Because there has been no Planned 50-percent Acquisition of D, C, or a Predecessor of D, there is no application of section 355(e) to the Second Distribution.

(C) *Gain on First Distribution.* By application of section 355(f), section 355 and the regulations thereunder (including the gain limitation rules in paragraph (e) of this section) would not apply to the First Distribution. Therefore, D1 would be required to recognize \$100x of gain (excess of the \$200x fair market value over the \$100x basis of C stock held by D1) under section 311(b), and D would be treated as receiving a distribution of \$180x to which section 301 applied. However, under paragraph (g)(1) of

this section, section 355(f) will not apply to the First Distribution. As a result, section 355, including the gain limitation rules of paragraph (e)(2) of this section, will apply to the First Distribution. Under paragraph (e)(2) of this section, D1's gain recognized by reason of the deemed acquisition of P stock by D will not exceed \$50x, an amount equal to the amount D1 would have recognized had it transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed the C1 stock to D1 shareholders in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D1 would recognize \$50x of gain, an amount equal to the gain in the hypothetical C1 stock (excess of the \$60x fair market value over the \$10x basis). Therefore, D1 recognizes \$50x of gain. Under paragraph (g)(2) of this section, however, D1 may choose to apply section 355(f) to the First Distribution, in which case D1 would recognize \$100x of gain under section 311(b) and section 301 would apply to the distribution of C stock to D.

Example 8. Sequential Predecessors—(i) Facts. X owns 100% of P1, which holds multiple assets, including Asset 1 and Asset 2. Y owns 100% of P2, which holds Asset 3, and Z owns 100% of D. The following steps occur as part of a Plan: P1 merges into P2 in a reorganization under 368(a)(1)(A). Immediately after the merger, X and Y own 10% and 90%, respectively, of the stock of P2. P2 then transfers Asset 1 to D and Z transfers property to D in an exchange qualifying under section 351. As a result of the exchange, P2 and Z own 10% and 90%, respectively, of the stock of D. D then contributes Asset 1 to C in exchange for additional C stock, and P2 retains Asset 2 and Asset 3. D distributes all of the stock of C to P2 and Z, pro rata. The contribution and distribution constitute a reorganization under 368(a)(1)(D), and D recognizes no gain under section 361. Immediately before the distribution, Asset 1 has a basis of \$40x and a fair market value of \$100x, and the stock of C held by D has a basis of \$100x and a fair market value of \$200x.

(ii) *Analysis—(A) P2 as Predecessor of D.* Under paragraph (b)(1) of this section, P2 is a Predecessor of D. Immediately before the distribution, and as part of a Plan, C holds P2 Relevant Property (Asset 1), the gain on which was not recognized in full as part of a Plan. Further, the C stock distributed in the distribution was acquired by D in exchange for a direct interest in P2 Relevant Property (Asset 1), and it reflects the basis in Separated Property (Asset 1). In addition, immediately after the distribution, P2 continues to hold P2 Relevant Property. Therefore, P2's Relevant Property has been divided between C and P2.

(B) *P1 as Predecessor of D.* Under paragraph (b)(1) of this section, P1 is a Predecessor of D. P1 transferred property to P2 (a Predecessor of D) as part of a Plan. Immediately before the distribution, and as part of a Plan, C holds P1 Relevant Property (Asset 1) the gain on which was not recognized in full as part of a Plan. Further, the C stock distributed in the distribution was acquired by D in exchange for a direct interest in P1 Relevant Property, and it reflects the basis in Separated Property (Asset

1). In addition, immediately after the distribution, P2 (a successor of P1 under paragraph (b)(2)(iii) of this section) continues to hold Relevant Property of P1. Therefore, P1's Relevant Property has been divided between C and P2 (the successor of P1).

(C) *Acquisition of predecessor stock.* Under paragraph (d)(1) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of P1 as a result of the merger of P1 into P2. Accordingly, there has been a Planned 50-percent Acquisition of P1. There is no acquisition of P2 stock.

(D) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$100x of gain (\$200x of aggregate fair market value minus \$100x of aggregate basis of the C stock held by D), the Statutory Recognition Amount described in section 361(c)(2), because there has been a Planned 50-percent Acquisition of P1, a Predecessor of D. However, under paragraph (e)(2) of this section, D's gain recognized by reason of the deemed acquisition of P1 stock will not exceed \$60x, an amount equal to the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed the C1 stock to D shareholders in a Hypothetical D/355(e) Reorganization. Under section 361(c)(2), D would recognize \$60x, an amount equal to the gain in hypothetical C1 stock (excess of the \$100x fair market over the \$40x basis). The fact that there is no Planned 50-percent Acquisition of either P2 or D does not change this result. Therefore, D recognizes \$60x of gain.

Example 9. Multiple Predecessors of Distributing—(i) Facts. X owns 100% of the stock of P1, which holds multiple assets, including Asset 1 and Asset 3. Y owns 100% of the stock of P2, which holds multiple assets, including Asset 2 and Asset 4. Z owns 100% of the stock of D. The following steps occur as part of a Plan: Each of P1 and P2 merges into D in a reorganization under section 368(a)(1)(A). Immediately after the mergers, each of X and Y owns 10%, and Z owns 80%, of the stock of D. D then contributes to C Asset 1 (acquired from P1), and Asset 2 (acquired from P2). In exchange for Asset 1 and Asset 2, D receives additional C stock. D distributes the stock of C to X, Y, and Z, pro rata. D's contribution of Asset 1 and Asset 2 and the distribution constitute a reorganization under section 368(a)(1)(D). D continues to hold Asset 3 and Asset 4. Immediately before the distribution, Asset 1 has a basis of \$50x and a fair market value of \$110x, Asset 2 has a basis of \$70x and a fair market value of \$90x, and the stock of C held by D has a basis of \$130x and a fair market value of \$220x.

(ii) *Analysis—(A) Predecessor.* Under paragraph (b)(1) of this section, each of P1 and P2 is a Predecessor of D. Immediately before the distribution and as part of a Plan, C holds P1 Relevant Property (Asset 1) and P2 Relevant Property (Asset 2), each of which was transferred as part of a Plan without full gain recognition. The C stock distributed in the distribution was acquired by D in exchange for Asset 1 and Asset 2, and that stock reflects the basis in both Asset 1 and Asset 2 (Relevant Property). In addition,

immediately after the distribution, D continues to hold Relevant Property of P1 and P2. Therefore, each of P1's and P2's Relevant Property has been divided between C and D.

(B) *Acquisition of Predecessor stock.* Under paragraph (d)(1) of this section, Z is treated as acquiring stock representing 80% of the voting power and value of each of P1 and P2 as a result of the mergers of P1 and P2 into D. Accordingly, there has been a Planned 50-percent Acquisition of P1 and P2.

(C) *Gain limited.* Without regard to the limitations in paragraph (e) of this section, D would be required to recognize \$90x of gain (\$220x of fair market value minus \$130x of basis of the C stock held by D), the Statutory Recognition Amount under section 361(c)(2). However, under paragraph (e)(2) of this section, D's gain recognized by reason of the deemed acquisition of P1 stock will not exceed \$60x (\$110x fair market value minus \$50x basis), an amount equal to the amount D would have recognized had it transferred Asset 1 (Separated Property) to a newly-formed corporation (C1) solely for stock and distributed that (C1) stock to D shareholders in a Hypothetical D/355(e) Reorganization. D's gain recognized by reason of the deemed acquisition of P2 stock will not exceed \$20x (\$90x fair market value minus \$70x basis), an amount equal to the amount D would have recognized had it transferred Asset 2 (Separated Property) to a second newly-formed corporation (C2) solely for stock and distributed the (C2) stock to D shareholders in a Hypothetical D/355(e) Reorganization. Therefore, D will recognize \$80x of gain (\$60x + \$20x).

Example 10. Successor of Controlled—(i) Facts. X owns 100% of the stock of each of D and R. The following steps occur as part of a Plan: D distributes all of its C stock to X. Immediately before the Distribution, D's C stock has a basis of \$10x and a fair market value of \$30x. C then merges into R in a reorganization under section 368(a)(1)(D). Immediately after the merger, X owns all of the R stock. As part of the same Plan, Z purchases 51% of the stock of R from X.

(ii) *Analysis—(A) Successor.* Under paragraph (c)(2) of this section, R is a Successor of C because after the distribution C transfers property to R in a section 381 transaction. Accordingly, under paragraph (d)(2) of this section, Z's acquisition of stock of R is treated as an acquisition of stock of C. Therefore, Z is treated as acquiring 51% of the stock of C.

(B) *Gain not limited.* The special gain limitation rules in paragraph (e)(2) or (3) of this section do not apply because there is not an acquisition of stock of D or a Predecessor of D. Therefore, because the distribution and Z's acquisition of a 51% interest in R are part of a Plan, D is required to recognize gain in the amount of \$20x (\$30x fair market value minus \$10x basis of the C stock held by D), the Statutory Recognition Amount under section 355(c)(2).

Example 11. Multiple Successors—(i) Facts. X owns 100% of the stock of both D and R. Y owns 100% of the stock of S. The following steps occur as part of a Plan: D distributes all of the C stock to X. Immediately after the distribution, D merges

into R in a reorganization under section 368(a)(1)(A). Following the merger, R merges into S in a reorganization under section 368(a)(1)(A). As a result of the merger of R into S, X and Y own 10% and 90%, respectively, of the S stock. Immediately before the distribution, D's C stock has a basis of \$10x and a fair market value of \$30x.

(ii) *Analysis—(A) Successor.* Under paragraph (c)(2)(i) of this section, R is a successor of D because, after the distribution, D transfers property to R in a section 381 transaction. Under paragraph (c)(2)(ii), S is also a successor of D because R (a successor of D) transfers property to S in a section 381 transaction.

(B) *Acquisition of Successor Stock.* Under paragraph (d)(1) of this section, there is no deemed acquisition of D stock as a result of the merger of D into R because X wholly owns the stock of D before the merger and wholly owns the stock of R after the merger. Under paragraph (d)(1) of this section, Y is treated as acquiring stock representing 90% of the voting power and value of R (Successor of D) as a result of the merger of R into S. Under paragraph (d)(2) of this section, an acquisition of the R stock is also treated as an acquisition of the D stock.

(C) *Gain.* The special gain limitation rules in paragraph (e)(2) or (3) of this section do not apply because there is not an acquisition of stock of D or a Predecessor of D. Therefore, because there is a Planned 50-percent Acquisition of R (Successor of D), D is required to recognize \$20x of gain (\$30x fair market value minus \$10x basis of the C stock held by D), the Statutory Recognition Amount described in section 355(c)(2).

(i) *Effective/applicability date—(1) In general.* Except as provided in paragraph (i)(2) or (3) of this section, this section applies to distributions occurring after January 18, 2017.

(2) *Transition rule—(i) In general.* Except as provided in paragraph (i)(3) of this section, this section does not apply to a distribution (as defined in paragraph (i)(2)(ii) of this section) that is—

(A) Made pursuant to a binding agreement in effect on or before December 16, 2016 and at all times thereafter;

(B) Described in a ruling request submitted to the Internal Revenue Service on or before December 16, 2016; or

(C) Described on or before December 16, 2016 in a public announcement or in a filing with the Securities and Exchange Commission.

(ii) *Definition of distribution.* For purposes of paragraphs (i)(2)(i) and (3) of this section, references to a distribution include a reference to a distribution and other related pre-distribution transactions that together effect a division of the assets of a Predecessor of Distributing. Therefore, for example, if a corporation would qualify as a Predecessor of Distributing under paragraph (b)(1) of this section,

Distributing may claim the benefit of the transition rule of paragraph (i)(2) of this section only if all steps relevant to the determination of Predecessor of Distributing status are described in the binding agreement, ruling request, announcement, or filing described in paragraph (i)(2)(i) of this section.

(3) *Exception.* Notwithstanding paragraph (i)(1) or (2) of this section, Distributing and any affiliated group that it is a member of as of the beginning of the date on which a distribution (as defined in paragraph (i)(2)(ii) of this section) may apply this section in its entirety to that distribution if it occurs after November 22, 2004. However, under this paragraph (i)(3), taxpayers must consistently apply this section in its entirety to all distributions occurring after November 22, 2004, that are part of the same Plan.

(j) *Expiration date.* The applicability of this section expires on or before December 16, 2019.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 1, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016-30160 Filed 12-16-16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9804]

RIN 1545-BN50

Premium Tax Credit Regulation VI

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations relating to the health insurance premium tax credit (premium tax credit). These final regulations affect individuals who enroll in qualified health plans through Health Insurance Exchanges (Exchanges, also called Marketplaces) and claim the premium tax credit, and Exchanges that make qualified health plans available to individuals and employers. These final regulations also affect individuals who are eligible for employer-sponsored health coverage.

DATES: *Effective Date:* These regulations are effective December 19, 2016.

Applicability Date: For dates of applicability, see §§ 1.36B-1(o), 1.36B-2(e), 1.36B-3(n), 1.36B-5(h), and 1.6011-8(b).

FOR FURTHER INFORMATION CONTACT:

Steve Toomey at (202) 317-4735, Shareen Pflanz at (202) 317-4727, or Lisa Mojiri-Azad at (202) 317-4649 (not toll-free calls).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2232.

The collection of information in these regulations is in § 1.36B-5. The collection of information is necessary to reconcile advance payments of the premium tax credit and determine the allowable premium tax credit. The collection of information is required to comply with the provisions of section 36B of the Internal Revenue Code (Code). The likely respondents are Marketplaces that enroll individuals in qualified health plans.

The burden for the collection of information contained in these regulations will be reflected in the burden estimate for Form 1095-A, *Health Insurance Marketplace Statement*, which is the form that the Marketplace will use to submit the information described in the final regulations.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Background

This document contains final regulations amending the Income Tax Regulations (26 CFR part 1) under section 36B relating to the health insurance premium tax credit. Section 36B was enacted by the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act). Final regulations under section 36B (TD 9590) were published on May 23, 2012 (77 FR 30,385). These regulations were amended in 2014 by TD 9663, published on May 7, 2014 (79 FR 26,117), and in 2015 by TD 9745, published December 18, 2015 (80 FR

78,974). On July 8, 2016, a notice of proposed rulemaking (REG-109086-15) was published in the **Federal Register** (81 FR 44,557). Written comments responding to the proposed regulations were received. The comments have been considered in connection with these final regulations and are available for public inspection at www.regulations.gov or on request. No public hearing was requested or held. After consideration of all the comments, the proposed regulations are adopted, in part, as amended by this Treasury decision. The rules proposed under REG-109086-15 on the effect of opt-out arrangements on an employee's required contribution for employer-sponsored coverage have been reserved and the Treasury Department and the IRS expect to finalize those regulations separately (see, section 1.d of this preamble).

Summary of Comments and Explanation of Provisions

1. Eligibility

a. Applicable Taxpayers

A taxpayer is eligible for a premium tax credit only if the taxpayer is an applicable taxpayer. To be an applicable taxpayer, a taxpayer's household income generally must be between 100 percent and 400 percent of the Federal poverty line (FPL) for the taxpayer's family size. The existing regulations in § 1.36B-2(b)(6) allow a taxpayer whose household income is below 100 percent of the applicable FPL to be treated as an applicable taxpayer if (1) the taxpayer or a family member enrolls in a qualified health plan, (2) an Exchange estimates at the time of enrollment that the taxpayer's household income for the taxable year will be between 100 and 400 percent of the applicable FPL, (3) advance credit payments are authorized and paid for one or more months during the taxable year, and (4) the taxpayer would be an applicable taxpayer but for the fact that the taxpayer's household income for the taxable year is below 100 percent of the applicable FPL.

An applicable taxpayer is allowed a premium tax credit for a month only if one or more members of the applicable taxpayer's family is enrolled in one or more qualified health plans through an Exchange and is not eligible for minimum essential coverage in that month. Section 36B(c)(2), § 1.36B-2(a). In general, government-sponsored programs are minimum essential coverage. Section 1.36B-2(c)(1). Under § 1.36B-2(c)(2)(v), an individual is treated as not eligible for Medicaid, the Children's Health Insurance Program (CHIP), or a similar program for a period of coverage under a qualified health

plan if, when the individual enrolls in the qualified health plan, an Exchange determines or considers (within the meaning of 45 CFR 155.302(b)) the individual to be ineligible for such program.

In addition, coverage under an eligible employer-sponsored plan is generally minimum essential coverage.¹ However, an individual who may (but does not) enroll in an employer-sponsored plan is generally considered eligible for that plan only if the plan is considered affordable and provides minimum value. Section 36B(c)(2)(C), § 1.36B-2(c)(3). In addition, under the employee safe harbor in § 1.36B-2(c)(3)(v)(A)(3), an employer-sponsored plan is not considered affordable for a plan year if, when the employee or a related individual enrolls in a qualified health plan for a period coinciding with the plan year, an Exchange determines that the employer-sponsored plan is not affordable for that plan year.

The existing regulations describing the employee safe harbor contain an exception for reckless disregard for the facts. Under the exception, the safe harbor does not apply in situations in which an Exchange determines that an individual is not eligible for affordable employer-sponsored coverage because an individual, with reckless disregard of the facts, provides incorrect information to the Exchange regarding affordability of the plan.

The proposed regulations add two additional intentional or reckless disregard exceptions to provisions regarding eligibility determinations by the Exchanges. First, to reduce the likelihood that individuals who recklessly or intentionally provide inaccurate information to an Exchange will benefit from the rule in § 1.36B-2(b)(6) (regarding an Exchange determination that the taxpayer's household income for the taxable year will be between 100 and 400 percent of the applicable FPL), the proposed regulations provide that a taxpayer whose household income is below 100 percent of the applicable FPL for the taxpayer's family size does not receive the benefit of that rule if, with

intentional or reckless disregard for the facts, the taxpayer provided incorrect information to an Exchange for the year of coverage.

Second, the proposed regulations provide that an individual who was determined or considered by an Exchange to be ineligible for Medicaid, CHIP, or a similar program (such as a Basic Health Program) does not receive the benefit of the rule in § 1.36B-2(c)(2)(v) (regarding an Exchange determination that an individual was not eligible for coverage under Medicaid, CHIP, or a similar program) if, with intentional or reckless disregard for the facts, the individual (or a person claiming a personal exemption for the individual) provided incorrect information to an Exchange for the year of coverage.

In each of the three instances in the existing and proposed section 36B regulations where an intentional or reckless disregard for the facts exception is provided, the proposed regulations clarify that a reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. The proposed regulations also provide that a disregard of the facts is intentional if the taxpayer knows the information provided to the Exchange is inaccurate.

Commenters asked that the final regulations clarify how the IRS will determine whether an individual has acted with reckless or intentional disregard of the facts, and how these standards will be applied and enforced. Some commenters requested that the final regulations clarify the definition of "reckless disregard" and provide examples. Other commenters expressed concern that the proposed rule would make taxpayers responsible for information provided by third parties who provide assistance with enrollment. Thus, the commenters recommended that the final regulations clarify that an individual is only responsible for information he or she provides to the Exchange and is not responsible for information provided by third parties. The commenters also suggested that the final regulations provide that individuals who use an expert to assist with enrolling in coverage should not be considered to have acted recklessly when relying on the expert's professional advice. Other commenters requested that the final regulations require that individuals be notified of the consequences of potential income-based eligibility fraud.

A commenter also stated that, under the final regulations, the IRS should have the burden of showing that a taxpayer's incorrect information was provided to the Exchange with intentional or reckless disregard for the facts. One commenter suggested that the final regulations clarify that the reckless or intentional disregard for the facts exceptions will be applied on an individual basis. In addition, the commenter asked that the final regulations address how the intentional or reckless disregard for the facts exception, as it applies to the employee safe harbor in § 1.36B-2(c)(3)(v)(A)(3), will be implemented by the Exchanges.

Finally, one commenter requested that the final regulations not adopt the intentional or reckless disregard for the facts exceptions.

After careful consideration of the comments received, the final regulations adopt the intentional or reckless disregard for the facts exception, and the definition of its terms, to the section 36B eligibility safe harbors for household income below 100 percent of the FPL, government programs such as Medicaid, and employer-sponsored coverage. As clarified in the proposed and final regulations, the intentional or reckless disregard for the facts exception applies only when the taxpayer knowingly provides inaccurate information to the Exchange or makes little or no effort to determine whether the information provided is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct of a reasonable person. The commenters' concerns are further addressed in this preamble.

These final regulations, in adopting the intentional or reckless disregard for the facts exceptions set forth in the proposed regulations without modification, do not create new or heightened standards or rules for determining whether a taxpayer acted with intentional or reckless disregard for the facts. Rather, the phrase "intentional or reckless disregard for the facts" as used in the section 36B regulations has a similar meaning and application currently used in other areas of the Code. For example, an intentional or reckless disregard standard also is applied in determining eligibility for other tax credits such as the earned income tax credit and the American opportunity tax credit, see sections 32(k) and 25A(i)(7)(A).

The IRS is responsible for enforcement of the intentional or reckless disregard for the facts exceptions during an examination of a taxpayer's tax return. Thus, the IRS must make the initial showing of facts

¹ In general, an eligible employer-sponsored plan is coverage provided by an employer to its employees (and their dependents) under a group health plan maintained by the employer. See section 5000A(f)(2) and § 1.5000A-2(c). Under section 5000A(f)(3) and § 1.5000A-2(g), minimum essential coverage does not include any coverage that consists solely of excepted benefits described in section 2791(c)(1), (c)(2), (c)(3), or (c)(4) of the Public Health Service Act (PHS Act) (42 U.S.C. 300gg-91(c)), or regulations issued under those provisions (45 CFR 148.220). In general, excepted benefits are benefits that are limited in scope or are conditional.

demonstrating intentional or reckless behavior. Exchanges have no role in enforcing or implementing this standard, although other provisions of law provide Exchanges the authority to impose penalties on individuals who provide incorrect information to an Exchange.

To provide additional clarity, in general, the intentional or reckless disregard for the facts exception only applies to the conduct of the individual attesting to the Exchange. Thus, an individual is only responsible for the information that he or she provides to the Exchange and is not liable for inaccurate information provided by third parties, such as an employer.

An individual's attestations, however, may affect the eligibility of all individuals who are listed on a Marketplace Application for Health Coverage and who the taxpayer intends at the time of enrollment to claim as a dependent. For example, if a taxpayer, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange concerning his household income and receives advance credit payments for coverage of himself and his three dependents, and his actual household income is below 100% of the applicable FPL, then the taxpayer is not an applicable taxpayer and a premium tax credit is not allowed for his coverage or the coverage of his three dependents.

Similarly, many individuals solicit and receive assistance with enrollment and completing the Marketplace Application for Health Coverage. To ensure effective and efficient enrollment through the Exchange, the Department of Health and Human Services uses Navigators, as described at 45 CFR 155.210, to assist potential applicants. In addition, the Marketplaces administer a program for individuals and entities to apply for and receive recognition as a certified application counselor, as defined in 45 CFR 155.225, who may formally offer and provide enrollment assistance to individuals and small businesses. Finally, 45 CFR 155.220 provides standards under which agents and brokers may register and facilitate enrollments through the Marketplaces. Navigators, certified application counselors, agents, and brokers (collectively, authorized advisors) receive comprehensive training on enrollment and completion of a Marketplace Application for Health Coverage, and individuals are encouraged to use them when making enrollment and advance credit payment decisions. Accordingly, for purposes of the final regulations, an individual does

not act recklessly when following the advice of an authorized advisor, so long as the individual provided the authorized advisor with necessary and accurate information. Whether reliance on advice provided by a person other than an authorized advisor is reckless will depend on all of the relevant facts and circumstances, including whether reliance was reasonable and whether the taxpayer provided necessary and accurate information to the other person.

To illustrate, assume Individual D is told by a Navigator that the child support payments D receives from her former spouse are included in her household income in determining whether she is eligible for advance credit payments. Relying on that information, D reports on a Marketplace Application for Health Coverage that her household income for the year of coverage will be over 100 percent of the applicable FPL for D's family size, and D receives the benefit of advance credit payments for the year. When filing her tax return for the year of coverage, D learns that child support payments are not included in her household income for the year of coverage and, thus, her household income is actually under 100 percent of the applicable FPL. D is not considered to have acted with intentional or reckless disregard for the facts because she relied on the advice of a Navigator in providing the information that the Marketplace used to determine whether she was eligible for advance credit payments. Thus, the provision in § 1.36B-2(b)(6) that allows a taxpayer whose household income is below 100 percent of the applicable FPL to be treated as an applicable taxpayer will apply to D despite the fact that her household income for the taxable year is below 100 percent of the applicable FPL.

In contrast, assume Individual E told the Navigator assisting with E's Marketplace Application for Health Coverage that E's lowest-cost option for purchasing self-only employer-sponsored coverage that provides minimum value would cost E \$10,000 for the taxable year, when in fact E knew that he could purchase such coverage for \$5,000. Based on the information E provided, the Navigator advises E that he should indicate on his Marketplace Application for Health Coverage that his required contribution for employer-sponsored coverage is \$10,000. E follows this advice and consequently receives the benefit of advance credit payments for the year. During a subsequent examination, the IRS determines that E could have purchased employer-sponsored

coverage that provides minimum value for \$5,000. For the year of coverage, E is not considered to have reasonably relied on the advice of a Navigator in providing information to the Marketplace because E knowingly provided inaccurate information to the Navigator. Thus, the employee safe harbor in § 1.36B-2(c)(3)(v)(A)(3) does not apply to E.

b. Nonappropriated Fund Health Benefits Program of the Department of Defense

The proposed regulations provide that the Nonappropriated Fund Health Benefits Program of the Department of Defense (the Program) is treated as an eligible employer-sponsored plan for purposes of determining if an individual is eligible for minimum essential coverage under section 36B. This treatment conforms the regulations under section 36B to the regulations under section 5000A, which treat the Program as an eligible employer-sponsored plan. Thus, if coverage under the Program does not provide minimum value (under § 1.36B-2(c)(3)(vi)) or is not considered affordable (under § 1.36B-2(c)(3)(v)) for an individual who does not enroll in the coverage, he or she is not treated as eligible for minimum essential coverage under the Program for purposes of premium tax credit eligibility.

One commenter requested that the final regulations clarify how Marketplaces will determine and verify whether an offer of coverage under the Program provides minimum value and is affordable. In general, employers are required to provide certain information to employees about the coverage that they offer, including information that is relevant to affordability and minimum value. These regulations do not make any changes to those requirements.

c. Eligibility for Employer-Sponsored Coverage for Months During a Plan Year

The existing section 36B regulations provide that an individual is eligible for minimum essential coverage through an eligible employer-sponsored plan if the individual had the opportunity to enroll in the plan and the plan is affordable and provides minimum value. Because in some instances individuals may not be allowed an annual opportunity to decide whether to enroll in eligible employer-sponsored coverage, the proposed regulations provide that if an individual declines to enroll in employer-sponsored coverage for a plan year and does not have the opportunity to enroll in that coverage for one or more succeeding plan years, for purposes of section 36B, the individual

is treated as ineligible for that coverage for the succeeding plan year or years for which there is no enrollment opportunity. This rule relating to eligibility for employer-sponsored coverage is proposed to apply for taxable years beginning after December 31, 2016.²

One commenter sought clarification on how this rule relating to eligibility for employer-sponsored coverage applies to employers with fiscal-year employer plans. The commenter also requests a delay in the effective date to allow additional time for implementation.

The rule in the proposed regulations relating to eligibility for employer-sponsored coverage applies to fiscal year plans in the same manner that it applies to calendar year plans. For example, assume an employer offers an employee affordable, minimum value coverage for a plan year of April 1, 2017 through March 30, 2018. In addition, under the terms of the employer's plan, if the employee declines the coverage beginning on April 1, 2017, the employee is precluded from enrolling for the plan year of April 1, 2018 through March 30, 2019, absent a special enrollment period. Under the proposed regulations, the employee is treated as eligible for this employer-sponsored coverage only for the period between April 1, 2017 and March 31, 2018. Thus, assuming the employee does not enroll in the employer-sponsored coverage through a special enrollment period, the employee is not considered eligible for this employer coverage during the period April 1, 2018 through March 31, 2019.

The final regulations do not adopt the commenter's suggestion to delay the applicability date of the provision relating to eligibility for employer-sponsored coverage to a year after 2017. The Treasury Department and the IRS believe that it would be unfair to employees and their family members who do not have an annual opportunity to enroll in coverage offered to them by an employer to delay the applicability date of this provision. Consequently, the final regulations provide that this

²Note that for purposes of section 4980H, in general, an applicable large employer will not be treated as having made an offer of coverage to a full-time employee for a plan year if the employee does not have an effective opportunity to elect to enroll in the coverage at least once with respect to the plan year. For this purpose, a plan year must be twelve consecutive months, unless a short plan year of less than twelve consecutive months is permitted for a valid business purpose. For additional rules on the definition of "offer" and "plan year" under section 4980H, see §§ 54.4980H-1(a)(35), 54.4980H-4(b), and 54.4980H-5(b).

provision is applicable for taxable years beginning after December 31, 2016.

d. Opt-Out Arrangements and An Employee's Required Contribution

The proposed regulations provide rules on the effect of payments made available under opt-out arrangements on an employee's required contribution for purposes of eligibility for the premium tax credit and an exemption from the section 5000A individual shared responsibility provision.³ An opt-out arrangement is an arrangement under which a payment (called an opt-out payment) is made available to an employee by an employer only if the employee declines coverage under an eligible employer-sponsored plan offered by the employer. Prior to the proposed regulations, the Treasury Department and the IRS released Notice 2015-87, 2015-52 I.R.B. 889, which also addressed the effect of opt-out arrangements on an employee's required contribution.

Several comments on the proposed rule were received. The Treasury Department and the IRS continue to examine the issues raised by opt-out arrangements and expect to finalize regulations on the effect of opt-out arrangements on an employee's required contribution at a later time.

As provided in Notice 2015-87, Q&A 9, and reiterated in the proposed rule, the regulations on opt-out arrangements generally will apply only for periods after the applicability of those final regulations. Until those final regulations are applicable, individuals and employers can continue to rely on the guidance provided in Notice 2015-87 and on the proposed rule, including transition relief as clarified and expanded in section 2.f of the preamble to the proposed rule (for opt-out arrangements contained in collective bargaining agreements in effect before December 16, 2015). See 81 FR 44,561.

Accordingly, until the applicability date of final regulations on opt-out arrangements, individuals may treat opt-out payments made available under unconditional opt-out arrangements (as defined in the Background section of the preamble to the proposed regulations (see 81 FR 44,560)) as increasing the employee's required contribution for purposes of sections 36B and 5000A. In addition, for the same period, an individual who can demonstrate that he or she meets the condition(s) (in

³The amount of an employee's required contribution has consequences under section 4980H and the related reporting requirements under section 6056. For more information, see Notice 2015-87, Q&A 7-9 and section 2.f of the preamble to the proposed rule (see 81 FR 44,561).

addition to declining the employer's health coverage) that must be satisfied to receive an opt-out payment under a conditional opt-out arrangement (as defined in the Background section of the preamble to the proposed regulations (see 81 FR 44,560)), may treat the amount of the conditional opt-out payment as increasing the employee's required contribution for purposes of sections 36B and 5000A.

In contrast, until the applicability date of final regulations on opt-out arrangements, employers are not required to increase an employee's required contribution by the amount of an opt-out payment made available under an opt-out arrangement (other than a payment made available under a non-relief-eligible opt-out arrangement⁴) for purposes of section 6056 (Form 1095-C, Employer-Provided Health Insurance Offer and Coverage), and an opt-out payment made available under an opt-out arrangement (other than a payment made available under a non-relief-eligible opt-out arrangement) will not be treated as increasing an employee's required contribution for purposes of any potential consequences under section 4980H.

e. Effective Date of Eligibility for Minimum Essential Coverage When Advance Credit Payments Discontinuance Is Delayed

The proposed regulations provide that if an individual who is enrolled in a qualified health plan for which advance credit payments are made informs the Exchange that the individual is or will soon be eligible for other minimum essential coverage and that advance credit payments should be discontinued, but the Exchange does not discontinue advance credit payments for the first calendar month beginning after the month the individual notifies the Exchange, the individual is treated as eligible for the other minimum essential coverage no earlier than the first day of the second calendar month beginning after the first month the individual may enroll in the other minimum essential coverage. Similarly, if a determination is made that an individual is eligible for Medicaid or CHIP but advance credit payments are not discontinued for the first calendar month beginning after the eligibility determination, the individual is treated as eligible for Medicaid or CHIP no earlier than the first day of the second

⁴For a discussion of non-relief-eligible opt-out arrangements, see Notice 2015-87, Q&A 9 and section 2.f of the preamble of the proposed rule. See 81 FR 44,561.

calendar month beginning after the determination.

Commenters noted that the proposed regulations do not address how the IRS will identify and verify scenarios in which an individual requested prospective discontinuation of advance credit payments but there was a delay in the discontinuation. The commenters also pointed out that consumers may request an accelerated termination if the Exchange and health plan issuer allow it and the proposed regulations do not address how these scenarios will be handled. Consequently, the commenters requested that the IRS issue clear instructions and guidance for taxpayers and tax preparers for situations in which there is a delay discontinuing or terminating advance credit payments to ensure that taxpayers will not be subject to penalties or repayment of advance credit payments for which they are not responsible.

The Instructions to Form 8962, Premium Tax Credit (PTC), and Publication 974, Premium Tax Credit, will include a discussion of this rule concerning eligibility for certain non-Marketplace minimum essential coverage when the discontinuance of advance credit payments is delayed. Furthermore, the IRS intends to, in Questions and Answers on www.irs.gov, address situations in which there is a delay in the discontinuance of advance credit payments and the taxpayer is allowed a premium tax credit for a month for which the taxpayer receives a Form 1095-B or Form 1095-C showing that the taxpayer was enrolled in non-Marketplace minimum essential coverage.

Commenters requested that the final regulations acknowledge that this rule concerning eligibility for non-Marketplace minimum essential coverage when there has been a delay in the discontinuance of advance credit payments does not change the obligations of health plan issuers for prior years, notwithstanding that the rule in the proposed regulations may be relied on by taxpayers for taxable years beginning after December 31, 2013. Although the obligations of health plan issuers are generally outside the scope of these regulations, it is the understanding of the Treasury Department and the IRS, in consultation with the Department of Health and Human Services (HHS), that this rule regarding when an individual is eligible for certain non-Marketplace coverage does not affect the obligations of health plan issuers or the deadlines imposed by or on those issuers.

One commenter requested that the rule extend to other situations, such as

when an individual receiving the benefit of advance credit payments is incarcerated after disposition of charges. Under section 1312(f)(1)(B) of the Affordable Care Act (42 U.S.C. 18032(f)(1)(B)), incarcerated individuals may not be enrolled through a Marketplace. However, unlike an individual enrolled in minimum essential coverage outside of the Marketplace, if there is a delay in disenrolling the incarcerated individual and discontinuing the advance credit payments, neither section 36B nor its regulations prohibit a taxpayer from claiming a premium tax credit for an incarcerated individual's Marketplace coverage. Thus, the final regulations do not adopt this comment.

The same commenter also requested a change in the rule concerning delays in discontinuance of advance credit payments after a Medicaid or CHIP determination. Under the proposed regulations, if there is a delay in discontinuance of advance credit payments following a Medicaid or CHIP eligibility determination, the individual is treated as eligible for Medicaid or CHIP no earlier than the first day of the second calendar month beginning after the determination. The commenter stated that, under the final regulations, an individual should be treated as eligible for Medicaid or CHIP no earlier than the first day of the second calendar month beginning after the eligibility determination is communicated to the Exchange.

The final regulations do not adopt this comment. The commenter is likely concerned about a situation in which the office that made a Medicaid or CHIP determination for an individual does not promptly notify the Marketplace of that status and the individual remains enrolled in Marketplace coverage with advance credit payments for multiple months. However, individuals enrolled in Marketplace coverage with advance credit payments who are determined eligible for Medicaid or CHIP should also promptly notify their Marketplace to discontinue the advance credit payments. Amending the rule to delay eligibility until the second month after the determination is communicated to the Marketplace effectively allows individuals who fail to promptly communicate with their Marketplaces to be dual enrolled for multiple months with advance credit payments.

2. Premium Assistance Amount

a. Payment of Taxpayer's Share of Premiums for Advance Credit Payments Following Appeal Determinations

Under existing § 1.36B-3(c)(1)(ii), a month is a coverage month for an individual only if the share of the premium for the individual's coverage for the month not covered by advance credit payments is paid by the unextended due date of the income tax return for the year of coverage of the taxpayer claiming a personal exemption for the individual.

As discussed in the preamble to the proposed regulations, instances arise in which an individual is initially determined ineligible for advance credit payments, does not enroll in a qualified health plan pending the individual's appeal of the determination, and is later determined to be eligible for advance credit payments through the appeals process. If the individual then elects to be retroactively enrolled in an Exchange health plan, the deadline for paying premiums for the retroactive coverage may be after the unextended due date for filing an income tax return for the year of coverage. To address this issue, the proposed regulations provide that a taxpayer who is eligible for advance credit payments pursuant to an eligibility appeal for a member of the taxpayer's coverage family who, based on the appeals decision, retroactively enrolls in a qualified health plan, is considered to have met the requirement in § 1.36B-3(c)(1)(ii) for a month if the taxpayer pays the individual's share of the premium for coverage under the plan for the month on or before the 120th day following the date of the appeals decision (the appeal premium payment period).

A commenter opined that to ensure accurate and consistent identification and reporting of payment deadlines, the triggering event that begins the appeal premium payment period under the section 36B regulations should align with the triggering event provided in 45 CFR 155.400(e)(1)(iii), which provides as follows: "For coverage to be effectuated under retroactive effective dates, . . . the deadline for making the binder payment must be no earlier than 30 calendar days from the date the issuer receives the enrollment transaction." The commenter notes that the date the appeal premium payment period begins under the proposed regulations (the date of the appeals decision) is different from the date the period begins under 45 CFR 155.400(e)(1)(iii) (the date the issuer receives the enrollment transaction) and suggests that the final regulations

conform to the language in 45 CFR 155.400(e)(1)(iii) because qualified health plan issuers would not know the date of the appeals decision and would not know whether the premium payment was made within 120 days of the appeals decision. The commenter also opined that the 120-day period in the proposed regulations may be too long for some retroactive enrollment scenarios, such as a situation in which an individual is enrolled in retroactive coverage for only a few months. The commenter also suggested that the appeal premium payment rule in the section 36B regulations should apply only in situations in which the appeal decision is after the individual's unextended due date for filing an income tax return for the year of coverage.

The final regulations do not adopt the suggested changes. The purpose of the appeal premium payment period in the section 36B regulations is to ensure that taxpayers who pay their premiums within a reasonable time following a favorable appeal decision may qualify for a premium tax credit. On the other hand, the payment date rule in 45 CFR 155.400(e)(1)(iii) relates to when the payment must be made to effectuate the retroactive coverage. Qualified health plan issuers need to know the date they received the enrollment transaction and thus whether the premium payments were timely made to effectuate the retroactive coverage, but have no need to know whether the payments were made within 120 days of the appeal decision. In addition, the 120-day period is needed to provide equitable treatment, whether the appeal decision is before or after the unextended due date for filing an income tax return for the year of coverage. It would be inequitable to allow a taxpayer who gets a favorable appeal decision five days after the unextended due date of his or her tax return the benefit of the 120-day appeal premium payment period but not extend the same benefit to a taxpayer who gets an appeal decision five days before the unextended due date.

3. Benchmark Plan Premium

a. Pediatric Dental Benefits

Under the existing section 36B regulations, if a member of a taxpayer's coverage family is enrolled in a stand-alone dental plan, the portion of the monthly premium for the stand-alone dental plan allocable to pediatric dental benefits is added to the taxpayer's monthly enrollment premium in determining the taxpayer's premium assistance amount for the month. Under the existing regulations, however, the

portion of the monthly premium for a stand-alone dental plan allocable to pediatric dental benefits does not affect the taxpayer's applicable benchmark plan premium.

Because the existing regulations frustrate the goal of section 36B of making coverage for essential health benefits affordable to individuals eligible for the premium tax credit, the proposed regulations provide that, if an Exchange offers one or more silver-level qualified health plans that do not include pediatric dental benefits, the applicable benchmark plan is determined by ranking (1) the premiums for the silver-level qualified health plans that include pediatric dental benefits offered by the Exchange and (2) the aggregate of the premiums for the silver-level qualified health plans offered by the Exchange that do not include pediatric dental benefits plus the portion of the premium allocable to pediatric dental benefits for stand-alone dental plans offered by the Exchange. In constructing this ranking, the premium for the lowest-cost silver plan that does not include pediatric dental benefits is added to the premium allocable to pediatric dental benefits for the lowest cost stand-alone dental plan, and similarly, the premium for the second lowest-cost silver plan that does not include pediatric dental benefits is added to the premium allocable to pediatric dental benefits for the second lowest-cost stand-alone dental plan. The second lowest-cost amount from this combined ranking of premiums is the taxpayer's applicable benchmark plan premium. Finally, the proposed regulations provide that the rule for determining the applicable benchmark plan for situations in which an Exchange offers one or more silver-level qualified health plans that do not cover pediatric dental benefits (the pediatric dental rule) is applicable for taxable years beginning after December 31, 2018.

One commenter noted that the effect of the rule in the proposed regulations relating to pediatric dental benefits is that some taxpayers will have a lower monthly premium assistance amount as compared to their monthly premium assistance amount under the existing section 36B regulations. In particular, the commenter pointed to Example 4 of § 1.36B-3(f)(9) of the proposed regulations in which the taxpayer's benchmark plan premium is lower under the rules of the proposed regulations than under the existing section 36B regulations. Under this example, the applicable benchmark plan premium would be based on the lowest-cost rather than the second-lowest-cost

silver-level qualified health plan. The commenter suggested that this is likely not a result intended by the Treasury Department and the IRS and recommended that the final regulations include a revision to the language of the proposed regulations to fix this unintended result.

The final regulations adopt the recommendation in this comment. Under the final regulations, if one or more silver-level qualified health plans offered through an Exchange do not cover pediatric dental benefits, the premium for the applicable benchmark plan is determined based on the second lowest-cost option among (i) the silver-level qualified health plans that are offered by the Exchange to the members of the coverage family and that provide pediatric dental benefits; and (ii) the silver-level qualified health plans that are offered by the Exchange to the members of the coverage family that do not provide pediatric dental benefits in conjunction with the second lowest-cost portion of the premium for a stand-alone dental plan (within the meaning of section 1311(d)(2)(B)(ii) of the Affordable Care Act (42 U.S.C. 18031(d)(2)(B)(ii)) offered by the Exchange to the members of the coverage family that is properly allocable to pediatric dental benefits. Thus, under the final regulations, if a taxpayer's coverage family is able to enroll in one or more silver-level qualified health plans that do not provide pediatric dental benefits, the second lowest-cost portion of the premium for a stand-alone dental plan offered by the Exchange to the members of the coverage family that is properly allocable to pediatric dental benefits is added to the premium for each of those silver-level plans in determining the taxpayer's applicable benchmark plan.

One commenter requested clarification on how to determine the portion of the premium of a stand-alone dental plan properly allocable to the cost of pediatric dental benefits. According to the commenter, the portion of a plan's premium that is allocable to each essential health benefit (EHB) is determined by using an EHB factor (a multiplier that applies to the plan and represents the portion of the total benefit package that represents the EHB), and the EHB factor does not change based on who is purchasing the plan and what benefits they are eligible to use. The commenter asks for clarification on if, and how, an EHB factor is to be applied to a stand-alone dental plan and whether a stand-alone dental plan should have a different EHB factor apply based on whether children, or only adults, are enrolled in the plan.

The determination of the portion of the premium of a stand-alone dental plan properly allocable to pediatric dental benefits is outside the scope of these regulations. However, HHS has confirmed that, under its guidance, if no members of a taxpayer's coverage family are eligible for pediatric dental benefits, the portion of the premium allocable to pediatric dental benefits for all stand-alone dental plans the family may enroll in is \$0.

Another commenter stated that the pediatric dental rule in the proposed regulations is inconsistent with the provisions of section 36B. Specifically, the commenter contends that the clear meaning of section 36B(b)(3)(E) is that the portion of a stand-alone pediatric dental plan premium allocable to pediatric dental benefits is added only to the enrollment premium, not the benchmark plan premium, in computing the premium tax credit, and is added only for taxpayers who have a family member who enrolls in a stand-alone dental plan. In addition, the commenter opines that the pediatric dental rule in the proposed regulations is overly complex and provides minimal benefit to a small group of taxpayers.

The Treasury Department and the IRS disagree that the pediatric dental rule is inconsistent with the provisions of section 36B. Although, as noted by the commenter, section 36B(b)(3)(E) relates only to the portion of a stand-alone dental plan premium that is added to a taxpayer's enrollment premium, the proposed regulations do not rely upon an interpretation of section 36B(b)(3)(E). Rather, as discussed in the preamble of the proposed regulations, the pediatric dental rule is based on statutory references to "self-only coverage" and "family coverage" in section 36B(b)(3)(B)(ii), and is consistent with the overall goal of section 36B, which is to make affordable the coverage of each of the essential health benefits described in section 1302(b) of the Affordable Care Act for individuals eligible for a premium tax credit. As discussed, that coverage may be obtained from either a qualified health plan covering all of the essential health benefits or one covering all benefits except pediatric dental in combination with a stand-alone dental plan. Finally, although the pediatric dental rule does add some complexity to the determination of a taxpayer's applicable benchmark plan, the rule will, in general, not result in more complexity to taxpayers because they generally use the benchmark plan premium amount reported to them by Exchanges to compute their premium tax credit. In addition, the pediatric dental rule in the final regulations,

which, for stand-alone dental plans, considers just the second lowest-cost portion of the premium properly allocable to pediatric dental benefits in the determination of a taxpayer's applicable benchmark plan, is less complex than the rule in the proposed regulations, which requires consideration of both the lowest-cost and the second lowest-cost portion.

Other commenters supported the pediatric dental rule and asked that taxpayers be allowed to compute their applicable benchmark plan using the pediatric dental rule in the proposed regulations for taxable years beginning before January 1, 2019. However, taxpayers must know their benchmark plan premium amount to properly compute their premium tax credit and, consequently, Exchanges must provide this information to taxpayers. Because this pediatric dental rule involves a change in the manner in which a taxpayer's applicable benchmark plan is determined, Exchanges need time to implement the new rule and have indicated that they are likely unable to do so for taxable years beginning before January 1, 2019. Consequently, the final regulations do not adopt this comment.

b. Members of Coverage Family Residing in Different States

Under existing § 1.36B-3(f)(4), if members of a taxpayer's family reside in different states and enroll in separate qualified health plans, the premium for the taxpayer's applicable benchmark plan is the sum of the premiums for the applicable benchmark plans for each group of family members living in the same state. Because this rule may not accurately reflect the cost of available coverage for a taxpayer whose family members reside in different locations in the same state, the proposed regulations provide that if members of a taxpayer's coverage family reside in different locations, whether within the same state or in different states, the taxpayer's benchmark plan premium is the sum of the premiums for the applicable benchmark plans for each group of coverage family members residing in different locations, based on the plans offered to the group through the Exchange for the rating area where the group resides. The proposed regulations provide that the rules for calculating the premium tax credit operate the same for families residing in multiple locations within a state and families residing in multiple states.

One commenter expressed concern that the rule in the proposed regulations concerning the benchmark plan premium for members of the coverage family residing in different locations

could result in unequal treatment of separate families, particularly in Marketplaces in which there are many rating areas within a relatively small geographic area and numerous plans are available for enrollment in many or all rating areas. Thus, the commenter asked that Marketplaces be allowed to use their own benchmark plan rating methodology rather than the rule in the proposed regulations for members of the coverage family who reside in different locations within a state.

The final regulations do not adopt this comment. The amount of a taxpayer's premium tax credit depends on the taxpayer's applicable benchmark plan and the premium for that plan. Allowing Exchanges to use different methodologies to determine the benchmark plan premium could result in inequitable treatment of taxpayers in different locations. One Exchange's methodology would undoubtedly provide a more generous benchmark plan premium for taxpayers who enroll in a qualified health plan through that Exchange as compared to taxpayers who enroll through another Exchange using a different methodology.

Another commenter asked that the final regulations clarify how the rule relating to family members residing in different locations works for farm workers who frequently migrate to find agricultural work, especially those who stay enrolled in the same plan despite the relocations. The rule concerning family members residing in different locations has no unique effect for individuals who frequently move to new locations and thus the final regulations include no new rules addressing this situation. HHS regulations at 45 CFR 155.335(e) require individuals who move to a new rating area to inform the Exchange in the new rating area of their move. The move may require a recomputation of the individual's advance credit payments, or perhaps necessitate the individual to enroll in a new qualified health plan, both of which are determined by the Exchange in the new rating area.

c. Aggregation of Silver-level Policies

Existing § 1.36B-3(f)(3) provides that if one or more silver-level plans offered through an Exchange do not cover all members of a taxpayer's coverage family under one policy (for example, because an issuer will not cover a taxpayer's dependent parent on the same policy the taxpayer enrolls in), the premium for the applicable benchmark plan may be the premium for a single policy or for more than one policy, whichever is the second lowest-cost silver option. Because this rule is complex for

taxpayers and difficult for Exchanges and the IRS to administer, the proposed regulations delete the existing rule and provide a new rule in its place. Under the proposed regulations, if a silver-level plan offers coverage to all members of a taxpayer's coverage family who reside in the same location under a single policy, the plan premium taken into account for purposes of determining the applicable benchmark plan is the premium for that policy. However, if a silver-level plan would require multiple policies to cover all members of a taxpayer's coverage family who reside in the same location, the plan premium taken into account for purposes of determining the applicable benchmark plan is the sum of the premiums for self-only policies under the plan for each member of the coverage family who resides in the same location. The proposed regulations also requested comments on an alternative rule under which the sum of the premiums for self-only policies under a plan for each member of the taxpayer's coverage family would always be used to determine a taxpayer's applicable benchmark plan.

One commenter asked that the final regulations adopt the alternative rule discussed in the preamble to the proposed regulations concerning the determination of a taxpayer's applicable benchmark plan, not the rules in the proposed regulations, which vary based on whether a single policy or multiple policies are needed to cover a taxpayer's family. The commenter opined that this alternative rule has the potential to streamline the applicable benchmark plan calculation with minimal impact to the amount of premium tax credit a taxpayer is allowed.

The final regulations do not adopt this comment. Under HHS regulations, the qualified health plan premium for a taxpayer with three dependents is not increased by adding one or more additional dependents to the taxpayer's family. 45 CFR 147.102(c)(1). That is, the portion of the premium due to the taxpayer's dependents is capped at three dependents and does not increase as a result of adding more dependents to the family. However, if the alternative rule suggested by the commenter is adopted, a taxpayer with four or more dependents would have a higher benchmark plan premium than a similarly-situated taxpayer with three dependents even though the additional dependents do not add to the cost of the coverage for the taxpayer with four or more dependents. Thus, aggregating the sum of the self-only policies under a plan for each member of a taxpayer's coverage family may provide an undue

benefit to taxpayers with four or more dependents. Accordingly, this approach should be limited to situations in which a silver-level plan requires multiple policies to cover all members of a taxpayer's coverage family who reside in the same location.

d. Effective/Applicability Dates

Under the proposed regulations, the changes to the rules concerning the determination of a taxpayer's applicable benchmark plan are proposed to be applicable for tax years beginning after December 31, 2018. Commenters noted that State-based Marketplaces often have very different eligibility and enrollment systems from the Federally-Facilitated Marketplace and from each other, and the changes to the applicable benchmark plan rules will require significant changes to their systems and long timelines for implementation. Consequently, the commenters asked that the Treasury Department and the IRS provide flexibility to State-based Marketplaces and provide ample time between the effective date of the final regulations and the date the states must implement the benchmark plan changes.

The final regulations do not alter the applicability date for the rule for computing the benchmark plan. Doing so would permit inequitable treatment of taxpayers in different locations and potentially have an adverse impact on certain taxpayers. Thus, the final regulations provide that the changes to the benchmark plan rules are applicable for taxable years beginning after December 31, 2018.

4. Information Reporting

The proposed regulations provide that when multiple families enroll in a single qualified health plan and advance credit payments are made for the coverage, the enrollment premiums reported by the Exchange for each family are the family's allocable share of the enrollment premiums, which is based on the proportion of each family's applicable benchmark plan premium. One commenter requested clarification that this reporting rule applies only in situations in which a taxpayer requests financial assistance through advance credit payments or cost-sharing reductions, or is seeking to enroll in Medicaid. The final regulations, like the proposed regulations, provide that the Exchange must report a portion of the plan's enrollment premium to each enrolled family if multiple families enroll in a single qualified health plan and advance credit payments are made for coverage under the plan. The portion reported is based on the proportion of

each family's applicable benchmark plan premium.

The proposed regulations also provide that, if an individual's coverage in a qualified health plan is terminated before the last day of a month, or if an individual is enrolled in coverage after the first day of a month and the coverage is effective on the date of the individual's birth, adoption, or placement for adoption or in foster care, or on the effective date of a court order, an Exchange must report the enrollment premiums for the month (excluding the premium allocated to benefits in excess of essential health benefits), reduced by any amount that was refunded because the enrollment was for less than a full month. This reporting requirement was proposed to apply for taxable years beginning after December 31, 2016.

One commenter expressed concern with the rule requiring that Exchanges reduce the reported enrollment premium by any amounts of the enrollment premiums that are refunded by the issuer of the qualified health plan. The commenter stated that this requirement is not something that currently is captured by its reporting system, and updating the system would require an effort that would be out of scale with the small size of the population enrolled for less than a full month. The commenter suggests that refund information could be obtained when a taxpayer computes his or her premium tax credit on the taxpayer's Federal income tax return. Alternatively, the commenter requested that this requirement become effective for a taxable year later than 2017. To provide enrollment systems additional time to implement the updates and system modifications necessary to accurately report refunds for partial months of coverage, the final regulations delay the applicability date for this rule by two years, so that it applies for taxable years beginning after December 31, 2018. Exchanges able to comply with the reporting rule before that date are encouraged to do so.

Effective/Applicability Date

Except as otherwise provided, these final regulations apply for taxable years beginning after December 31, 2016. The rules relating to the benchmark plan premium described in section 3 of this preamble and the rules relating to reporting by the Exchanges described in section 4 of this preamble apply for taxable years beginning after December 31, 2018. As discussed in the Effective/Applicability Date section of the preamble to the proposed regulations, taxpayers may rely on certain provisions

of the proposed regulations for taxable years ending after December 31, 2013.

See section 1.d of this preamble for a discussion of the effective date/ applicability date for proposed regulations regarding opt-out arrangements.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required.

It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the information collection required under these regulations is imposed under section 36B. Consistent with the statute, these regulations require Exchanges to report certain coverage information to the IRS and to furnish a statement to the responsible individual who enrolled an individual or family in the coverage. These regulations merely provide the method for reporting the information and furnishing the statements required under section 36B. Moreover, the regulations attempt to minimize the burden associated with this collection of information by limiting reporting to the information that the IRS requires to administer the premium tax credit.

Based on these facts, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal authors of these proposed regulations are Lisa Mojiri-Azad, Shareen S. Pflanz, and Stephen J. Toomey of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in the development of the regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes,

Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.36B-0 is amended by:

- 1. Adding the entries for § 1.36B-2(b)(6)(i) and (ii).
- 2. Redesignating entry for § 1.36B-2(c)(4) as (c)(5) and adding new entries for § 1.36B-2(c)(3)(v)(A)(7), (c)(4), (c)(4)(i), (c)(4)(ii), (c)(4)(ii)(A), (c)(4)(ii)(B), (c)(5), (d), and (e).
- 3. Redesignating entry for § 1.36B-3(c)(4) as (c)(5) and adding a new entry for § 1.36B-3(c)(4).
- 4. Revising entries for § 1.36B-3(d)(1) and (2).
- 5. Revising entries for § 1.36B-3(f)(3), (4), and (5).
- 6. Adding entries for § 1.36B-3(f)(5)(i) and (ii).
- 7. Revising entries for § 1.36B-3(f)(6) and (7).
- 8. Adding entries for § 1.36B-3(f)(8), (f)(9), (m), and (n).
- 9. Adding entries for § 1.36B-5(c)(3)(iii), (c)(3)(iii)(A), and (c)(3)(iii)(B).

The revisions and additions read as follows:

§ 1.36B-0 Table of contents.

* * * * *

§ 1.36B-2 Eligibility for premium tax credit.

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- (b) * * *
- (6) * * *
- (i) In general.
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* * * * *

- (4) Special eligibility rules.
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 - (A) In general.
 - (B) Medicaid or CHIP.
 - (5) Related individuals not claimed as a personal exemption deduction.
 - (d) [Reserved]
 - (e) Effective/applicability dates.

* * * * *

§ 1.36B-3 Computing the premium assistance credit amount.

* * * * *

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- (4) Appeals of coverage eligibility.
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- (1) Premium assistance amount.
- (2) Examples.
- * * * * *
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- (3) Silver-level plan not covering pediatric dental benefits.
- (4) Family members residing in different locations.
- (5) Single or multiple policies needed to cover the family.
 - (i) Policy covering a taxpayer's family.
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- (6) Plan not available for enrollment.
- (7) Benchmark plan terminates or closes to enrollment during the year.
- (8) Only one silver-level plan offered to the coverage family.
- (9) Examples.
- * * * * *
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- (n) Effective/applicability date.

§ 1.36B-5 Information reporting by Exchanges.

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- (c) * * *
- (3) * * *
- (iii) Partial month of coverage.
- (A) In general.
- (B) Certain mid-month enrollments.

* * * * *

■ **Par. 3.** Section 1.36B-1 is amended by revising paragraphs (l), (m), and (o) to read as follows:

§ 1.36B-1 Premium tax credit definitions.

* * * * *

- (l) *Self-only coverage.* Self-only coverage means health insurance that covers one individual and provides coverage for the essential health benefits as defined in section 1302(b)(1) of the Affordable Care Act (42 U.S.C. 18022).
- (m) *Family coverage.* Family coverage means health insurance that covers more than one individual and provides coverage for the essential health benefits as defined in section 1302(b)(1) of the Affordable Care Act (42 U.S.C. 18022).

* * * * *

- (o) *Effective/applicability date.* Except for paragraphs (l) and (m), this section applies to taxable years ending after December 31, 2013. Paragraphs (l) and (m) of this section apply to taxable years beginning after December 31, 2018. Paragraphs (l) and (m) of § 1.36B-1 as contained in 26 CFR part I edition revised as of April 1, 2016, apply to taxable years ending after December 31, 2013, and beginning before January 1, 2019.

■ **Par. 4.** Section 1.36B-2 is amended by:

- 1. Revising paragraph (b)(6) introductory text and paragraphs (b)(6)(i) and (ii).
- 2. Adding three sentences to the end of paragraph (c)(2)(v).
- 3. Revising paragraph (c)(3)(i).
- 4. Revising paragraph (c)(3)(iii)(A).
- 5. Removing the sentence at the end of the paragraph (c)(3)(v)(A)(3) and adding in its place three new sentences.
- 6. Adding paragraph (c)(3)(v)(A)(7).
- 7. Revising paragraph (c)(4).
- 8. Removing and reserving paragraph (d).
- 9. Adding paragraph (e).

The revisions and additions read as follows:

§ 1.36B-2 Eligibility for premium tax credit.

* * * * *

(b) * * *

(6) *Special rule for taxpayers with household income below 100 percent of the Federal poverty line for the taxable year—(i) In general.* A taxpayer (other than a taxpayer described in paragraph (b)(5) of this section) whose household income for a taxable year is less than 100 percent of the Federal poverty line for the taxpayer's family size is treated as an applicable taxpayer for the taxable year if—

- (A) The taxpayer or a family member enrolls in a qualified health plan through an Exchange for one or more months during the taxable year;
- (B) An Exchange estimates at the time of enrollment that the taxpayer's household income will be at least 100 percent but not more than 400 percent of the Federal poverty line for the taxable year;
- (C) Advance credit payments are authorized and paid for one or more months during the taxable year; and
- (D) The taxpayer would be an applicable taxpayer if the taxpayer's household income for the taxable year was at least 100 but not more than 400 percent of the Federal poverty line for the taxpayer's family size.

(ii) *Exceptions.* This paragraph (b)(6) does not apply for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange for the year of coverage. A reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. A disregard of the facts is intentional if the

taxpayer knows the information provided to the Exchange is inaccurate.

* * * * *

(c) * * *

(2) * * *

(v) * * * This paragraph (c)(2)(v)

does not apply for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange for the year of coverage. A reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. A disregard of the facts is intentional if the taxpayer knows that information provided to the Exchange is inaccurate.

* * * * *

(3) * * *

(i) *In general.* For purposes of section 36B, an employee who may enroll in an eligible employer-sponsored plan (as defined in section 5000A(f)(2) and the regulations under that section) that is minimum essential coverage, and an individual who may enroll in the plan because of a relationship to the employee (a related individual), are eligible for minimum essential coverage under the plan for any month only if the plan is affordable and provides minimum value. Except for the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note), government-sponsored minimum essential coverage is not an eligible employer-sponsored plan. The Nonappropriated Fund Health Benefits Program of the Department of Defense is considered eligible employer-sponsored coverage, but not government-sponsored coverage, for purposes of determining if an individual is eligible for minimum essential coverage under this section.

* * * * *

(iii) * * *

(A) *Failure to enroll in plan.* An employee or related individual may be eligible for minimum essential coverage under an eligible employer-sponsored plan for a month during a plan year if the employee or related individual could have enrolled in the plan for that month during an open or special enrollment period for the plan year. If an enrollment period relates to coverage for not only the upcoming plan year (or the current plan year in the case of an enrollment period other than an open enrollment period), but also coverage in

one or more succeeding plan years, this paragraph (c)(3)(iii)(A) applies only to eligibility for the coverage in the upcoming plan year (or the current plan year in the case of an enrollment period other than an open enrollment period).

* * * * *

(v) * * *

(A) * * *

(3) * * * This paragraph (c)(3)(v)(A)(3) does not apply for an individual who, with intentional or reckless disregard for the facts, provides incorrect information to an Exchange concerning the portion of the annual premium for coverage for the employee or related individual under the plan. A reckless disregard of the facts occurs if the taxpayer makes little or no effort to determine whether the information provided to the Exchange is accurate under circumstances that demonstrate a substantial deviation from the standard of conduct a reasonable person would observe. A disregard of the facts is intentional if the taxpayer knows that the information provided to the Exchange is inaccurate.

* * * * *

(7) *Opt-out arrangements.* [Reserved]

* * * * *

(4) *Special eligibility rules—(i) Related individual not claimed as a personal exemption deduction.* An individual who may enroll in minimum essential coverage because of a relationship to another person eligible for the coverage, but for whom the other eligible person does not claim a personal exemption deduction under section 151, is treated as eligible for minimum essential coverage under the coverage only for months that the related individual is enrolled in the coverage.

(ii) *Exchange unable to discontinue advance credit payments—(A) In general.* If an individual who is enrolled in a qualified health plan for which advance credit payments are made informs the Exchange that the individual is or will soon be eligible for other minimum essential coverage and that advance credit payments should be discontinued, but the Exchange does not discontinue advance credit payments for the first calendar month beginning after the month the individual informs the Exchange, the individual is treated as eligible for the other minimum essential coverage no earlier than the first day of the second calendar month beginning after the first month the individual may enroll in the other minimum essential coverage.

(B) *Medicaid or CHIP.* If a determination is made that an individual who is enrolled in a qualified

health plan for which advance credit payments are made is eligible for Medicaid or CHIP but the advance credit payments are not discontinued for the first calendar month beginning after the eligibility determination, the individual is treated as eligible for the Medicaid or CHIP no earlier than the first day of the second calendar month beginning after the eligibility determination.

(d) [Reserved]

(e) *Effective/applicability date.* (1) Except as provided in paragraph (e)(2) of this section, this section applies to taxable years ending after December 31, 2013.

(2) Paragraph (b)(6)(ii), the last three sentences of paragraph (c)(2)(v), paragraph (c)(3)(i), paragraph (c)(3)(iii)(A), the last three sentences of paragraph (c)(3)(v)(A)(3), and paragraph (c)(4) of this section apply to taxable years beginning after December 31, 2016. Paragraphs (b)(6), (c)(3)(i), (c)(3)(iii)(A), and (c)(4) of § 1.36B–2 as contained in 26 CFR part I edition revised as of April 1, 2016, apply to taxable years ending after December 31, 2013, and beginning before January 1, 2017.

■ **Par. 5.** Section 1.36B–3 is amended by:

- 1. Redesignating paragraph (c)(4) as paragraph (c)(5) and adding a new paragraph (c)(4).
- 2. Revising paragraph (d)(1).
- 3. Revising paragraph (d)(2).
- 4. Revising paragraph (f).
- 5. Adding paragraph (n).

The revisions and additions read as follows:

§ 1.36B–3 Computing the premium tax credit amount.

* * * * *

(c) * * *

(4) *Appeals of coverage eligibility.* A taxpayer who is eligible for advance credit payments pursuant to an eligibility appeal decision implemented under 45 CFR 155.545(c)(1)(ii) for coverage of a member of the taxpayer's coverage family who, based on the appeal decision, retroactively enrolls in a qualified health plan is considered to have met the requirement in paragraph (c)(1)(ii) of this section for a month if the taxpayer pays the taxpayer's share of the premiums for coverage under the plan for the month on or before the 120th day following the date of the appeals decision.

* * * * *

(d) * * *

(1) *Premium assistance amount.* The premium assistance amount for a coverage month is the lesser of—

(i) The premiums for the month, reduced by any amounts that were refunded, for one or more qualified health plans in which a taxpayer or a member of the taxpayer's family enrolls (enrollment premiums); or

(ii) The excess of the adjusted monthly premium for the applicable benchmark plan (benchmark plan premium) over $\frac{1}{12}$ of the product of a taxpayer's household income and the applicable percentage for the taxable year (the taxpayer's contribution amount).

(2) *Examples.* The following examples illustrate the rules of paragraph (d)(1) of this section.

Example 1. Taxpayer Q is single and has no dependents. Q enrolls in a qualified health plan with a monthly premium of \$400. Q's monthly benchmark plan premium is \$500, and his monthly contribution amount is \$80. Q's premium assistance amount for a coverage month is \$400 (the lesser of \$400, Q's monthly enrollment premium, and \$420, the difference between Q's monthly benchmark plan premium and Q's contribution amount).

Example 2. (i) Taxpayer R is single and has no dependents. R enrolls in a qualified health plan with a monthly premium of \$450. The difference between R's benchmark plan premium and contribution amount for the month is \$420.

(ii) The issuer of R's qualified health plan is notified that R died on September 20. The issuer terminates coverage as of that date and refunds the remaining portion of the September enrollment premiums (\$150) for R's coverage.

(iii) R's premium assistance amount for each coverage month from January through August is \$420 (the lesser of \$450 and \$420). Under paragraph (d)(1) of this section, R's premium assistance amount for September is the lesser of the enrollment premiums for the month, reduced by any amounts that were refunded (\$300 (\$450–\$150)) or the difference between the benchmark plan premium and the contribution amount for the month (\$420). R's premium assistance amount for September is \$300, the lesser of \$420 and \$300.

Example 3. The facts are the same as in *Example 2* of this paragraph (d)(2), except that the qualified health plan issuer does not refund any enrollment premiums for September. Under paragraph (d)(1) of this section, R's premium assistance amount for September is \$420, the lesser of \$450 and \$420.

* * * * *

(f) *Applicable benchmark plan—(1) In general.* Except as otherwise provided in this paragraph (f), the applicable benchmark plan for each coverage month is the second-lowest-cost silver plan (as described in section 1302(d)(1)(B) of the Affordable Care Act (42 U.S.C. 18022(d)(1)(B))) offered to the taxpayer's coverage family through the Exchange for the rating area where the taxpayer resides for—

(i) Self-only coverage for a taxpayer—
(A) Who computes tax under section 1(c) (unmarried individuals other than surviving spouses and heads of household) and is not allowed a deduction under section 151 for a dependent for the taxable year;

(B) Who purchases only self-only coverage for one individual; or

(C) Whose coverage family includes only one individual; and

(ii) Family coverage for all other taxpayers.

(2) *Family coverage.* The applicable benchmark plan for family coverage is the second lowest-cost silver plan that would cover the members of the taxpayer's coverage family (such as a plan covering two adults if the members of a taxpayer's coverage family are two adults).

(3) *Silver-level plan not covering pediatric dental benefits.* If one or more silver-level qualified health plans offered through an Exchange do not cover pediatric dental benefits, the premium for the applicable benchmark plan is determined based on the second lowest-cost option among—

(i) The silver-level qualified health plans that are offered by the Exchange to the members of the coverage family and that provide pediatric dental benefits; and

(ii) The silver-level qualified health plans that are offered by the Exchange to the members of the coverage family that do not provide pediatric dental benefits in conjunction with the second lowest-cost portion of the premium for a stand-alone dental plan (within the meaning of section 1311(d)(2)(B)(ii) of the Affordable Care Act (42 U.S.C. 18031(d)(2)(B)(ii)) offered by the Exchange to the members of the coverage family that is properly allocable to pediatric dental benefits determined under guidance issued by the Secretary of Health and Human Services.

(4) *Family members residing in different locations.* If members of a taxpayer's coverage family reside in different locations, the taxpayer's benchmark plan premium is the sum of the premiums for the applicable benchmark plans for each group of coverage family members residing in different locations, based on the plans offered to the group through the Exchange where the group resides. If all members of a taxpayer's coverage family reside in a single location that is different from where the taxpayer resides, the taxpayer's benchmark plan premium is the premium for the applicable benchmark plan for the coverage family, based on the plans offered through the Exchange to the

taxpayer's coverage family for the rating area where the coverage family resides.

(5) *Single or multiple policies needed to cover the family*—(i) *Policy covering a taxpayer's family*. If a silver-level plan or a stand-alone dental plan offers coverage to all members of a taxpayer's coverage family who reside in the same location under a single policy, the premium (or allocable portion thereof, in the case of a stand-alone dental plan) taken into account for the plan for purposes of determining the applicable benchmark plan under paragraphs (f)(1), (f)(2), and (f)(3) of this section is the premium for this single policy.

(ii) *Policy not covering a taxpayer's family*. If a silver-level qualified health plan or a stand-alone dental plan would require multiple policies to cover all members of a taxpayer's coverage family who reside in the same location (for example, because of the relationships within the family), the premium (or allocable portion thereof, in the case of a stand-alone dental plan) taken into account for the plan for purposes of determining the applicable benchmark plan under paragraphs (f)(1), (f)(2), and (f)(3) of this section is the sum of the premiums (or allocable portion thereof, in the case of a stand-alone dental plan) for self-only policies under the plan for each member of the coverage family who resides in the same location.

(6) *Plan not available for enrollment*. A silver-level qualified health plan or a stand-alone dental plan that is not open to enrollment by a taxpayer or family member at the time the taxpayer or family member enrolls in a qualified health plan is disregarded in determining the applicable benchmark plan.

(7) *Benchmark plan terminates or closes to enrollment during the year*. A silver-level qualified health plan or a stand-alone dental plan that is used for purposes of determining the applicable benchmark plan under this paragraph (f) for a taxpayer does not cease to be the applicable benchmark plan for a taxable year solely because the plan or a lower cost plan terminates or closes to enrollment during the taxable year.

(8) *Only one silver-level plan offered to the coverage family*. If there is only one silver-level qualified health plan or one stand-alone dental plan offered through an Exchange that would cover all members of a taxpayer's coverage family who reside in the same location (whether under one policy or multiple policies), that plan is used for purposes of determining the taxpayer's applicable benchmark plan.

(9) *Examples*. The following examples illustrate the rules of this paragraph (f). Unless otherwise stated, in each

example the plans are open to enrollment to a taxpayer or family member at the time of enrollment and are offered through the Exchange for the rating area where the taxpayer resides:

Example 1. Single taxpayer enrolls in Exchange coverage. Taxpayer A is single, has no dependents, and enrolls in a qualified health plan. The Exchange in the rating area in which A resides offers only silver-level qualified health plans that provide pediatric dental benefits. Under paragraphs (f)(1) and (f)(2) of this section, A's applicable benchmark plan is the second lowest cost silver plan providing self-only coverage for A.

Example 2. Single taxpayer enrolls with dependent child through an Exchange where all qualified health plans provide pediatric dental benefits. Taxpayer B is single and claims her 12-year old daughter, C, as a dependent. B purchases family coverage for herself and C. The Exchange in the rating area in which B and C reside offers qualified health plans that provide pediatric dental benefits but does not offer qualified health plans without pediatric dental benefits. Under paragraphs (f)(1) and (f)(2) of this section, B's applicable benchmark plan is the second lowest-cost silver plan providing family coverage to B and C.

Example 3. Single taxpayer enrolls with dependent child through an Exchange where one or more qualified health plans do not provide pediatric dental benefits. (i) Taxpayer D is single and claims his 10-year old son, E, as a dependent. The Exchange in the rating area in which D and E reside offers three silver-level qualified health plans, one of which provides pediatric dental benefits (S1) and two of which do not (S2 and S3), in which D and E may enroll. The Exchange also offers two stand-alone dental plans (DP1 and DP2) available to D and E. The monthly premiums allocable to essential health benefits for the silver-level plans are as follows:

S1—\$650
S2—\$620
S3—\$590

(ii) The monthly premiums, and the portion of the premium allocable to pediatric dental benefits, for the two dental plans are as follows:

DP1—\$50 (\$20 allocable to pediatric dental benefits)
DP2—\$40 (\$15 allocable to pediatric dental benefits).

(iii) Under paragraph (f)(3) of this section, D's applicable benchmark plan is the second lowest cost option among the following offered by the rating area in which D resides: Silver-level qualified health plans providing pediatric dental benefits (\$650 for S1) and the silver-level qualified health plans not providing pediatric dental benefits, in conjunction with the second lowest-cost portion of the premium for a stand-alone dental plan properly allocable to pediatric dental benefits (\$590 for S3 in conjunction with \$20 for DP1 = \$610 and \$620 for S2 in conjunction with \$20 for DP1 = \$640). Under paragraph (e) of this section, the adjusted monthly premium for D's applicable benchmark plan is \$640.

Example 4. Single taxpayer enrolls with dependent adult through an Exchange where one or more qualified health plans do not provide pediatric dental benefits. (i) The facts are the same as in *Example 3*, except Taxpayer D's coverage family consists of D and D's 22-year old son, F, who is a dependent of D. The monthly premiums allocable to essential health benefits for the silver-level plans are as follows:

S1—\$630
S2—\$590
S3—\$580

(ii) Because no one in D's coverage family is eligible for pediatric dental benefits, \$0 of the premium for a stand-alone dental plan is allocable to pediatric dental benefits in determining A's applicable benchmark plan. Consequently, under paragraphs (f)(1), (f)(2), and (f)(3) of this section, D's applicable benchmark plan is the second lowest-cost option among the following options offered by the rating area in which D resides: Silver-level qualified health plans providing pediatric dental benefits (\$630 for S1) and the silver-level qualified health plans not providing pediatric dental benefits, in conjunction with the second lowest-cost portion of the premium for a stand-alone dental plan properly allocable to pediatric dental benefits (\$580 for S3 in conjunction with \$0 for DP1 = \$580 and \$590 for S2 in conjunction with \$0 for DP1 = \$590). Under paragraph (e) of this section, the adjusted monthly premium for D's applicable benchmark plan is \$590.

Example 5. Single taxpayer enrolls with dependent and nondependent. Taxpayer G is single and resides with his 25-year old daughter, H, and with his 14-year old son, I. G may claim I, but not H, as a dependent. G, H, and I enroll in coverage through the Exchange in the rating area in which they all reside. The Exchange offers only silver-level plans providing pediatric dental benefits. Under paragraphs (f)(1) and (f)(2) of this section, G's applicable benchmark plan is the second lowest-cost silver plan covering G and I. However, H may qualify for a premium tax credit if H is otherwise eligible. See paragraph (h) of this section.

Example 6. Change in coverage family. Taxpayer J is single and has no dependents when she enrolls in a qualified health plan. The Exchange in the rating area in which she resides offers only silver-level plans that provide pediatric dental benefits. On August 1, J has a child, K, whom she claims as a dependent. J enrolls in a qualified health plan covering J and K effective August 1. Under paragraphs (f)(1) and (f)(2) of this section, J's applicable benchmark plan for January through July is the second lowest-cost silver plan providing self-only coverage for J, and J's applicable benchmark plan for the months August through December is the second lowest-cost silver plan covering J and K.

Example 7. Minimum essential coverage for some coverage months. Taxpayer L claims his 6-year old daughter, M, as a dependent. L and M are enrolled for the entire year in a qualified health plan that offers only silver-level plans that provide pediatric dental benefits. L, but not M, is eligible for government-sponsored minimum essential

coverage for September to December. Thus, under paragraph (c)(1)(iii) of this section, January through December are coverage months for M, and January through August are coverage months for L. Because, under paragraphs (d) and (f)(1) of this section, the premium assistance amount for a coverage month is computed based on the applicable benchmark plan for that coverage month, L's applicable benchmark plan for January through August is the second lowest-cost option covering L and M. Under paragraph (f)(1)(i)(C) of this section, L's applicable benchmark plan for September through December is the second lowest-cost silver plan providing self-only coverage for M.

Example 8. Family member eligible for minimum essential coverage for the taxable year. The facts are the same as in Example 7, except that L is not eligible for government-sponsored minimum essential coverage for any months and M is eligible for government sponsored minimum essential coverage for the entire year. Under paragraph (f)(1)(i)(C) of this section, L's applicable benchmark plan is the second lowest-cost silver plan providing self-only coverage for L.

Example 9. Benchmark plan premium for a coverage family with family members who reside in different locations. (i) Taxpayer N's coverage family consists of N and her three dependents O, P, and Q. N, O, and P reside together but Q resides in a different location. The monthly applicable benchmark plan premium for N, O, and P is \$1,000 and the monthly applicable benchmark plan premium for Q is \$220.

(ii) Under paragraph (f)(4) of this section, because the members of N's coverage family reside in different locations, the monthly premium for N's applicable benchmark plan is the sum of \$1,000, the monthly premiums for the applicable benchmark plan for N, O, and P, who reside together, and \$220, the monthly applicable benchmark plan premium for Q, who resides in a different location than N, O, and P. Consequently, the premium for N's applicable benchmark plan is \$1,220.

Example 10. Aggregation of silver-level policies for plans not covering a family under a single policy. (i) Taxpayers R and S are married and live with S's mother, T, whom they claim as a dependent. The Exchange for their rating area offers self-only and family coverage at the silver level through Issuers A, B, and C, which each offer only one silver-level plan. The silver-level plans offered by Issuers A and B do not cover R, S, and T under a single policy. The silver-level plan offered by Issuer A costs the following monthly amounts for self-only coverage of R, S, and T, respectively: \$400, \$450, and \$600. The silver-level plan offered by Issuer B costs the following monthly amounts for self-only coverage of R, S, and T, respectively: \$250, \$300, and \$450. The silver-level plan offered by Issuer C provides coverage for R, S, and T under one policy for a \$1,200 monthly premium.

(ii) Under paragraph (f)(5) of this section, Issuer C's silver-level plan that covers R, S, and T under one policy (\$1,200 monthly premium) and Issuer A's and Issuer B's silver-level plans that do not cover R, S and T under one policy are considered in

determining R's and S's applicable benchmark plan. In addition, under paragraph (f)(5)(ii) of this section, in determining R's and S's applicable benchmark plan, the premium taken into account for Issuer A's plan is \$1,450 (the aggregate premiums for self-only policies covering R (\$400), S (\$450), and T (\$600) and the premium taken into account for Issuer B's plan is \$1,000 (the aggregate premiums for self-only policies covering R (\$250), S (\$300), and T (\$450)). Consequently, R's and S's applicable benchmark plan is the Issuer C silver-level plan covering R's and S's coverage family and the premium for their applicable benchmark plan is \$1,200.

Example 11. Benchmark plan premium for a taxpayer with family members who cannot enroll in one policy and who reside in different locations. (i) Taxpayer U's coverage family consists of U, U's mother, V, and U's two daughters, W and X. U and V reside together in Location 1 and W and X reside together in Location 2. The Exchange in the rating area in which U and V reside does not offer a silver-level plan that covers U and V under a single policy, whereas all the silver-level plans offered through the Exchange in the rating area in which W and X reside cover W and X under a single policy. Both Exchanges offer only silver-level plans that provide pediatric dental benefits. The silver plan offered by the Exchange for the rating area in which U and V reside that would cover U and V under self-only policies with the second-lowest aggregate premium costs \$400 a month for self-only coverage for U and \$600 a month for self-only coverage for V. The monthly premium for the second-lowest cost silver plan covering W and X that is offered by the Exchange for the rating area in which W and X reside is \$500.

(ii) Under paragraph (f)(5)(ii) of this section, because multiple policies are required to cover U and V, the members of U's coverage family who reside together in Location 1, the premium taken into account in determining U's benchmark plan is \$1,000, the sum of the premiums for the second-lowest aggregate cost of self-only policies covering U (\$400) and V (\$600) offered by the Exchange to U and V for the rating area in which U and V reside. Under paragraph (f)(5)(i) of this section, because all silver-level plans offered by the Exchange in which W and X reside cover W and X under a single policy, the premium for W and X's coverage that is taken into account in determining U's benchmark plan is \$500, the second-lowest cost silver policy covering W and X that is offered by the Exchange for the rating area in which W and X reside. Under paragraph (f)(4) of this section, because the members of U's coverage family reside in different locations, U's monthly benchmark plan premium is \$1,500, the sum of the premiums for the applicable benchmark plans for each group of family members residing in different locations (\$1,000 for U and V, who reside in Location 1, plus \$500 for W and X, who reside in Location 2).

Example 12. Qualified health plan closed to enrollment. Taxpayer Y has two dependents, Z and AA. Y, Z, and AA enroll in a qualified health plan through the Exchange for the rating area where the family

resides. The Exchange, which offers only qualified health plans that include pediatric dental benefits, offers silver-level plans J, K, L, and M, which are, respectively, the first, second, third, and fourth lowest cost silver plans covering Y's family. When Y's family enrolls, Plan J is closed to enrollment. Under paragraph (f)(6) of this section, Plan J is disregarded in determining Y's applicable benchmark plan, and Plan L is used in determining Y's applicable benchmark plan.

Example 13. Benchmark plan closes to new enrollees during the year. (i) Taxpayers BB, CC, and DD each have coverage families consisting of two adults. In that rating area, Plan 2 is the second lowest cost silver plan and Plan 3 is the third lowest cost silver plan covering the two adults in each coverage family offered through the Exchange. The BB and CC families each enroll in a qualified health plan that is not the applicable benchmark plan (Plan 4) in November during the annual open enrollment period. Plan 2 closes to new enrollees the following June. Thus, on July 1, Plan 3 is the second lowest cost silver plan available to new enrollees through the Exchange. The DD family enrolls in a qualified health plan in July.

(ii) Under paragraphs (f)(1), (f)(2), (f)(3), and (f)(7) of this section, the silver-level plan that BB and CC use to determine their applicable benchmark plan for all coverage months during the year is Plan 2. The applicable benchmark plan that DD uses to determine DD's applicable benchmark plan is Plan 3, because Plan 2 is not open to enrollment through the Exchange when the DD family enrolls.

Example 14. Benchmark plan terminates for all enrollees during the year. The facts are the same as in Example 13, except that Plan 2 terminates for all enrollees on June 30. Under paragraphs (f)(1), (f)(2), (f)(3), and (f)(7) of this section, Plan 2 is the silver-level plan that BB and CC use to determine their applicable benchmark plan for all coverage months during the year, and Plan 3 is the applicable benchmark plan that DD uses.

Example 15. Exchange offers only one silver-level plan. Taxpayer EE's coverage family consists of EE, his spouse FF, and their two dependent children GG and HH, who all reside together. The Exchange for the rating area in which they reside offers only one silver-level plan that EE's family may enroll in and the plan does not provide pediatric dental benefits. The Exchange also offers one stand-alone dental plan in which the family may enroll. Under paragraph (f)(8) of this section, the silver-level plan and the stand-alone dental plan offered by the Exchange are used for purposes of determining EE's applicable benchmark plan under paragraph (f)(3) of this section. Moreover, the lone silver-level plan and the lone stand-alone dental plan offered by the Exchange are used for purposes of determining EE's applicable benchmark plan regardless of whether these plans cover EE's family under a single policy or multiples policies.

* * * * *

(n) *Effective/applicability date.* (1) Except as provided in paragraph (n)(2) of this section, this section applies to

taxable years ending after December 31, 2013.

(2) Paragraphs (c)(4), (d)(1) and (d)(2) of this section apply to taxable years beginning after December 31, 2016. Paragraph (f) of this section applies to taxable years beginning after December 31, 2018. Paragraphs (d)(1) and (d)(2) of § 1.36B-3, as contained in 26 CFR part I edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2017. Paragraph (f) of § 1.36B-3, as contained in 26 CFR part I edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2019.

■ **Par. 6.** Section 1.36B-5 is amended by:

- 1. Adding a sentence to the end of paragraph (c)(3)(i).
- 2. Adding paragraphs (c)(3)(iii) and (h).

The additions read as follows:

§ 1.36B-5 Information reporting by Exchanges.

* * * * *

(c) * * *

(3) * * *

(i) * * * If advance credit payments are made for coverage under the plan, the enrollment premiums reported to each family under paragraph (c)(1)(viii) of this section are the premiums allocated to the family under § 1.36B-3(h) (allocating enrollment premiums to each taxpayer in proportion to the premiums for each taxpayer's applicable benchmark plan).

* * * * *

(iii) *Partial month of coverage.*—(A) *In general.* Except as provided in paragraph (c)(3)(iii)(B) of this section, if an individual is enrolled in a qualified health plan after the first day of a month, the amount reported for that month under paragraphs (c)(1)(iv), (c)(1)(v), and (c)(1)(viii) of this section is \$0.

(B) *Certain mid-month enrollments.* For information reporting that is due on or after January 1, 2019, if an individual's qualified health plan is terminated before the last day of a month, or if an individual is enrolled in coverage after the first day of a month and the coverage is effective on the date of the individual's birth, adoption, or placement for adoption or in foster care, or on the effective date of a court order, the amount reported under paragraphs (c)(1)(iv) and (c)(1)(v) of this section is the premium for the applicable benchmark plan for a full month of coverage (excluding the premium allocated to benefits in excess of essential health benefits), and the

amount reported under paragraph (c)(1)(viii) of this section is the enrollment premium for the month, reduced by any amounts that were refunded.

* * * * *

(h) *Effective/applicability date.* Except for the last sentence of paragraph (c)(3)(i) of this section and paragraph (c)(3)(iii) of this section, this section applies to taxable years ending after December 31, 2013. The last sentence of paragraph (c)(3)(i) of this section and paragraph (c)(3)(iii) of this section apply to taxable years beginning after December 31, 2018. Paragraph (c)(3) of § 1.36B-5 as contained in 26 CFR part I edition revised as of April 1, 2016, applies to information reporting for taxable years ending after December 31, 2013, and beginning before January 1, 2019.

■ **Par. 7.** Section 1.5000A-3 is amended by adding a new paragraph (e)(3)(ii)(G) to read as follows:

§ 1.5000A-3 Exempt individuals.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(G) *Opt-out arrangements.* [Reserved]

* * * * *

■ **Par. 8.** Section 1.6011-8 is revised to read as follows:

§ 1.6011-8 Requirement of income tax return for taxpayers who claim the premium tax credit under section 36B.

(a) *Requirement of return.* Except as otherwise provided in this paragraph (a), a taxpayer who receives the benefit of advance payments of the premium tax credit under section 36B must file an income tax return for that taxable year on or before the due date for the return (including extensions of time for filing) and reconcile the advance credit payments. However, if advance credit payments are made for coverage of an individual for whom no taxpayer claims a personal exemption deduction, the taxpayer who attests to the Exchange to the intention to claim a personal exemption deduction for the individual as part of the determination that the taxpayer is eligible for advance credit payments must file a tax return and reconcile the advance credit payments.

(b) *Effective/applicability date.* Except as otherwise provided, this section applies for taxable years beginning after December 31, 2016. Paragraph (a) of § 1.6011-8 as contained in 26 CFR part I edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2017.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 9.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Section 301.6011-2 also issued under 26 U.S.C. 6011(e). * * *

§ 301.6011-2 [Amended]

■ **Par. 10.** Section 301.6011-2(b)(1) is amended by adding “1095-B, 1095-C” after “1094 series”, and removing “1095 series”.

John Dalrymple,

Deputy Commissioner for Service and Enforcement.

Approved: December 8, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016-30037 Filed 12-14-16; 4:15 pm]

BILLING CODE 4830-01-P

DEPARTMENT OF JUSTICE

28 CFR Parts 0 and 44

[CRT Docket No. 130; AG Order No. 3791-2016 No. RIN 1190-AA71]

Standards and Procedures for the Enforcement of the Immigration and Nationality Act

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule revises the Department of Justice's (Department's) regulations implementing a section of the Immigration and Nationality Act (INA) concerning unfair immigration-related employment practices. The revisions conform the regulations to the statutory text as amended, simplify and add definitions of statutory terms, update and clarify the procedures for filing and processing charges of discrimination, ensure effective investigations of unfair immigration-related employment practices, reflect developments in nondiscrimination jurisprudence, reflect changes in existing practices (e.g., electronic filing of charges), reflect the new name of the office within the Department charged with enforcing this statute, and replace outdated references.

DATES: This rule is effective on January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Alberto Ruisanchez, Deputy Special Counsel, Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, 950 Pennsylvania Avenue

NW., Washington, DC 20530, (202) 616-5594 (voice) or (800) 237-2515 (TTY); or Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, 950 Pennsylvania Avenue NW., Washington, DC 20530, (202) 353-9338 (voice) or (800) 237-2515 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

The anti-discrimination provision of the Immigration and Nationality Act (INA), section 274B, codified at 8 U.S.C. 1324b, was enacted by Congress as part of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, to prohibit certain unfair immigration-related employment practices. Congress provided for the appointment of a Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel) to enforce this provision. Congress has amended 8 U.S.C. 1324b several times. On November 29, 1990, by section 535 of the Immigration Act of 1990, Public Law 101-649, Congress added a new subsection (a)(6) prohibiting covered entities from requesting more or different documents or rejecting valid documents during the employment eligibility verification process. *See* 8 U.S.C. 1324b(a)(6) (1994). On September 30, 1996, by section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, div. C, Congress further amended that provision by providing that unfair documentary practices were unlawful only if done “for the purpose or with the intent of discriminating against an individual in violation of” 8 U.S.C. 1324b(a)(1). *See* 8 U.S.C. 1324b(a)(6) (2000). The Department has not updated the set of regulations implementing section 1324b, 28 CFR part 44, to reflect the statutory text as amended by IIRIRA. The revisions promulgated by this final rule apply to the Special Counsel’s investigations and to cases adjudicated under section 1324b.

The revisions to 28 CFR part 44 incorporate the intent requirement contained in the amended statute, and also change the regulatory provisions regarding the Special Counsel’s investigation of unfair immigration-related employment practices. Specifically, the revisions update the ways in which charges of discrimination can be filed, clarify the procedures for processing such charges, and conform the regulations to the statutory text to clarify the timeframes within which the Special Counsel may file a complaint with the Office of the Chief Administrative Hearing Officer

(OCAHO). The revisions also simplify the definitions of certain statutory terms and define additional statutory terms to clarify the full extent of the prohibitions against unfair immigration-related employment practices and to eliminate ambiguities in the regulatory text. Additionally, the revisions codify the Special Counsel’s existing authority to seek and ensure the preservation of evidence during investigations of alleged unfair immigration-related employment practices. The revisions also replace references to the former Immigration and Naturalization Service with references to the Department of Homeland Security (DHS), where applicable, in accordance with the Homeland Security Act of 2002, Public Law 107-296 (HSA).

Finally, the revisions reflect the change in the name of the office within the Department’s Civil Rights Division that enforces the anti-discrimination provision, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to the Immigrant and Employee Rights Section.

Summary of Changes to the Final Rule

The Department carefully considered the 47 individually-submitted comments received in response to the Notice of Proposed Rulemaking (NPRM) entitled Standards and Procedures for the Enforcement of the INA that was published in the **Federal Register** on August 15, 2016 (81 FR 53965). Following several commenters’ requests for an extension of the original 30-day comment period, on September 14, 2016, the Department extended the comment period by an additional 30 days, for a total of 60 days (81 FR 63155). The comment period closed on October 14, 2016. After consideration of the comments, the Department is making four changes: One change to the definition of “discriminate” at § 44.101(e) to make clear that intent to discriminate must be based on national origin or citizenship status in order to violate 8 U.S.C. 1324b; one change to § 44.101(k)(3) to make the regulatory language mirror the statutory language; one change to § 44.200(a)(3)(ii) to clarify the cross reference in that paragraph; and one technical change to § 44.300(d) to correct the citation to Title VII of the Civil Rights Act of 1964, as amended.

Background on Legal Authority

The authority to promulgate this rule lies in two sections of the INA. *See* 8 U.S.C. 1103, 1324b. By statute, the Special Counsel serves in the Department and enforces the anti-discrimination provision of the INA. 8

U.S.C. 1324b(c). The INA lays out the Attorney General’s authority to administer and enforce those laws within Title 8, United States Code, that are conferred upon the Attorney General. 8 U.S.C. 1103(a)(1). In addition to the Attorney General’s authority to administer and enforce laws expressly conferred to the Attorney General under the INA, “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” *Id.* The same section of the INA authorizes the Attorney General to “establish such regulations . . . , delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” 8 U.S.C. 1103(g)(2); *see also* Homeland Security Act of 2002, Public Law 107-296, sec. 1102 (adding “(g)” as a “subsection” of section 1103); *Cormia v. Home Care Giver Servs., Inc.*, 10 OCAHO no. 1160, 3 (2012) (noting that “Congress gave the Attorney General the power to promulgate regulations to effectuate and enforce § 1324b, as well as the power to delegate that authority”) (citing 8 U.S.C. 1103(g)). In addition to the broad grant of authority to the Attorney General under 8 U.S.C. 1103, the anti-discrimination provision itself includes express delegations of rulemaking and other authorities to the Attorney General. *See, e.g.*, 8 U.S.C. 1324b(c)(4) (to establish regional offices); 8 U.S.C. 1324b(f)(2) (to ensure that administrative law judges hearing cases under the statute and the Special Counsel have “reasonable access” to examine evidence of persons or entities being investigated); *cf.* 8 U.S.C. 1324b(b)(1) (providing that charges “shall contain such information as the Attorney General requires”); 8 U.S.C. 1324b(e)(2) (providing that the Attorney General shall designate the administrative law judges who consider cases under section 1324b).

Discussion of Comments

The following section reviews comments the Department received in response to the NPRM and sets forth the Department’s responses to those comments. The Department received 47 comments on the NPRM by the close of the comment period, October 14, 2016. The Department’s responses to comments regarding this rule’s economic impact are included in the Regulatory Procedures section of this rule. Other comments are summarized below, along with the Department’s responses.

General Comments

Issue: Five commenters express support for the proposed rule, in whole

or in part. One commenter “strongly supports the entirety of the Department’s proposed rulemaking.” Another commenter states that its employer members “generally support those sections of the proposed rule that will clarify existing investigation and enforcement procedures for the Special Counsel and update existing language to reflect statutory changes.”

Response: The Department acknowledges these expressions of support.

Issue: The Department received one comment two days before the close of the comment period requesting an extension of the comment period “until executive and legislative positions are filled in 2017.”

Response: The Department declines to grant the request made through this comment. The Department has provided a 60-day comment period, which is reasonable and appropriate. The Department has reviewed all comments carefully and sees no reason to delay the publication of this rule.

Issue: A number of commenters ask the Department not to promulgate the rule based on various concerns. The Department is addressing the specific concerns raised by these commenters below, by subject.

Response: The Department addresses below the specific concerns that these commenters raise. The Department will make this rule final as proposed with four changes.

Issue: One commenter asks the Department not to promulgate the rule on the basis that it is “ultra vires to the rule making authority and functions vested in the [Attorney General] and OSC by Congress.” This commenter cites to 8 U.S.C. 1103(g)(1) to support the commenter’s position that the Attorney General is limited to promulgating substantive rules under the INA relating only to the functions of the Executive Office for Immigration Review, another component within the Department. Based on that reading, this commenter claims that the Attorney General and Special Counsel lack the authority to issue rules “with regard to the interpretation and enforcement of the immigration-related anti-discrimination provisions of INA § 274B.” This commenter also claims that the Attorney General and the Special Counsel lack the authority “to regulate standards governing the order and burden of proof to be applied by administrative law judges (ALJs) and the courts for the purpose of evaluating claims of citizenship or national origin discrimination, or document abuse.” This commenter points to the fact that the Attorney General and the Special

Counsel have “refrain[ed] for 30 years from issuing rules regarding the burden and standard of proof governing claims of discrimination under INA § 274B” as an implicit recognition that “these adjudicative functions lie exclusively with OCAHO administrative law judges.” Another commenter describes the NPRM as an “unlawful, ultra vires, expansion of DOJ OSC power.”

Response: The Department disagrees with these comments and has decided that it will promulgate this rule. As discussed in the Background on Legal Authority section above, the Attorney General has the authority to promulgate this rule. While one commenter believes that 8 U.S.C. 1103(g)(1) precludes the Department from issuing these regulations, we contend that that paragraph cannot be read in isolation. As discussed above, 8 U.S.C. 1103(a)(1) together with subsection 1103(g)—and section 1324b—provide the Attorney General with the necessary authority to promulgate this rule. Furthermore, nothing in this rule alters the burden or standards of proof for assessing whether a person or entity has violated the statute, nor does the rule alter the authority of administrative law judges to adjudicate cases under section 1324b.

Issue: Two commenters express concern that the Department does not enforce this law sufficiently. One of these commenters expresses appreciation for the government’s interest in solving these problems, and states, “[t]hese immigrants, who are not being hired and wish to fight the prejudice” cannot combat discrimination in hiring because of “their lack of knowledge of the U.S legal system. They already have to face obstacles of coming to the United States and taking on a new challenge of trying to establish themselves and then business owners are denying them the basic rights every American is given.”

Response: Although the Department recognizes the challenges that many employment-authorized immigrants face in overcoming discriminatory barriers, the Department has vigorously enforced this law to combat the discriminatory barriers identified by the commenter. The Department also engages in extensive outreach to the public to educate workers and employers about their rights and responsibilities under this law. Moreover, promulgating this rule is critical to conforming the existing regulations to the law. Information about the Department’s enforcement and outreach work under this law is available at <http://www.justice.gov/crt/about/osc>.

Issue: One commenter expresses concern that an employer that refuses to

hire a worker who lacks employment authorization will be accused of discrimination, and that the employer that hires the same worker will be accused of violating the separate prohibition against knowingly hiring an unauthorized worker, found at 8 U.S.C. 1324a.

Response: The Department disagrees with the accuracy of the example set forth in this comment. Section 1324b protects only employment-authorized individuals from discrimination under the INA. 8 U.S.C. 1324b(a)(1) (“It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (*other than an unauthorized alien, as defined in section 1324a(h)(3) of this title*) . . .” (emphasis added)); *see also* 8 U.S.C. 1324a(h)(3) (defining “unauthorized alien” as an alien that is not “lawfully admitted for permanent residence” or “authorized to be so employed”). As a result, an employer’s refusal to hire a worker based on that worker’s lack of employment authorization does not violate the INA’s anti-discrimination provision. *See* 8 U.S.C. 1324b(a)(2)(C). The Department, along with DHS’s U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE), has issued several public education materials that discuss how employers can avoid discrimination while also complying with legal requirements to verify employment eligibility and ensure they do not knowingly employ a worker who lacks employment authorization. For more information, visit www.justice.gov/crt/employer-information; <https://www.uscis.gov/i-9-central>; <https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf>.

Office Name Change

Issue: One commenter disagrees with the proposal to change the name of the office that enforces section 1324b, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the Immigrant and Employee Rights Section. The commenter claims that the new name “is . . . not in line with the statute” because section 274b(c) of the INA requires the President to appoint a Special Counsel to handle “Immigration-Related Unfair Employment Practices,” not for “Employee Rights” more generally. Moreover, the commenter claims that changing the name of the office will alter the Special Counsel’s authority to enforce the law.

Response: The Department disagrees with this comment. The statute does not prescribe a name for the office that enforces section 1324b and the change in office name does not affect the Special Counsel's authority under the law. For the reasons discussed in the NPRM, in particular to eliminate public confusion regarding two offices in the Federal Government with the same name, the Department is changing the office's name to the Immigrant and Employee Rights Section.

Comments Related to the Rule's Interpretation of Discrimination

The Department received approximately 30 comments on the proposed rule's revisions related to the meaning of discrimination under section 1324b, many of which cited § 44.101(e) and (g) as areas of concern. Most of the comments about these proposed revisions raised one or more of the following concerns: (1) The proposed revisions seek to remove the statutory requirement to show discriminatory intent; (2) the proposed revisions seek to change the long-established evidentiary paradigms used by courts to determine whether discrimination has been proved; and (3) the proposed revision to § 44.200(a)(3) would remove a showing of "harm" to establish a violation.

Throughout the comments, many commenters expressed concerns that the proposed revisions would lead to "strict liability" for "innocent" or "unintentional conduct." Some commenters indicate that the proposed revisions would lead to violations under the statute based on a disparate impact theory of discrimination. Other commenters object to the proposed revisions for not requiring that an employer act with ill will or animus in order to violate the statute.

The Department agrees that section 1324b requires a showing of intentional discrimination on the basis of a protected characteristic and that a violation cannot be established under a strict liability standard or a disparate impact theory. The Department's position remains that ill will or animus is not required to commit discrimination under the statute. To the extent that the proposed revisions created any confusion on these points, the Department is discussing these comments in more detail below.

1. *Comments on the proposed revisions' effect on discriminatory intent.* Most comments relating to the meaning of discriminatory intent under section 1324b address the definitions of "discriminate" at § 44.101(e) and the phrase "for the purpose or with the

intent of discriminating against an individual in violation of paragraph (1)" at § 44.101(g). Regardless of whether the discussion is about discrimination in hiring, firing, or recruitment and referral for a fee in violation of 8 U.S.C. 1324b(a)(1), or about discrimination in unfair documentary practices under 8 U.S.C. 1324b(a)(6), the analysis for determining discriminatory intent is the same so the Department will address comments on the topic of intent together.

Issue: One commenter expresses support for the definition of "discriminate" at § 44.101(e). This commenter states that the "clarity provided by the proposed regulation with regard to § 1324b(a)(6) is of particular importance because," in the commenter's experience, including that of its affiliate unions, "it is not uncommon for employers to require more or different documents for employment verification from non-citizens than from U.S. citizens, or from certain groups of workers based on their national origin as opposed to workers who 'appear' to be U.S. citizens."

Response: The Department agrees with this comment and, as discussed in the NPRM, this definition clarifies what discrimination means under section 1324b. As the commenter suggests, and as discussed below, the definition of "discriminate" includes intentionally treating individuals differently from others because of a protected characteristic.

Issue: Several commenters believe that the proposed revisions seek to remove the discriminatory intent element from section 1324b altogether. Many of these commenters discuss at length the Ninth Circuit decision in *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798 (9th Cir. 1998), in which the Court held that post-1996, a violation of 8 U.S.C. 1324b(a)(6) required a showing of discriminatory intent. *Id.* at 801. Numerous commenters provide the following example of a situation that the commenters believe could violate the law under the proposed revisions: A U.S. citizen decides unprompted to show a driver's license and unrestricted Social Security card for the employment eligibility verification process while a lawful permanent resident decides unprompted to show a Form I-551 Permanent Resident Card. One commenter further objects that the proposed definition of discriminate "appears to include any employer conduct regardless of whether that conduct is in any way related to an employee's immigration status." (emphasis in original).

Response: The Department agrees that the statute prohibits only intentional discrimination, and added paragraphs (e) and (g) to make that intent requirement clear. Indeed, for claims under section 1324b(a)(6), the regulations must be revised because the regulations in effect today include no intent requirement, even though the statute was amended to require discriminatory intent in 1996 and the Special Counsel has enforced the law as amended since 1996. However, in light of these comments, the Department is making one clarifying edit to the definition of "discriminate" in paragraph (e) to address any confusion. The Department is also more clearly explaining these proposed revisions to address any confusion about the meaning of discrimination and to reiterate that discriminatory intent is required in order to violate the statute.

As an initial matter, paragraph (e)'s definition of "discriminate" as proposed solely addressed what that term means, namely, "intentionally treating an individual differently from other individuals, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility." In the sentence in which the term "discriminate" appears in section 1324b(a)(1), the statute makes clear that any discrimination must be "because of" a protected characteristic, *i.e.*, citizenship status or national origin. Reading the regulatory definition together with the statute, the language prohibits intentionally treating an individual differently from others because of a protected characteristic—the classic definition of disparate treatment discrimination. Nonetheless, based on the comments received, the Department recognizes the possibility that when read alone, paragraph (e)'s definition as proposed may create confusion. Therefore, the Department has decided to add language to the regulatory text to make even clearer that the definition at paragraph (e) must be read together with the statute's broader prohibition against discrimination based on national origin or citizenship status.

To the extent that commenters believe the proposed revisions would seek to prohibit any difference in treatment whatsoever, the law and regulations make clear that only disparate treatment based on a protected characteristic is prohibited. See 8 U.S.C. 1324b(a)(1), (a)(6). Further, as discussed in the NPRM, a primary purpose of updating these regulations is to conform the regulations to the statute, which was amended in 1996 to provide that unfair documentary practices were unlawful

only if done “for the purpose or with the intent of discriminating against an individual in violation of” 8 U.S.C. 1324b(a)(1). The definition at paragraph (g) makes clear that discrimination under 8 U.S.C. 1324b(a)(6) also requires “intentionally treating an individual differently based on national origin or citizenship status.”

The definitions in these paragraphs reflect longstanding black letter civil rights law and the Special Counsel’s long-held position on what constitutes intentional discrimination under section 1324b. *See, e.g., City of Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding sex discrimination where employer required female employees to make larger contributions than men to its pension fund because such treatment satisfies “the simple test of whether the evidence shows ‘treatment of a person in a manner which, but for that person’s sex, would be different’”); *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (applying the “simple test” in *Manhart*). The holding in *Robison*, 147 F.3d 798, on which several commenters rely for their position that the Department is seeking to remove the intent requirement from the statute, is also in harmony with the Special Counsel’s position. In that case, the Ninth Circuit held that “Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment.” *Robison Fruit Ranch, Inc.*, 147 F.3d at 801. The Court did not find discrimination because the employer’s documentary requests were made to both U.S. citizens and non-U.S. citizens. *Id.* This decision is consistent with the Department’s position on what discrimination means under the statute.

While several commenters state that the Department’s proposed definition of discrimination is based exclusively on references to OCAHO decisions or the Special Counsel’s prior positions, the NPRM and this rule contain several references to seminal Supreme Court cases that support the Department’s proposed definition. Moreover, the suggestion that OCAHO case law is insufficient is misguided because Congress authorized OCAHO administrative law judges (ALJs) to decide cases under the statute. *See* 8 U.S.C. 1324b(e)(2).

In one example provided by a number of commenters mentioned above, a lawful permanent resident chooses to show a Permanent Resident Card for the employment eligibility verification process while a U.S. citizen provides a driver’s license and Social Security card, both “without any prompting by

the employer.” The employer in this example would not face liability unless the employer was requesting specific, more, or different documents from workers for employment eligibility verification purposes because of the workers’ protected characteristic. If, however, the employer allows each worker to show his or her choice of valid documentation for the employment eligibility verification process, the employer would not be discriminating in violation of the statute.

Issue: A number of commenters object to what they claim is an attempt to apply a strict liability standard to “innocent” or “unintentional conduct” that lacks the necessary “ill will or animus.” One commenter points to the dictionary definitions of “discriminate,” claiming that the proper legal definition of “discriminate” involves “unfair or bad treatment,” and that if the definition just meant “different” treatment, employers who engage in “innocent behavior [would be] swept up in the enforcement apparatus.” Another commenter states that Congress intended a showing of animus or ill will to establish a violation and the regulation should reflect that legislative intent. This commenter objects that the definition of “discriminate” would “actually apply to employers who intentionally treat individuals differently even if [the employers] want to help [the employees] through the employment eligibility process.” The commenter suggests that under the proposed revisions, providing sign language assistance to a worker completing the Form I–9 or allowing a family member or friend to serve as an interpreter could constitute intentional discrimination and violate the law. Other commenters provide different examples of conduct they see as helpful to a worker that they claim could be a violation of the law under the proposed revisions, such as an employer that asks a lawful permanent resident who neglects to include a USCIS/alien number in Section 1 “for documentation,” or an employer that says to a worker who selected lawful permanent resident in Section 1 of the Form I–9, “Oh, I see you are a permanent resident. Do you have your green card for completion of Section 2 [of the Form I–9]?” Two commenters share a similar example involving a human resources associate who seeks to assist new employees complete the Form I–9 by asking whether the employee is a U.S. citizen or born outside of the United States, and depending upon the answer, suggests

specific documents that could satisfy Form I–9 requirements. Another commenter, relying on “good faith” defenses set forth in section 1324a, suggests that discrimination can never include “good faith efforts to verify the employment eligibility” of workers. This commenter also criticizes the NPRM’s use of language from *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 22–23 (2014), arguing that the Department’s references to *Life Generations* fail to support the proposition that discrimination in violation of section 1324b does not require ill will or malice.

Response: The Department disagrees that the law requires a showing of animus or ill will to establish discriminatory intent or that section 1324b recognizes a “good faith” defense to discrimination. An employer cannot justify discriminatory conduct simply by claiming a lack of ill will or animus, or that differential treatment based on citizenship or national origin is nevertheless legal because the employer is trying to assist workers in “good faith.” The Department’s position mirrors the Supreme Court’s and other courts’ analyses on what constitutes intentional discrimination in a variety of contexts, including the principle that explicit discrimination is disparate treatment even absent a malevolent motive, and is consistent with OCAHO case law. *See, e.g., Johnson Controls*, 499 U.S. at 199 (stating that, in the context of Title VII, “absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”); *Life Generations Healthcare, LLC*, 11 OCAHO no. 1227 at 22–23 (“It is not required that malice or ill will be shown, and the absence of a malevolent motive does not alter the character of a discriminatory policy.”) (citing *Johnson Controls*); *see also Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135, 161 (2008) (stating that, under the Age Discrimination in Employment Act (ADEA), “an otherwise discriminatory employment action cannot be rendered lawful because the employer’s motives were benign”); *Manhart*, 435 U.S. at 711 (articulating the “simple test of [sex discrimination as] whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different’”); *E.E.O.C. v. Baltimore Cnty.*, 747 F.3d 267, 273 (4th

Cir. 2014) (“To prove facial discrimination under the ADEA, a plaintiff is not required to prove an employer’s discriminatory animus.”); *Holland v. Gee*, 677 F.3d 1047, 1059 (11th Cir. 2012) (stating that in an employment discrimination case that “insofar as [a respondent] insists that there must be proof of ill will or ‘animus,’ that suggestion is misguided”); *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2006) (stating that “ostensibly benign purpose” for differential treatment does not overcome discriminatory intent under the Fair Housing Act); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500–01 (10th Cir. 1995) (holding that “a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the [Fair Housing Act] in a different manner than others”). This same interpretation of discrimination has long been described in the Special Counsel’s public education materials, Web site, and outreach presentations. In short, a definition of discrimination that requires complainants to prove that an employer acted with ill will, hostility or animus, in addition to showing differential treatment on the basis of a protected characteristic, finds no support in the statutory text or case law.

While some commenters criticize the NPRM’s characterization of *Life Generations*, the *Life Generations* case makes clear that “a person has the intent to discriminate if he or she would have acted differently but for the protected characteristic.” 11 OCAHO no. 1227 at 29. The ALJ in *Life Generations* explained that the proper test to determine discriminatory intent asks whether the outcome or treatment received would have been different if the protected classes had been reversed. *Id.* at 22–23. The ALJ in that case found the requisite discriminatory intent because it was “evident . . . that had the groups been reversed, the outcome would have differed” despite the fact that the human resources personnel “bore no hostile motives toward foreign-born employees, and had no subjective discriminatory intent.” *Id.* In finding that the employer had the requisite discriminatory intent under section 1324b(a)(6), the ALJ relied on Supreme Court precedent establishing that “the absence of a malevolent motive does not alter the character of a discriminatory policy.” *Id.* at 23 (citing *Johnson Controls*, 499 U.S. at 199); see also *United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1163 (1993)

(“An employer knowingly and intentionally discriminates on a prohibited basis if it deliberately treats a job applicant differently on the basis of the applicant’s citizenship status regardless of the employer’s motivation for the discrimination.”). The proposed revisions correctly characterize the *Life Generations* ruling and are consistent with its analysis of discriminatory intent under section 1324b.

We further note that a number of the commenters’ examples would not violate the statute as long as the employers are not treating employees differently because of a protected characteristic. In one example, an employer allows an employee’s friend or family member to help translate the Form I–9 for the employee. Such an act would not be considered discrimination unless the employer allowed only certain employees to have a friend or family member assist in completing the Form I–9 based on citizenship status or national origin.

We agree that other commenters’ examples could raise potential violations, but this conclusion is based on the statutory language in effect for decades and the Special Counsel’s long-standing positions. In the example of the employer who asks a lawful permanent resident for documentation after the worker fails to provide a USCIS/alien number in Section 1, the employer would be discriminating in violation of section 1324b(a)(6) if the employer did not ask other workers for documentation to verify missing information in Section 1. In other words, if an employer requested that lawful permanent residents who failed to write their USCIS/alien number show a document with that number, but did not request the same of U.S. citizens who left Form I–9 fields blank (e.g., zip code or date of birth), that employer may well violate section 1324b(a)(6). More broadly, it is not clear from the example why the hypothetical employer would not simply ask the lawful permanent resident to write in the missing USCIS/alien number instead of asking for a document.

In another example, an employer that says to a lawful permanent resident, “Oh, I see you are a lawful permanent resident. Do you have your green card for Section 2?” may also be acting in violation of the law. Employers may not request specific documents for employment eligibility verification purposes based on a worker’s citizenship status or national origin. Regarding this specific example, lawful permanent residents do not have to show their permanent resident card or “green card” when they start working;

if an employer requests specific documentation from lawful permanent residents but does not request specific documents of U.S. citizens, it would be discrimination. And as with the above example, the employer in this example would be liable under the current statutory language, regardless of whether the Department amended the implementing regulations.

Similarly, in the example involving a human resources associate asking for an employee’s citizenship status and then offering suggestions for documentation that the employee might have based on the answer, the act may indeed violate the law if the employer’s actions amount to requesting specific documents for employment eligibility verification purposes from workers based on their citizenship status or national origin.

The Department further notes that many of the examples provided by commenters characterize the act of asking for specific documents from workers during the employment eligibility verification process as “assistance.” The Department disagrees with this characterization. Requesting specific employment eligibility verification documents from employees unnecessarily limits their choice of documentation. An employer that is interested in helping workers through the employment eligibility verification process should provide all workers with the Lists of Acceptable Documents and explain to them that they may present one List A document or one List B document and one List C document.

Because the text of section 1324b does not contain a “good faith” defense, unlike section 1324a, the Department will not insert such a defense to discrimination in the proposed revisions.

Issue: One commenter disagrees with changes to § 44.200(a)(1)’s description of the prohibition against discrimination in hiring, firing, recruitment and referral for a fee. Specifically, this commenter disagrees with the removal of the word “knowingly” and states, “one must ‘know’ they are discriminating to be liable under this intentional act” and that it was “illogical” for the Department to remove what the commenter believes is a “required element” for establishing a violation.

Response: The Department disagrees with this comment and is adopting the language from the proposed rule without change. The proposed revision properly reflects the statute’s requirement that a person or entity must engage in “intentional” discrimination. Further, the Department disagrees that a person or entity must know it is

discriminating to violate the statute; as discussed in the responses to other comments above, the statute requires that an employer intentionally treat individuals differently based on their citizenship status or national origin. An employer's "knowledge" that this disparate treatment constitutes "discrimination" is not an element of a violation.

Issue: A number of commenters disagree with the change in terminology in § 44.200(a)(3) from "documentation abuses" to "unfair documentary practices." These commenters stated that these changes "blur[] the line of intent required" to establish a violation and are part of a "march toward strict liability."

Response: The Department disagrees with these comments. As discussed in the NPRM, the change from "documentation abuses" to "unfair documentary practices" is intended to more clearly describe the prohibited conduct. In addition, this change in terminology more closely tracks the statutory language and has no impact on the intent required to prove a violation.

2. *Comments regarding the proper evidentiary frameworks for establishing discrimination.* Several commenters raise concerns that the proposed revisions do not comply with the proper evidentiary frameworks for analyzing discrimination claims.

Issue: A number of commenters claim that the rule's definition of "discriminate" shifts the burden to the employer, contrary to well-established discrimination case law. Several commenters believe the proposed definition of "discriminate" "steamrolls over the substance and procedure of well-established Title VII law," and, according to another commenter, converts cases under 8 U.S.C. 1324b to "disparate impact cases that are outside of OSC's jurisdiction." One commenter claims that the Department is seeking to import a complainant's burden of proof at the liability stage in a pattern or practice case to the disparate treatment circumstantial evidence context. This commenter insists that paragraph (e)'s definition of "discriminate" in the NPRM "directly contradicts" the traditional burden-shifting framework recognized by OCAHO in *U.S. v. Diversified Technology and Services of Virginia, Inc.*, 9 OCAHO no. 1095, 13 (2003). Yet another commenter states that "[t]he proposed rule would essentially presume discrimination at the first stage." Another commenter believes the proposed revisions would "effectively remove the employer's ability to offer any defense or non-

discriminatory explanation for its actions."

Response: The Department disagrees that the definition of "discriminate" or any other proposed revision alters the long-established evidentiary burdens to prove discrimination, but as discussed above has added clarifying language to the definition of "discriminate" to address any confusion about what is required to show discrimination in violation of the law.

Section 1324b is modeled after Title VII of the Civil Rights Act of 1964, and case law under that statute "has long been held to be persuasive in interpreting § 1324b." *Sodhi v. Maricopa Cty. Special Health Care Dist.*, 10 OCAHO no. 1127, 7–8 (2008). The evidentiary frameworks set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), for individual claims of discrimination and in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360–62 (1977), for pattern or practice claims of discrimination apply to cases under section 1324b. The Department has consistently relied on such frameworks when litigating cases before OCAHO. Moreover, OCAHO has analyzed cases under section 1324b using these traditional frameworks, including in *Diversified Technology*, 9 OCAHO no. 1095, and *Life Generations*, 11 OCAHO no. 1227. The definition of "discriminate" in the proposed rule does not alter the parties' respective burdens in a pattern or practice claim or individual claim, and the *McDonnell Douglas* and *Teamsters* frameworks set forth by the Supreme Court in interpreting Title VII continue to apply.

An example provided by several commenters helps to illustrate the traditional framework for establishing an intentional discrimination claim, which the proposed revisions do not change. In this example, an employer's Forms I–9 show "that the overwhelming majority of non-citizens had provided a List A document (their [Form I–551 Permanent Resident] card), whereas the overwhelming majority of U.S. citizens had provided a List B and a List C document," and "the employer offers no guidance to new employees on completing the Form I–9 and accepts precisely the documents volunteered by the employees." The commenters believe that under the proposed revisions and the recent OCAHO decision in *Life Generations*, 11 OCAHO no. 1227 at 22, the Special Counsel and OCAHO could nevertheless "find discriminatory intent by the employer, triggering sanctions." This concern misinterprets the proposed revisions and the *Life Generations* case. Although

statistical disparities can "serve an important role" in establishing a *prima facie* case of discrimination, *Teamsters*, 431 U.S. at 339–40, the employer's action in the commenters' example does not amount to discrimination because the employer did not request more, different or specific documents, or reject valid documentation, based on a protected class. Even assuming a different example where a complainant makes out a *prima facie* case of discrimination that includes statistical evidence showing that different protected classes presented different documents, the employer could then provide a legitimate, non-discriminatory reason for the statistical disparity. For instance, the employer may state that the employees volunteered to show those documents with no request by the employer. The complainant would then have an opportunity to offer evidence rebutting the employer's legitimate non-discriminatory reason. Ultimately, the burden still rests on the complainant to prove that the employer requested specific documents from employees based on their protected class.

Given the above, the Department disagrees that the NPRM's quotes from the *Life Generations* case are taken out of context. While *Life Generations* applied the evidentiary framework in *Teamsters*, the definition at paragraph (e) applies regardless of whether a case involves an individual claim of discrimination analyzed under *McDonnell Douglas*, a pattern or practice claim decided under *Teamsters*, or a case based on direct evidence of discrimination. What the Department wishes to make clear in these proposed revisions, and specifically in the definitions in paragraphs (e) and (g) of § 44.101 that the Department is adopting in this rule, is that an employer cannot overcome evidence of discrimination simply by claiming that the discriminatory behavior (which in the context of unfair documentary practices would be requests for more, different, or specific documents, or the rejection of valid documentation, based on an employee's citizenship status or national origin) was somehow justified because it was meant to "help" workers or was not based on "ill will" or "animus." Such explanations cannot constitute legitimate, non-discriminatory reasons because, by their very terms, the explanations acknowledge that there is disparate treatment based on a protected class.

As noted above, the Department agrees that disparate impact liability is unavailable under section 1324b. None

of the proposed revisions affects that conclusion.

Issue: In contrast to the comments above, one commenter believes that 8 U.S.C. 1324a offers the preferred framework over Title VII for interpreting discrimination under 8 U.S.C. 1324b. This commenter states that section 1324b “is not a ‘stand-alone’ anti-discrimination statute, and that [the Special Counsel] cannot interpret the statute as if it were. Rather, § [1324b] is irrevocably tethered to the scope of the employer sanctions regime, and [the Special Counsel’s] regulatory jurisdiction does not extend beyond those anti-discrimination concerns that are reasonably related to employer sanctions or the employment verification requirements of § [1324a].” This commenter points to a shared historical context for the two provisions and the fact that 8 U.S.C. 1324a requires that employers treat certain individuals differently in particular contexts based on the lack of, type of, or duration of employment authorization. This commenter further states that “Congress intended § [1324b] . . . to account for the particular complexities in the immigration field that differ from the broader and more absolute prohibitions against employment discrimination in the Title VII context,” and that “§ [1324b] stands . . . on a different footing from other types of employment discrimination.”

Response: The Department does not believe any change to the rule is required by this comment. It is well-accepted that section 1324b should be read within the context of the overarching scheme that Congress created in IRCA. However, employers that comply with section 1324a can also comply with section 1324b, and the fact that the law requires employers to treat employees differently based on their immigration status in some instances under section 1324a does not justify using a different standard for what discrimination under section 1324b means, thereby departing from black letter civil rights law and the Special Counsel’s long-held positions. OCAHO has long looked to Title VII case law in interpreting section 1324b. *See Sodhi*, 10 OCAHO no. 1127 at 7–8 (“Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964 as amended . . . case law developed under that statute has long been held to be persuasive in interpreting § 1324b.”). The Department agrees with OCAHO precedent that the evidentiary frameworks and principles that the Supreme Court has established to analyze employment discrimination cases under Title VII are highly

instructive in interpreting section 1324b.

The Department also disagrees with the commenter’s suggestion that because section 1324a requires employers to treat certain individuals differently in particular contexts based on their employment authorization, citizenship status and national origin should be viewed as qualitatively different than other protected classes. Section 1324b carefully lays out the available exceptions to the general prohibition against discrimination based on citizenship status or national origin. *See* 8 U.S.C. 1324b(a)(2)(A), (a)(2)(C), (a)(4). Apart from those exceptions, the Department believes that citizenship status and national origin should be viewed and analyzed in the same manner as any other protected class for discrimination purposes.

3. *Comments on the “harm” required to establish a violation of section 1324b(a)(6).* The Department received a number of comments regarding how, if at all, the proposed revisions would change the conduct required to establish an unfair documentary practice, namely, what is required to establish a “harm” under the statute.

Issue: One commenter expresses support for the proposed revisions to § 44.200(a)(3), and states that it is “entirely consistent with the statute’s remedial scheme to allow OSC or a private complainant to seek to remedy unfair documentary practices even where no employee has experienced economic harm, as both reviewing courts and administrative law judges have held.”

Response: The Department appreciates this comment.

Issue: A number of commenters state that this rule would remove the requirement to show an individual was “harmed” to establish liability. The commenters do not specify what they refer to as “harm,” though some specifically pointed to the proposed revision’s clarification at § 44.200(a)(3)(ii), which explains that a violation of section 1324b(a)(6) does not require proof of an “economic harm.” Another commenter states that discrimination under section 1324b(a)(6) must include some harm other than just treating people differently, such as “unfavorable” treatment or “abusive” behavior.

Response: The Department believes no change is warranted by these comments. As discussed above, a finding of a violation under the law is premised on a showing of discrimination. As discussed in the NPRM, the statutory text does not include any language requiring an

economic injury to establish a violation under section 1324b(a)(6). Moreover, the harm or “unfavorable” treatment in a claim under section 1324b(a)(6) is subjecting a worker to a discriminatory document request or rejection based on the worker’s citizenship status or national origin. This has been the statutory requirement since the 1996 amendments, and the proposed revisions make no change to the elements required to establish a violation.

Definitions

The Department received several comments regarding the definitions in § 44.101 and discusses them below.

Issue: The Department received one comment on the definition of “charge” in paragraph (a). The commenter disagrees with the change in this definition to eliminate the requirement upon a charging party to identify the injured party’s specific immigration status to satisfy the regulatory definition of a charge. According to this commenter, this change may cause the Special Counsel to “not properly allocate its resources” because the Special Counsel would not have information about immigration status. The comment also states that if the Department has eliminated the requirement to provide immigration status information “because persons in the U.S. are sometimes unclear as to their legal status, then that point further evidences the complexity of this system for employees and employers alike.”

Response: The Department declines to change this definition as proposed. The charging party is still required to provide citizenship status information, and nothing in the regulations prohibits the Special Counsel from requesting additional information, as needed, regarding the injured party’s immigration status. As discussed in the NPRM, immigration status information is not required to determine whether the Special Counsel has jurisdiction to investigate an alleged unfair immigration-related employment practice, and the Department will not require this information to deem a submission to constitute a charge under § 44.101(a). The Department does not believe that the absence of this information upfront from a charging party will have any effect on its ability to properly allocate resources.

Issue: The Department received a number of comments on the definition of charging party in paragraph (b) and its cross reference to the “injured party” definition in paragraph (i). These commenters disagree with the use of the term “injured party,” which is defined

as “an individual who claims to be adversely affected directly by an unfair immigration-related employment practice.” 28 CFR 44.101(i). The commenters state that referring to the person claiming an injury as “injured” before making a determination on the merits of the claim “essentially presumes that which must be proven, suggesting an effort to write out of the statute the requirement to prove ‘adverse effect’ and moving to a ‘strict liability’ standard.” The commenters believe that “a party should be a ‘charging party’ or an ‘individual’ until they have proven that they are ‘injured.’” Another commenter believes the charging party definition should remain as it is or changed to “a neutral term, such as ‘claimant’” in order “to eliminate the impression, even if only subliminally, that an individual filing a claim has been ‘injured.’”

Response: The Department disagrees with the commenters’ suggestion that by simply using the term “injured party,” the Department is making a judgment on the merits of a claim. “Injured party” is defined as “an individual who claims to be adversely affected” in order to avoid any presumption of the merits of the claim. This term has also been in the regulations since they were initially promulgated in 1987 without impacting the impartiality of the Special Counsel’s investigations. See Unfair Immigration-Related Employment Practices, 52 FR 9277 (Mar. 23, 1987) (codified at 28 CFR pt. 44). An “injured party” may or may not be a “charging party” as the statute allows that a person acting on behalf of an individual who “is adversely affected directly by an unfair immigration-related employment practice” may also file a charge. 8 U.S.C. 1324b(b)(1). The Department declines to make any changes to the definition of “charging party” or “injured party” as proposed.

Issue: The Department received three comments about the definition of “citizenship status” in paragraph (c). One commenter requests that the Department define “citizenship status” using a “flexible definition of immigration status” that includes individuals whose status is unclear. Another commenter believes that the Department is seeking through this definition to expand the class of individuals protected from citizenship status discrimination beyond those who meet the “protected individual” definition in 8 U.S.C. 1324a(b)(3) to include all non-citizens. A third commenter claims that the statute provides no basis to include “immigration status” in the definition of “citizenship status.” This commenter also stated that the term “immigration

status” is ambiguous and would require human resources personnel to be “immigration law expert[s]” to determine what it means.

Response: The Department disagrees with these comments and will adopt the language of the proposed definition without change. The proposed definition does not address the issue of or attempt to modify the classes of individuals who are protected from unfair immigration-related employment practices under the statute. Rather than addressing particular immigration statuses, this definition simply makes clear that “citizenship status” connotes more than just whether an individual is or is not a U.S. citizen, and also includes a non-U.S. citizen’s immigration status. See, e.g., *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1647 (1993) (“Congress intended the term ‘citizenship status’ to refer both to alienage and to non-citizen status.”). In addition, understanding what constitutes immigration status discrimination does not require human resources personnel to be immigration experts. To comply with this law, the employer does not need to know the intricacies of a particular immigration status or what an individual needs to show to qualify for employment given such a status. Rather, if an employer, based on an individual’s immigration status, treats that individual differently in the hiring, firing, recruitment or referral for a fee process, or commits an unfair documentary practice, the employer may violate the law. Using an example from the NPRM, an employer that refuses to hire a refugee based on that person’s status as a refugee may well violate section 1324b(a)(1).

Issue: The Department received three comments on paragraph (f)’s definition of “for purposes of satisfying the requirements of section 1324a(b).” One commenter expresses support for paragraph (f)’s definition of “for purposes of satisfying the requirements of section 1324a(b)” as “a reasonable construction of the statutory language.”

Two commenters raise concerns that paragraph (f) is overly broad. The first commenter believes the statute’s prohibition against unfair documentary practices is unambiguous and refers only to the Form I-9 process. This commenter claims that the use of E-Verify does not “satisfy the requirements of [section] 1324a(b)” because the statute authorizing E-Verify does not explicitly reference section 1324a(b), and therefore discrimination in the use of E-Verify cannot constitute an unfair documentary practice under 8 U.S.C. 1324b. This commenter further

believes that under the definition in the proposed rule, employment processes that have nothing to do with satisfying the requirements of section 1324a(b) would be covered, such as requesting documents as part of vaccination law compliance, tax law compliance, and criminal background checks. The second commenter states that section 1324b(a)(6) does not cover discrimination involving E-Verify because Congress was aware of electronic verification when it amended section 1324b in 1996 and chose not to include “any electronic system” in section 1324b.

Response: The Department declines to make any change to this definition as proposed in the NPRM. As noted in the NPRM, OCAHO has recognized that unfair documentary practices can occur outside of the actual completion of the Form I-9. For example, discriminatory documentary requests at the application stage to verify employment eligibility can constitute unfair documentary practices in violation of the law. See *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012) (recognizing potential liability for unfair documentary practices committed against job applicants).

Discriminatory documentary practices, such as requesting more or different documents or rejecting valid documentation, in the E-Verify process likewise violate 8 U.S.C. 1324b(a)(6). The E-Verify process flows from and is inextricably intertwined with 8 U.S.C. 1324a(b), and E-Verify’s primary purpose is to assist employers with confirming an individual’s work authorization status once the individual and the employer have completed the Form I-9 as required by 8 U.S.C. 1324a(b). Contrary to one commenter’s assertion, the E-Verify statute, found at 8 U.S.C. 1324a note, explicitly references 8 U.S.C. 1324a(b) in several places. See, e.g., 8 U.S.C. 1324a note, secs. 403(a)(2)(A); 403(a)(2)(B)(ii); 403(a)(4)(A); 403(b)(2)(A); 403(b)(3); 403(b)(4); 403(c). Moreover, when Congress created several pilot programs in 1996, including what would later be named E-Verify, Congress mandated reports at the end of the third and fourth years of the pilot projects to assess, among other things, the degree to which these programs “assist in the enforcement of section 274A” of the INA. 8 U.S.C. 1324a note, Sec. 405(a)(3). While Congress authorized the electronic program that would be later named E-Verify at the same time that it last amended section 1324b(a)(6), the electronic program did not launch until 1997. *History and Milestones of the E-Verify Program*, U.S. Citizenship and

Immigration Services, <https://www.uscis.gov/e-verify/about-program/history-and-milestones> (last updated July 15, 2015). Therefore, it is no surprise that Congress did not include a reference to this program in the 1996 amendments to section 1324b(a)(6).

Because an employer's use of E-Verify is inextricably intertwined with "the requirements of section 1324a(b)," the use of E-Verify is covered by the definition. However, to the extent that an employer adopts a practice that does not have the purpose of verifying employment authorization, such as making document requests for tax or vaccination purposes, that practice would fall outside the scope of the definition and the law's prohibition against unfair documentary practices.

Issue: Several commenters express concern about the definition of "hiring" at paragraph (h). One commenter claims that this definition "would now include an unlimited range of employer activity," and that "any employer conduct may constitute discrimination (regardless of intent) during the pre-hire process." This commenter also raises concerns that this new definition would interfere with an employer's ability to ask applicants general questions about eligibility to work in the United States and to ask questions associated with a post-hire background check, including asking an applicant to identify the applicant's country of origin, present an identification document from the applicant's country of origin, or respond to questions about issues that arise in the background check.

One commenter raises a concern that the proposed definition is so broad that it would "require every person working for a single employer to be a Form I-9 expert" and suggests that the proposed definition would expand liability for employers based on the acts of those who are not "decision maker[s]," using, as one example, an 18-year old assembly line worker who tells his sibling that his employer is hiring and to "go to the office" and "bring your license, social security card and green card."

Other commenters criticize the definition's inclusion of "recruitment" and "onboarding." These commenters cite to *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 11 (2012) and *Mid-Atlantic Reg'l Org. Coal. v. Heritage Landscape Servs.*, 10 OCAHO no. 1134, 8 (2012), as support for a narrower definition of "hiring" that would include only "the entire selection process." The commenters argue that there is only one reference to "recruitment" in both 8 U.S.C. 1324a and 8 U.S.C. 1324b, namely, "recruitment or referral for a fee," and

therefore argue that the statute does not apply to a prospective employer's pre-hire activity like recruitment. The commenters further claim that there is no authority to include "onboarding" processes like training or new employee orientation in this definition.

Response: The Department declines to make any changes to this definition as proposed in the NPRM. Nevertheless, based on comments received, the Department offers further clarification below. The Department's proposed definition of "hiring" is in line with OCAHO case law and the Special Counsel's longstanding position that discrimination at any point in the hiring process can violate the statute. At the outset, an employer that asks all applicants whether they are eligible to work would not violate the statute because there would be no differential treatment based on citizenship status or national origin. As a result, and contrary to one commenter's concern, this proposed definition would not affect an employer's ability to ask all job applicants about eligibility to work in the United States.

The Department further disagrees that this definition imputes any liability to an employer for acts of employees that could not already be imputed to an employer under the statute, regulations in effect today, and relevant case law. The question of when an employer is liable for the acts of its employees is very fact-specific and is not addressed by this proposed definitional change.

Although the Department agrees that recruitment as used in paragraph (h) could not include "recruitment for a fee," the Department distinguishes between "recruiting" that occurs in the process of hiring an individual and "recruiting for a fee" as used in the statute. While recruitment by an employer is the act of soliciting applicants and applications, recruiting for a fee involves a third party soliciting applicants as a paid service to an employer. The Department believes that an employer soliciting applicants and applications must be included in the definition of "hiring" because such recruiting activity is an integral part of the selection process. Recruiting may impact, and in some cases determine, who learns about the job vacancy, who applies for a position, and who is selected for a position. Including recruiting in the definition of "hiring" is also supported by OCAHO case law. See, e.g., *Mid-Atlantic Reg'l Org. Coal.*, 10 OCAHO no. 1134 at 8 (noting that section 1324b "specifically applies to recruitment for employment as well as to hiring"). Finally, the statute's explicit reference to "recruitment for a fee" by

a third party does not mean that an employer's hiring efforts cannot encompass both recruitment of and selection of prospective employees.

The definition of "hiring" must also include the onboarding process to capture all of the steps necessary to select individuals and place them in positions to work. Employers vary widely in their terminology, practices, and views regarding what steps are necessary to complete the selection process. For instance, some employers make a job offer, which the employee accepts, but which is conditioned implicitly or explicitly on meeting other requirements like passing drug tests, completing a formal application, or completing the Form I-9. This "selection" of a candidate is only tentative; it is not final because it is conditioned on the completion of other tasks.

Including onboarding in the definition of "hiring" would ensure that all these steps to place an individual in a position to start work are covered by the statute. For instance, the definition would capture such practices as discriminatory background checks that may occur after a conditional offer is made and accepted, but before actual employment begins. To the extent that employers impose background checks on new hires in a discriminatory manner based on citizenship status or national origin, this could violate the law. Finally, an employer that requests documentation as part of the background check process as a proxy for verifying authorization to work based on a worker's citizenship status or national origin, may violate the statute's prohibition against discrimination in hiring, in addition to the prohibition against unfair documentary practices.

This view is consistent with OCAHO case law, which has "long held that it is the entire selection process, and not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment." *Id.* For instance, in *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 510-11 (1999), OCAHO found that discrimination in the employment eligibility verification process (which occurred at the onboarding stage) violated not only the statute's prohibition against unfair documentary practices but also the statute's general prohibition against discrimination in hiring, firing, and recruitment or referral for a fee under 8 U.S.C. 1324b(a)(1).

Issue: The Department received one comment on the definition of "more or different documents than are required under such section" in paragraph (j).

This commenter believes that the statute does not provide support for the definition's inclusion of "any limitation on an individual's choice of acceptable documentation to present to satisfy the requirements of 8 U.S.C. 1324a(b)." This commenter also believes the definition is confusing because Form I-9 rules already impose limitations on which documents individuals completing the Form I-9 may present. The commenter further raises the example of E-Verify's requirement that an individual who chooses to show a List B document for the Form I-9 for an employer that uses E-Verify can only show a List B document that contains a photo.

Response: The Department disagrees with this comment and is adopting the definition as the Department proposed with no change. For the reasons discussed in the NPRM, OCAHO case law supports the reading of the statute reflected in this definition, and the Special Counsel's longstanding position has been that discriminatory requests for specific documents violate the statute. *See, e.g., Townsend Culinary, Inc.*, 8 OCAHO no. 1032 at 507; *United States v. Strano Farms*, 5 OCAHO no. 748, 206, 222-23 (1995); *United States v. Beverly Ctr.*, 5 OCAHO no. 762, 347, 351 (1995); *United States v. A.J. Bart, Inc.*, 3 OCAHO no. 538, 1374, 1387 (1993); *see also United States v. Zabala Vineyards*, 6 OCAHO no. 830, 72, 85-88 (1995) (holding, prior to the enactment of IIRIRA, that 8 U.S.C. 1324b(a)(6) did not prohibit an employer's request for specific documents "in the absence of evidence that . . . aliens but not other new hires were required to rely on and produce specific documents").

Regarding the comment that the definition is confusing in light of existing limitations on the documents individuals can provide, the examples the commenter provides do not involve an employer imposing a limitation based on an individual's citizenship status or national origin. The fact that Form I-9 rules impose, as the commenter states, "limitation[s] on the documents that may be presented" does not implicate a specific discrimination concern. In the commenter's example involving an E-Verify user, if an employer specifies that a worker who wishes to show a List B document can only show a List B document with a photo based on the employer's use of E-Verify, and applies this E-Verify obligation consistently regardless of its workers' citizenship status or national origin, the employer would not violate the statute because of that specification. However, an employer that imposes limitations on the types of valid and

acceptable Form I-9 documents a worker can present due to the worker's protected class is likely to violate the statute.

Issue: The Department received one comment on the definition of "protected individual" in paragraph (k). This commenter raises a concern that the definition excludes lawful permanent residents who do not apply for naturalization within six months of the date the lawful permanent resident first becomes eligible.

Response: The Department will not make the change proposed by the commenter because the definition of "protected individual" comes directly from the statute at 8 U.S.C. 1324b(a)(3), and only Congress can change the meaning of "protected individual." However, the Department is modifying the definition of "protected individual" to make the regulatory language mirror the statutory language by adding the words "granted the status of" to paragraph (k)(3).

Issue: One commenter expresses support for the definition of "recruitment and referral for a fee" in paragraph (l) and also asks the Department to clarify that "the exclusion of union hiring halls applies to" this definition "in the same manner as [the exclusion] applies to the parallel phrases in 8 CFR 274a.1(d) & (e)."

Response: The Department agrees with the commenter that the definition at paragraph (l) as proposed excludes union hiring halls. This definition has the same meaning as "recruit for a fee" and "refer for a fee," respectively, in 8 CFR 274a.1, and those definitions expressly exclude union hiring halls as well.

Issue: One commenter requests that the Department add a definition to the rule to "clarify that [section 1324b of] the INA protects all work authorized individuals from unfair documentary practices." This commenter believes the proposed rule "does not adequately guard all work-authorized individuals from unfair documentary practices." The commenter states that while there is a conflict in the case law on this issue, it believes that "the more persuasive cases hold that the prohibition on document abuse, 8 U.S.C. 1324b(a)(6), extends to all work-authorized individuals."

Response: The Department declines to add regulatory language addressing this issue. The Department notes that the revised rule incorporates the amended statutory language found in 8 U.S.C. 1324b(a)(6).

Charge Processing

Issue: A number of commenters raise concerns about paragraph (d) of § 44.301, which allows a 45-day period for a charging party to provide requested information to allow the Special Counsel to determine whether to deem what is initially an inadequate submission a charge. Some commenters believe that there is no statutory support for the use of such a grace period, pointing to what the commenters believe are "specific and relatively strict filing deadlines." Another commenter claims that the proposed revision would "in practice all but eliminate" the 45-day period because the Special Counsel could proceed to investigate while waiting for the missing information even if the individual never provides the information.

Response: The Department disagrees with these comments and is adopting the language as the Department proposed with no changes. The Department agrees with commenters that the statute requires that the charging party file a charge within 180 days of the alleged unfair immigration-related employment practice. However, the statute also gives the Attorney General broad discretion to determine what information is necessary to constitute a charge. 8 U.S.C. 1324b(b)(1) ("Charges shall be in writing under oath or affirmation and shall contain such information as the Attorney General requires."). Pursuant to the authority granted in 8 U.S.C. 1324b(b)(1), the Attorney General has provided several ways a charging party can meet its charge filing obligations. First, a charging party can timely file a charge that on its face satisfies the definition of "charge" at § 44.101(a). Second, a charging party can file a submission that is "inadequate to constitute a complete charge as defined in § 44.101(a)" but then provide additional information to make the charge "complete." Section 44.301(d)(1) and (d)(2). Third, the Special Counsel can deem a submission to "be a complete charge even though it is inadequate to constitute a charge as defined in § 44.101(a)." Section 44.301(e). As long as the initial submission is timely, nothing in the statute prevents the Attorney General from later deeming the submission to be a charge.

The Department's regulations on the handling of inadequate submissions are consistent with case law interpreting similar statutory language in Title VII. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 109 (2002) (upholding an EEOC regulation that permitted "an otherwise timely filer to verify a charge

after the time for filing has expired.”). Like section 1324b, Title VII contains time limits for filing charges. 42 U.S.C. 2000e–5(e)(1). Title VII also contains language nearly identical to the language in 8 U.S.C. 1324b(b)(1). 42 U.S.C. 2000e–5(b) (“Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.”). Like the Department, the EEOC has promulgated regulations governing what information is required to file a charge. See 29 CFR 1601.12(a) (laying out information to be contained in a charge); 29 CFR 1601.12(b) (providing that notwithstanding the requirements for a charge’s contents in paragraph (a), a charge can be “amended” to “cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein” and that amendments regarding acts “related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.”). The Supreme Court in *Edelman* upheld the EEOC’s rule regarding charges filed under Title VII as “reasonable.” 535 U.S. at 114. While the Department is adopting regulatory language distinct from that in the EEOC’s regulations, the same reasoning supports the Attorney General’s authority to determine the information required for a charge and to adopt these regulations regarding charge processing.

Moreover, the Department’s decision to maintain a 45-day grace period for submitting additional information promotes certainty and finality for respondents and the Special Counsel by using a definite timeframe for the charging party to provide the requested information. The regulations are necessary to prevent the Special Counsel from investigating claims that clearly fall outside of its jurisdiction, while at the same time ensuring that timely-filed meritorious submissions that may be missing some information can still be considered timely. The statute’s remedial purpose would be frustrated, and meritorious claims would be foreclosed, if the Special Counsel imposed a harsh and rigid rule requiring dismissal of timely-filed charges that may allege a violation of section 1324b, but that do not initially set forth all the elements necessary to be deemed a complete charge.

Issue: One commenter writes in support of § 44.301, which sets forth how the Special Counsel handles submissions and charges received more than 180 days after the date of alleged discrimination. This commenter appears to refer to language in paragraph (g) that

provides that the Special Counsel shall dismiss charges and submissions received more than 180 days after the date of alleged discrimination “unless the Special Counsel determines that the principles of waiver, estoppel, or equitable tolling apply.”

Response: The Department appreciates this comment. As discussed more in the NPRM, these principles are well-established in relevant administrative decisions. See, e.g., *Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 73 (1994); *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 779 (1992).

Issue: The Department received three comments criticizing the proposed language in § 44.301(g) regarding the acceptance of charges more than 180 days after the alleged violation where principles of waiver, estoppel or equitable tolling apply. One commenter objects to § 44.301(g)’s lack of express language describing the frequency with which the principles of waiver, estoppel, or equitable tolling will apply. Another commenter claims that it is “not appropriate” for the Special Counsel “to accept late filings at its discretion” because it “subjects employers to uncertainty and lack of finality.” A third commenter states that these “‘equitable’ provisions provide the Special Counsel with immense leeway to obviate the statutory 180-day filing deadline” in section 1324b.

Response: The Department is satisfied that the explanation provided in the preamble and acknowledged by the commenters—that those equitable modifications of filing deadlines would be “sparingly applied”—is sufficient. Because the Department will make exceptions only rarely, the Department does not agree that this proposed change creates the level of uncertainty and lack of finality that outweighs the need for flexibility in rare circumstances, such as where the charging party’s untimely filing was due to circumstances beyond the charging party’s control. As noted in the response to the previous comment, these principles are well-established in relevant administrative decisions.

Investigation

Issue: Some commenters claim that § 44.302 would substantially broaden the Special Counsel’s investigatory powers without a legal basis and in a way that would raise constitutional concerns under the Fourth Amendment, all without sufficient explanation as to the reasons. These commenters also cite to *In re Investigation of Charge of Estela Reyes-Martinon v. Swift & Co.*, 9 OCAHO no. 1058 (2000), to assert that the Special Counsel lacks the

investigatory power under section 1324b to seek written interrogatory answers or to require that respondents create evidence not yet in existence. Another commenter claims that this new “broad, sweeping authority” would allow the Special Counsel to “subpoena anything, in any format, at any time.” For example, this commenter asks whether this would mean that “employers must now keep Forms I–9 for an indefinite period of time,” a requirement that in this commenter’s view could violate other federal and state laws.

Response: The Department disagrees with these comments and is adopting the language as proposed with no changes. First, neither the law nor the regulations on their face violate the Fourth Amendment. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (Facial challenges are “the most difficult . . . to mount successfully.”); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (“[C]laims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes.”); *Sibron v. New York*, 392 U.S. 40, 59 (1968) (“The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of an individual case.”). If a person or entity believes that in a particular case the Department is applying the statute or regulations in an unconstitutional manner, they may bring an as-applied constitutional challenge.

Second, the Department agrees that while a person or entity being investigated must respond to requests for information and also respond to requests for documents that already exist, the person or entity is not required to otherwise create new documents or to provide documents in a format that does not exist at the time of the subpoena. For example, if an employer does not make and retain copies of Form I–9 documentation, the employer is not obligated to provide copies of Form I–9 documentation, nor should it ask its employees to provide a copy or present their documentation anew to make copies. However, the Department disagrees that the proposed revisions in the NPRM require otherwise. Moreover, Department regulations have allowed the Special Counsel to propound interrogatories since originally promulgated in 1987, which is consistent with the Special Counsel’s authority to have, “in accordance with regulations of the Attorney General[,] . . . reasonable access to examine evidence of any

person or entity being investigated.” 8 U.S.C. 1324b(f)(2).

The Department also disagrees with the comment that the *Swift* decision precludes the Special Counsel from propounding interrogatories. Although these commenters are correct that the ALJ in *Swift* determined that OCAHO lacked authority to order a party to respond to interrogatories propounded by the Special Counsel, 9 OCAHO no. 1058 at 14, the ALJ also recognized that the Special Counsel might still have the authority to propound interrogatories, *id.* at 8, 13, and also acknowledged that other OCAHO ALJs had ordered respondents to comply with subpoenas seeking both documents and answers to interrogatories. *Id.* at 12–13. The ALJ in *Swift* further acknowledged but declined to follow a prior case, *In re Investigation of Strano Farms*, in which a different ALJ held that “the fact that the evidence sought in the subpoena at issue does not currently exist in documentary form does not invalidate the subpoena in question.” 3 OCAHO no. 521, 1217, 1223 (1993). Because *Swift* concerned OCAHO authority, not the Special Counsel’s authority, and in light of the conflict in case law, the Department does not believe *Swift* is determinative on this issue. The Department is relying on the broad authority under 8 U.S.C. 1324b(f)(2) and OCAHO case law that supports the Special Counsel’s ability to propound interrogatories and, when necessary, seek a subpoena to obtain answers. This is in accord with the Special Counsel’s current practice of requesting both documents and information during investigations and obtaining a subpoena from OCAHO as necessary to ensure that the Special Counsel receives needed information and documents.

Third, regarding concerns on Form I–9 retention requirements, while an employer being investigated is obligated to maintain potentially relevant documents, which would include Forms I–9, other employers are subject only to the general retention requirements in section 1324a and any other federal, state or local record retention obligations (including any preservation requirements under other investigations/suits).

Issue: One commenter questions why the Department has sought to codify a respondent’s preservation obligations in § 44.302(d), asserting that the proposed document retention provisions “are overly vague, confusing, and unnecessary.” In particular, the commenter said that “[t]he proposal gives little guidance to employers concerning how they are to determine what evidence is ‘potentially relevant’

to an allegation or how to apply that ‘potentially relevant’ formulation.”

Response: The Department disagrees with this commenter’s suggested conclusions but is providing here additional explanation for the proposals. OCAHO has acknowledged that an employer is on notice of its obligation to preserve potentially relevant evidence when it receives notice of a charge filed against it under section 1324b. *See Sefic v. Marconi*, 9 OCAHO no. 1123, 13–14 (2007). In *Sefic*, OCAHO cited to *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977), for the proposition that “unlike a litigant in a private suit who may get notice only when a complaint is filed, a Title VII defendant gets notice of the possibility of a suit when the charge is served.” *Sefic*, 9 OCAHO no. 1123 at 14. Paragraph (d) reflects this obligation. Moreover, the paragraph applies the preservation obligation to any alleged unfair immigration-related employment practice, meaning that the respondent has notice of the alleged violation(s) that the Special Counsel is investigating.

What constitutes “potentially relevant” evidence will vary depending upon the scope of the Special Counsel’s investigation and the evidence the employer has. In the context of an investigation by the Special Counsel, potentially relevant evidence will often include evidence relating to a person or entity’s recruiting, hiring, employment eligibility verification, and firing policies and practices. As with other types of employment discrimination claims, this may commonly include job applications, personnel records, a person or entity’s policies, and applicant flow information. Potentially relevant evidence under section 1324b will also include Forms I–9 along with any attachments, and E-Verify information. The Department notes that these examples are merely illustrative and by no means reflect the universe of what can be considered potentially relevant to an investigation by the Special Counsel. After considering the public comments, the Department is adopting this paragraph as it was proposed.

Authority To File OCAHO Complaints

Issue: Several commenters disagree with the proposed revision to § 44.303(d) regarding the timeframe for the Special Counsel to file a charged-based complaint with OCAHO. One of these commenters raises a concern that the Department is attempting to extend the applicable statute of limitations for the Special Counsel to file a complaint, rather than clarifying existing statutory limitations. This commenter believes

this proposed revision will cause investigations under this law to go “in perpetuity” and that the timeframe to file a complaint would be “excessive and unreasonable.” The commenter further believes this change will promote abusive and costly litigation and asks the Department to reconsider. A different commenter disagrees with the Department’s interpretation of the statutory language, reading the statute to limit the Special Counsel to filing a complaint by the end of the additional 90-day period during which the Special Counsel continues to have the right to investigate the charge and file a complaint. Another commenter states that this proposed revision is “extremely burdensome and disruptive to employers.” A different commenter states that “this puts employers in the position of having to potentially wait years to know whether a claim will be pursued.”

Response: The Department declines to make any changes to § 44.303(d) as proposed because the proposed revision makes no change to the applicable statutory time limits for charge-based complaints filed by the Special Counsel and is consistent with case law under both this law and a similar provision in Title VII. *See, e.g., United States v. Agripac, Inc.*, 8 OCAHO no. 1028, 399, 404 (1999); *United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1156–57 (1993); *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 361 (1977). As noted in the NPRM, the proposed revisions simply clarify that the Special Counsel is not bound by the statutory time limits for filing a complaint that are applicable to private actions. Moreover, the Department does not anticipate any significant changes to the speed with which it handles its investigations, and any costs that employers incur as a result of protracted litigation exist regardless of this proposed revision. For the reasons discussed in the NPRM, the Department believes this proposed revision is appropriate.

Issue: A number of comments address the proposed revision to § 44.304(b) regarding the timeframe for the Special Counsel to file a complaint with OCAHO based on an investigation opened at the Special Counsel’s initiative. One commenter expresses support for the proposed revision, stating that “[i]t is in the interest of all parties—employers, employees, and OSC—if this filing deadline is removed so that OSC can thoroughly and accurately investigate a case before formally filing a case against an employer.” This commenter also states that “nothing in the Immigration and

Nationality Act . . . provides for a filing deadline for these cases” and “[t]he [EEOC], a sister federal agency that protects against employment discrimination, has no similar filing deadline.”

Several commenters are critical of the proposed revision. Some commenters believe “[t]he Special Counsel’s time to bring a complaint and the scope of that complaint should be consistent with Congress’ clear directive in Section 1324b(d)(3).” These commenters appear to believe that because the statute lays out a clear timeframe for filing charges, there should be a comparable limit on the timeframe imposed on the Special Counsel for filing a complaint. One commenter disagrees with the Department’s reading of the statute, insisting that it requires the Special Counsel to file a complaint within 180 days of the discriminatory act. Another commenter argues that the NPRM inappropriately relies on *Agripac, Inc.*, 8 OCAHO no. 1028, and *General Dynamics Corp.*, 3 OCAHO no. 517, for the proposition that “the statute contains no time limits for an independent investigation.” This commenter similarly dismisses the Department’s reliance on *Occidental Life Insurance*, 432 U.S. 355. Other commenters point to the original regulatory text as support for why the Department cannot revise that regulatory text to align more closely with the statutory text.

Response: The Department declines to make any change to § 44.304(b) as proposed. As discussed in the NPRM, the most reasonable application of 8 U.S.C. 1324b(d)(3), which specifies that “[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel,” is that the Special Counsel may not file a complaint unless the Special Counsel opened an investigation on the Special Counsel’s own initiative pursuant to 8 U.S.C. 1324b(d)(1) within 180 days of the last known act of discrimination, as the opening of the Special Counsel’s investigation is the nearest equivalent to the filing of a charge. This reading of the statute is also supported by case law. See *United States v. Fairfield Jersey, Inc.*, 9 OCAHO no. 1069, 5 (2001) (acknowledging the absence of a statutory time limitation for the filing of a complaint arising out of an independent investigation). Furthermore, in the NPRM the Department cited to *Agripac*, *General Dynamics Corporation*, and *Occidental Life Insurance* when discussing the Special Counsel’s time limits for filing

a *charge-based* complaint, not—as one commenter suggests—when discussing the Special Counsel’s time limits for filing a complaint based on an independent investigation that the Special Counsel opened pursuant to 8 U.S.C. 1324b(d)(1). The Department agrees with the commenter that *Agripac* was not based on an independent investigation opened pursuant to 8 U.S.C. 1324b(d)(1). The Department cited to *Agripac* and *General Dynamics Corporation* in the NPRM for the broader proposition that the Special Counsel is not bound by the statutory time limits that are applicable to individuals filing private actions, and cited to *Occidental Life Insurance* as instructive given the similar charge-filing procedures and virtually identical timetables found in Title VII. The Department has considered the view expressed by this commenter. However, the Department is not changing its long-held interpretation of 8 U.S.C. 1324(d)(3), but rather, is conforming the regulatory text to more closely align with the statutory text.

Issue: Some commenters object more broadly to the clarified time limitations for the Department to file a complaint, based on a view that the timelines are contrary to public policy. In particular, these commenters state that a longer deadline for the Department to file complaints would interfere with the availability of witnesses, employers’ ability to preserve evidence, and witnesses’ ability to recall the events in question, and would burden employers by requiring a longer document retention period. A number of commenters also object to the Department’s reliance on a five-year limitations period under 28 U.S.C. 2462 for bringing actions to impose civil penalties.

Response: The Department will make no changes to its clarified time limitations for filing a complaint in either § 44.303(d) or § 44.304(b) and is adopting these subsections as proposed with no changes. These timelines are consistent with the statute and OCAHO case law cited in the NPRM and discussed in the prior comment response above. In addition, section 1324b is aimed at stopping discriminatory practices and providing redress for victims of discrimination. In the Department’s view, public policy would not be served by imposing time limitations on this remedial statute that are unsupported by the statutory language. Furthermore, any delays or costs associated with protracted litigation exists independent of this proposed revision. Finally, the Department’s reliance on 28 U.S.C. 2462

for imposing a time limit for the Special Counsel to bring an action involving civil penalties is not new, but rather, reflects the Department’s long-standing position regarding the outer time limits imposed on the Special Counsel. As discussed in the NPRM, similar to the EEOC, the Special Counsel is still bound by equitable limits on the filing of a complaint. See *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014).

Other Comments

Issue: Two commenters express support for reforming U.S. immigration laws and in particular reforming immigration laws for employment-based visas. One commenter raised concerns about the wait times for beneficiaries of employment-based visas.

Response: These comments fall outside the scope of this rule. The proposed revisions implemented by this final rule do not change U.S. immigration laws or the employment-based visa process, including wait times. The proposed revisions implement existing law prohibiting unlawful employment discrimination based on citizenship status or national origin.

Issue: One commenter raises concerns about the Form I–9 employment eligibility verification process and asked that “everyone, federal agencies, employers and employees, lawyers, Congress, etc. should together establish a timely efficient effective employment verification process, or scrap it.”

Response: USCIS, within DHS, publishes the Form I–9 and accompanying guidance and determines which documents are acceptable for employment eligibility verification, pursuant to the requirements of 8 U.S.C. 1324a. This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Issue: One commenter seeks guidance on whether an employer may refuse to accept for employment eligibility verification purposes a driver’s license or identification card issued by a state that does not have “citizenship requirements.”

Response: USCIS publishes the Form I–9 and accompanying guidance and determines which documents are acceptable for employment eligibility verification. This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Issue: One commenter requests guidance on the issue of states recognizing other states’ driver’s licenses and “certifications” as “valid

eligibility” for individuals to obtain licenses in a state where a particular immigration status may otherwise disqualify that individual.

Response: This issue falls outside the scope of this rule and the Department refers the commenter to USCIS for more information on this issue.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

The rule has been drafted and reviewed in accordance with Executive Order 12866 (Sept. 30, 1993), and Executive Order 13563 (Jan. 18, 2011). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits (while recognizing that some benefits and costs are difficult to quantify), reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, the Department must determine whether a regulatory action is “significant” and, therefore, subject to the requirements of the Executive Order and Office of Management and Budget (OMB) review. Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as any 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 the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impacts 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 this Executive Order.”

The Department has determined that the rule is not an economically significant regulatory action under section 3(f)(1) of Executive Order 12866 because the Department estimates that its annual economic impact will be a one-time, first-year-only cost of approximately \$28.0 million—far less than \$100 million. The Department has quantified and monetized the costs of the rule over a period of 10 years (2017 through 2026) to ensure that its estimate captures all major benefits and costs, but has determined that all quantifiable costs will be incurred only during the first year after the regulation is implemented. Because the Department was unable to quantify the benefits of the rule due to data limitations, the benefits are described qualitatively.

The Department considered the following factors when measuring the rule’s impact: (a) Employers familiarizing themselves with the rule, (b) employers reviewing and revising their employment eligibility verification policies, and (c) employers and employees viewing training webinars. The largest cost is the cumulative costs that employers would have to incur to review and revise their employment eligibility verification policies, which the Department estimates to be \$17,858,003. The next largest cost is the cost employers would have to incur to familiarize themselves with the rule, which the Department estimates to be \$10,132,200.

The economic analysis presented below covers all employers with four or more employees, consistent with the statute’s requirement that a “person or entity” have more than three employees to fall within the Special Counsel’s jurisdiction for citizenship status and national origin discrimination in hiring, firing, and recruitment or referral for a fee. 8 U.S.C. 1324(a)(2).

In the following sections, the Department first presents a summary of the public comments received on the economic analysis, the Department’s responses to these comments, and changes made to the estimation of the costs of this rule in response to those comments. Next, the Department presents a subject-by-subject analysis of the costs of the rule. The Department

then presents the undiscounted 10-year total cost (\$28.0 million) and a discussion of the expected benefits of the rule. Because the costs are incurred entirely in the first year, they are not discounted.

The Department did not identify any transfer payments associated with the provisions of the rule. Transfer payments, as defined by OMB Circular A–4, are “monetary payments from one group to another that do not affect total resources available to society.” OMB Circular A–4 at 38 (Sept. 17, 2003). Transfer payments do not result in additional costs or benefits to society.

In the subject-by-subject analysis, the Department presents the labor and other costs for each provision of the rule. Exhibit 1 displays the labor categories that are expected to experience an increase in the level of effort (workload) due to the rule. To estimate the cost, the Department multiplied each labor category’s hourly compensation rate by the level of effort. The Department used wage rates from the Mean Hourly Wage Rate calculated by the Bureau of Labor Statistics.¹ Wage rates are adjusted using a loaded wage factor to reflect total compensation, which includes health and retirement benefits. The loaded wage factor was calculated as the ratio of average total compensation to average wages in 2015, which resulted in 1.44 for the private sector.² The Department then multiplied the loaded wage factor by each labor category’s wage rate to calculate an hourly compensation rate.

¹ Bureau of Labor Statistics, December 2015 National Occupational Employment and Wage Estimates: United States (Mar. 10, 2016), http://www.bls.gov/schedule/archives/ecec_nr.htm#2015.

² The Department calculated average total compensation by taking the average of the cost of total compensation for all workers in December, September, June, and March of 2015 ($(\$31.70 + \$31.53 + \$31.39 + \$31.65)/4 = \$31.57$), and calculated average wages by taking the average of the cost of wages and salaries for those employees in each of those four months ($(\$22.14 + \$21.98 + \$21.82 + \$21.94)/4 = \$21.97$). See data retrieved from the BLS data retrieval tool, Private Industry Total Compensation for All Occupations and Private Industry Wages and Salaries for All Occupations, <http://data.bls.gov/cgi-bin/surveymost?cm>. (http://www.bls.gov/schedule/archives/ecec_nr.htm.) The Department then calculated the loaded wage factor by taking the ratio of average total compensation to average total wages ($\$31.57/\$21.97 = 1.44$).

EXHIBIT 1—CALCULATION OF HOURLY COMPENSATION RATES

Position	Average hourly wage a	Loaded wage factor b	Hourly compensation rate c = a × b
Human Resources Manager	\$56.29	1.44	\$81.0576
Attorney	65.51	.....	94.3344

1. Public Comments on Regulatory Assessment and Department Responses

This section discusses public comments to the economic analysis that accompanied the proposed rule, the Department's responses to those comments, and changes made to the estimation of costs of this rule in response to those comments.

The Department received 24 comments related to the economic analysis accompanying the proposed rule. However, 18 of these comments had similar, although not identical, text. The remaining six comments presented unique input on the economic analysis.

a. Comments Regarding the Number of Employers Affected by the Rule

Many commenters disagreed with the methodology included in the economic analysis for estimating the number of impacted employers. The commenters indicated that the Department has underestimated the number of impacted employers because it used a basis of the number of organizational members of the Council for Global Immigration (CFGI) and the Society for Human Resource Management (SHRM), totaling 56,685 firms. The commenters suggested using data from the U.S. Census of Business, compiled by the Office of Advocacy of the U.S. Small Business Administration (SBA), which shows that there were 2,182,169 firms with more than four employees in 2012, the most recent year for which the data is available.

Relying on 2012 U.S. Census Bureau data, one commenter indicated that 3,916,991 employers with at least five employees should be included in the analysis. The commenter stated that it is not reasonable to limit the analysis to organizations with developed human resources practices because, regardless of whether an organization has developed human resources practices, it can be held accountable for unfair immigration-related unfair employment practices.

One commenter asserted that the number of organizational members of CFGI and SHRM should not be the basis for the number of impacted employers because those associations do not

represent the entire universe of employers with developed human resource practices, which is equal to approximately 2 million employers.

For purposes of calculating rule familiarization costs, one commenter stated that firms with fewer than four employees should be included because these firms will have to familiarize themselves with the rule to figure out its scope and how changes to their business would impact the applicability of the rule.

For purposes of calculating the costs to review and revise existing policies, procedures, and management training materials, one commenter indicated that either the SBA data on covered employers should have been used (*i.e.*, 2,182,169 firms) or the Department should have taken the readily available information from USCIS about employers using the E-Verify system (more than 600,000 employers) to estimate better the number of employers likely to have some formal employment eligibility verification policy.

The Department does not agree that all employers covered by the law should be included to estimate the costs of the rule, nor does the Department agree that all E-Verify employers or all employers with fewer than four employees should be included. The revisions to the current regulations are meant to clarify obligations that employers already have under the statute and current regulations, and do not impose new burdens for compliance.

The number of employers that will be impacted by the revisions to the current regulations is limited to those employers that have sufficiently detailed policies for avoiding discrimination under section 1324b such that the revisions will require them to review and update their policies. Many E-Verify and other employers may have basic policies in place for the proper administration of the Form I-9 and E-Verify processes, and many employers may have anti-discrimination policies concerning hiring and firing. In the Department's experience investigating discrimination claims, however, and in the Department's experience educating employers

through its hotline and other training opportunities, few employers already have policies in place governing how to avoid the types of discrimination covered by section 1324b. In the Department's experience, even fewer employers already have policies that describe information about the Special Counsel's complaint-filing deadlines, charge-filing procedures, and definitions of statutory terms, as this type of information does not typically relate to the duties of human resources professionals, which are at the heart of the revisions.

Accordingly, the Department estimates that very few employers—including E-Verify employers—have employment policies so detailed that they will require revisions to their policies. Within the small group of employers that have detailed discrimination policies that describe employer obligations under section 1324b, a smaller number of employers may include the name of the office that enforces this statute in their written policies. Similarly, in the Department's experience, very small employers—those with fewer than four employees—are least likely to have developed policies relating to discrimination under section 1324b in part because their size makes it much less likely that they employ a full-time human resources professional dedicated to developing and implementing policies, but also because section 1324b clearly limits jurisdiction for discrimination in hiring, firing, and recruitment or referral for a fee to employers with four or more employees.

The Department also disagrees that the appropriate number of employers is the number of E-Verify users because, in the Department's experience regularly educating and working with these employers, E-Verify employers are not necessarily more likely to have detailed written policies relating to section 1324b that will require any updates based on the revisions made to the existing regulations.

b. Comments Regarding the Methodology for Estimating the Number of Organizations Represented Among CFGI and SHRM Membership

To determine the number of employers affected by the rule, the analysis assumed that the same ratio of organizational members to individual members existed for CFGI and SHRM. A commenter stated that it is not accurate to assume that the ratio of CFGI individual contacts to organizational members is the same as the ratio of SHRM individual members to the number of organizations that employ them. The commenter asserted that the more accurate estimate of the number of organizations represented in SHRM's membership is 125,000, rather than 56,455 organizations.

The Department will adopt the number of estimated organizational members that SHRM and CFGI provided, which is 125,000. The Department believes that the number of organizational members of SHRM and CFGI provides the best estimate of the number of employers likely to have detailed written policies discussing employer obligations under section 1324b. The Department reasonably expects that most of the limited number of employers that already have policies discussing employer obligations under section 1324b will be unlikely to have to make any revisions to those policies. The reason for this is that the revisions do not impose any new compliance obligations.

The Department requested membership information from SHRM and CFGI before the publication of the NPRM and appreciates receiving that information now.

c. Comments Regarding the "Upfront, One-Time Cost" Assumption

A commenter expressed disagreement with the assumption that the rule imposes an "upfront, one-time cost." Instead, the commenter indicated that in addition to the costs of initial implementation, employers will incur legal costs and training costs every time they are presented with a unique situation that is not covered by the employer's general policy against discrimination, *e.g.*, any acknowledgment of citizenship status during the hiring process.

The Department does not agree that there will be ongoing training costs because the costs described by the commenter relate not to burdens that are imposed by the revisions to the current regulations, but instead relate to the overall burden of compliance. As noted, employers have the same obligations

under the statute and current regulations not to discriminate or retaliate.

d. Comments Regarding the Estimated Costs for Implementation of the Rule

A commenter stated that the Department significantly underestimates the number of employees who will be involved in reading, reviewing, and making changes to policies by assuming that only one human resources manager per employer will do so. The commenter asserted that it is almost certain that more people will be involved in making these changes, including supervisors and, in many cases, in-house and outside counsel. Additionally, the commenter asserted that after changes are made, all employees involved in the hiring process will have to be brought up to speed, which will necessitate additional training. The commenter also asserted that the Department underestimates the amount of time required to review the rule, revise policies, and update staff on the new regulation and policies. In particular, this commenter pointed to the SHRM Knowledge Center five-step process for developing human resources policies as instructive for assessing the appropriate amount of time needed for an entity to revise current policies based on the regulatory changes.

The Department does not agree that, for most employers, more than one staff member needs to be involved in reading, reviewing, and making changes to policies as a result of the rule. Although employers may have different experiences in implementing HR updates, the Department estimates, based on its experience with entities covered by this law, that on average, only one individual will be involved in making the few if any changes. Instead, it appears that the commenters are concerned about reviewing and educating themselves about existing obligations to prevent discrimination, which relates to compliance with the law in general but not the changes in the rule. For example, employers are already prohibited from discriminating in hiring, firing, and recruiting or referring for a fee based on citizenship status and national origin. Also, employers already must allow each employee to choose which valid documentation to provide for employment eligibility verification purposes, regardless of citizenship status or national origin. If an employer decides to create a new policy explaining those obligations and train its staff accordingly, these costs are not tied to changes promulgated in this rule but instead to obligations that have

existed since at least 1996 and in some cases 1986.

The Department does not agree that additional training is required for the changes promulgated through this rule because relatively few employers have sufficiently detailed policies that would be impacted by revisions to the current regulations.

Although the Department recognizes that employers may have different practices, the Department does not believe, based on its experience with covered entities, that, in general, more than one-and-a-half hours is required to review the new rule and update policies that require revisions. In the Department's view, the five-step process cited by one commenter for *developing* human resources policies would not apply in this context. The first step in the five-step process, which is "identifying the need for a policy," is inapplicable because an entity should be assessing the need for a policy based not on these regulatory changes but based on the entity's legal obligations required by statute. Likewise, the second step, "determine policy content," would flow not from these regulatory revisions but from the statute. The Department similarly disagrees that steps three and four—obtaining stakeholder support and updating staff about the regulatory changes—should be factored into this calculation, as staff seeking to comply with their statutory and current regulatory obligations would not need to be updated on these types of regulatory revisions and, as discussed throughout this rule, the revisions to the regulations create no new obligations. While the fifth step, which involves updating and revising the policy, may apply in some instances, the Department has accounted for this in its assessment of one-and-a-half hours for reviewing and revising policies.

e. Comments Regarding the Estimated Cost for Training

A commenter stated that the estimated training costs are based on untenable assumptions. Specifically, the commenter expressed disagreement that only 347 people would receive the training. Instead, the commenter indicated that it should be assumed that one employee for each of the affected employers would take the one-hour training. Also, the commenter stated that the training cost component will not be a one-time cost item but, instead, will be a recurring cost as new or replacement managers are hired. Additionally, the formation of new employer companies will trigger future additional training costs. Similarly,

another commenter stated that the Department fails to account for the significant staff time that will be required to ensure that those involved in the hiring process are aware of the new regulation and policies and, therefore, underestimates the training cost of this rule “by many orders of magnitude.”

The Department does not agree with the assertions by these commenters and has already addressed three of these four issues above in responses to other comments. In response to concerns about training costs to new employers, the Department also does not agree that the formation of new employers requires additional costs. When an employer is formed, the employer should learn of its obligations under various employment, labor, and other laws, but the changes promulgated through this rule likely have no effect on new employers because they do not alter employers’ core obligations to comply with section 1324b, and any training on these obligations would have occurred anyway—regardless of this rule’s changes to the current regulations. For example, learning about the name of the office that enforces section 1324b is less critical than an employer learning about its core statutory obligations not to discriminate. A new employer would have no need to revise any policies to reflect the narrow changes in this rule because the employer could simply prepare a policy that incorporates longstanding obligations not to discriminate unlawfully based on citizenship status or national origin, and not to retaliate. In response to concerns that the training cost is a recurring cost as new or replacement managers are hired, the Department does not agree. For the same reasons that a new employer would not incur costs flowing from the changes to the regulations, a new or replacement manager would need training on the employer’s core obligations to comply with section 1324b and not training to understand the changes between the previous and current regulations.

f. Comments Regarding Specific Costs Not Accounted for in the Economic Analysis

A commenter stated that the Department does not account for (1) increases in legal fees and penalties for defending discrimination claims due to the new regulation, or (2) additional costs for document retention employers will incur due to changes in the statute of limitations for the Special Counsel to file a charge.

The Department does not agree that there is sufficient basis for the assertion

that the revisions will cause an increase in legal fees and penalties. The revisions make no change to the applicable statutory time limits for charge-based complaints filed by the Special Counsel and are consistent with case law under both this law and Title VII. Moreover, the Department does not anticipate any significant changes to the speed with which it handles its investigations, and any costs that employers incur as a result of protracted litigation exist regardless of this revision.

Moreover, the Department currently extends investigation times through stipulations with respondents and, when needed, by seeking leave from the Office of the Chief Administrative Hearing Officer (OCAHO). Finally, the Special Counsel has filed nine lawsuits in the last five years combined and has entered into a total of 100 settlements during that same period. Thus, a relatively small number of employers are affected by litigation costs, and these employers have no basis to expect that the revisions would increase the level of litigation. If anything, the revisions would better assist employers in understanding the case law that is reflected in the revisions, helping them to comply with the law and avoid litigation altogether. Moreover, the Department makes many free resources available to employers to assist them with compliance, including (1) a public Web site containing an employer tab with over 20 employer guidance documents, a frequently asked questions section, free educational videos, and technical assistance letters; (2) a toll-free employer hotline; and (3) free hardcopy educational materials distributed in many forums.

Employers investigated by the Special Counsel already have document retention requirements, and the revisions do not change those requirements. Those requirements end once a matter is resolved, after the conclusion of any monitoring period, which ordinarily takes two to three years. Employers that are not subject to an investigation by the Special Counsel would continue to operate under their existing retention policies. The commenters did not provide estimates for these additional retention requirements.

g. Other General Comments on the Economic Analysis

A few commenters stated that the NPRM does not satisfy the requirements of the Regulatory Flexibility Act or that it underestimates the impacts of the rule on employers. A commenter stated that the rule exceeds the \$100 million threshold under the Regulatory

Flexibility Act requirements, arguing that the rule should be further analyzed by the Office of Information and Regulatory Affairs within OMB. The commenter, however, did not provide an explanation for how the commenter arrived at this estimated amount.

Accordingly, the Department is unable to analyze the specifics of the commenter’s comment and therefore declines to agree with this comment and instead relies upon its own analysis of the economic impact of these revisions, and as discussed in responses provided above to other comments.

2. Subject-by-Subject Analysis

a. Employers Familiarize Themselves With the Rule

During the first year of the rule, employers with a developed human resources practice will need to read and review the rule to learn about the new requirements. The Department determined that no costs will be incurred by employers to familiarize themselves with the rule in years two through ten because (1) the cost for an existing employer to familiarize itself with the rule if it delays doing so until a subsequent year is already incorporated into the first-year cost calculations; and (2) for employers that are newly created in years two through ten, the cost of familiarization is the same as exists under the current regulations and, therefore, there is no incremental cost.

Employers will incur labor costs to familiarize themselves with the new rule. To estimate the labor cost of this provision, the Department first estimated the number of employers that will need to familiarize themselves with the rule by relying on the number of organizational members in CFGI and SHRM.³ The Department used the number of organizational members in these two organizations as a proxy for the number of employers with a developed human resources practice that can be expected to institutionalize the regulatory changes.

The Department then multiplied the estimated number of employers by the assumed number of human resources managers per employer, the time required to read and review the new rule, and the hourly compensation rate.

³ The Department obtained the estimated number of organizational members in CFGI and SHRM, 125,000, directly from these two organizations in their comment in response to the economic analysis accompanying the proposed rule. The estimated total number of employers is 125,000.

The Department estimated this one-time cost to be \$10,132,200.⁴

b. Employers Review and Revise Employment Eligibility Verification Policies

The rule will require some employers to revise their employment eligibility verification policies. Although under 8 U.S.C. 1324a, all U.S. employers must properly complete a Form I-9 for each individual they hire for employment in the United States to verify the individual's identity and employment authorization, only a subset of employers has detailed written policies specifically addressing compliance with section 1324b. The Department assumed that these employers would be in the practice of saving their policies in an electronic format that can be readily modified. For the policy revisions, employers will complete a simple "search-and-replace" to update the agency's name and possibly replace the term "documentation abuse(s)" with "unfair documentary practice(s)."

Only a very limited subset of those employers that have detailed written employment eligibility verification policies will need to make additional modifications to their policies. The Department estimated costs only for those employers that have written employment eligibility verification policies and that will review their policies and make changes as needed. The time involved will depend on the changes employers need to make, whether those changes need to be made to one or more documents or resource materials, and how many sections of the policy will need to be modified.

Employers with policies for verifying employment eligibility (and possibly employers with hiring or termination policies, even if they lack policies for verifying employment eligibility) might conduct a front-to-back review of their policies to determine whether any additional changes are needed.

These changes and reviews will represent an upfront, one-time cost to employers. The Department estimates this cost as the sum of the cost of revising the policies by making word replacements; the cost, for some employers, of making additional changes beyond word replacements; and the cost of conducting a front-to-back review of the employment eligibility verification policies.

⁴ The Department estimated the cost of this review by multiplying the estimated number of employers (125,000) by the number of HR managers per employer (1), the time needed to read and review the rule (1 hour), and the hourly compensation rate (\$81.0576). This calculation yields a labor cost of \$10,132,200.

To estimate the labor cost for making word replacements to the employment eligibility verification policies, the Department first estimated the number of employers that will make these revisions because of the rule by relying on the number of organizational members in SHRM and CFGI. The Department then multiplied the estimated number of employers by the assumed number of human resources managers per employer, the time required to make the revisions, and the hourly compensation rate.⁵ This calculation yields \$2,533,050 in labor costs related to revising employment eligibility verification policies in the first year of the rule. Dollar values presented in this section may not sum because of rounding error.

To estimate the additional cost to those employers making changes beyond word replacements in the first year of the rule, the Department assumed that 5 percent of employers (*i.e.*, the number of organizational members in CFGI and SHRM) will make these changes. The Department then multiplied the number of employers that will make these additional changes by the assumed number of human resources managers per employer, the time required to make the changes, and the hourly compensation rate. This calculation yields \$126,653 in labor costs in the first year of the rule.⁶

To estimate the cost of conducting a front-to-back review of the policies for verifying employment eligibility (or hiring and termination policies), the Department multiplied the number of employers (*i.e.*, the number of organizational members in CFGI and SHRM) by the number of human resources managers per employer, the time required for a review, and the hourly compensation rate. This

⁵ To estimate the cost of making revisions, the Department multiplied the estimated number of employers (125,000) by the assumed number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to make the revisions (0.25 hours). This calculation results in a cost of \$2,533,050.

⁶ To estimate the cost of making changes beyond word replacements, the Department first calculated the number of employers that will make these changes. The Department obtained the number of employers that will make these additional changes by multiplying the number of affected employers (125,000) by the assumed percentage of employers that will make these additional changes (5%). This calculation yields the number 6,250. The Department then multiplied that number of employers (6,250) by the number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to make the changes (0.25 hours). This calculation results in a cost of \$126,653.

calculation yields \$15,198,300 in labor costs in the first year of the rule.⁷

In total, the one-time costs to employers to revise policies for verifying employment eligibility by making word replacements, to make additional changes beyond word replacements for some employers, and to conduct a front-to-back review of those policies, are estimated to be \$17,858,003 (\$2,533,050 + \$126,653 + \$15,198,300) during the first year of rule implementation.

c. Employers and Employees View Training Webinars

To assist employers, employees, attorneys, and advocates in understanding the changes resulting from the rule, during the first year of implementation, as a part of the Department's ongoing educational webinar series, the Department expects to schedule three live, optional employer training webinars per month and one live, optional advocate/employee training webinar per month. These live one-hour training webinars will cover the full spectrum of employer obligations and employee rights under the statute. The Department also expects to create three one-hour recorded webinars: One for employers and their representatives and two for employees and their representatives (one in English and one in Spanish). All of these resources will be accessible, including to persons with disabilities, online at no cost to the public including employers. They will be accessible remotely and will not require travel. The Department anticipates that participation will occur mostly through viewings of the one-hour recorded webinars. The recorded training webinars developed to explain the post-rule regulatory and statutory obligations and rights will eventually replace the Department's existing live webinars. Therefore, the Department has calculated these costs for employers, employees, and their representatives to be incurred in the first year when learning about the changes, whether through a live or recorded training webinar. After that, newly-created employers will be viewing training webinars instead of (not in addition to) viewing current webinars, with no incremental costs incurred. Periodically,

⁷ To estimate the cost of reviewing the policies, the Department assumed, out of an abundance of caution, that all of the employers affiliated with CFGI or SHRM will dedicate one human resources manager to conduct a front-to-back review of their policies. Accordingly, the Department multiplied the number of employers (125,000) by the assumed number of human resources managers per employer (1), the hourly compensation rate (\$81.0576), and the time required to review the policies (1.5 hours). This calculation results in a cost of \$15,198,300.

the Department may update the webinar content in light of legal and policy developments, and may publish supplemental educational materials for employer and employee audiences on its Web site, including in other languages.

To estimate the cost to employers of viewing training webinars, the Department summed the labor costs for those viewing live webinars and the labor costs for those viewing recorded webinars. To estimate the number of employers viewing the live webinars, the Department used statistics on the average number of employer participants in live webinars. To estimate the number of employers viewing a recorded webinar, the Department used data on the number of viewings of the Department's educational videos about employer obligations under 8 U.S.C. 1324b that are posted on YouTube. Both estimates assume a 15-percent increase in participation following the implementation of the rule.⁸ The Department multiplied the number of employers expected to view a webinar (represented by their human resources managers) by the hourly compensation rate, the time required to view a webinar, and the number of training webinars in the first year for both live and recorded webinars. The total one-time cost to employers for viewing live and recorded webinars is estimated to be \$27,316.⁹

To estimate the cost to employees of viewing live training webinars, the Department used existing statistics on the average participation of employees. To estimate the cost to employees of

viewing recorded webinars, the Department used the employer-to-employee ratio of participation in the live webinars and applied it to the number of views of the Department's educational videos on the Web site *www.YouTube.com*. Both estimates assume a 5-percent increase in participation following the implementation of the rule.¹⁰ These estimates are based upon only the webinars recorded in English because the Department does not expect an increase in the number of views of the Spanish webinars following the implementation of the rule. In the Department's experience, in many cases the live Spanish webinars that have been offered have been canceled due to lack of attendees. In other cases, the Spanish webinars proceeded but with a turnout of fewer than ten participants, who are typically employees (identified as employees by the type of questions they ask or by their registrations with personal email addresses). The Department multiplied the number of employees expected to view webinars (represented by their attorneys) by the hourly compensation rate, the time required to view a webinar, and the number of training webinars in the first year for both live and recorded webinars. The Department estimates a total and aggregate one-time cost of \$1,887 for viewing live or recorded advocate/employee webinars.¹¹

Accordingly, the Department estimates the total one-time cost to

¹⁰ On average, 12 individuals participate in live webinars for employees. The Department assumed that there will be a 5-percent increase in individuals following the implementation of the rule. Thus, the Department estimated costs for one employee (*i.e.*, 5 percent of the 12 individuals) related to viewing the live webinars. On average, 567 individuals viewed the educational YouTube videos. The Department assumed the same proportion of employees-to-employees viewing the live webinars ($0.268 = 12/44.7$) will view the recorded webinars. This number will translate to 152 employees or employee advocates viewing the educational YouTube videos. Thus, the Department estimated costs for 8 employees (*i.e.*, 5 percent of the 152 individuals) related to viewing the recorded webinar.

¹¹ The Department estimated the cost of viewing live webinars by taking the product of the number of employee representatives (captured by the attorney occupational category) viewing the live webinar (1), the hourly compensation rate (\$94.3344), the number of webinars (12), and the time required to view the webinar (1 hour). This resulted in a cost of \$1,132. The Department then estimated the cost of viewing recorded webinars by taking the product of the number of employee representatives, assumed to be an attorney, viewing the recorded webinar (8), the hourly compensation rate (\$94.3344), the number of webinars (1), and the time required to view the webinar (1 hour). This resulted in a cost of \$755. The total cost of viewing webinars was estimated by taking the sum of the cost of viewing live webinars and the cost of viewing recorded webinars, to obtain a total cost of \$1,887.

employers and employees of viewing live and recorded webinars to be \$29,203 (\$27,316 + \$1,887).

d. Benefits of the Rule

The Department was not able to quantify the benefits of the rule due to data limitations, particularly the difficulties in calculating the amount of time employers will save from the rule. Several benefits to society will result, however, from the rule, including the following:

Helping employers understand the law more efficiently. The Department projects that the regulatory changes will reduce the time and effort necessary for employers to understand their statutory obligations by incorporating well-established administrative decisions, the Department's long-standing positions, and statutory amendments into the regulations.

Increasing public access to government services. The regulatory changes will streamline the charge-filing process for individuals alleging discrimination. For example, the criteria needed to satisfy the definition of a "charge" have been reduced, and members of the public can now file charges electronically.

Eliminating public confusion regarding two offices in the Federal Government with the same name. The regulatory changes will reflect the change in the name of the office responsible for enforcing 8 U.S.C. 1324b from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the Immigrant and Employee Rights Section, thereby eliminating delays in processing submissions that currently occur due to confusion associated with having two Offices of Special Counsel in the Federal Government.¹²

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, and Executive Order 13272 (Aug. 13, 2002), require agencies to prepare a regulatory flexibility analysis of the anticipated impact of a regulation on small entities. The RFA provides that the agency is not required to prepare such an analysis if an agency head certifies, along with a statement providing the factual basis for such

¹² In addition to the Office of Special Counsel for Immigration-Related Unfair Employment Practices located in the Department's Civil Rights Division by 28 CFR 0.53, Congress has established an Office of Special Counsel charged with protecting employees, former employees, and applicants for employment from prohibited personnel practices, among other functions. See 5 U.S.C. 1211–1212.

⁸ On average, 44.7 individuals participate in live webinars for employers. The Department assumed that there will be a 15-percent increase in the number of participants following the implementation of the rule. Thus, the Department estimated costs for seven employers (*i.e.*, 15 percent of the 44.7 individuals) related to viewing the live webinar. On average, 567 individuals have viewed each of the educational YouTube videos. Thus, the Department estimated costs for 85 employers (*i.e.*, 15 percent of the 567 individuals) related to viewing the recorded webinar.

⁹ The Department estimated the cost of viewing the live webinars by taking the product of the number of employer representatives (human resources managers) viewing the live webinar (7), the hourly compensation rate (\$81.0576), the number of webinars per year (36), and the time required to view the webinar (1 hour). This yielded a cost of \$20,427. The Department then estimated the cost of viewing the recorded webinars by taking the product of the number of employer representatives (HR managers) viewing the recorded webinars (85), the hourly compensation rate (\$81.0576), the number of webinars (1), and the time required to view the webinar (1 hour). This yielded a cost of \$6,890. The total cost of viewing webinars was estimated by taking the sum of the cost of viewing live webinars and the cost of viewing recorded webinars, to obtain a total cost of \$27,316.

certification, that the regulation is not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Based on the following analysis, the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The Department's analysis focused on small businesses or nonprofits with 20 to 499 employees. The Department assumed that small businesses or nonprofits with fewer than 20 employees would not have a detailed written policy addressing compliance with 8 U.S.C. 1324b.

The Department assumed that, in total, 125,000 entities will be affected by the rule. Of those 125,000 affected entities, the Department estimated that 62,500 entities will be small employers.¹³ Dividing the affected population (62,500) by the total number of small businesses and non-profits (664,094), the Department estimates that the rule will impact 9.4 percent of small entities.¹⁴

¹³ According to the SHRM Web site, approximately 50 percent of the organization's members work in organizations with fewer than 500 employees. See SHRM, About the Society for Human Resource Management, <http://www.shrm.org/about/pages/default.aspx>. Taking 50 percent of the total estimated number of members in SHRM and CFI (125,000) results in 62,500 small entities.

¹⁴ The Department assumed that the total number of small businesses and non-profits is equal to the number of firms with 20 to 499 employees. Because the U.S. Census Bureau did not identify the number of firms with 20 to 499 employees in 2013, the most recent year for which data is available, the Department calculated the estimated number of firms with 20 to 499 employees in that year by calculating the number of establishments with 20 to 499 employees in 2013 and dividing it by the ratio of small establishments to small firms in 2012. To perform that calculation, the Department first determined the estimated number of firms with 20 to 99 employees in 2013 by (1) adding the number of establishments with 20 to 49 employees in 2013 and the number of establishments with 50 to 99 employees in 2013 (652,075 + 221,192 = 873,267); (2) dividing the number of establishments with 20 to 99 employees in 2012 by the number of firms with 20 to 99 employees in 2012 (687,272/494,170 = 1.39076); and (3) dividing the first number by the second (873,267/1.39076 = 627,906). The Department then determined the estimated number of firms with 100 to 499 employees in 2013 by (1) adding the number of establishments with 100 to 249 employees in 2013 and the number of establishments with 250 to 499 employees in 2013 (124,411 + 31,843 = 156,254); (2) dividing the number of establishments with 100 to 499 employees in 2012 by the number of firms with 100 to 499 employees in 2012 (360,207/83,423 = 4.3178); and (3) dividing the first number by the second (156,254/4.3178 = 36,188). Last, to determine the estimated number of firms with 20 to 499 employees in 2013, the Department added the estimated number of firms with 20 to 99 employees in 2013 and the estimated number of firms with 100 to 499 employees in 2013 (627,906 + 36,188 = 664,094). See U.S. Census Bureau, 2013 County Business Patterns (NAICS), <http://censtats.census.gov>; U.S. Census Bureau, 2012

The Department estimated the costs of (a) familiarizing staff with the new requirements in the rule, (b) reviewing and revising their employment eligibility verification policy, and (c) viewing a training webinar. The analysis focused on the first year of rule implementation when all costs of the rule are incurred. The Department estimated that the total one-year cost per small employer is \$324.¹⁵ The Department has determined that the yearly cost of \$324 will not have a significant economic impact on any of the affected small entities. Therefore, the Department has certified that the rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

These regulations contain no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 8 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any Federal mandate that may result in more than \$100 million in expenditures by State, local, and tribal governments in the aggregate or by the private sector.

Statistics of U.S. Businesses, Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States and States, Totals: 2012; http://www.census.gov/econ/sub/historical_data.html.

¹⁵ The Department estimated a cost of \$324 per small entity by taking the sum of the cost per small entity of each of the changes to the rule. This includes the following costs: familiarization with the rule (\$81), revising employment eligibility verification policies by making word replacements (\$20), making additional changes beyond word replacements (\$20), conducting a front-to-back review of the employment eligibility verification policies (\$122), and viewing the training webinar (\$81).

Executive Order 13132 (Federalism)

The agency has reviewed this rule in accordance with Executive Order 13132 (Aug. 4, 1999), and has determined that it does not have "federalism implications." This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

This rule does not have tribal implications under Executive Order 13175 (Nov. 6, 2000) that will require a tribal summary impact statement. The rule will 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.

Executive Order 13045 (Protection of Children)

This rule is not a covered regulatory action under Executive Order 13045 (Apr. 21, 1997). The rule will have no environmental health risk or safety risk that may disproportionately affect children.

Executive Order 12630 (Constitutionally Protected Property Rights)

This rule does not have takings implications under Executive Order 12630 (Mar. 15, 1988). The rule will not effect a taking or require dedications or exactions from owners of private property.

Executive Order 12988 (Civil Justice Reform Analysis)

This rule was drafted and reviewed in accordance with Executive Order 12988 (Feb. 5, 1996), and will not unduly burden the Federal court system. Complaints respecting unfair immigration-related employment practices are heard in the first instance by the Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, with only a miniscule number appealed each year to the Federal Circuit Courts of Appeal and an even smaller number of subpoenas or orders enforced by Federal District Courts.

List of Subjects

28 CFR Part 0

Authority delegations (government agencies), Government employees,

Organization and functions (government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

28 CFR Part 44

Administrative practice and procedure, Equal employment opportunity, Immigration.

For the reasons stated in the preamble, the Attorney General amends 28 CFR parts 0 and 44 as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

■ 2. Section 0.53 is revised to read as follows:

§ 0.53 Immigrant and Employee Rights Section.

(a) The Immigrant and Employee Rights Section shall be headed by a Special Counsel for Immigration-Related Unfair Employment Practices (“Special Counsel”). The Special Counsel shall be appointed by the President for a term of four years, by and with the advice and consent of the Senate, pursuant to section 274B of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. The Immigrant and Employee Rights Section shall be part of the Civil Rights Division of the Department of Justice, and the Special Counsel shall report directly to the Assistant Attorney General, Civil Rights Division.

(b) In carrying out the Special Counsel’s responsibilities under section 274B of the INA, the Special Counsel is authorized to:

(1) Investigate charges of unfair immigration-related employment practices filed with the Immigrant and Employee Rights Section and, when appropriate, file complaints with respect to those practices before specially designated administrative law judges within the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, U.S. Department of Justice;

(2) Intervene in proceedings involving complaints of unfair immigration-related employment practices that are brought directly before such administrative law judges by parties other than the Special Counsel;

(3) Conduct, on the Special Counsel’s own initiative, investigations of unfair immigration-related employment practices and, where appropriate, file complaints with respect to those practices before such administrative law judges;

(4) Conduct, handle, and supervise litigation in U.S. District Courts for judicial enforcement of subpoenas or orders of administrative law judges regarding unfair immigration-related employment practices;

(5) Initiate, conduct, and oversee activities relating to the dissemination of information to employers, employees, and the general public concerning unfair immigration-related employment practices;

(6) Establish such regional offices as may be necessary, in accordance with regulations of the Attorney General;

(7) Perform such other functions as the Assistant Attorney General, Civil Rights Division may direct; and

(8) Delegate to any subordinate any of the authority, functions, or duties vested in the Special Counsel.

■ 3. Revise part 44 to read as follows:

PART 44—UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

Sec.

44.100 Purpose.

44.101 Definitions.

44.102 Computation of time.

44.200 Unfair immigration-related employment practices.

44.201 [Reserved].

44.202 Counting employees for jurisdictional purposes.

44.300 Filing a charge.

44.301 Receipt of charge.

44.302 Investigation.

44.303 Determination.

44.304 Special Counsel acting on own initiative.

44.305 Regional offices.

Authority: 8 U.S.C. 1103(a)(1), (g), 1324b.

§ 44.100 Purpose.

The purpose of this part is to implement section 274B of the Immigration and Nationality Act (8 U.S.C. 1324b), which prohibits certain unfair immigration-related employment practices.

§ 44.101 Definitions.

For purposes of 8 U.S.C. 1324b and this part:

(a) *Charge* means a written statement in any language that—

(1) Is made under oath or affirmation;

(2) Identifies the charging party’s name, address, and telephone number;

(3) Identifies the injured party’s name, address, and telephone number, if the charging party is not the injured party;

(4) Identifies the name and address of the person or other entity against whom the charge is being made;

(5) Includes a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration-related employment practice;

(6) Indicates whether the basis of the alleged unfair immigration-related

employment practice is discrimination based on national origin, citizenship status, or both; or involves intimidation or retaliation; or involves unfair documentary practices;

(7) Indicates the citizenship status of the injured party;

(8) Indicates, if known, the number of individuals employed on the date of the alleged unfair immigration-related employment practice by the person or other entity against whom the charge is being made;

(9) Is signed by the charging party and, if the charging party is neither the injured party nor an officer of the Department of Homeland Security, indicates that the charging party has the authorization of the injured party to file the charge;

(10) Indicates whether a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission, and if so, the specific office and contact person (if known); and

(11) Authorizes the Special Counsel to reveal the identity of the injured or charging party when necessary to carry out the purposes of this part.

(b) *Charging party* means—

(1) An injured party who files a charge with the Special Counsel;

(2) An individual or entity authorized by an injured party to file a charge with the Special Counsel that alleges that the injured party is adversely affected directly by an unfair immigration-related employment practice; or

(3) An officer of the Department of Homeland Security who files a charge with the Special Counsel that alleges that an unfair immigration-related employment practice has occurred or is occurring.

(c) *Citizenship status* means an individual’s status as a U.S. citizen or national, or non-U.S. citizen, including the immigration status of a non-U.S. citizen.

(d) *Complaint* means a written submission filed with the Office of the Chief Administrative Hearing Officer (OCAHO) under 28 CFR part 68 by the Special Counsel or by a charging party, other than an officer of the Department of Homeland Security, alleging one or more unfair immigration-related employment practices under 8 U.S.C. 1324b.

(e) *Discriminate* as that term is used in 8 U.S.C. 1324b(a) means the act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.

(f) The phrase “for purposes of satisfying the requirements of section 1324a(b),” as that phrase is used in 8 U.S.C. 1324b(a)(6), means for the purpose of completing the employment eligibility verification form designated in 8 CFR 274a.2, or for the purpose of making any other efforts to verify an individual’s employment eligibility, including the use of “E-Verify” or any other electronic employment eligibility verification program.

(g) An act done “for the purpose or with the intent of discriminating against an individual in violation of [1324(a)(1)],” as that phrase is used in 8 U.S.C. 1324b(a)(6), means an act of intentionally treating an individual differently based on national origin or citizenship status in violation of 8 U.S.C. 1324b(a)(1), regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.

(h) *Hiring* means all conduct and acts during the entire recruitment, selection, and onboarding process undertaken to make an individual an employee.

(i) *Injured party* means an individual who claims to be adversely affected directly by an unfair immigration-related employment practice.

(j) The phrase “more or different documents than are required under such section,” as that phrase is used in 8 U.S.C. 1324b(a)(6), includes any limitation on an individual’s choice of acceptable documentation to present to satisfy the requirements of 8 U.S.C. 1324a(b).

(k) *Protected individual* means an individual who—

(1) Is a citizen or national of the United States;

(2) Is an alien who is lawfully admitted for permanent residence, other than an alien who—

(i) Fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization, or, if later, within six months after November 6, 1986; or

(ii) Has applied on a timely basis, but has not been naturalized as a citizen within two years after the date of the application, unless the alien can establish that he or she is actively pursuing naturalization, except that time consumed in the Department of Homeland Security’s processing of the application shall not be counted toward the two-year period;

(3) Is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a) or 8 U.S.C. 1255a(a)(1);

(4) Is admitted as a refugee under 8 U.S.C. 1157; or

(5) Is granted asylum under 8 U.S.C. 1158.

(l) *Recruitment or referral for a fee* has the meaning given the terms “recruit for a fee” and “refer for a fee,” respectively, in 8 CFR 274a.1, and includes all conduct and acts during the entire recruitment or referral process.

(m) *Respondent* means a person or other entity who is under investigation by the Special Counsel, as identified in the written notice required by § 44.301(a) or § 44.304(a).

(n) *Special Counsel* means the Special Counsel for Immigration-Related Unfair Employment Practices appointed by the President under 8 U.S.C. 1324b, or a duly authorized designee.

§ 44.102 Computation of time.

When a time period specified in this part ends on a day when the Federal Government in Washington, DC is closed (such as on weekends and Federal holidays, or due to a closure for all or part of a business day), the time period shall be extended until the next full day that the Federal Government in Washington, DC is open.

§ 44.200 Unfair immigration-related employment practices.

(a)(1) *General*. It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(1) for a person or other entity to intentionally discriminate or to engage in a pattern or practice of intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(i) Because of such individual’s national origin; or

(ii) In the case of a protected individual, as defined in § 44.101(k), because of such individual’s citizenship status.

(2) *Intimidation or retaliation*. It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(5) for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under 8 U.S.C. 1324b or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under that section.

(3) *Unfair immigration-related employment practices*. It is an unfair immigration-related employment practice under 8 U.S.C. 1324b(a)(6) for—

(i) A person or other entity, for purposes of satisfying the requirements of 8 U.S.C. 1324a(b), either—

(A) To request more or different documents than are required under § 1324a(b); or

(B) To refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual; and

(ii) To make such request or refusal for the purpose or with the intent of discriminating against any individual in violation of paragraph (a)(1) of this section, regardless of whether such documentary practice is a condition of employment or causes economic harm to the individual.

(b) *Exceptions*. (1) Paragraph (a)(1) of this section shall not apply to—

(i) A person or other entity that employs three or fewer employees;

(ii) Discrimination because of an individual’s national origin by a person or other entity if such discrimination is covered by 42 U.S.C. 2000e–2; or

(iii) Discrimination because of citizenship status which—

(A) Is otherwise required in order to comply with law, regulation, or Executive order; or

(B) Is required by Federal, State, or local government contract; or

(C) The Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(2) Notwithstanding any other provision of this part, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire an individual, or to recruit or refer for a fee an individual, who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

§ 44.201 [Reserved]

§ 44.202 Counting employees for jurisdictional purposes.

The Special Counsel will calculate the number of employees referred to in § 44.200(b)(1)(i) by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred. The Special Counsel will use the 20 calendar week requirement contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), for purposes of determining whether the exception of § 44.200(b)(1)(ii) applies, and will refer to the Equal Employment Opportunity Commission charges of national origin discrimination that the Special Counsel determines are covered by 42 U.S.C. 2000e–2.

§ 44.300 Filing a charge.

(a) Who may file: Charges may be filed by:

(1) Any injured party;
(2) Any individual or entity authorized by an injured party to file a charge with the Special Counsel alleging that the injured party is adversely affected directly by an unfair immigration-related employment practice; or

(3) Any officer of the Department of Homeland Security who alleges that an unfair immigration-related employment practice has occurred or is occurring.

(b) Charges shall be filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice. A charge is deemed to be filed on the date it is postmarked or the date on which the charging party otherwise delivers or transmits the charge to the Special Counsel.

(c) Charges may be sent by:

- (1) U.S. mail;
- (2) Courier service;
- (3) Electronic or online submission; or
- (4) Facsimile.

(d) No charge may be filed respecting an unfair immigration-related employment practice described in § 44.200(a)(1)(i) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this section, unless the charge is dismissed as being outside the scope of this part.

§ 44.301 Receipt of charge.

(a) Within 10 days of receipt of a charge, the Special Counsel shall notify the charging party and respondent by certified mail, in accordance with paragraphs (b) and (c) of this section, of the Special Counsel's receipt of the charge.

(b) The notice to the charging party shall specify the date on which the charge was received; state that the charging party, other than an officer of the Department of Homeland Security, may file a complaint before an administrative law judge if the Special Counsel does not do so within 120 days of receipt of the charge; and state that the charging party will have 90 days from the receipt of the letter of determination issued pursuant to

§ 44.303(b) by which to file such a complaint.

(c) The notice to the respondent shall include the date, place, and circumstances of the alleged unfair immigration-related employment practice.

(d)(1) If a charging party's submission is found to be inadequate to constitute a complete charge as defined in § 44.101(a), the Special Counsel shall notify the charging party that the charge is incomplete and specify what additional information is needed.

(2) An incomplete charge that is later deemed to be complete under this paragraph is deemed filed on the date the initial but inadequate submission is postmarked or otherwise delivered or transmitted to the Special Counsel, provided any additional information requested by the Special Counsel pursuant to this paragraph is postmarked or otherwise provided, delivered or transmitted to the Special Counsel within 180 days of the alleged occurrence of an unfair immigration-related employment practice or within 45 days of the date on which the charging party received the Special Counsel's request for additional information, whichever is later.

(3) Once the Special Counsel determines adequate information has been submitted to constitute a complete charge, the Special Counsel shall issue the notices required by paragraphs (b) and (c) of this section within 10 days.

(e) In the Special Counsel's discretion, the Special Counsel may deem a submission to be a complete charge even though it is inadequate to constitute a charge as defined in § 44.101(a). The Special Counsel may then obtain the additional information specified in § 44.101(a) in the course of investigating the charge.

(f) A charge or an inadequate submission referred to the Special Counsel by a federal, state, or local government agency appointed as an agent for accepting charges on behalf of the Special Counsel is deemed filed on the date the charge or inadequate submission was postmarked to or otherwise delivered or transmitted to that agency. Upon receipt of the referred charge or inadequate submission, the Special Counsel shall follow the applicable notification procedures for the receipt of a charge or inadequate submission set forth in this section.

(g) The Special Counsel shall dismiss a charge or inadequate submission that is filed more than 180 days after the alleged occurrence of an unfair immigration-related employment practice, unless the Special Counsel

determines that the principles of waiver, estoppel, or equitable tolling apply.

§ 44.302 Investigation.

(a) The Special Counsel may seek information, request documents and answers to written interrogatories, inspect premises, and solicit testimony as the Special Counsel believes is necessary to ascertain compliance with this part.

(b) The Special Counsel may require any person or other entity to present Employment Eligibility Verification Forms ("Forms I-9") for inspection.

(c) The Special Counsel shall have reasonable access to examine the evidence of any person or other entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such books, records, accounts, papers, electronic and digital documents, databases, systems of records, witnesses, premises, and other sources of information the Special Counsel may deem pertinent to ascertain compliance with this part.

(d) A respondent, upon receiving notice by the Special Counsel that it is under investigation, shall preserve all evidence, information, and documents potentially relevant to any alleged unfair immigration-related employment practices, and shall suspend routine or automatic deletion of all such evidence, information, and documents.

§ 44.303 Determination.

(a) Within 120 days of the receipt of a charge, the Special Counsel shall undertake an investigation of the charge and determine whether to file a complaint with respect to the charge.

(b) If the Special Counsel determines not to file a complaint with respect to such charge by the end of the 120-day period, or decides to continue the investigation of the charge beyond the 120-day period, the Special Counsel shall, by the end of the 120-day period, issue letters to the charging party and respondent by certified mail notifying both parties of the Special Counsel's determination.

(c) When a charging party receives a letter of determination issued pursuant to paragraph (b) of this section, the charging party, other than an officer of the Department of Homeland Security, may file a complaint directly before an administrative law judge in the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days after his or her receipt of the Special Counsel's letter of determination. The charging party's complaint must be filed with OCAHO as provided in 28 CFR part 68.

(d) The Special Counsel's failure to file a complaint with respect to such charge with OCAHO within the 120-day period shall not affect the right of the Special Counsel to continue to investigate the charge or later to bring a complaint before OCAHO.

(e) The Special Counsel may seek to intervene at any time in any proceeding brought by a charging party before OCAHO.

§ 44.304 Special Counsel acting on own initiative.

(a) The Special Counsel may, on the Special Counsel's own initiative, conduct investigations respecting unfair immigration-related employment practices when there is reason to believe that a person or other entity has engaged or is engaging in such practices, and shall notify a respondent by certified mail of the commencement of the investigation.

(b) The Special Counsel may file a complaint with OCAHO when there is reasonable cause to believe that an unfair immigration-related employment practice has occurred no more than 180 days prior to the date on which the Special Counsel opened an investigation of that practice.

§ 44.305 Regional offices.

The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out the Special Counsel's duties.

Dated: December 14, 2016.

Loretta E. Lynch,
Attorney General.

[FR Doc. 2016-30491 Filed 12-16-16; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA-2015-0006]

RIN 1218-AC84

Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is amending its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and

illnesses is an ongoing obligation. The duty to record an injury or illness continues for as long as the employer must keep records of the recordable injury or illness; the duty does not expire just because the employer fails to create the necessary records when first required to do so. The amendments consist of revisions to the titles of some existing sections and subparts and changes to the text of some existing provisions. The amendments add no new compliance obligations and do not require employers to make records of any injuries or illnesses for which records are not currently required to be made.

The amendments in this rule are adopted in response to a decision of the United States Court of Appeals for the District of Columbia Circuit. In that case, a majority held that the Occupational Safety and Health Act does not permit OSHA to impose a continuing recordkeeping obligation on employers. One judge filed a concurring opinion disagreeing with this reading of the statute, but finding that the text of OSHA's recordkeeping regulations did not impose continuing recordkeeping duties. OSHA disagrees with the majority's reading of the law, but agrees that its recordkeeping regulations were not clear with respect to the continuing nature of employers' recordkeeping obligations. This final rule is designed to clarify the regulations in advance of possible future federal court litigation that could further develop the law on the statutory issues addressed in the D.C. Circuit's decision.

DATES: This final rule becomes effective on January 18, 2017. *Collections of information:* There are collections of information contained in this final rule (see Section XI, Office of Management and Budget Review Under the Paperwork Reduction Act of 1995). Notwithstanding the general date of applicability that applies to all other requirements contained in the final rule, affected parties do not have to comply with the collections of information in the recordkeeping regulations (as revised by this final rule) until the Department of Labor publishes a separate document in the **Federal Register** announcing that the Office of Management and Budget has approved them under the Paperwork Reduction Act.

FOR FURTHER INFORMATION CONTACT:

Press inquiries: Mr. Frank Meilinger, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202)

693-1999; email meilinger.francis2@dol.gov.

Technical inquiries: Ms. Mandy Edens, Director, Directorate of Technical Support and Emergency Management, OSHA, U.S. Department of Labor, Room N-3653, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2270; email edens.mandy@dol.gov.

Copies of this Federal Register notice and news releases: Electronic copies of these documents are available at OSHA's Web page at <http://www.osha.gov>.

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I. Background

A. The OSH Act and Citation of OSH Act Violations

The Occupational Safety and Health Act of 1970 (OSH Act or Act) arose out of a Congressional finding that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments. *See* 29 U.S.C. 651(a). Accordingly, the purpose of the statute is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. *See* 29 U.S.C. 651(b).

To effectuate the Act's purpose, Congress authorized the Secretary of Labor to promulgate occupational safety and health standards (29 U.S.C. 655); a standard, as defined in the Act, requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably

necessary or appropriate to provide safe or healthful employment and places of employment. *See* 29 U.S.C. 652(8). The Act also grants broad authority to the Secretary to promulgate other types of regulations such as those related to employer self-inspections and keeping employees informed of matters related to occupational safety and health. 29 U.S.C. 657(c). The OSH Act specifically directs the Secretary to promulgate regulations requiring employers to make and maintain accurate records of work-related injuries and illnesses. 29 U.S.C. 657(c)(1) and (2), 673(a); *see also* 651(b)(12), 657(g)(2), 673(e).

OSHA issues citations and assesses monetary penalties when it finds that employers are not complying with the Act or with applicable standards and regulations. 29 U.S.C. 658, 659, 666. Section 9(c) of the OSH Act contains a statute of limitations providing that no citation may be issued after the expiration of six months following "the occurrence of any violation." 29 U.S.C. 658(c). Generally, OSH Act violations continue to occur for as long as employees are exposed to the condition posed by the non-compliant workplace. *See Sec'y of Labor v. Cent. of Georgia R.R. Co.*, 5 BNA OSHC 1209, 1211 (Rev. Comm'n 1977) (explaining that a violation occurs "whenever . . . [a] standard is not complied with and an employee has access to the resulting zone of danger"). Thus, employers have an ongoing obligation to correct conditions that violate OSHA standards and regulations, and under section 9(c), violations are subject to citations and penalties for up to six months after the last instance of employee exposure to the violative condition.

B. OSHA's Recordkeeping Regulations and the Importance of Accurate Workplace Injury and Illness Data

In 1971, OSHA issued its first recordkeeping regulations at 29 CFR part 1904. OSHA promulgated revisions to these regulations in 2001 in an effort to improve the quality of workplace injury and illness records by making OSHA's recordkeeping system easier to use and understand. *See* 66 FR 5916 (January 19, 2001).

OSHA's recordkeeping regulations require employers to record information about certain injuries and illnesses occurring in their workplaces, and to make that information available to employees, OSHA, and the Bureau of Labor Statistics (BLS). Employers must record work-related injuries and illnesses that meet one or more recording criteria, including injuries and illnesses resulting in death, loss of consciousness, days away from work,

restricted work activity or job transfer, medical treatment beyond first aid, or a diagnosis of a significant injury or illness by a physician or other licensed health care professional. 29 CFR 1904.7. Employers must document each recordable injury or illness on an "OSHA 300" form, which is a log of all work-related injuries and illnesses. 29 CFR 1904.29(a) through (b)(1). Employers also must prepare a supplementary "OSHA 301 Incident Report" or equivalent form for each recordable injury and illness; the Incident Reports provide additional details about the injuries and illnesses recorded in the 300 Log. 29 CFR 1904.29(b)(2).

At the end of each calendar year, employers must review their 300 Logs to verify that the entries are complete and accurate. 29 CFR 1904.32(a)(1). Employers also must correct any deficiencies identified during this annual review. *Id.* By February 1 of each year, employers must create, certify, and post annual summaries of the cases listed on their 300 Logs for the prior calendar year. 29 CFR 1904.32(a), (b). Annual summaries must remain posted until April 30 each year. 29 CFR 1904.32(b)(6). Employers must retain their OSHA Logs, Incident Reports, and annual summaries for five years following the end of the calendar year that they cover. 29 CFR 1904.33(a). The regulations contain provisions explaining when records need to be revised during the retention period.

Accurate injury and illness records serve several important purposes. *See* 66 FR at 5916–17, January 19, 2001. One purpose is to provide information to employers. The information in the OSHA-required records makes employers more aware of the kinds of injuries and illnesses occurring and the hazards that cause or contribute to them. When employers analyze and review the information in their records, they can identify and correct hazardous workplace conditions. Injury and illness records are essential for employers to manage their safety and health programs effectively; these records permit employers to track injuries and illnesses over time so they can evaluate the effectiveness of protective measures implemented in response to identified hazards.

Similarly, employees—who have access to OSHA injury and illness records throughout the five-year retention period (*see* 29 CFR 1904.35)—can use information about the occupational injuries and illnesses occurring in their workplaces to become better informed about, and more alert to, the hazards they face. Employees who

are aware of the hazards around them may be more likely to follow safe work practices and to report workplace hazards to their employers. When employees are aware of workplace hazards, and participate in the identification and control of those hazards, the overall level of safety and health in the workplace can improve.

OSHA also has access to employer injury and illness records during the retention period (see 29 CFR 1904.40 and 1904.41), and these records are an important source of information for OSHA and enhance its enforcement efforts. During the initial stages of an inspection, an OSHA representative reviews the employer's injury and illness data so that OSHA can focus its inspection on the hazards revealed by the records. In some years, OSHA has also surveyed a subset of employers covered by the OSH Act for their injury and illness data, and used that information to help identify the most dangerous types of worksites and the most prevalent types of safety and health hazards.

Additionally, BLS uses data derived from employers' injury and illness records to develop national statistics on workplace injuries and illnesses. These statistics include information about the source, nature, and type of the injuries and illnesses that are occurring in the nation's workplaces. To obtain the data to develop national statistics, BLS and participating State agencies conduct an annual survey of employers in almost all sectors of private industry. BLS makes the aggregate survey results available for research purposes and for public information. This data provides information about the incidence of workplace injuries and illnesses and the nature and magnitude of workplace safety and health problems. Congress, OSHA, and safety and health policymakers in Federal, State, and local governments use BLS statistics to make decisions concerning safety and health legislation, programs, and standards. And employers and employees can use BLS statistics to compare the injury and illness data from their workplaces with data from the nation as a whole.

C. An Employer's Failure To Record a Recordable Illness or Injury Is a Failure To Maintain Accurate Injury and Illness Records and Is a Continuing Violation

A continuing violation exists when there is noncompliance with "the text of . . . [a] pertinent law [that] imposes a continuing obligation to act or refrain from acting." *Earle v. Dist. of Columbia*, 707 F.3d 299, 307 (D.C. Cir. 2012). Where there is an ongoing obligation to

act, each day the action is not taken results in a continuing, ongoing violation. In other words, "a new claim accrues each day the violation is extant." *Interamericas Inv., Ltd. v. Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997). For example, in *United States v. Edelkind*, 525 F.3d 388 (5th Cir. 2008), the Fifth Circuit found that willfully failing to pay child support as required by federal law was a continuing offense because "each day's acts . . . [brought] a renewed threat of the substantive evil Congress sought to prevent." *Id.* at 394–95 (internal quotation marks and citations omitted). And in *Postow v. OBA Federal Savings & Loan Association*, 627 F.2d 1370 (D.C. Cir. 1980), the D.C. Circuit held that a lender's failure to provide required disclosures to borrowers was a continuing violation of the Truth-in-Lending Act because the violation subverted the goals of the statute every day the borrowers did not have the information. *Id.* at 1379–80. See also, e.g., *United States v. Bailey*, 444 U.S. 394, 413 (1980) (escape from federal custody is a continuing offense in light of "the continuing threat to society posed by an escaped prisoner"); *United States v. George*, 625 F.3d 1124 (9th Cir. 2010) (failure to comply with statute requiring registration as a sex offender is a continuing offense), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012); *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951) (Alien Registration Act imposes ongoing registration obligation; failure to register is a continuing violation).

OSHA has long treated recordkeeping violations under the OSH Act as continuing violations—and, as explained below in Section II.B.1 of this preamble—this view is consistent with section 8(c) of the Act, in which Congress instructed the Secretary to require employers to make and maintain accurate records of workplace injuries and illnesses. OSHA's longstanding position is that an employer's duty to record an injury or illness continues for the full duration of the record-retention-and-access period, *i.e.*, for five years after the end of the calendar year in which the injury or illness became recordable. This means that if an employer initially fails to record a recordable injury or illness, the employer still has an ongoing duty to record that case; the recording obligation does not expire simply because the employer failed to record the case when it was first required to do so. As long as an employer fails to comply with its ongoing duty to record an injury or illness, and therefore with

its obligation to maintain accurate records, there is an ongoing violation of OSHA's recordkeeping requirements that continues to occur every day employees work at the site. Therefore, OSHA can cite employers for such recordkeeping violations for up to six months after the five-year retention period expires without running afoul of the OSH Act's statute of limitations.¹ OSHA has consistently issued such citations since it enacted its first recordkeeping regulations, as evidenced by the case law in the following paragraph. The purpose of this final rule is simply to clarify what has always been OSHA's interpretation of its recordkeeping regulations.

The Occupational Safety and Health Review Commission has upheld OSHA's position on the continuing nature of recordkeeping violations. See, e.g., *Sec'y of Labor v. Gen. Dynamics*, 15 BNA OSHC 2122 (Rev. Comm'n 1993) (recordkeeping violations "occur" at any point during the retention period when records are inaccurate, so citations for those violations are not barred simply because they are issued more than six months after the obligation to record first arose); *Sec'y of Labor v. Johnson Controls, Inc.*, 15 BNA OSHC 2132 (Rev. Comm'n 1993) (recordkeeping violations continue until correction or expiration of the retention period). The Commission addressed this issue most recently in *Secretary of Labor v. AKM LLC*, 23 BNA OSHC 1414 (Rev. Comm'n 2011) (*Volks I*), confirming that an employer's failure to make a required OSHA record is a continuing violation, and that an uncorrected violation continues until the employer is no longer required to keep OSHA records for the year at issue.²

D. The D.C. Circuit's Decision in *Volks II*

A panel of the D.C. Circuit reviewed the Commission's *Volks I* decision, and on April 6, 2012, issued a decision—

¹ Of course, OSHA may not issue a citation more than six months after the employer corrects the violation. See, e.g., *Sec'y of Labor v. Mangans Painting Co.*, 21 BNA OSHC 2043, 2048 (Rev. Comm'n 2007) (citation was time-barred where the employer abated the violation more than six months prior to the issuance date).

² Although the Coalition for Workplace Safety stated that OSHA has never expressed a policy of treating recordkeeping violations as ongoing, Ex. 0013, OSHA's citation history—and the Commission decisions upholding those citations—make clear that OSHA took this approach for many years. See *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (OSHA citations embody the Secretary's interpretation of regulations). See discussion in Section I.C, Background, above. Throughout this preamble, exhibit numbers are referred to in the form Ex. XXXX, where XXXX reflects the last four digits of the full document number (OSHA–2015–006–XXXX).

Volks II—reversing the Commission. *AKM LLC v. Sec’y of Labor*, 675 F.3d 752 (D.C. Cir. 2012) (*Volks II*). The majority opinion in *Volks II*, without discussion of Commission precedent to the contrary, held that the OSH Act does not provide authority for the Secretary to impose a continuing recordkeeping obligation on employers, explaining that “the . . . language in [the OSH Act] . . . which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure.” *Id.* at 758; *see also id.* at 756–57. The majority stated that OSHA must cite an employer for failing to record an injury or illness within six months of the first day on which the regulations require the recording; a citation issued later than that, according to the *Volks II* majority, is barred by the OSH Act’s statute of limitations. *Id.* at 753–59.

In a separate opinion concurring in the judgment in *Volks II*, Judge Garland disagreed with the majority’s conclusion that the OSH Act did not permit continuing record-making obligations. Judge Garland agreed with the Secretary that the OSH Act does allow for continuing violations of recordkeeping requirements. He concluded, however, that the specific language in the recordkeeping regulations reviewed by the panel did not implement this statutory authority and did not create continuing recordkeeping obligations. *Id.* at 759–64. Under the analysis in Judge Garland’s concurring opinion, OSHA in fact has statutory authority to create a continuing obligation for employers to make and maintain accurate records of work-related illnesses and injuries, and can revise its recordkeeping regulations to more clearly implement that statutory authority.

Thus, because of the *Volks II* decision, OSHA has decided to clarify employers’ obligations under its recordkeeping regulations and to elaborate on its understanding of the statutory basis for those obligations. OSHA disagrees with the legal holding in the majority opinion in *Volks II*, but agrees with Judge Garland that, while the OSH Act gives the Secretary authority to impose continuing recordkeeping obligations, the text of the recordkeeping regulations did not make clear OSHA’s longstanding intention to fully implement that authority. Therefore, OSHA is changing its recordkeeping regulations to clarify that the duty to make and maintain an accurate record of a work-related illness or injury is an ongoing obligation that continues until the required record is made or until the

end of the record-retention-and-access period prescribed by the regulations. To that end, OSHA is revising the titles of some sections and subparts in part 1904 and changing the text of some of the recordkeeping requirements. OSHA describes the changes in **SUPPLEMENTARY INFORMATION**, Section III, later in this preamble.

E. Events Preceding This Final Rule

On July 29, 2015, OSHA issued a proposed rule entitled “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness.” 80 FR 45116. Before issuing the proposal, OSHA consulted with the Advisory Committee on Construction Safety and Health (ACCSH). OSHA provided ACCSH with a summary and explanation of the proposal and a statement regarding the need for the proposed revisions to 29 CFR part 1904. On December 4, 2014, ACCSH voted to recommend that OSHA proceed with the proposal.³

OSHA provided 60 days for public comment and eventually extended the comment period for an additional 30 days. 80 FR 57765. OSHA received a total of 30 comments. The comments are addressed elsewhere in this preamble.

II. Legal Authority

A. Overview

As explained previously, in **SUPPLEMENTARY INFORMATION**, Section I.A, the OSH Act authorizes the Secretary of Labor to issue “standards” and other “regulations.” *See, e.g.*, 29 U.S.C. 655, 657. An occupational safety and health standard, issued pursuant to section 6 of the Act, prescribes measures to be taken to remedy an identified occupational hazard. Other regulations, issued pursuant to general rulemaking authority found, *inter alia*, in section 8 of the Act, establish enforcement or detection procedures designed to further the goals of the Act generally. 29 U.S.C. 657(c); *Workplace Health and Safety Council v. Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995). This final rule amends OSHA’s recordkeeping regulations issued pursuant to authority expressly granted by sections 8 and 24 of the Act. 29 U.S.C. 657, 673. It simply clarifies existing duties under part 1904, and does not impose any new substantive recordkeeping requirements.

Many commenters suggested that OSHA does not have legal authority to

promulgate this rule. Exs. 0003, 0008, 0009, 0010, 0011, 0012, 0013, 0014, 0016, 0017, 0020, 0021, 0023, 0026. OSHA disagrees. As recognized by Judge Garland in his concurring opinion in *Volks II*, and explained in more detail in **SUPPLEMENTARY INFORMATION**, Section II.B, later in this preamble, the OSH Act plainly authorizes this regulatory action. Numerous provisions of the OSH Act both underscore Congress’ acknowledgement that accurate injury and illness records are a critical component of the national occupational safety and health program and give the Secretary broad authority to enact recordkeeping regulations that create a continuing obligation for employers to make and maintain accurate records of work-related illnesses and injuries. Section 2(b)(12) of the Act states that one of the purposes of the OSH Act is to assure, so far as possible, safe and healthful working conditions by providing for appropriate reporting procedures that will help achieve the objectives of the Act and “accurately describe” the nature of the occupational safety and health problem. *See* 29 U.S.C. 651(b)(12). Section 8(c)(1) requires each employer to “make, keep and preserve” and to “make available” to the Secretary such records prescribed by regulation as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. *See* 29 U.S.C. 657(c)(1). Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to “maintain accurate records” of, and to make periodic reports on, work-related deaths, injuries and illnesses. *See* 29 U.S.C. 657(c)(2). Section 8(g)(2) of the Act generally empowers the Secretary to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under the Act. *See* 29 U.S.C. 657(g)(2). Section 24(a) requires the Secretary to develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics and to compile accurate statistics on work injuries and illnesses. *See* 29 U.S.C. 673(a). And Section 24(e) provides that on the basis of the records made and kept pursuant to section 8(c) of the Act, employers must file such reports with the Secretary as the Secretary prescribes by regulation as necessary to carry out his functions under the Act. *See* 29 U.S.C. 673(e).

³ The National Federation of Independent Businesses has requested that the transcript of ACCSH’s meeting be added to the docket of this rulemaking. Ex. 0014. The transcript can now be found at Ex. 0030.

B. The OSH Act Authorizes the Secretary To Impose a Continuing Obligation on Employers To Make and Maintain Accurate Records of Work-Related Injuries and Illnesses, and Incomplete or Otherwise Inaccurate Records Create Ongoing, Citable Conditions

1. Section 8(c) of the Act Governs Employers' Recordkeeping Obligations, and That Provision Authorizes the Imposition of Continuing Obligations on Employers To Make and Maintain Accurate Records of Work-Related Illnesses and Injuries

"Whether [an] . . . obligation is continuing is a question of statutory construction." *Earle*, 707 F.3d at 307. The express language of the OSH Act readily supports a continuing violation theory in recordkeeping cases. And section 8(c) grants the Secretary broad authority to impose requirements he considers "necessary or appropriate," including recordkeeping regulations that provide that an employer's duty to make records of injuries and illnesses is an ongoing obligation. 29 U.S.C. 657(c).

Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to "maintain accurate records" of work-related deaths, injuries and illnesses. See 29 U.S.C. 657(c)(2) (emphasis added). And section 8(c)(1) requires employers to "make, keep and preserve" and to "make available" records that the Secretary identifies as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. See 29 U.S.C. 657(c)(1) (emphasis added). The language Congress used in these provisions therefore authorizes the Secretary to require employers to have on hand and to make available records that accurately reflect *all* of the recordable injuries and illnesses that occurred during the designated time period. Moreover, this statutory language is inconsistent with any suggestion that Congress intended the duty to record an injury or illness to be a discrete obligation that expires if the employer fails to comply on the first day the Secretary's regulations require recording.

This is because the words "accurate" and "maintain" in section 8(c)(2) of the Act connote a continued course of conduct that includes an ongoing obligation to create records. The word "maintain" means to "[c]ause or enable (a condition or state of affairs) to continue," an example being when one works to ensure that something stays "in good condition or in working order

by checking or repairing it regularly." http://www.oxforddictionaries.com/us/definition/american_english/maintain?searchDictCode=all. Therefore, "maintain" plainly implies an ongoing action. See, e.g., *Carey v. Shiley, Inc.*, 32 F.Supp.2d 1093, 1103 (S.D. Iowa 1998) ("continuing duty to maintain records for" the Food and Drug Administration). And "accurate" means "conforming exactly to truth," and is synonymous with "exact." <http://www.merriam-webster.com/dictionary/accurate>. See also, e.g., *Huntington Sec. Corp. v. Busey*, 112 F.2d 368, 370 (6th Cir. 1940) (noting that the term "accurately" . . . in its ordinary use[] means precisely, exactly correctly, without error or defect"). Therefore, the OSH Act's direction to enact regulations requiring employers to "maintain accurate [injury and illness] records" is a mandate for the Secretary to impose an ongoing or continuing duty on employers to have true or exact documentation of recordable incidents. An employer cannot be said to have (or to be keeping or maintaining) accurate (or true or exact) records of injuries and illnesses for a particular calendar year if there are recordable injuries or illnesses that occurred during that year that are missing from those records. Put simply, the Secretary cannot fulfill the statutory obligation of ensuring that employers "maintain accurate records" without imposing on employers an ongoing duty to create records for injuries and illnesses in the first place; a duty to maintain accurate records inherently implies an ongoing obligation to create the records that must be maintained.

The Fourth Circuit recognized as much in *Sierra Club v. Simkins Industries*, 847 F.2d 1109, 1115 (4th Cir. 1988), a Clean Water Act case, when it refused to allow a company to defend against its failure to file and retain water sampling records on the ground that it never collected the data it needed to create the records in the first place. The court ruled that an ongoing duty to maintain records implies a corresponding, and continuing, duty to have those records, explaining that it would not allow the company "to escape liability . . . by failing at the outset to sample and to create and retain the necessary . . . records." *Id.* See also, e.g., *Big Bear Super Mkt. No. 3 v. INS*, 913 F.2d 754, 757 (9th Cir. 1990) (per curiam) (statutory and regulatory scheme described by the court as requiring companies to "maintain" documents is interpreted to impose a "continuing duty" on those companies "to prepare and make" the documents in the first instance); *Park v. Comm'r of*

Internal Revenue, 136 T.C. 569, 574 (U.S. Tax Ct. 2011) (noting that a party that did not create required records thereby failed to "keep" those records), *rev'd and remanded on other grounds*, 722 F.3d 384 (D.C. Cir. 2013).

The "make, keep, and preserve" and "make available" language in section 8(c)(1) similarly envisions a continuing duty to record and provides additional support for the Secretary's interpretation of the "maintain accurate records" language in section 8(c)(2). "Keep" is a synonym for "maintain," <http://thesaurus.com/browse/maintain>, and both words imply a continued course of conduct, as does "preserve."⁴ See, e.g., *Powerstein v. Comm'r of Internal Revenue*, T.C. Memo 2011-271, 2011 WL 5572600, at *13 (U.S. Tax Ct. Nov. 16, 2011) (interpreting statutory and regulatory requirements to "keep" tax records to mean that taxpayers must "maintain" such records); *Freedman v. Comm'r of Internal Revenue*, T.C. Memo 2010-155, 2010 WL 2942167, at *1 (U.S. Tax Ct. July 21, 2010) (same).

The fact that Congress included the word "make" in a phrase with two other terms that both call for a continuing action suggests that "make" was also intended to signify a continuing course of conduct in the recordkeeping context. The most reasonable reading of section 8(c)(1), particularly in light of the "maintain accurate records" language in section 8(c)(2), is that the phrase "make, keep, and preserve" authorizes one continuous recordkeeping requirement that includes both the creation and the keeping of records. See, e.g., *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (noting a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The related authorization to the Secretary to prescribe such recordkeeping regulations as he considers "necessary or appropriate" further emphasizes the breadth of the Secretary's discretion in implementing the statute.

Thus, the Secretary does not believe that section 8(c) authorizes two and only two discrete duties: A duty to create a record that can arise at only one moment in time, and a duty to preserve

⁴ The legislative history of the OSH Act shows that Congress used "keep" and "maintain" synonymously. In a Senate Report, Congress described section 8(c)(2)—which talks about "maintaining" records—as "requiring employers to keep records of all work-related injuries and diseases." S. Rep. No. 91-1282, at 31 (1970), reprinted in Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 171 (1971) (emphasis added).

that record if it should be created. Such a view would be inconsistent with the most relevant provision of the Act, section 8(c)(2), which is the provision that specifically addresses the Secretary's authority to prescribe regulations for injury and illness recordkeeping, *i.e.*, to prescribe regulations that require employers to "maintain accurate records" of workplace illnesses and injuries. Nothing about the Congressional direction to "maintain accurate records" is naturally read as creating two entirely discrete obligations, or as conveying Congressional intent to limit the duty to make a required record to a single point in time. Records that omit work-related injuries and illnesses are not accurate, and no purpose is served by maintaining inaccurate records. Instead, Congress intended employers, employees, and the Secretary to have access to accurate information about injuries and illnesses occurring in workplaces.

The requirement in section 8(c)(1) that employers "make available" such records as the Secretary prescribes regarding injuries and illnesses further illustrates that section 9(c)'s statute of limitations does not limit the Secretary to acquiring only six months of accurate injury and illness data. A regulation requiring employers, if requested, to make available accurate records showing injuries and illnesses that have occurred within the past few years is on its face well within the OSH Act's grant of authority. Nothing in the statutory language suggests that the Secretary can only require employers to provide information regarding work-related injuries and illnesses that have occurred within the past six months. Such a limitation would cripple OSHA's ability to gather complete information and to improve understanding of safety and health issues, contrary to Congressional intent. Furthermore, the duty to make accurate multi-year records available upon request arises when the request is made, and the statute of limitations therefore does not begin to run until the request is made and the employer fails to comply.

It therefore follows that section 8(c) of the Act authorizes the Secretary to enact regulations that impose a continuing obligation on employers to make and maintain accurate records of work-related illnesses and injuries. Not only are such recordkeeping regulations expressly called for by the language of section 8(c), but they are also consistent with Congressional intent and the purpose of the OSH Act. The Supreme Court recognizes a "familiar canon of statutory construction that remedial

legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). And reading the statute in light of its protective purposes further supports the Secretary's interpretation that the Act calls for treating the duty to record injuries and illnesses as a continuing obligation. *See, e.g., United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1090–91 (D. Minn. 1982) (requirement in Consumer Product Safety Act to "immediately inform" the government of product defects is read as creating a continuing obligation to report because any other reading would frustrate the statute's goal of protecting the public from hazards).

The legislative history of the OSH Act also demonstrates that Congress wanted employers to have accurate injury and illness records both for the purpose of making workplaces safer and healthier and for the purpose of allowing the federal government to study the nation's occupational safety and health problems. As the House Committee on Education and Labor noted, before passage of the OSH Act it was impossible to know the extent of national occupational safety and health issues due to variability in state reporting measures; thus, Congress viewed it as an "evident Federal responsibility" to provide for "[a]ccurate, uniform reporting standards." H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971). *See also* 29 U.S.C. 673(a) ("The Secretary shall compile accurate statistics on work injuries and illnesses . . ."); *Sec'y of Labor v. Gen. Motors Corp.*, 8 BNA OSHC 2036, 2039 (Rev. Comm'n 1980) ("Examination of the legislative history of [sections 8(c)(1) and 8(c)(2)] . . . shows a clear congressional intent that th[e] reporting requirement be interpreted broadly in order to develop information for future scientific use.').

Some commenters, including the Coalition for Workplace Safety and the American Health Care Association, stated a concern that interpreting section 8(c) to authorize continuing violations means that OSHA is claiming unfettered discretion to essentially eliminate any statute of limitations for recordkeeping violations. Exs. 0011, 0013, 0020. OSHA disagrees. OSHA's interpretation does not mean that the Secretary's authority is unconstrained. Under section 8(c)(1), the records the Secretary requires must be "necessary or appropriate" to enforcement of the Act or to gathering information regarding

the causes or prevention of occupational accidents or illnesses. 29 U.S.C. 657(c)(1). Under section 8(d), the Secretary must obtain information with a minimum burden on employers, especially small businesses, and reduce unnecessary duplication to the maximum extent feasible. 29 U.S.C. 657(d). Moreover, under the Paperwork Reduction Act, the Secretary and the Office of Management and Budget must determine that a recordkeeping requirement will have practical utility and will not be unduly burdensome. 44 U.S.C. 3506(c)(3).

2. The OSH Act's Statute of Limitations Does Not Define OSHA Violations or Address When Violations Occur, Nor Does the Language in Section 9(c) Preclude Continuing Recordkeeping Violations

As explained previously, it is section 8(c) of the OSH Act that authorizes the Secretary to establish the nature and scope of employers' recordkeeping obligations. The OSH Act's statute of limitations in section 9(c) deals only with the question of *when* OSHA can cite a violation; it says nothing about what *constitutes* a violation, or when a violation *occurs*. A violation is a breach of a duty, and the question of what duties the Secretary may prescribe must logically be dealt with prior to addressing the statute of limitations. Section 9(c) cannot be read as prohibiting the Secretary from imposing continuing recordkeeping obligations on employers covered by the OSH Act when the text and legislative history of the Act show that section 8(c) authorizes the Secretary to create such obligations. Thus, the OSH Act's statute of limitations simply sets the period within which legal action must be taken *after* the obligation ceases or the employer comes into compliance. *See, e.g., Inst. For Wildlife Prot. v. United States Fish & Wildlife Serv.*, No. 07–CV–358–PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007) (declining to apply applicable statute of limitations to "nullify . . . [the government's] ongoing duty to designate critical habitat" for an endangered species "and . . . insulate the agency from challenges to any continued inaction").

Moreover, "statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose," *Interamericas*, 111 F.3d at 382 (citing *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386 (1984) and *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)), and nothing in section 9(c) precludes continuing violations in recordkeeping cases. To the contrary, the language in section 9(c)

is very general, providing only that “[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation.” 29 U.S.C. 658(c). The “occurrence” of something is not necessarily a discrete event; it can encompass actions or events that continue over time. For example, one dictionary defines “occurrence” as “the existence or presence of something.” <http://dictionary.cambridge.org/dictionary/american-english/occurrence> 2. See also, e.g., *PECO Energy Co. v. Boden*, 64 F.3d 852, 856–57 (3d Cir. 1995) (scheme of repeated thefts over the span of six years constituted a single “occurrence” such that only one insurance deductible applied to the resulting loss). Similarly, the term “occurrence of any violation” in section 9(c) does not mean that an OSHA violation is necessarily a discrete event that takes place at one, and only one, point in time.

Had Congress wanted the statute of limitations to run from the time a violation first occurred, it could have used language so stating. Indeed, Congress has used language more readily susceptible to that interpretation in other statutes. See, e.g., the Multiemployer Pension Plans Amendments Act, 29 U.S.C. 1451(f)(1) (statute of limitations runs from “the date on which the cause of action arose”); the Federal Employers’ Liability Act, 45 U.S.C. 56 (statute of limitations runs from “the day the cause of action accrued”); the general statute of limitations governing civil actions against the United States, 28 U.S.C. 2401(a) (claims barred unless “filed within six years after the right of action first accrues”).

This new rule is intended to clarify that if an employer fails to record an injury or illness within seven days, the obligation to record continues on past the seventh day, such that each successive day where the injury or illness remains unrecorded constitutes a continuing “occurrence” of the ongoing violation. If the employer records the injury on the twentieth, thirtieth, or some later day, the violation ceases to occur at that point, and any citation would need to be issued within six months of the cessation of the violation. This position is entirely consistent with section 9(c). Neither OSHA nor the Commission nor any court has ever treated section 9(c) as precluding all continuing violations. Indeed, continuing violations are common in the OSHA context, with the Commission taking the position that violations of OSHA requirements, including recordkeeping violations, generally continue as long as employees

are exposed to the non-complying conditions. See, e.g., *Sec’y of Labor v. Arcadian Corp.*, 20 BNA OSHC 2001 (Rev. Comm’n 2004) (violation of the OSH Act’s general duty clause stemming from the unsafe operation of a urea reactor); *Johnson Controls*, 15 BNA OSHC 2132 (recordkeeping); *Sec’y of Labor v. Safeway Store No. 914*, 16 BNA OSHC 1504 (Rev. Comm’n 1993) (hazard communication program and material safety data sheets); *Sec’y of Labor v. Yelvington Welding Serv.*, 6 BNA OSHC 2013 (Rev. Comm’n 1978) (fatality reporting); *Cent. of Georgia R.R.*, 5 BNA OSHC 1209 (housekeeping).⁵ Indeed, the *Volks II* panel also acknowledged that the duties to preserve records, to train employees, and to correct unsafe machines may continue. 675 F.3d at 756, 758. The OSH Act simply would not achieve Congress’ fundamental objectives if basic employer obligations were not continuing.

These cases reflect fundamental OSH Act principles. Safety and health standards are rules that require, *inter alia*, “conditions.” 29 U.S.C. 652(8). The absence of a required condition violates the standard. It does not matter when the absence first arose or how long it has persisted. If a condition is required and is not present (e.g., a machine is not guarded or a hazardous materials container is not labeled), a violation occurs and a citation requiring abatement may be issued within six months of the observed noncompliance. This construction follows from the language of the Act and is essential to the Secretary’s ability to enforce compliance. Accordingly, continuing obligations and violations are a regular occurrence under the OSH Act. Nothing in section 9(c), which applies equally to standards and regulations such as recordkeeping requirements, bars them.

In addition, continuing violations have been found to exist under other laws with statutes of limitations that contain language similar to that in section 9(c) of the OSH Act. For example, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), the Supreme Court addressed the statute of limitations in Title VII of the Civil Rights Act of 1964, which precludes the filing of claims a certain number of days after the alleged unlawful employment practice

“occurred.” See 42 U.S.C. 2000e–5(e)(1). The Court concluded that the statute authorized application of a continuing violations doctrine in hostile work environment cases, holding that in such cases, an unlawful employment action can “occur” over a series of days or even years. *Morgan*, 536 U.S. at 116–20. Similarly, in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Supreme Court found continuing violations of the Fair Housing Act, which at the time required the commencement of civil actions within 180 days “after the alleged discriminatory housing practice occurred.” And in *Postow*, 627 F.2d 1370, the D.C. Circuit found a continuing violation of the Truth-in-Lending Act, which, at 15 U.S.C. 1640(e), provides that actions must be brought within one year from the date of the “occurrence” of the violation. The language of section 9(c) of the OSH Act is at least equally receptive to continuing violations, since it allows citation within six months of “the occurrence of any violation.” “Occurrence” of “any” violation is open-ended language that does not suggest that a violation can exist at only one moment in time.

Notably, even the *Volks II* majority appeared to recognize that the word “occurrence” does not necessarily have a single fixed meaning, stating that “[o]f course, where . . . a company continues to subject its employees to unsafe machines . . . or continues to send its employees into dangerous situations without appropriate training . . . OSHA may be able to toll the statute of limitations on a continuing violations theory since the dangers created by the violations persist.” 675 F.3d at 758. The court also acknowledged that a violation of the record-retention requirement—through the loss or destruction of a previously-created record—is a violation that continues from the time of the loss or destruction until the conclusion of the five-year retention period. *Id.* at 756; see *id.* at 763 (concurring opinion).

Moreover, continuing violations have been found even under statutes of limitations that contain language that is arguably *less* receptive to continuing violations than section 9(c); courts implicitly recognize that the underlying legal requirement, not the statute of limitations, determines whether there is a continuing legal obligation. For example, courts have found continuing violations of various laws that are governed by the general five-year statute of limitations for criminal cases in 18 U.S.C. 3282(a), which requires initiation of an action “within five years . . . after

⁵ The American Petroleum Institute stated that the OSH Act limits continuing obligations only to “physical hazards.” Ex. 0020. This assertion finds no basis in the statute or case law. In any event, access to accurate injury and illness records helps employers and employees address and avoid physical hazards. See Section II.B.3. Legal Authority.

. . . [the] offense shall have been committed.” See, e.g., *United States v. Bell*, 598 F.3d 366, 368–69 (7th Cir. 2010) (continuing violation of child support payment requirements), *overruled on other grounds*, *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012); *Edelkind*, 525 F.3d 388 (same); *United States v. Are*, 498 F.3d 460 (7th Cir. 2007) (crime of being found in the United States after deportation is a continuing violation).

The D.C. Circuit has suggested that suits alleging a continuing failure to act are permissible even under the general statute of limitations governing civil actions against the United States (28 U.S.C. 2401(a)), which provides that claims are barred unless “filed within six years after the right of action first accrues.” *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006). In *Wilderness Society*, the court intimated, but did not decide, that an agency’s failure to act in accordance with a statutory deadline for action was a continuing violation, such that a lawsuit to compel agency action would not be time-barred just because it was filed more than six years after the agency first missed the statutory deadline. The court explained that because the suit “‘does not complain about what the agency has done but rather about what the agency has yet to do,’” it likely would not be time-barred. *Id.* at 589 (quoting *In re United Mine Workers of America Int’l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999)). See also, e.g., *Padres Hacia Una Vida Mejor v. Jackson*, No. 1:11–CV–1094 AWI DLB, 2012 WL 1158753 (E.D. Cal. April 6, 2012) (28 U.S.C. 2401(a) did not bar a claim based on EPA’s ongoing failure to act on complaints of discrimination within regulatory deadlines). And the Fifth Circuit found continuing violations of the Bank Holding Company Act in a case governed by the general statute of limitations in 28 U.S.C. 2462, which requires actions to enforce civil fines, penalties, or forfeitures to be “commenced within five years from the date when the claim first accrued.” *Interamericas*, 111 F.3d 376. See also, e.g., *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5th Cir. 2000) (finding a continuing violation of disposal requirements for polychlorinated biphenyls under the Toxic Substances Control Act in a case involving the general statute of limitations at 28 U.S.C. 2462); *Advance Mach Co.*, 547 F.Supp. at 1085 (finding a continuing violation of the Consumer Product Safety Act in a case governed by 28 U.S.C. 2462); cf. *Capital Tel. Co v. FCC*, 777 F.2d 868, 871 (2d Cir. 1985) (per

curiam) (deferring to FCC determination that company’s “actions constituted a ‘continuing violation’” despite an applicable statute of limitations (47 U.S.C. 415(b)) requiring the filing of complaints “within two years from the time the cause of action accrues”).

Finally, concerns about stale claims have little bearing on OSHA recordkeeping cases. OSHA recognizes that statutes of limitations are designed to “keep stale claims out of the courts.” *Havens Realty*, 455 U.S. at 380. They protect parties from having to defend against stale claims and ensure that courts are not faced with “adjudicat[ing] claims that because of their staleness may be impossible to resolve with even minimum accuracy.” *Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003). Claims generally are considered stale when so much time has passed that relevant evidence has been lost and witnesses are no longer available or do not have reliable memories of the relevant occurrence. *Id.* But “[w]here the challenged violation is a continuing one, the staleness concern disappears.” *Havens Realty*, 455 U.S. at 380. And nothing about continuing violations in the context of OSHA recordkeeping violations undermines this general principle.

The American Petroleum Institute cited an example of a case where the employer’s recordkeeper had passed away by the time of the hearing. Ex. 0020. However, reliance on witness recollection is often not necessary in recordkeeping cases because one can ordinarily ascertain whether an injury or illness occurred, and what treatment was necessary, by looking at medical reports, workers’ compensation documents, and other relevant records, even if the affected employee or other witnesses are no longer available. In fact, OSHA’s Recordkeeping Policies and Procedure Manual, CPL 02–00–135 (Dec. 30, 2004), directs compliance officers to review medical records to determine whether an employer has failed to enter recordable injuries and illnesses on the OSHA forms. And with respect to whether the employer recorded the injury or illness, the only evidence the parties and the court will need are the employer’s OSHA Log and Incident Report Forms, which existing regulations require employers to maintain for five years. Furthermore—and contrary to the comment by the American Petroleum Institute that staleness concerns primarily hurt employers (Ex. 0020)—OSHA ultimately bears the burden of proving that a recordable injury or illness occurred and the employer did not record it. Therefore, the absence of documents

and witnesses generally will be more prejudicial to OSHA’s case than to the employer’s defense. See *Secretary v. Home Depot #6512*, 22 BNA OSHC 1863 (Rev. Comm’n 2009) (vacating citation for failure to report employee fatality because Secretary did not provide sufficient evidence to establish fatality was work-related). And any limited staleness concerns that exist are outweighed by the fact that ongoing recordkeeping requirements are essential to fulfilling the purposes of the OSH Act. See generally *Connecticut Light & Power Co. v. Sec’y of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (“Consideration of limitations periods requires a fair and reasonable weighing of the conflicting concerns of the remedial intent of the [statute] . . . and the desire to keep stale claims out of the courts.”).

Moreover, under this final rule, an employer’s obligation is the same as under the current rule: To record injuries and illnesses within seven days and maintain the records for five years. The new rule simply clarifies that an employer cannot avoid the five-year maintenance requirement by failing to make the record in the initial seven days; rather, the obligation to make the record continues throughout the five-year maintenance period even if the employer fails to meet its initial obligation. Therefore, employers who record injuries and illnesses promptly, as paragraph 1904.29(b)(3) requires, will not face staleness concerns.

3. Incomplete or Otherwise Inaccurate Records of Work-Related Illnesses and Injuries Create an Ongoing Condition Detrimental to Full Enforcement of the Act

OSHA records “are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier.” *Gen. Motors Corp.*, 8 BNA OSHC at 2041. As explained previously, in **SUPPLEMENTARY INFORMATION**, Section I.B, employers must give employees (as well as OSHA and BLS) access to injury and illness records. OSHA injury and illness records are designed to be used by employers, employees, the public health community, and the government to learn about the injuries and illnesses that are occurring in American workplaces. See “Improve Tracking of Injuries and Illnesses,” 81 FR 29623 (May 12, 2016). Accurate OSHA injury and illness records enable employers to identify, and correct, hazardous conditions, allow employees to learn about the hazards they face, and permit the government to determine where and why injuries are occurring so that

appropriate regulatory or enforcement measures can be taken. (See **SUPPLEMENTARY INFORMATION**, Section I.B, earlier in this preamble, for a full discussion of the purposes served by OSHA injury and illness records.) Thus, Congress viewed accurate records as necessary for the enforcement of the Act. 29 U.S.C. 657(c). Inaccurate or incomplete injury and illness records will leave all of the relevant parties underinformed, and thereby create an ongoing hazardous condition detrimental to full enforcement of the Act. The Commission has recognized as much. See, e.g., *Gen. Dynamics*, 15 BNA OSHC at 2131 n. 17 (recordkeeping regulations “clearly are safety- and health-related”); *Johnson Controls*, 15 BNA OSHC at 2135–36 (“[A] failure to record an occupational injury or illness . . . does not differ in substance from any other condition that must be abated pursuant to . . . occupational safety and health standards . . .”).

Nor is there any meaningful distinction to be drawn between cases involving inadequate training or unsafe machines (which may also be seen as involving repeated affirmative acts, for example, sending untrained employees to work in hazardous conditions) and recordkeeping cases (involving failures to create and maintain accurate records of workplace illnesses and injuries). The lack of access—by employers, employees and OSHA—to accurate records is as much an ongoing non-complying condition under the Act as is an untrained employee or an unguarded machine. Whether the condition was created by an act of omission or of commission, the condition is one that continues to violate the Act until it is abated.

Moreover, under the system Congress established in the OSH Act, any distinction that can be drawn between action and inaction lacks legal significance. As the Commission recognizes, “unlike other federal statutes in which an overt act is needed to show any violation, the OSH Act penalizes both overt acts and failures to act in the face of an ongoing, affirmative duty to perform prescribed obligations.” *Volks I*, 23 BNA OSHC at 1417 n.3 (emphasis in original). See also, e.g., *Gen. Dynamics*, 15 BNA OSHC at 2130 (“[T]he Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only ‘act’ that the Secretary must show to prove a violation.”). That is why it is still a citable violation if an employer has left a hazardous machine unguarded for years—even though the employer has

not done anything to the machine since first removing the guard. That is why it is a violation if an employer fails to label containers of hazardous chemicals or have safety data sheets on hand, regardless of how long the inaction persists or when it first occurred. And courts regularly find that a failure to act in accordance with an ongoing legal obligation constitutes a continuing violation. Such cases have included a lender’s failure to make required disclosures to a borrower (*Postow*, 627 F.2d 1370), a sex offender’s failure to register with authorities (*George*, 625 F.3d 1124), a parent’s failure to pay child support (*Edelkind*, 525 F.3d 388), an agency’s failure to comply with statutory mandates and deadlines (*Wilderness Soc’y*, 434 F.3d 584), a company’s failure to create and maintain water sampling records (*Sierra Club*, 847 F.2d 1109), and a failure on the part of the government to act on complaints of discrimination (*Padres Hacia Una Vida Mejor*, 2012 WL 1158753).

Incomplete and inaccurate OSHA records therefore result in an *ongoing non-complying condition*—namely employers, employees, and the government being denied access to information necessary to full enforcement of the Act. This non-complying condition continues every day that the records are inaccurate.⁶

Additionally, the legislative history of the Act reflects Congress’ concern about harm resulting to employees in workplaces with incomplete records of occupational injuries and illnesses. Most notably, a report of the Senate Committee on Labor and Public Welfare stated that “[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program.” S. Rep. No. 91–1282, at 16 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative

⁶ For this reason, *Gabelli v. SEC*, 133 S.Ct. 1316 (2013), cited by Nabors Drilling USA and the National Association of Manufacturers, is inapposite. Exs. 0010, 0026. *Gabelli* deals with the discovery rule, which pertains to whether a claim’s accrual date should be extended until the plaintiff learns of the unlawful conduct. The discovery rule is not needed where, as here, the unlawful conduct is ongoing. In *Gabelli*, which involved a civil enforcement action under the Investment Advisers Act, the Supreme Court held that the five-year statute of limitations in 28 U.S.C. 2462 ran from the date a fraud was complete, not from the date the government discovered the fraud. *Gabelli* does not stand for the proposition that the language in 28 U.S.C. 2462 precludes application of a continuing violation theory. Indeed, in *Gabelli* the government agreed that the alleged illegal activity ended more than five years prior to the filing of the complaint, so there was no issue about the duration of the violative conduct.

History of the Occupational Safety and Health Act of 1970, at 156 (1971) (emphasis added). Additionally, a report from the House of Representatives shows that Congress recognized “comprehensive [injury and illness] reporting” as playing a key role in “effective safety programs.” H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971).

Some commenters, including Nabors Drilling USA and the North American Insulation Manufacturers’ Association, expressed the opinion that this rule will do nothing to improve safety and health. Exs. 0010, 0016, 0017, 0019, 0026. For the reasons already stated, OSHA disagrees, and evidence submitted by other commenters supports OSHA’s conclusion. For example, North America’s Building Trades Unions commented that records of workplace injuries and illnesses are valuable to help identify hazards and correct problems in the workplace, both immediately and over time, and that this information is of particular value in the construction industry where workers change jobsites often. Ex. 0025. The United Steelworkers (USW) provided an example of a company safety committee noticing that the employer was not accurately recording hand lacerations caused by certain equipment; later, an employee using the same equipment suffered an amputation. Ex. 0028. Properly maintained records could have helped alert the employer to the hazardous machine before the amputation occurred. The USW also provided several examples of workplace hazards that emerge as trends over time, including occupational hearing loss, exposure to hazardous chemicals, and musculoskeletal disorders. Injury and illness records are an important tool in the identification of these types of hazards. Ex. 0028.

Additionally, as noted by commenter ORCHSE Strategies, LLC, although most employers are diligent about recording injuries and illnesses as required, some are not.⁷ Ex. 0015. OSHA’s ability to enforce the recordkeeping regulations is an important tool to ensure that accurate information about workplace safety is

⁷ The USW suggested that OSHA incorporate into this rule a prohibition on employer practices that discourage reporting of injuries and illnesses. Ex. 0028. Such a prohibition would be beyond the scope of this rulemaking, which is limited to clarifying existing obligations. However, such practices are addressed in OSHA’s recent rulemaking, “Improve Tracking of Injuries and Illnesses,” 81 FR 29623 (May 12, 2016).

available and that conscientious employers are not placed at a disadvantage by employers who intentionally underreport and thus appear safer than they actually are. Ex. 0015; see Ex. 0024. Although OSHA's recordkeeping rules have always required employers to maintain records for five years, they did not previously expressly state that an employer cannot skirt this requirement by ignoring its obligation to record an injury or illness when first learning of it. This final rule clarifies the recordkeeping requirements and enables OSHA to ensure that employers make and keep an accurate, five-year record of workplace injuries and illnesses. Indeed, without this clarification, as the AFL-CIO noted, the rule would not achieve Congress' intent that the Secretary collect accurate data about workplace safety. Ex. 0024.

4. OSHA Is Acting Within Its Regulatory Authority, and Consistently With the General Case Law, in Issuing This Clarifying Rule

Several commenters expressed the view that the *Volks II* majority opinion prohibits the Secretary from imposing a continuing obligation on employers to record, and maintain records of, injuries and illnesses, with a few commenters stating that OSHA is improperly attempting to "overturn" the *Volks II* decision. Exs. 0003, 0008, 0009, 0010, 0011, 0012, 0013, 0014, 0016, 0017, 0020, 0021, 0023, 0026. OSHA disagrees. For the reasons described below, OSHA does not believe it is improper to respond to the *Volks II* decision by clarifying the regulations before there is any additional litigation over OSHA's statutory authority to establish continuing recordkeeping obligations.

Given that OSHA agrees with Judge Garland that the regulations as previously written did not clearly convey the intended continuing obligation, it would have been fruitless for OSHA to seek further appellate review of the *Volks II* decision, as some commenters suggested. See Exs. 0017, 0020, 0021. The executive branch of the federal government may elect not to appeal an adverse decision from the judiciary for a number of reasons unrelated to its views about the merits of the ruling, and, as the Supreme Court recognizes, the government's decision to forgo appeal in a particular case should not foreclose future review of relevant issues in other appropriate judicial forums. See *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984) (declining to apply non-mutual collateral estoppel against the federal government in part because doing so "would force the . . .

[government] to abandon prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review"). Thus, OSHA has acted reasonably in deciding to clarify its regulations before there is any additional litigation over the issues of statutory interpretation addressed in *Volks II*.

OSHA acknowledges that this clarification of its recordkeeping regulations to address the textual deficiencies identified by Judge Garland leaves unsettled the issue of OSHA's statutory authority to regulate in this manner. (Two of three judges on the *Volks II* panel found that the OSH Act did not permit OSHA to issue continuing recordkeeping regulations; however, Judge Garland disagreed with the majority's holding on this point.) When OSHA implements this rule, that issue will likely be the subject of future litigation in various federal courts, and potentially in the Supreme Court. Courts generally recognize the value of allowing the law to develop through litigation in multiple forums. See, e.g., *Mendoza*, 464 U.S. at 160 (noting "benefit . . . from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts."). See also *Holland v. Nat'l Mining Ass'n*, 309 F.3d 909, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit would squelch the circuit disagreements that can lead to Supreme Court review.").

OSHA has issued rules with a similar clarifying purpose following adverse court decisions before. For example, after the Fifth Circuit held that OSHA's respirator standard and the training provisions in the asbestos standard did not permit citing an employer for each individual employee who was not provided the required respirator or training, OSHA issued a final rule "to make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty." 73 FR 75568-01, 75569 (Dec. 12, 2008); see *Chao v. OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). See also 72 FR 64342-01, 64342-43 (Nov. 15, 2007) (final rule clarifying employers' responsibility to pay for PPE, issued in response to

Commission decision vacating citation for employer's failure to pay).⁸

OSHA also disagrees with the commenters, including the Coalition for Workplace Safety and the National Association of Home Builders, who suggested that a Supreme Court case, *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), precludes the Secretary from promulgating this final rule. Exs. 0011, 0013, 0017, 0020. In holding that the Ninth Circuit should have deferred to the FCC's interpretation of a statutory term instead of following the contrary interpretation the court had adopted in an earlier case, *Brand X* stated that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982 (emphasis added). *Brand X* does not control here, however, because *Volks II* did not clearly hold that the OSH Act unambiguously forecloses continuing recordkeeping violations. Indeed, the court expressly acknowledged that the loss or destruction of a record previously made constitutes a continuing violation of the requirement to retain records for five years. 675 F.3d at 756; see *id.* at 763 (concurring opinion). Moreover, although parts of the majority opinion suggest that the "clear" language in the OSH Act's statute of limitations precludes continuing record-making violations (because the majority said that the word "occurrence" requires a discrete action to have taken place within the six-month limitations period, 675 F.3d at 755-56), the court nevertheless acknowledged ambiguity in the meaning of "occurrence" when it agreed that training and machine guarding violations can continue, not because a discrete action occurs within the six-month window, but because "the dangers created by th[ose] violations persist." *Id.* at 758.⁹ Notably, nothing in

⁸ Nor is it uncommon for federal agencies to engage in nonacquiescence when faced with what they believe are erroneous court decisions. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

⁹ The Coalition for Workplace Safety also stated that the cases *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960) and *Ledbetter v. Goodyear*, 550 U.S. 618 (2007) prohibit this final rule. Ex. 0013. However, these cases do not control this rule because they involve causes of action that the Court found to accrue at one discrete moment

the OSH Act's statute of limitations distinguishes between standards (such as machine guarding requirements) and regulations (such as recordkeeping requirements). Finally, the fact that Judge Garland disagreed with the majority about what the statute says lends further support to OSHA's view that *Volks II* should not be read as holding that the OSH Act unambiguously forecloses this regulatory action.

As touched upon previously in this preamble, OSHA further believes that general case law on continuing violations clearly supports a continuing violation theory for OSHA recordkeeping violations. The *Volks II* majority stated that recordkeeping violations are not "the sort of conduct we generally view as giving rise to a continuing violation[.]" *i.e.*, the kind of violation "whose 'character as a violation . . . [does] not become clear until . . . repeated during the limitations period . . . because it is . . . [the] cumulative impact . . . that reveals . . . illegality.'" *Volks II*, 675 F.3d at 757 (quoting *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997)). While the "cumulative impact" theory is one way to establish a continuing violation (see, e.g., *Morgan*, 536 U.S. 101 (hostile environment claims under Title VII)), established precedent recognizes a second type of continuing violation—a violation that continues to occur on a day-by-day (or act-by-act) basis and whose illegality was clear from the beginning. See, e.g., *Edelkind*, 525 F.3d 388 (failure to pay child support is a continuing offense); *Sierra Club*, 847 F.2d 1109 (finding continuing violations of the Clean Water Act where the company failed to comply with permit requirements for reporting and record retention); *Postow*, 627 F.2d 1370 (violation of Truth-in-Lending Act's disclosure requirements is a continuing violation). This is the type of continuing violation relevant here because all OSHA violations—including recordkeeping violations—"continue" only insofar as non-compliant conditions exist.

The D.C. Circuit explicitly recognized the existence of these two types of continuing violation cases in *Earle*, 707 F.3d 299, 1307—a post-*Volks II* case that made no reference to the *Volks II* majority opinion, but cited, with approval, Judge Garland's concurring

in time—the illegal execution of a collective bargaining agreement and a particular instance of sex discrimination, respectively. In contrast, a failure to maintain an accurate record of workplace injuries and illnesses is a continuing violation that reoccurs each day it persists.

opinion.¹⁰ In *Earle*, the court, quoting Judge Garland, explained that where a statute "imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does.'" *Id.* at 307. And "[w]hether the obligation is continuing is a question of statutory construction." *Earle*, 707 F.3d at 307. The court explained that *Postow* had found a continuing violation of the Truth-in-Lending Act because the "goals of the Act" required construing the obligation to be continuing. *Id.* So too, the goals of the OSH Act require construing the recordkeeping obligation to be continuing. The purpose of recording injuries is to allow the recorded information to be used thereafter, throughout the retention and access period. Accurate and complete OSHA records enable employers, employees, and the government to understand the hazards present in the workplace so that corrective measures can be taken. Inaccurate and incomplete records, by contrast, are likely to be misleading.

The Secretary recognizes that one court has said that: "The Supreme Court has made clear . . . that the application of the continuing violations doctrine should be the exception, rather than the rule." *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) (not referring to any specific decision) (quoted in *Volks II*, 675 F.3d at 757). Even so, the Secretary believes that the language and purposes of the OSH Act make it clear that the duty to maintain and make available records is a continuing obligation for all the reasons set forth previously.¹¹

¹⁰ It is also noteworthy that *Earle* was written by Judge Henderson, who was part of the *Volks II* majority.

¹¹ In *Toussie v. United States*, 397 U.S. 112 (1970), the Supreme Court stated that "the doctrine of continuing offenses should be applied in only limited circumstances since . . . 'the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent.'" *Id.* at 115 (citations omitted). But *Toussie* was a criminal case subject to the general principle that "criminal limitations statutes are 'to be liberally interpreted in favor of repose.'" *Id.* (emphasis added and citations omitted). See also *Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) (per curiam) ("[T]he considerations moving the Court to decide [in *Toussie*] that the offense was not a continuing one were entwined with the criminal aspects of the matter, and the holding was limited to criminal statutes of limitations."). In contrast, as noted previously, in Legal Authority, Section II.B.2, OSHA civil enforcement cases are subject to the opposing principle that "statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose." *Interamericas*, 111 F.3d at 382.

III. Summary and Explanation of the Final Rule

OSHA is amending its recordkeeping regulations, 29 CFR part 1904, to clarify that employers covered by the recordkeeping requirements have a continuing obligation to make and maintain accurate records of all recordable injuries and illnesses. This obligation continues for as long as the employer must maintain records for the year in which an injury or illness became recordable, and it does not expire if the employer fails to create a record when first required to do so.

The continuing obligation to make and maintain accurate records of work-related illnesses and injuries is in accord with longstanding OSHA policy. Thus, this final rule does not impose new or additional obligations on employers covered by part 1904. Employers will not be required to make records of any injuries or illnesses for which records are not currently required; nor are the recording requirements themselves changing. Because the rule imposes no new burdens or obligations and changes no law, it is simply a clarification, not a substantive change (as a few commenters contended; see Exs. 0012, 0014, 0020). As discussed at length previously, the amendments are meant simply to clarify employers' obligations in the wake of the *Volks II* decision. The amendments consist of revisions to various sections of the regulatory text as well as changes to the titles of some sections and subparts. (Titles are useful for clarity but do not change the legal meaning of the text itself. See *Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189–90 (1991)).

As discussed in more detail later in this preamble, the amendments clarify the following: (1) *OSHA 300 Log*. Employers must record every recordable injury or illness on the Log. This obligation continues through the five-year record retention-and-access period if employers do not create the record when first required to do so. During that period, employers must update the Log by adding cases not previously recorded and by noting changes to previously recorded cases. (2) *OSHA 301 Incident Report*. Employers must prepare a Form 301 Incident Report for each recordable illness or injury. This obligation continues throughout the five-year retention-and-access period if employers do not prepare the report when first required to do so. Unlike with the Log, employers are not required to update the Incident Report

to show changes to the case that occur after the form is initially prepared. (3) *Year-end records review; preparation certification; and posting of the Form 300A annual summary.* These ancillary tasks are intended to be performed at particular times during each year. They are not continuing obligations.

Many commenters expressed concern that this rule increases recordkeeping obligations and thus will require employers to devote additional time and resources to recordkeeping. Exs. 0008, 0010, 0012, 0013, 0014, 0020, 0021, 0026, 0027. For example, Nabors Drilling USA commented that the new rule will force it “to hire one or more individuals whose sole job will be to police our volumes of OSHA 300, 300A, and 301 logs for accuracy one-hundred percent of the time,” and the National Federation of Independent Businesses stated its belief that the rule imposes on employers “a duty of daily reconsideration” of each “decision to not record or to not fully record an injury.” Exs. 0010, 0014. This concern is misplaced. An employer’s obligation remains the same as it was before: To record workplace injuries and illnesses within seven days and to maintain the record for five years. There is no new requirement to review or reassess existing records over the course of the maintenance period (and, correspondingly, there are no additional costs involved). The new rule simply makes clear that if an employer fails to record an injury or illness within seven days, it is not relieved of the requirement to make and keep an accurate record of all recordable injuries and illnesses for the duration of five years. As explained above in Section I.C, this has long been OSHA’s position. In response to the observation in *Volks II* that a record cannot be maintained if it was never made, 657 F.3d at 756, the new rule is meant to explain that the obligations to make and maintain records go hand-in-hand. An employer cannot skirt the requirement to maintain accurate injury and illness records by failing to make the records in the first place.

The commenters’ concern about needing to regularly reassess recordkeeping determinations applies to only one type of recordkeeping violation—the type in which a well-intentioned employer simply makes a mistake and fails to record a recordable case (e.g., due to administrative oversight or because of an erroneous belief that the case is not recordable). The commenters’ concern has no relevance to cases in which employers simply decide not to record cases they know to be recordable or in which

employers have known, pervasive shortcomings in their recordkeeping policies and systems. See Ex. 0019 (comment from American Society of Safety Engineers). While inadvertent mistakes are always a possibility with respect to any regulatory obligation—whether discrete or continuing—OSHA generally focuses its recordkeeping enforcement resources on systematic recording failures, not on one-time errors made in good-faith attempts at compliance.¹² See, e.g., *Secretary v. Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (Rev. Comm’n 1997) (affirming 176 willful recordkeeping violations where employer failed to train responsible employee on how to complete OSHA forms and failed to record dozens of injuries of a type that affected workers at “an extraordinarily high rate”). And while employers are responsible for complying with the requirement to accurately record workplace injuries and illnesses and to maintain accurate records for five years, there is no separate requirement for daily (or regular) reconsideration of decisions not to record. Thus, even though OSHA may cite an employer for failing to record a recordable case, OSHA would have no basis for separately citing an employer for failing to reconsider prior recordkeeping determinations.

A. Description of Revisions

1. Section 1904.0—Purpose

OSHA received no comments on the proposed changes to § 1904.0 and has adopted the provision as proposed. OSHA has revised this section to clarify and emphasize employers’ ongoing duties to make and maintain accurate records of each and every recordable injury and illness under part 1904. The revised language reflects the longstanding requirement for employers to provide their injury and illness records to certain government representatives and to employees and former employees and their representatives. The additions to the regulatory text include language reiterating that recordkeeping requirements are important in helping OSHA achieve its mission of providing safe and healthful working conditions for the nation’s workers. OSHA also

¹² OSHA notes, however, that an employer may be cited for an OSH Act violation as long as it has knowledge that the cited condition exists, whether or not the employer also has particular knowledge that the cited condition violates the Act. See, e.g., *Secretary v. Shaw Constr., Inc.*, 6 BNA OSHC 1341 (Rev. Comm’n 1978) (finding employer in violation of trenching standard where employer knew trench was not sloped, even though employer was unsure which OSHA standard applied to the trench). Recordkeeping violations are no different from other OSH Act violations in this respect.

added a new sentence at the end of this section to explain that records will be considered “accurate” if correct and complete records are made and maintained for each and every recordable injury and illness in accordance with the provisions of part 1904. This concept is not new, as the requirement for employers to maintain accurate records is derived directly from the OSH Act, 29 U.S.C. 657(c)(2).

2. Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

OSHA proposed to amend the title of this Subpart to better reflect the content of revised §§ 1904.4 and 1904.29, which address employers’ duties to make and maintain accurate records, as well as recordkeeping forms and criteria. OSHA received no comments on this proposed change and has adopted the change as proposed.

3. Paragraph (a) of § 1904.4—Basic Requirement

OSHA received no comments on the proposed changes to § 1904.4(a) and has adopted the changes as proposed. OSHA has revised this paragraph to reiterate the requirement that employers make and maintain accurate records of every injury and illness that meets the recording criteria in paragraphs (a)(1) through (3) of § 1904.4. The prior version of paragraph (a), which required employers to “record” injuries and illnesses, was less explicit in expressing OSHA’s intent that employers both create and keep accurate records. The revised language confirms that an employer’s duty includes both creating and preserving accurate records of recordable injuries and illnesses. To be accurate, these records must be correct and complete. The revised language also reflects more closely the language of the OSH Act at 29 U.S.C. 657(c)(1) and (2). OSHA did not propose to change, and is not changing, the recording criteria in paragraphs (a)(1) through (3) of existing § 1904.4.

4. Note to Paragraph (a) of § 1904.4

OSHA proposed to add a note to § 1904.4(a) to clarify the Secretary’s longstanding position that the duty to make and maintain accurate injury and illness records continues throughout the entire record-retention period set out in § 1904.33(a). This retention period runs for five years from the end of the calendar year that the records cover. An employer who fails to create a required record during the seven-day grace period provided for in § 1904.29(b)(3) must still create the record so long as the retention period has not elapsed.

Given this ongoing duty, OSHA may issue recordkeeping citations to employers that have incomplete or otherwise inaccurate records at any point during the retention period, and, under the six-month statute of limitations set out in 29 U.S.C. 658(c), for up to six months thereafter.

OSHA received a number of comments about its proposal to specify that the recordkeeping duty is a continuing one. These comments are addressed in Section II.B, Legal Authority, above. For the reasons stated there, OSHA has adopted the changes as proposed.

5. Paragraph (b)(3) of § 1904.29—How quickly must each injury or illness be recorded?

OSHA proposed to revise paragraph (b)(3) of § 1904.29. The paragraph, as proposed and adopted in this final rule, states OSHA's longstanding requirement that each and every recordable injury and illness must be recorded on both the OSHA 300 Log for that year and a 301 Incident Report within seven calendar days of when the employer receives information that the injury or illness occurred. OSHA is making minor wording changes to the first sentence of paragraph (b)(3), and the remainder of paragraph (b)(3), as proposed and adopted, is designed to make clear that employers who fail to record as required within seven days are not then relieved of the obligation to record. Thus, the obligation to record continues until the five-year retention period in § 1904.33(a) has ended.

North America's Building Trades Unions suggested that OSHA's use of the word "deadline" to refer to the end of the seven-day reporting period might cause confusion about whether the obligation continues after the "deadline" is missed. Ex. 0025. OSHA agrees and is removing this word in the final rule. OSHA has always interpreted the seven-day recording period as a grace period when an employer can gather information on an injury or illness without fear of being cited by OSHA for a failure to record. Similarly, OSHA has always interpreted the obligation to record as continuing throughout the record retention period. The amendments to this paragraph simply clarify OSHA's long-held positions.

Other comments disagreeing with OSHA's proposal to specify that the recordkeeping duty is a continuing one are addressed in Section II.B, Legal Authority, above. For the reasons stated there, OSHA has adopted the remainder of the provision as proposed.

6. Section 1904.32—Year-End Review and Annual Summary

OSHA proposed to amend the title of this section to more accurately describe the topics covered by § 1904.32, which include an employer's year-end review of records. OSHA received no comments on this proposed change and has adopted the change as proposed.

7. Paragraph (a) of § 1904.32—Basic Requirement

OSHA received no comments on the proposed changes to § 1904.32(a) and has adopted the changes as proposed. OSHA has revised paragraph (a)(1) of § 1904.32 to make clear that employers must examine each year's OSHA 300 Log at the end of the year to ensure that each and every recordable injury and illness is recorded on the Log, and that each entry is accurate. If an employer discovers, during this review, that an injury or illness is missing or that any aspect of an entry is inaccurate, the employer must correct the deficiency.

OSHA has added a new paragraph (paragraph (a)(2)) to § 1904.32. This paragraph provides that after reviewing and verifying the Log entries under § 1904.32(a)(1), employers must verify that all entries on the Log are accurately recorded on OSHA 301 Incident Reports. Paragraph (a)(2) clarifies that if an employer discovers, during the § 1904.32(a)(1) review, that an injury or illness was initially left off of the OSHA 300 Log, the employer must both add it to the log and create an accurate Incident Report for that injury or illness.

OSHA is moving the language from paragraph (a)(2) in § 1904.32 to paragraph (a)(3) in the same section. OSHA is adding a clause to that paragraph to explain that the annual summary should be created only after an employer verifies the accuracy of the Log. This language is for clarification purposes only and does not add any new compliance requirements. OSHA is also renumbering paragraphs (a)(3) and (4) of § 1904.32 as paragraphs (a)(4) and (5), respectively. OSHA did not propose to make, and is not making, any substantive changes to these provisions.

The specific tasks required of employers under § 1904.32(a)—to conduct a year-end review of the Log, and to prepare, certify, and post the annual summary—are in addition to the duties described elsewhere in part 1904, and do not supersede or modify them. These other duties include the fundamental continuing obligation for employers to ensure that Logs are accurate and complete and that all recordable cases are included on them. The specific steps required under

§ 1904.32(a) are supplementary tasks designed to help ensure that employers are maintaining accurate records. These supplementary tasks are to be performed at specified times (at the end of each calendar year, and from February 1 to April 30 for posting). Failure to perform one of these supplementary tasks by the required date or during the required time period is a violation of § 1904.32 that may be cited during the following six months. *See Volks II*, 675 F.3d at 761–62 (concurring opinion).

8. Paragraph (b)(1) of § 1904.32—How extensively do I have to review the OSHA 300 Log at the end of the year?

OSHA received no comments on the proposed changes to paragraph (b)(1) of § 1904.32 has adopted the changes as proposed. OSHA is amending paragraph (b)(1) of § 1904.32 to reflect the revisions to § 1904.32(a)(1). The changes to paragraph (b)(1) reiterate that employers must review the Log and its entries sufficiently to verify that all recordable injuries and illnesses for the relevant year are entered, and that those entries are accurate. In addition, OSHA is making one minor, non-substantive change to the heading of paragraph (b)(1).

9. Section 1904.33—Retention and Maintenance of Accurate Records

OSHA proposed to update the title of this section to more accurately reflect the obligations described in § 1904.33. OSHA received no comments on this proposed change and has adopted the change as proposed.

10. Paragraph (b)(1) of § 1904.33—Other than the obligation identified in § 1904.32, do I have further recording duties with respect to OSHA 300 Logs and 301 Incident Reports during the five-year retention period?

OSHA proposed to amend the heading for this paragraph to reflect that employers have recording duties with respect to Incident Reports, as well as OSHA 300 Logs, during the five-year retention period. OSHA also proposed to amend the text of paragraph (b)(1) of § 1904.33 to provide an introduction to the paragraphs that follow.

OSHA proposed to add paragraphs (b)(1)(i) through (iii) to § 1904.33 to provide further guidance to employers on the duties to update Log entries and Incident Reports. Proposed paragraph (b)(1)(i) was designed to clarify employers' duties to make and keep OSHA 300 Log entries for each and every recordable injury and illness that occurs during the year to which the Log relates. There must also be an associated Incident Report for each illness and

injury recorded on the Log. As the proposed language made explicit, these duties continue until the five-year retention period ends; thus, an employer may be required to make an entry on the OSHA Log or fill out an Incident Report for an illness or injury that occurred several years ago, if the employer either just learned of the incident or failed initially to record as required upon learning of the incident.

Proposed paragraph (b)(1)(ii) addressed changes that must be made to OSHA Logs throughout the retention period. As emphasized throughout this rule, employers' OSHA 300 Logs must be accurate. This means that if an employer discovers that any aspect of a previously-recorded case (such as the classification, description, or outcome of the case) has changed, or that a case was recorded incorrectly at the outset, the employer must amend the entry to reflect the new or corrected information.

Proposed paragraph (b)(1)(iii) reiterated the requirement in paragraph (b)(1)(i) that there must be an Incident Report for each and every recordable injury and illness. The primary purpose of proposed paragraph (b)(1)(iii) was to explain that employers are not required to update or correct existing Incident Reports during the retention period. This principle was previously stated in § 1904.33(b)(3).

OSHA received a number of comments questioning its assertion that the proposed changes to paragraph (b)(1) of § 1904.33 would not require anything new of employers. These comments are addressed below and in Section II.B, Legal Authority, above. The proposed language was intended not to change, but rather to state more clearly, what was already required under the recordkeeping rules. The prior recordkeeping rules provided that during the five-year retention period, the employer must update the Logs to include newly discovered recordable injuries and illnesses and to show changes that occurred in previously recorded cases. They did not explicitly state the employer's continuing duty to record cases it initially failed to record as required. Judge Garland's concurring opinion in *Volks II* concluded that the regulation was not worded explicitly enough to create a continuing obligation to record all such cases, as compared with newly discovered cases. *Volks II*, 675 F.3d at 760–61.

At the time OSHA amended the recordkeeping rules in 2001, it was well-established law in the Commission that employers had a continuing duty to record these previously unrecorded injuries and illnesses on their Logs. See *Gen. Dynamics*, 15 BNA OSHC 2122;

Johnson Controls, 15 BNA OSHC 2132. Nothing in the 2001 rulemaking suggested that OSHA had any intention of changing this fundamental requirement. The 2001 recordkeeping regulations required employers to promptly record cases on the 300 Log, and, throughout the five-year retention period, to add to the Log newly discovered cases even if they occurred some time ago. These rules did not assume noncompliance; in other words, the rules did not explicitly state what an employer must do if it failed to record a case that was recordable. But by stating in the 2001 regulations that newly discovered cases should be recorded, the Secretary did not intend to signify that other cases the employer had learned about need not be recorded.

The 2001 regulations also stated that employers were *not* required to “update” Form 301 Incident Reports. In *Volks II*, Judge Garland read this to mean that employers do not have to create a form at all, once the initial seven-day recording period is over. See *Volks II*, 675 F.3d at 760–61 (concurring opinion). That was not the Secretary's intention. The intent was to distinguish between the Log, which employers must update to reflect new and changed information, and the 301 Form, which employers do not need to update. (The Secretary explained that although updating the Log would provide useful, accurate information, updating Incident Reports would not enhance the information in the employer's records sufficiently to warrant the additional burden that would be associated with such a requirement. See 66 FR at 6050, January 19, 2001.) That OSHA did not require employers to update Incident Reports did not mean employers were not required to create the forms in the first place. The language in the final rule clarifies this.

For the reasons stated above and in Section II.B, Legal Authority, OSHA has adopted the proposed revisions to § 1904.33(b)(1) without change.

11. Paragraph (b)(2) of § 1904.33—Do I have to make additions or corrections to the annual summary during the five-year retention period?

OSHA proposed minor changes to paragraph (b)(2) of § 1904.33. These proposed changes were not substantive. The recordkeeping rules do not require employers to update or make changes to annual summaries during the five-year retention period. OSHA received no comments on the proposed changes to § 1904.33(b)(2) and has adopted the changes as proposed.

12. Paragraph (b)(3) of § 1904.33

OSHA proposed to delete paragraph (b)(3) from § 1904.33 and move it, in slightly modified form, to paragraph (b)(1)(iii) in § 1904.33. OSHA received no comments on this proposed change to the regulatory text and has adopted the change as proposed.

13. Section 1904.34—Change in Business Ownership

Commenter Nabors Drilling USA observed that the language in the proposed rule might create confusion about the obligations of a new owner regarding the accuracy of the previous owner's injury logs. Ex. 0010. To eliminate any potential confusion, OSHA is adding a sentence at the end of § 1904.34 to clarify that when a business changes ownership, the new owner is not responsible for recording work-related injuries and illnesses that occurred before the change in ownership.

14. Paragraph (b)(2) of § 1904.35—Do I have to give my employees and their representatives access to the OSHA injury and illness records?

Paragraph (b)(2) of § 1904.35 addresses employee access to records created under part 1904. OSHA proposed only one minor change to this paragraph—the addition of the word “accurate” to describe the records to which employees, former employees, and their representatives must be given access. Accurate records are described in § 1904.0. OSHA received no comments on this proposed change to the regulatory text and has adopted the change as proposed.

15. Paragraph (b)(2)(iii) of § 1904.35—If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?

In paragraph (b)(2)(iii) of § 1904.35, OSHA proposed to add the term “accurate” to describe the OSHA 300 Logs to which employees, former employees, and their representatives must be given access. Accurate records are described in § 1904.0. Records are required so they can be used, and records must be accurate if they are to serve this purpose. The duty to provide an accurate record upon request arises when the request is made, not before, so the six-month statute of limitations does not begin to run until the request is made.

Nabors Drilling USA asked whether the change to § 1904.35 creates a private right of action by employees, former employees, and their representatives to pursue claims over recordkeeping. Ex. 0010. It does not. OSHA received no

other comments on the proposed change to § 1904.35 and has adopted the change as proposed.

16. Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government

OSHA proposed to revise the title of Subpart E to more precisely reflect the requirement in the Subpart that government representatives be given access to *accurate* fatality, injury, and illness information. OSHA received no comments on this proposed change and has adopted the change as proposed.

17. Section 1904.40—Providing Accurate Records to Government Representatives

OSHA proposed to revise the title of § 1904.40 to reflect the changes to paragraph (a) of that section. OSHA received no comments on this proposed change and has adopted the change as proposed.

18. Paragraph (a) of § 1904.40—Basic Requirement

OSHA proposed to add the term “accurate” to paragraph (a) of § 1904.40 to reflect OSHA’s longstanding expectation that employers provide government representatives with *accurate* records upon request. OSHA also proposed some non-substantive wording changes to this paragraph.

Nabors Drilling USA suggested that OSHA revisit the four-business-hour timeframe in which employers must provide requested records to government representatives. Ex. 0010. This suggestion is beyond the scope of this rulemaking because this final rule only clarifies, and does not change, existing obligations. OSHA received no other comments on its proposed changes to § 1904.40(a) and has adopted the changes as proposed.

IV. State Plans

The 28 States and U.S. Territories with their own OSHA-approved occupational safety and health plans must adopt a rule comparable to the amendments that Federal OSHA is promulgating to 29 CFR part 1904 in this final rule. The States and U.S. Territories with OSHA-approved occupational safety and health plans covering private employers and State and local government employees are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. In addition, six States and U.S. Territories have OSHA-approved

State plans that apply to State and local government employees only: Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands.

Under 29 CFR 1952.4(a), States with approved occupational safety and health plans under section 18 of the OSH Act (29 U.S.C. 667) must adopt recordkeeping and reporting regulations that are “substantially identical” to those set forth in 29 CFR part 1904. State plans’ recording and reporting requirements for determining which injuries and illnesses must be recorded, and how they will be recorded, must be the same as the Federal requirements. 29 CFR 1952.4(a). State plans may promulgate injury or illness recording and reporting requirements that are more stringent than, or supplemental to, 29 CFR part 1904, after consulting with, and obtaining approval from, Federal OSHA. *Id.*

State plans may not grant variances from injury and illness recording and reporting requirements for private sector employers; any such variances must be granted by Federal OSHA. 29 CFR 1952.4(b). And a State may grant such a variance for a State or local government entity only after obtaining Federal OSHA approval. *Id.*

V. Final Economic Analysis

These revisions to OSHA’s recordkeeping rules do not constitute an economically significant regulatory action under Executive Order 12866. (See 58 FR 51735, September 30, 1993). Executive Order 12866 requires regulatory agencies to conduct an economic analysis for significant rules. A rule is economically significant under Executive Order 12866 if it will have an annual effect on the economy of \$100 million or more. This rule does not satisfy that criterion; as explained later in this preamble, neither the benefits nor the costs of the rule equal or exceed \$100 million. OSHA has also determined that this rule does not meet the definition of a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA). See 5 U.S.C. 804(2).¹³

¹³ Nor does this rule present a “novel legal issue” rendering it a significant regulatory action, as the Coalition for Workplace Safety suggests. Ex. 0013. The commenter states that the final rule presents such a novel legal issue because OSHA is “us[ing] a rule to overturn a U.S. Court of Appeals decision.” As explained above in Legal Authority, Section II.B.4, OSHA does not agree with this characterization of the rulemaking. This rule is intended simply to clarify the meaning of the recordkeeping regulations following the *Volks II* decision, and the decision does not deprive OSHA of authority to promulgate this rule.

The Regulatory Flexibility Act of 1980, as amended by SBREFA in 1996, requires OSHA to determine whether its regulatory actions will have a significant impact on a substantial number of small entities. See 5 U.S.C. 601 *et seq.* OSHA’s analysis indicates that the final rule will not have such an impact.

This final rule simply reiterates and clarifies employers’ existing obligations to record work-related injuries and illnesses. This rule does not require employers to make records of any injuries or illnesses for which records were not already required. Nor does the rule impose any new requirement that employers reconsider or reassess records once they have been made; employers remain subject to the existing requirement that they ensure the accuracy and completeness of their 300 Logs. OSHA estimated the costs of these requirements as part of the final recordkeeping rule issued in January of 2001, see 66 FR 6081–6120, January 19, 2001. The revisions contained in this final rule impose no new cost burden because they do not require employers to do anything new.

A number of commenters stated their belief that the final rule will impose additional costs because it requires employers to reassess, or “think about,” each record of a workplace injury or illness repeatedly over the course of five full years. Exs. 0008, 0010, 0012, 0013, 0020, 0021, 0026, 0027. The National Federation of Independent Businesses estimated, “conservatively,” that this rule will cost the economy \$1,933,710,222 over five years, assuming each employer has one “unrecorded or partially-recorded injury.”¹⁴ Ex. 0014. This concern is misplaced. An employer’s obligations remain the same as they have always been under the recordkeeping rules: To record workplace injuries and illnesses within seven days of when it learns of them and to maintain the records for five years. The final rule does not contain any new requirement to review or reassess existing records over the course of the maintenance period (see Section III, SUMMARY AND EXPLANATION, above); it simply

¹⁴ To arrive at this number, the commenter assumed that “daily reconsideration” would take one minute per day per unrecorded or partially recorded injury or illness, and then multiplied one minute per day by 365 days per year by five years (minus seven days for the regulatory grace period) by an estimated 1,365,985 covered businesses by \$46.72 per hour. Ex. 0014. In addition to assuming a requirement for daily reconsideration that the rule does not impose, this calculation does not account for the fact that concerns about reassessment will apply to only a subset of all recordkeeping cases. See discussion in Section III, SUMMARY AND EXPLANATION, above.

makes clear that if an employer fails to record an injury or illness within seven days of learning about it, it is not relieved of the requirement to have and keep an accurate record of all recordable injuries and illnesses for the duration of five years. Because the final rule imposes no new requirement for review of records, there are no additional costs involved for the time it would take to conduct such review. Moreover, there is no evidence in the record that employers have ever incurred meaningful costs (let alone costs on the level of those described by the National Federation of Independent Businesses) for regularly reassessing or “thinking about” their records—either in the many years before the *Volks II* decision when OSHA was enforcing recordkeeping requirements in a manner consistent with the clarification contained in this final rule, or after the decision, when it is undisputed that the Secretary may cite an employer for a failure-to-record at any time within the six-month period following a violation. Therefore, there is no reason to think employers will incur such costs now.

Even if these revisions to OSHA’s recordkeeping rules would result in some costs beyond those OSHA estimated in 2001, any such costs would be nominal. According to OSHA’s 2016 request to the Office of Management and Budget for an extension of the approval of the information collection requirements in the recordkeeping rules, an estimated 1.99 million injuries and illnesses must be recorded on OSHA logs each year. See http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-1218-002.¹⁵ Although OSHA accounted for the costs associated with full recordkeeping compliance as part of the 2001 rulemaking, and finds that this rulemaking will impose no additional costs on employers, OSHA will assume, for the sake of this analysis, that this rule will lead to the recording of a small number of recordable cases (one percent of all recordable cases) that would not have been recorded previously. In other words, OSHA will calculate the costs that would be imposed even if an additional 19,900 injuries and illnesses will be recorded as a result of the final rule. (OSHA took the same approach in

its preliminary economic analysis, although there OSHA referred to this as an assumption involving a one-percent rate of noncompliance. OSHA believes the terminology it used in the proposal led to some confusion, so it has clarified its approach for purposes of this final rule.)¹⁶ OSHA also will examine a sensitivity analysis of the results assuming that this rule will lead to the recording of an even larger number of cases (5 percent of recordable injuries and illnesses).

The National Association of Manufacturers questioned OSHA’s preliminary economic analysis, suggesting that OSHA’s one-percent and five-percent assumptions were too low. Ex. 0026. OSHA believes, however, that the true costs associated with this final rule are zero, and is using the one-percent and five-percent assumptions simply to demonstrate that even if this rule leads to the recording of some additional injuries and illnesses, any costs incurred by employers as a result will be minimal.

In 2014, OSHA prepared a Final Economic Analysis for a final rule addressing the industries entitled to a partial exemption from recordkeeping requirements and the reporting of injuries and fatalities to OSHA. In that analysis, OSHA estimated that it takes .38 of an hour to record an injury or illness on all required OSHA forms, taking into account requirements for providing access to records. See 79 FR 56130, 56165 (September 18, 2014). And according to the 2016 Information Collection Request (ICR), the average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29–9011) is estimated to be \$48.78 (which includes a 43% addition for benefits). See http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-1218-002. This means that the total estimated cost of preparing OSHA records is \$18.54 per injury or illness. The American Society of Safety Engineers and the National Association of Manufacturers questioned these estimates of time and cost as too low. Exs. 0019, 0026. OSHA stands by these estimates, however, as they have been developed carefully through multiple notice and comment

rulemakings and Paperwork Reduction Act notices. Those who believe OSHA underestimated these values are failing to recognize that not all costs of investigating an accident are attributable to OSHA’s recordkeeping requirements. Much of the same information has to be collected for workers’ compensation purposes. To avoid overlapping paperwork, OSHA allows, and many employers take advantage of, the option to use equivalent workers’ compensation forms in place of OSHA’s recordkeeping forms. See 29 CFR 1904.29(a), (b)(4).

Thus, if 19,900 cases will be recorded as a result of the final rule, the total cost associated with this regulatory action will be 19,900 times \$18.54, or approximately \$368,946 per year. And if OSHA makes the even more conservative assumption that 5 percent of 1.99 million injuries and illnesses (99,500) would be recorded as a result of the final rule, the total estimated cost of the rule, across all affected employers, would be under \$1.85 million per year. Even this hypothetical cost would only exist if employers are not currently complying fully with the existing rule, but increase their compliance as a result of this clarification.

Just as there are no (or minimal) new costs associated with this rule, the rule will result in no new economic benefits. OSHA believes the revisions to the recordkeeping rules are technologically feasible because they do not require employers to perform any actions that they were not already performing under existing requirements. And because the rule does not impose any significant new compliance costs, OSHA deems it economically feasible.

VI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA examined the regulatory requirements of the final rule to determine if they would have a significant economic impact on a substantial number of small entities. As indicated in Section V, Final Economic Analysis, earlier in this preamble, the rule is expected to have no effect, or at most a nominal effect, on compliance costs and regulatory burden for employers, whether large or small. Accordingly, OSHA certifies that the rule will not have a significant economic impact on a substantial number of small entities.

VII. Environmental Impact Assessment

OSHA has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act

¹⁵ The National Association of Manufacturers objected that BLS estimates of recordable injuries are larger than OSHA’s estimate of the total injuries that must be recorded. Ex. 0026. This is correct, but not all employers are required to record their injuries. See 29 CFR 1904.1, 2 (describing exemptions for employers with 10 or fewer employees and those in certain industries). OSHA only uses BLS recordable injury estimates for those industries required to record injuries.

¹⁶ Nabors Drilling USA commented that if OSHA is correct that 99% of employers already fully comply with the recordkeeping requirements, this final rule serves no purpose. Ex. 0010. As explained above, however, OSHA is not suggesting that 99% of employers are in full compliance with OSHA recordkeeping requirements. In any event, unlike most OSHA rulemakings, this final rule is not intended to change employers’ behavior, but rather is designed to clarify OSHA’s requirements. Thus, the current rate of recordkeeping compliance is unrelated to the need for this final rule.

(NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the Department of Labor's NEPA procedures (29 CFR part 11). OSHA finds that the revisions included in the rule will have no major negative impact on air, water, or soil quality, plant or animal life, the use of land or other aspects of the environment. And recordkeeping and reporting requirements normally qualify for categorical exclusion from NEPA requirements in any event. *See* 29 CFR 11.10(a).

VIII. Federalism

OSHA reviewed this final rule in accordance with the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption must be limited to the extent possible. Because this rulemaking action involves a regulation that is not an occupational safety and health standard under section 6 of the OSH Act, it does not preempt State law. *See* 29 U.S.C. 667(a). The effect of a final rule on states and territories with OSHA-approved occupational safety and health plans is discussed previously in Section IV, State Plans.

IX. Unfunded Mandates

OSHA cannot enforce compliance with its regulations or standards on "any State or political subdivision of a State." 29 U.S.C. 652(5). Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. But the final rule does not involve any unfunded mandates being imposed on any State or local government entity. Moreover, as discussed previously, OSHA estimates that there are no, or minimal, compliance costs associated with the rule. Therefore, this rule will not impose a Federal mandate on the private sector in excess of \$100 million in expenditures in any one year. Thus, OSHA certifies that this final rule is not a significant regulatory action within the meaning of Section 202 of the

Unfunded Mandates Reform Act (2 U.S.C. 1532).

X. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this rule in accordance with Executive Order 13175 (65 FR 67249, November 6, 2000) and determined that it does not have "tribal implications" as defined in that order. The rule does 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.

XI. Office of Management and Budget Review Under the Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and OMB regulations (5 CFR part 1320) require agencies to obtain approval from OMB before conducting any collection of information. The PRA defines a "collection of information" as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format" (44 U.S.C. 3502(3)(A)).

OSHA's existing recordkeeping forms consist of the OSHA 300 Log, the 300A Summary, and the 301 Incident Report. These forms are contained in the Information Collection Request (ICR) titled 29 CFR part 1904, Recording and Reporting Occupational Injuries and Illnesses, which OMB approved under OMB Control Number 1218-0176 (expiration date 01/31/2018).

In accordance with the PRA, OSHA solicited public comments on the July 29, 2015 proposed rule. The proposed rule also invited the public to submit comments to OMB and OSHA on the proposed collections of information with regard to the following:

- Whether the proposed collections of information are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the collections of information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automated or other technological techniques for collecting and transmitting information.

Because the proposal simply reiterated and clarified employers' existing obligations to record and maintain work-related injuries and illnesses and did not add any new collection of information, the Agency maintained the existing burden hour and cost estimates in the Recording and Reporting Occupational Injuries and Illnesses Information Collection Request. The Department also submitted this ICR to OMB for review in accordance with 44 U.S.C. 3507(d) on July 29, 2015. On October 7, 2015, OMB withheld approval of the revised ICR and issued a Notice of Action (NOA) stating that prior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates (*see* <http://www.reginfo.gov/public/do/DownloadNOA?requestID=266192>).

The final rule adds no new compliance obligations. The rule simply reiterates and clarifies employers' existing obligations to record work-related injuries and illnesses; it does not require employers to make records of any injuries or illnesses for which records were not already required. Nor does the rule impose any new requirement that employers reconsider or reassess records once they have been made; employers remain subject to the existing requirement that they ensure the accuracy and completeness of their 300 Logs. These revisions impose no new cost burden because they do not require employers to do anything new. The Department of Labor has submitted a final ICR to OMB maintaining the existing burden hours and cost estimates. A copy of this ICR is available at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201610-1218-003. OSHA will publish a separate notice in the **Federal Register** that will announce OMB results of that review. OSHA notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and the collection of information notice displays a currently valid OMB control number (44 U.S.C. 3507(a)(3)). Also, notwithstanding any other provision of law, no employer shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

OSHA received comments relating to the estimated time necessary to meet the paperwork requirements of the proposed changes published in the July

29, 2015 proposed rule. A number of commenters stated their belief that the rule will impose additional costs because it requires employers to reassess, or “think about,” each record of a workplace injury or illness repeatedly over the course of five full years. Ex. 0008, 0010, 0012, 0013, 0020, 0021, 0026, 0027. This concern is misplaced. An employer’s obligations remain the same as they are under the existing rule: To record workplace injuries and illnesses within seven days of when it learns of them and to maintain accurate records for five years. The final rule does not contain any new requirement to review or reassess existing records over the course of the maintenance period; it simply makes clear that if an employer fails to record an injury or illness within seven days of learning about it, it is not relieved of the requirement to have and keep an accurate record of all recordable injuries and illnesses for the duration of five years. Because the final rule imposes no new requirement for review of records, there are no additional costs involved for the time it would take to conduct such review.

OSHA estimates that it takes .38 of an hour to record an injury or illness on all required OSHA forms, taking into account requirements for providing access to records. The average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29–9011) is estimated to be \$48.78 (which includes a 43% addition for benefits). This means that the total estimated cost of preparing OSHA records is \$18.54 per injury or illness. The American Society of Safety Engineers and the National Association of Manufacturers questioned these estimates of time and cost as too low. Exs. 0019, 0026. OSHA stands by these estimates, however, as they have been developed carefully through multiple notice and comment rulemakings and Paperwork Reduction Act notices. Not all costs of investigating an accident are attributable to OSHA’s recordkeeping requirements. Much of the same information has to be collected for workers’ compensation purposes. To avoid overlapping paperwork, OSHA allows, and many employers take advantage of, the option to use equivalent workers’ compensation forms in place of OSHA’s recordkeeping forms. See 29 CFR 1904.29(a), (b)(4).

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about this ICR.

1. *Title*: 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses.

2. *Number of respondents*: Approximately 640,000 employers with 1,300,000 establishments are regularly required to maintain the forms.

3. *Frequency of responses*: Annually.

4. *Number of responses*: Approximately 1.99 million injury and illness cases are recorded on the OSHA forms.

5. *Average time per response*: Time required completing and maintaining an entry (other than a needlestick) on the OSHA Form 300 ranges from 5 minutes to 30 minutes and averages 14 minutes. Time required completing an entry on the OSHA 301 averages 22 minutes. OSHA estimates 40% of recordable cases are recorded on form 301.

6. *Estimated total burden hours*: The final rule adds no new compliance obligations and does not require employers to make records of any injuries or illnesses for which records are not currently required to be made. The current total burden hours for the recordkeeping (part 1904) ICR are 2,525,458.

7. *Estimated costs (capital-operation and maintenance)*: There are no capital costs for the proposed information collection.

List of Subjects in 29 CFR Part 1904

Health statistics, Occupational safety and health, Safety, Reporting and recordkeeping requirements, State plans.

Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor. It is issued pursuant to 29 U.S.C. 657, 673; 5 U.S.C. 553; and Secretary of Labor’s Order No. 1–2012 (77 FR 3912, January 25, 2012).

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, the Occupational Safety and Health Administration amends part 1904 of title 29 of the Code of Federal Regulations as follows:

PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

■ 1. Revise the authority citation for part 1904 to read as follows:

Authority: 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor’s Order No. 3–2000 (65 FR 50017), or 1–2012 (77 FR 3912), and 5 U.S.C. 553.

■ 2. Revise § 1904.0 to read as follows:

§ 1904.0 Purpose.

The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.

Note to § 1904.0: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits.

Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

■ 3. Revise the heading of subpart C to read as set forth above.

■ 4. In § 1904.4, revise paragraph (a) introductory text and add a note to § 1904.4(a) to read as follows:

§ 1904.4 Recording criteria.

(a) *Basic requirement*. Each employer required by this part to keep records of fatalities, injuries, and illnesses must, in accordance with the requirements of this part, make and maintain an accurate record of each and every fatality, injury, and illness that:

* * * * *

Note to § 1904.4(a): This obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continues throughout the entire record retention period described in § 1904.33.

* * * * *

■ 5. Revise § 1904.29(b)(3) to read as follows:

§ 1904.29 Forms.

* * * * *

(b) * * *

(3) *How quickly must each injury or illness be recorded?* You must enter each and every recordable injury or illness on the OSHA 300 Log and on a 301 Incident Report within seven (7) calendar days of receiving information that the recordable injury or illness occurred. A failure to record within seven days does not extinguish your continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses in accordance

with the requirements of this part. This obligation continues throughout the entire record retention period described in § 1904.33. See §§ 1904.4(a); 1904.32(a)(1); 1904.33(b)(1); and 1904.40(a).

* * * * *

■ 6. Revise the heading and paragraphs (a) and (b)(1) of § 1904.32 to read as follows:

§ 1904.32 Year-end review and annual summary.

(a) *Basic requirement.* At the end of each calendar year, you must:

(1) Review that year's OSHA 300 Log to verify that it contains accurate entries for all recordable injuries and illnesses that occurred during the year, and make any additions or corrections necessary to ensure its accuracy;

(2) Verify that each injury and illness recorded on the 300 Log, including any injuries and illnesses added to the Log following your year-end review pursuant to paragraph (a)(1) of this section, is accurately recorded on a corresponding 301 Incident Report form;

(3) After you have verified the accuracy of the Log, create an annual summary of injuries and illnesses recorded on the Log;

(4) Certify the summary; and

(5) Post the summary.

(b) * * *

(1) *How extensively do I have to review the OSHA 300 Log at the end of the year?* You must review the Log and its entries as extensively as necessary to verify that all recordable injuries and illnesses that occurred during the year are entered and that the Log and its entries are accurate.

* * * * *

■ 7. Revise the heading and paragraph (b) of § 1904.33 to read as follows:

§ 1904.33 Retention and maintenance of accurate records.

* * * * *

(b) *Implementation*—(1) *Other than the obligation identified in § 1904.32, do I have further recording duties with respect to the OSHA 300 Logs and 301 Incident Reports during the five-year retention period?* You must make the following additions and corrections to the OSHA Log and Incident Reports during the five-year retention period:

(i) The OSHA Logs must contain entries for all recordable injuries and illnesses that occurred during the calendar year to which each Log relates. In addition, each and every recordable injury and illness must be recorded on an Incident Report. This means that if a recordable case occurred and you

failed to record it on the Log for the year in which the injury or illness occurred, and/or on an Incident Report, you are under a continuing obligation to record the case on the Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report;

(ii) You must also make any additions and corrections to the OSHA Log that are necessary to accurately reflect any changes that have occurred with respect to previously recorded injuries and illnesses. Thus, if the classification, description, or outcome of a previously recorded case changes, you must remove or line out the original entry and enter the new information; and

(iii) You must have an Incident Report for each and every recordable injury and illness; however, you are not required to make additions or corrections to Incident Reports during the five-year retention period.

(2) *Do I have to make additions or corrections to the annual summary during the five-year retention period?* You are not required to make additions or corrections to the annual summaries during the five-year retention period.

■ 8. Revise § 1904.34 to read as follows:

§ 1904.34 Change in business ownership.

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the Part 1904 records to the new owner. The new owner must save all records of the establishment kept by the prior owner, as required by § 1904.33, but need not update or correct the records of the prior owner. The new owner is not responsible for recording and reporting work-related injuries and illnesses that occurred before the new owner took ownership of the establishment.

■ 9. Revise paragraphs (b)(2) introductory text and (b)(2)(iii) of § 1904.35 to read as follows:

§ 1904.35 Employee involvement.

* * * * *

(b) * * *

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access accurate OSHA injury and illness records, with some limitations, as discussed below.

* * * * *

(iii) *If an employee or representative asks for access to the OSHA 300 Log,*

when do I have to provide it? When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant and accurate OSHA 300 Log(s) by the end of the next business day.

* * * * *

Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government

■ 10. Revise the heading of subpart E to read as set forth above.

■ 11. Revise the heading and paragraph (a) of § 1904.40 to read as follows:

§ 1904.40 Providing accurate records to government representatives.

(a) *Basic requirement.* When an authorized government representative requests the records you keep under part 1904, you must provide accurate records, or copies thereof, within four (4) business hours of the request.

* * * * *

[FR Doc. 2016–30410 Filed 12–16–16; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–1029]

Drawbridge Operation Regulation; Northeast Cape Fear River, Wilmington, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation; modification.

SUMMARY: The Coast Guard has modified a temporary deviation from the operating schedule that governs the CSX Hilton Railroad Bridge across the Northeast Cape Fear River, mile 1.5, at Wilmington, NC. This modified deviation is necessary to manually operate the bridge and perform emergency bridge repairs. This modified deviation allows the bridge to remain in the closed-to-navigation position.

DATES: This modified deviation is effective without actual notice from December 19, 2016 through 6 p.m. on December 30, 2016. For the purposes of enforcement, actual notice will be used from December 9, 2016 at 6 p.m., until December 19, 2016.

ADDRESSES: The docket for this deviation, [USCG–2016–1029] is available at <http://www.regulations.gov>. Type the docket number in the “SEARCH” box and click “SEARCH”. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this modified temporary deviation, call or email Mr. Hal R. Pitts, Bridge Administration Branch Fifth District, Coast Guard, telephone 757–398–6222, email Hal.R.Pitts@uscg.mil.

SUPPLEMENTARY INFORMATION: On November 25, 2016, the Coast Guard published a temporary deviation entitled “Drawbridge Operation Regulation; Northeast Cape Fear River, Wilmington, NC” in the **Federal Register** (81 FR 85160). Under that temporary deviation, the bridge will remain in the closed-to-navigation position and open on signal during daylight hours, if at least 3 hours notice is given. The CSX Corporation, owner and operator of the CSX Hilton Railroad Bridge across the Northeast Cape Fear River, mile 1.5, in Wilmington, NC, has requested a modified temporary deviation from the current operating regulations due to an electrical casualty to the submarine cable and electrical components caused by Hurricane Matthew. The bridge is limited to manual operation, which requires personnel to manually operate components of the bridge in locations where additional safety measures are required, limiting the bridge to daylight operations. This modified temporary deviation, extending the date until 6 p.m. on December 30, 2016, is necessary for completion of repairs to the bridge. The bridge is a bascule draw bridge and has a vertical clearance in the closed position of 4 feet above mean high water.

The current operating schedule is set out in 33 CFR 117.829(b). Under this modified temporary deviation, the bridge will remain in the closed-to-navigation position and open on signal during daylight hours, if at least 3 hours notice is given. Communications with the bridge tender may be interrupted during drawbridge operations. Notice may be given via 904–381–5793 (CSX Engineering Help Desk), if unable to contact the bridge tender via normal established methods.

The Northeast Cape Fear River is used by a variety of vessels including small commercial fishing vessels, recreational vessels and tugs and barges. The Coast Guard has carefully coordinated the restrictions with waterway users.

Vessels able to safely pass through the bridge in the closed position may do so at any time. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transit to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 13, 2016.

Hal R. Pitts,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2016–30354 Filed 12–16–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2016–0962]

Safety Zone; Captain of the Port Boston Fireworks Display Zone, Boston Harbor, Boston, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the subject safety zone for First Night Fireworks on December 31, 2016, to provide for the safety of life on navigable waterways during the fireworks display. Our regulation for Captain of the Port (COTP) Boston fireworks display zone, Boston Harbor, Boston, MA identifies the regulated area for this fireworks display. During the enforcement period, no vessel may transit this regulated area without approval from the COTP Boston or a designated representative.

DATES: The regulation in 33 CFR 165.119(a)(2) will be enforced Saturday, December 31, 2016 from 10 p.m. until 11:59 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Mark Cutter, Sector Boston Waterways Management Division, U.S. Coast Guard; telephone

617–223–4000, email Mark.E.Cutter@uscg.mil.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.119(a)(2) on Saturday, December 31, 2016 from 10 p.m. until 11:59 p.m., for the First Night Fireworks in Boston Inner Harbor. This action is being taken to provide for the safety of life on navigable waterways during the fireworks display. Our regulation for COTP Boston fireworks display zone, Boston Harbor, Boston, MA, 33 CFR 165.119(a)(2), specifies the location of the regulated area as all U.S. navigable waters of Boston Inner Harbor within a 700-foot radius of the fireworks barge in the approximate position 42°21′41.2″ N, 071°02′36.5″ W. (NAD 1983), located off of Long Wharf, Boston, MA. The safety zone will include all U.S. navigable waters of Boston Inner Harbor within a 700-foot radius of the firework barge when in position. As specified in 33 CFR 165.119(e), during the enforcement period, no vessel may transit this regulated area without approval from the COTP Boston or a COTP designated representative.

This notice of enforcement is issued under authority of 33 CFR 165.119 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide mariners with advanced notification of this enforcement period via the Local Notice to Mariners and Broadcast Notice to Mariners.

Dated: December 7, 2016.

C.C. Gelzer,

Captain, U.S. Coast Guard, Captain of the Port Boston.

[FR Doc. 2016–30313 Filed 12–16–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AD26

Roadless Area Conservation; National Forest System Lands in Colorado

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

SUMMARY: The U.S. Department of Agriculture (USDA) is reinstating the North Fork Coal Mining Area exception to the Colorado Roadless Rule. The Colorado Roadless Rule is a State-specific rule that establishes management direction for the conservation of roadless area values and

characteristics across approximately 4.2 million acres of land located within the State of Colorado in Roadless Areas on National Forest System (NFS) lands. The North Fork Coal Mining Area exception to the Colorado Roadless Rule provides for the construction of temporary roads, if needed, for coal exploration and coal-related surface activities in the 19,700-acre area defined as the North Fork Coal Mining Area. The Colorado Roadless Rule was promulgated on July 3, 2012, but the U.S. District Court for the State of Colorado ruled that the environmental analysis performed by the U.S. Forest Service on behalf of the USDA pursuant to the National Environmental Policy Act was deficient. The Forest Service prepared a Supplemental Environmental Impact Statement (SEIS) to respond to the specific deficiencies identified in that U.S. District Court ruling. In addition, an administrative correction is being conducted by the USDA for Colorado Roadless Area (CRA) boundaries associated with the North Fork Coal Mining Area based on updated information. The correction adds an additional 200 acres to the roadless area in the 2012 Colorado Roadless Rule. These boundary corrections address changes identified by new road survey information.

DATES: This rule is effective February 17, 2017.

ADDRESSES: The public may inspect the project record for this final rule at the USDA, Forest Service, Rocky Mountain Regional Office, Strategic Planning Staff, 740 Simms Street, Golden, Colorado, between 8 a.m. and 4:30 p.m. on business days. Those wishing to inspect the project record at the Regional Office should call 303-275-5103 ahead of arrival to facilitate an appointment and entrance to the building. In addition, key documents from the project record are posted on the Forest Service Web site at www.fs.usda.gov/goto/coroadlessrule.

FOR FURTHER INFORMATION CONTACT: Jason Robertson; Acting Director; Recreation, Lands, and Minerals; Rocky Mountain Regional Office, at 303-275-5470. Individuals using telecommunication devices for the deaf may call the Federal Information Relay Services at 1-800-877-8339 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: This preamble describes the basis and purpose of the rule, summarizes public comments received and Agency responses, describes alternatives considered, and serves as the record of decision for this rulemaking. The

preamble is organized into the following sections:

- Executive Summary
- Background
- Purpose and Need
- Decision
- Decision Rationale
- Public Involvement
- Alternatives Considered
- Environmentally Preferable Alternative
- Comments on the Proposed Rule
- Regulatory Certifications

Executive Summary

The Forest Service manages approximately 14.5 million acres of public lands in Colorado distributed among eight National Forests and two National Grasslands. Of this, the Forest Service designated about 4.2 million acres as CRAs under the 2012 Colorado Roadless Rule.

In January 2001, the Roadless Area Conservation Rule (2001 Roadless Rule) was adopted into regulation (36 CFR 294, Subpart B (2001)). The 2001 Roadless Rule was subject to litigation for more than a decade that created uncertainty over the management of roadless areas throughout the Nation. This uncertainty, along with State-specific concerns, was a key factor that influenced the State of Colorado to petition the USDA for a State-specific roadless rule in 2006.

On July 3, 2012, the USDA promulgated the final Colorado Roadless Rule (36 CFR 294, Subpart D) which replaced the 2001 Roadless Rule authority over roadless areas in Colorado. The Colorado Roadless Rule included a provision that allowed for construction of temporary roads when needed for coal exploration and/or coal-related surface activities for certain lands within CRAs in the North Fork coal mining area of the Grand Mesa, Uncompahgre, and Gunnison National Forests. In July 2013, High Country Conservation Advocates, WildEarth Guardians, and the Sierra Club challenged the North Fork Coal Mining Area exception of the Colorado Roadless Rule, and in June 2014 the District Court of Colorado found the environmental documents supporting the Colorado Roadless Rule to be in violation of the National Environmental Policy Act due to analysis deficiencies. In September 2014, the District Court of Colorado vacated the North Fork Coal Mining Area exception of the Colorado Roadless Rule, but left the remainder of the Rule intact. On April 7, 2015, the Forest Service published a Notice of Intent to prepare a SEIS for rulemaking to reinstate the North Fork Coal Mining Area exception and address the concerns raised by the court (80 FR

18598). On November 20, 2015, the Forest Service published the proposed rule and Supplemental Draft Environmental Impact Statement (SDEIS) for public comment (80 FR 72665).

This Final Rule and Supplemental Final Environmental Impact Statement (SFEIS) focuses on the court-identified deficiencies as well as Endangered Species Act compliance. To address the court-identified deficiencies, the Forest Service quantified carbon dioxide and methane emissions from potential coal-mining operations and combustion of coal from the North Fork Coal Mining Area that could occur from reinstatement of the North Fork Coal Mining Area exception. In addition, the Forest Service conducted a market substitution analysis of coal absent the North Fork Coal Mining Area exception to address the court-identified deficiencies. The Forest Service also reinitiated consultation under the Endangered Species Act due to new species listings that did not exist in 2012 when the original Colorado Roadless Rule was released and changed critical habitat designations as required by the Endangered Species Act; and provided new information regarding fisheries that were not included or available for the 2012 analysis.

The Forest Service analyzed three alternatives in detail in the SEIS. Alternative A is the no action alternative in which the North Fork Coal Mining Area exception is not reinstated and the area is managed as general roadless areas under the Colorado Roadless Rule. Alternative B is the selected alternative and reinstates the North Fork Coal Mining Area exception as written in the 2012 Colorado Roadless Rule to an area of about 19,700 acres. Alternative C is similar to Alternative B in that it reinstates the North Fork Coal Mining Area exception as written in the 2012 Colorado Roadless Rule but would only apply it to an area of about 12,600 acres.

Background

The history of the Colorado Roadless Rule and, in particular, the North Fork Coal Mining Area exception, provide important context for the current rulemaking effort. Colorado Senate Bill 05-243, signed into Colorado law on June 8, 2005, created and identified a 13-member bipartisan task force to examine protection of NFS roadless areas within Colorado. The task force was directed to make recommendations to the Governor regarding management of these lands. On November 13, 2006, then-Governor Bill Owens submitted a petition to the USDA to develop a State-

specific roadless rule. The petition reflected the task force recommendations and included the North Fork Coal Mining Area exception. Governor Owens stated that the petition weighed Colorado's interests and reflected the concerns of the entire State. Specific to coal resources, the task force recommended that the Colorado Roadless Rule not apply to about 55,000 acres of CRAs within the Grand Mesa, Uncompahgre, and Gunnison National Forests. However, the rule would be applied to and protect areas with potential coal resources within CRAs on the Pike-San Isabel, Routt, White River, and San Juan National Forests, eliminating future roaded access to coal resources in those CRAs. The North Fork Coal Mining Area, as originally petitioned by Governor Owens, was about 55,000 acres and included all or portions of Currant Creek, Electric Mountain, Flatirons, Flattops-Elk Park, Pilot Knob, and Sunset CRAs.

After Governor Owens submitted the State's petition, Bill Ritter, Jr. was elected Governor of Colorado. In April 2007, then-Governor Ritter resubmitted the petition with minor modifications. Governor Ritter supported the concept of the Colorado Roadless Rule and the North Fork Coal Mining Area but explicitly asked that the area remain in the Colorado roadless inventory, rather than having the acres removed.

In July 2008, in response to public comments and discussions with coal interests, the USDA reduced the size of the North Fork Coal Mining Area to about 29,000 acres in the proposed Colorado Roadless Rule and included all or portions of Currant Creek, Electric Mountain, Flatirons, Pilot Knob, and Sunset CRAs (73 FR 43543). In 2010, John Hickenlooper was elected Governor of Colorado. Governor Hickenlooper also supported having a North Fork Coal Mining Area exception. In April 2011, in response to additional public comments, the USDA further reduced North Fork Coal Mining Area to approximately 20,000 acres in the revised proposed Colorado Roadless Rule and included all or portions of Currant Creek, Electric Mountain, Flatirons, Pilot Knob, and Sunset CRAs (76 FR 21272).

The State of Colorado, USDA, Forest Service, and the public worked in partnership for many years to find a balance between conserving roadless area characteristics for future generations and allowing management activities—including the construction of temporary roads that would not foreclose coal exploration and development—within CRAs that are important to Colorado's citizens and the

economy. Throughout the rulemaking process, a total of five formal comment periods were held by the State and Forest Service resulting in 27 public meetings and more than 312,000 comments. In addition, five meetings open to the public were held by the Roadless Area Conservation National Advisory Committee, which provided recommendations to the Secretary of Agriculture. The USDA believes that designation of the North Fork Coal Mining Area and its road exception strikes an appropriate balance between conserving roadless area characteristics and addressing State-specific concerns regarding the continued exploration and development of coal resources in the North Fork Valley.

On July 3, 2012, the USDA promulgated the final Colorado Roadless Rule, which replaced the 2001 Roadless Rule authority over roadless areas in Colorado (36 CFR 294, Subpart D). The 2012 Colorado Roadless Rule included a North Fork Coal Mining Area exception for temporary road construction but further reduced its size by removing the acreage in the Currant Creek CRA in response to public concerns and to balance the value of roadless characteristics with economic development. The final rule included a North Fork Coal Mining Area of 19,100 acres but U.S. Forest Service has since learned that number was misrepresented; the actual acreage is 19,500 acres. The reduced North Fork Coal Mining Area included all or portions of the Flatirons, Pilot Knob, and Sunset CRAs (less than 0.5% of the total CRAs). While the North Fork Coal Mining Area was included under the protections of the current rule, that rule also provided for the construction of temporary roads, if needed, for future coal exploration and development activities.

In July 2013, High Country Conservation Advocates, WildEarth Guardians, and the Sierra Club challenged the North Fork Coal Mining Area exception of the Colorado Roadless Rule in part of a larger lawsuit regarding Forest Service and Bureau of Land Management (BLM) decisions related to coal lease modifications and an exploration proposal within the North Fork Coal Mining Area (*High Country Conservation Advocates v. United States Forest Service*, 52 F. Supp. 3d 1174, D. Colo. 2014). With respect to the challenge to the Colorado Roadless Rule, in June 2014, the District Court of Colorado identified environmental analysis deficiencies including failure to disclose greenhouse gas emissions associated with potential mine operations; failure to disclose

greenhouse gas emissions associated with combustion of coal potentially mined from the area; and failure to address a report about coal substitution submitted during a public comment period. In September 2014, the District Court of Colorado vacated the North Fork Coal Mining Area exception of the Colorado Roadless Rule (36 CFR 294.43(c)(1)(ix)) but otherwise left the rule intact and operational. The court also vacated Forest Service and BLM decisions on lease modifications and exploration proposal. *High Country Conservation Advocates v. United States Forest Service*, 67 F. Supp. 3d 1262 (D. Colo. 2014).

On April 7, 2015, the Forest Service published a Notice of Intent to prepare a SEIS to reinstate the North Fork Coal Mining Area exception in the **Federal Register** (80 FR 18598). The SEIS complements the 2012 Final Environmental Impact Statement for the Colorado Roadless Rule and is limited in scope to address the deficiencies identified by the District Court of Colorado in *High Country Conservation Advocates v. United States Forest Service*. The Forest Service prepared the SEIS on behalf of the USDA to reinstate the North Fork Coal Mining Area exception with the Department of the Interior's BLM and Office of Surface Mining Reclamation and Enforcement, and the State of Colorado, Department of Natural Resources all serving as cooperating agencies under the National Environmental Policy Act regulations (40 CFR 1501.6).

Purpose and Need

The overarching purpose and need for reinstating the North Fork Coal Mining Area exception is the same as the purpose and need for the 2012 Colorado Roadless Rule. However, the specific purpose and need for reinstating the North Fork Coal Mining Area exception is to provide management direction for conserving approximately 4.2 million acres of CRAs while addressing the State's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area. The original purpose of and need for action as articulated in the 2012 FEIS is as follows:

The USDA, the Forest Service, and the State of Colorado agree that a need exists to provide management direction for conserving roadless area characteristics within roadless areas in Colorado. In its petition to the Secretary of Agriculture, the State of Colorado indicated a need to develop State-specific regulations for the management

of Colorado's roadless areas for the following reasons:

- Roadless areas are important because they are, among other things, sources of drinking water, important fish and wildlife habitat, semi-primitive or primitive recreation areas that include both motorized and non-motorized recreation opportunities, and naturally appearing landscapes. A need exists to provide for the conservation and management of roadless area characteristics.

- The USDA, the Forest Service, and the State of Colorado recognize that timber cutting, sale, or removal and road construction/reconstruction have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area characteristics. Therefore, there is a need to generally prohibit these activities in roadless areas. Some have argued that linear construction zones also need to be restricted.

- A need exists to accommodate State-specific situations and concerns in Colorado's roadless areas. These include:

- reducing the risk of wildfire to communities and municipal water supply systems,
- facilitating the exploration and development of coal resources in the North Fork Coal Mining Area,
- permitting construction and maintenance of water conveyance structures,
- restricting linear construction zones, while permitting access to current and future electrical power lines, and
- accommodating existing permitted or allocated ski areas.
- There is a need to ensure CRAs are accurately mapped.

Decision

USDA hereby reinstates part 294 of Title 36 of the Code of Federal Regulations, 36 CFR 294.43(c)(1)(ix), as described in Alternative B of the "Rulemaking for Colorado Roadless Areas Supplemental Final Environmental Impact Statement." This decision is not subject to Forest Service administrative review regulations.

In addition, USDA is administratively correcting CRA boundaries based on the increased accuracy of the inventory of forest road locations obtained since the promulgation of the Colorado Roadless Rule in 2012.

Decision Rationale

The Colorado Roadless Rule as promulgated in 2012 provides a high level of conservation of roadless area characteristics on approximately 4.2

million acres. The Colorado Roadless Rule achieves this by establishing prohibitions for tree cutting, road construction/reconstruction, and the use of linear construction zones. The 2012 Colorado Roadless Rule also addressed State-specific concerns that are important to the citizens and economy of Colorado. These concerns included: (1) Reducing the risk of wildfire to communities and municipal water supply systems, (2) permitting construction and maintenance of water conveyance structures, (3) restricting linear construction zones, (4) accommodating ski areas, and (5) facilitating exploration and development of coal resources in the North Fork Coal Mining Area. Providing for the State-specific concerns generally allows for tree cutting and road construction/reconstruction beyond what was allowed under the 2001 Roadless Rule. The 2012 Colorado Roadless Rule designated about 1.2 million acres of CRAs as upper tier to offset the potential impacts of providing the exceptions. The upper tier are acres within CRAs where exceptions to road construction/reconstruction and tree cutting are more restrictive and limiting than the 2001 Roadless Rule. The selection of Alternative B as the final rule restores the balance between providing for the conservation of roadless area characteristics across the 4.2 million acres of CRAs and addressing the State-specific concern of preserving the exploration and development opportunities of coal resources in the North Fork Coal Mining Area.

The 2012 Colorado Roadless Rule was developed in a highly collaborative manner. Five formal comment periods were held, which included 27 public meetings and resulted in about 312,000 comments. The final amount of CRA and upper tier acreage was arrived at through a collaborative process between the Forest Service and stakeholders. The final North Fork Coal Mining Area is a result of a series of compromises. The North Fork Coal Mining Area was originally proposed in Governor Owens' 2006 petition as about 55,000 acres including six different CRAs. Through the collaborative process, the North Fork Coal Mining Area was reduced to 29,000 acres in July 2008; then to 20,000 acres in April 2011; and finally to 19,500 acres in July 2012. The reinstatement of the North Fork Coal Mining Area demonstrates USDA's commitment to the public collaborative process and respects the stakeholders' good faith compromises and engagement during the original effort to

develop the 2012 Colorado Roadless Rule.

The main purpose of the SEIS and this rulemaking is to address the deficiencies identified by the District Court of Colorado, which included the quantification of greenhouse gas emissions associated with potential mine operations and coal combustion from the North Fork Coal Mining Area and consideration of coal substitution if the coal in the North Fork Coal Mining Area remained inaccessible. In addition, some public comments to the proposed version of this rule expressed concern regarding the impact the final rule could have on greenhouse gas emissions and climate change. The SEIS estimates that gross greenhouse gas emissions of recovering and combusting all 172 million short tons of coal estimated to be made accessible by the final rule could result in approximately 443 million metric tons of carbon dioxide equivalent (CO₂e) occurring between 2016 and 2054 (the projected timeframe over which coal resources could be produced). The SEIS also estimates gross annual greenhouse gas emissions of approximately 13.5 million metric tons of CO₂e at the projected low production level and 39.9 million metric tons of CO₂e at the projected high production level based on established air quality permits. These estimated emissions are conservative and likely overestimate potential greenhouse gas emissions because the analyses assumed all coal in the North Fork Coal Mining Area would be recovered and the upper bound of the analyses utilized the maximum production rates authorized under state air quality permits, which is unlikely ever to be reached.

The Forest Service conducted an analysis to determine the impact the final rule would have on net greenhouse gas emissions and considered the substitution of North Fork Coal Mining Area coal with other energy sources. This analysis assumes that if the no action alternative were selected, coal that would have otherwise become accessible via the North Fork Coal Mining Area exception would be substituted with other forms of energy or other coal to meet electricity generation demands. This analysis also assumes for modeling purposes that electricity generation across all fuel sources, by year, would remain constant across alternatives. Under the average production scenario, the North Fork Coal Mining Area would produce about 10 million short tons annually.

Results from models used by the Forest Service indicate that absent the final rule, most North Fork Coal Mining Area coal would likely be substituted

with other coal (both underground and surface coal), natural gas, and minor amounts of renewable energies contributing to electrical generation. The Integrated Planning Model (maintained by ICF International) was used by the Forest Service for coal market estimates which included a number of updates to key energy outlooks and regulatory factors (80 FR 64662), as requested by the public and the Environmental Protection Agency during the comment period for the proposed rule and SDEIS.

The SFEIS estimates the final rule would result in a net increase in carbon emissions from energy production, transportation, and combustion of about 17 million metric tons of CO₂ from 2016 to 2054 based on substitution effects. Similarly, the final rule could result in a net increase in methane gas emissions from coal operation releases of 16.7 million metric tons of CO₂e from 2016 to 2054 based on substitution effects.

According to data retrieved from EPA's Greenhouse Gas Data Inventory Explorer, coal mining in the United States accounted for 73.9 million metric

tons CO₂e of GHG emissions in 2014. Estimated annual emissions from extraction of North Fork Coal Mining Area coal would be about 1.5–4.5% of the 2014 coal-mining emissions, depending upon the scenario (assuming a constant emissions rate for comparison purposes). If transportation of North Fork Valley coal is included, estimated emissions would be about 2.4–7% of National 2014 coal-mining emissions (this is likely an overestimate as the National figure does not include transportation). National emissions of CO₂ from fossil fuel combustion for electricity generation were estimated at 2,039 million metric tons in 2014. Estimated annual CO₂ emissions from combustion of North Fork Coal Mining Area coal, including combustion assumed to occur outside the United States, would therefore be about 0.6–1.7% of the 2014 national estimate (assuming a constant emissions rate for comparison purposes). For additional context, the City of Denver estimated its 2013 annual GHG emissions to be about 13 million metric tons CO₂e (Denver Environmental Health, 2015). For the

State of Colorado in 2010 total GHG emissions were about 130 million metric tons CO₂e, of which 96 million metric tons resulted from fossil fuel combustion and 36 million metric tons resulted from coal combustion (CDPHE, 2014).

The Forest Service monetized the climate impacts associated with these projected GHG changes using a range of estimates of the social cost of carbon (SCC) and social cost of methane (SCM) developed by the U.S. Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). The IWG social cost of carbon and methane metrics provide a monetary estimate of the future damages associated with a marginal increase in carbon dioxide and methane emissions, respectively, in a particular year. See Table 1 for the results of this analysis. When accounting for the social cost of both carbon dioxide and methane emissions, the quantified net benefits of the final rule are mostly negative based on the range of social cost of carbon and methane estimates recommended by the IWG for use in regulatory analysis.

TABLE 1—PRESENT NET VALUES OF THE FINAL RULE, 2016–2054
[Millions of 2014 dollars]

Analysis	Lower estimate	3% Discount avg. (lower)	3% Discount avg. (upper)	Upper estimate
SDEIS (carbon dioxide only)	–\$12,468	–\$3,363	–\$1,624	\$1,920
SFEIS (carbon dioxide only)	–1,394	–197	253	457
SFEIS (carbon dioxide and methane)	–3,440	–964	–479	206

USDA reviewed the social cost of carbon and social cost of methane analyses contained in the SEIS. While USDA considered the full range of values presented in the analyses, it primarily focused on the 3% discount average rates for the upper and lower estimates.

USDA recognizes the provisional nature and uncertainties associated with efforts to characterize net benefits of this regulatory action. This is demonstrated by the differences in results used in the SDEIS and SFEIS (see Table 1). At the extreme, the estimated net benefits when excluding the social cost of methane emissions changed from –\$12.5 billion to –\$1.4 billion. These differences were due to a number of changes to future market and regulatory projections between the SDEIS and the SFEIS that include changes to assumptions used in the substitution analysis affected the estimates that were largely based on changes in energy markets:

- Electricity demand was revised downward;

- The natural gas supply assumption was revised, leading to lower gas prices;
- Coal supply was revised, leading to lower coal prices;
- Coal transportation costs were revised due to a higher diesel outlook; and
- The final Clean Power Plan is represented in the SFEIS while a proxy for the proposed Clean Power Plan was represented in the SDEIS.¹

The substantial differences in the estimates conducted only 6 months apart, in addition to the differences across production scenarios and discount rates, demonstrate the provisional nature of this type of analysis. The analysis of the costs of emissions impacts spans 50 years. Greater changes will likely occur during those 50 years in the context of energy

¹The United States is currently defending the legality of the Clean Power Plan. *West Virginia v. Environmental Protection Agency*, No. 15–1363 (D.C. Cir.). On February 9, 2016, the U.S. Supreme Court stayed the Clean Power Plan pending judicial review before the D.C. Circuit Court of Appeals and any subsequent proceedings in the Supreme Court.

markets, policies for management of greenhouse gases, and new technologies affecting carbon dioxide output than have occurred over the last 6 months. For example, the Department of the Interior announced in January of 2016 it would undertake a broad, programmatic review of the Federal coal program as well as pause from holding lease sales, issuing coal leases, and approving lease modification, with exceptions, during the programmatic review (Dept. of the Interior Sec. Order No. 3338, Jan 15, 2016).

According to the U.S. Energy Information Administration, in 2014 coal provided 39% of U.S. electricity generation and 60% of Colorado's energy generation. The final rule reinstates the exception for temporary road construction and reconstruction within the North Fork Coal Mining area that would facilitate future coal exploration and potential development, which in turn preserves access to approximately 172 million short tons of coal. North Fork Valley coal meets the definition for compliant and super-

compliant coal, indicating the coal has high energy value and low sulfur, ash, and mercury content, making it desirable for generation of electricity. The final rule does not authorize any coal leasing, exploration, or development. These actions would only occur after additional environmental review, public involvement, and Agency decision-making.

The USDA, Forest Service, and State of Colorado maintain that coal production in the North Fork Coal Mining Area provides an important economic contribution and stability for the communities in the North Fork Valley. Employment and income are not considered measures of benefits (in the SEIS, nor in the 2012 analysis), but are a descriptor of distribution of potential impacts of the decision on local or regional economies and populations, consistent with Office of Management and Budget Circular A-4, and Forest Service Manual 1970 and Handbook 1909.17. The SEIS analyzed a study area most affected by mining operations in the North Fork Valley and indicates mining, including all other mining activities in addition to coal mining, could account for approximately 9,500 jobs and \$871 million in labor income (2013 dollars), depending on the number of mines operating in the area. Jobs in the mining sector typically show higher average labor income than both State and study area averages. The SFEIS estimates that implementation of this final rule could support approximately 410 to 1,050 direct jobs and 840 to 2,180 total jobs (direct, indirect, and induced), which could result in \$47 to \$67 million in direct labor income and \$122 to \$172 million in total labor income (direct, indirect, and induced). It is important to note that these economic impact figures are estimates based on available information and analytical assumptions that are subject to changes in coal and energy markets, policies for management of greenhouse gases, technological advancements, and other factors.

Almost half (49%) of mineral royalties collected by the Federal Government on coal leases go to the State in which the lease is located. Of the royalties paid in Colorado, 50% goes to public school funding and 10% funds the Water Conservation Board. The remaining 40% goes to local impact programs with half going directly to the counties and towns and the other half available through a grant program for local governments. The SFEIS estimates that implementation of the final rule could result in about \$6.8 million in Federal mineral royalties. However, any new

leases could undergo negotiations with the BLM and result in a lower royalty rate.

The USDA believes that the final rule is in the public interest because the North Fork Coal Mining Area and its temporary road construction exception strikes an appropriate balance between conserving roadless area characteristics and addressing the State's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Valley. As the Colorado Department of Natural Resources noted in its comment letter on the proposed rule, this exception is "fundamental to this balance . . . to ensure that the coal mines in that area would be able to expand and continue to provide critical jobs for Coloradans." The North Fork Coal Mining Area exception applies to about 0.5% of CRAs. Its current size of 19,700 acres represents a substantial reduction of the 55,000-acre area originally proposed by the State of Colorado to be excluded from the Rule entirely. As noted in the District Court of Colorado's decision, the Colorado Roadless Rule is a product of "collaborative, compromise-oriented policymaking" and represents "a balance of important conservation interests with the also important economic need to develop natural resources in Colorado." This decision restores that balance.

USDA has given serious consideration to the potential environmental effects of this decision. This decision preserves the opportunity for subsequent coal exploration and development but does not represent an irreversible or irretrievable commitment of coal resources. Coal resources would not be leased or developed without additional environmental review, public involvement, and decision making.

The USDA considered Alternatives A and C for the final rule. However, Alternative A was not selected as the final rule because it does not meet the purpose of and need for the action to address the State's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area. Alternative C was not selected as the final rule because it provides fewer local economic benefits and makes less coal available than Alternative B.

Public Involvement

The Forest Service and cooperating agencies solicited public comments on the reinstatement of the North Fork Coal Mining Area exception through two public comment periods. The first comment period began on April 7, 2015, with the publication of the notice of

intent to prepare an SEIS in the **Federal Register**. The initial comment period ended on May 22, 2015, (45-day comment period), and approximately 119,400 letters were received. The second comment period began on November 20, 2015, with the publication of the notice of availability for the SDEIS in the **Federal Register**. This comment period ended on January 15, 2016, (45-day comment period with 11-day extension to allow for sufficient time to comment over the holiday season), and approximately 104,500 letters were received, with approximately 700 unique letters and the remainder were form letters. An additional 33,000 letters were received after the close of the comment period. In addition, two public open houses were held, one on December 7, 2015, in Paonia, Colorado, and one on December 9, 2015, in Denver, Colorado, to allow the public to ask questions and clarify information on the proposal to reinstate the North Fork Coal Mining Area exception.

Alternatives Considered

The Forest Service analyzed three alternatives in detail in the SEIS. Alternative A is the required no action alternative and reflects the continuation of current management. The District Court of Colorado vacated only the North Fork Coal Mining Area exception, leaving the remaining Colorado Roadless Rule intact. Currently the North Fork Coal Mining Area is being managed the same as non-upper tier acres with general prohibitions on tree cutting, sale, and removal; road construction/reconstruction; and use of linear construction zones within CRAs.

Alternative B, selected as the final rule, reinstates the North Fork Coal Mining Area exception as written in the 2012 Colorado Roadless Rule. It would apply the exception to about 19,700 acres, which varies from the 2012 North Fork Coal Mining Area by an additional 200 acres to align it with corrected CRA boundaries based on updated road inventory data.

Alternative C is similar to Alternative B in that it reinstates the North Fork Coal Mining Area exception as written in the 2012 Colorado Roadless Rule. The difference is that the North Fork Coal Mining Area boundaries would not include "wilderness capable" acres identified in the 2007 Draft GMUG Forest Plan revision effort per Alternative C. The exception would apply to about 12,600 acres.

All alternatives, including Alternative A, add the administrative boundary correction to CRA boundaries associated with the North Fork Coal Mining Area.

This correction is part of the final decision and will update the official CRA boundaries. The changes are based on road inventories utilizing global positioning systems of roads that existed prior to 2012 in the vicinity of the North Fork Coal Mining Area. The boundaries of the CRAs will be adjusted to match the actual location of the roads on the ground.

In addition to the alternatives analyzed in detail, the Forest Service also considered another 12 alternatives that were not carried into detailed analysis. These alternatives were raised during the public comment process and included:

- methane capture and use or reduction,
- carbon offset,
- carbon fee,
- limit of sale of North Fork coal to facilities using Integrated Gasification Combined Cycle or carbon capture/storage technologies,
- utilizing greenhouse gas and climate effects for determining the value of coal,
- energy efficiency measures and renewable energy,
- providing assistance to coal companies and local communities with switching to renewable energy,
- issuance of new leases based on bond obligations,
- requirement of an irrevocable bond,
- exclusion of the Pilot Knob CRA,
- increased upper tier acreage, and
- increased recreational opportunities.

Environmentally Preferable Alternative

The environmentally preferable alternative is the one that would best promote the national environmental policy as expressed in Section 101 of NEPA, 42 U.S.C. 4331. Generally, this means the alternative that causes the least damage to the biological and physical environment. It also means the alternative that best protects, preserves, and enhances the historic, cultural, and natural resources. In addition, it means the alternative that attains the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable or unintended consequences.

Of the three alternatives analyzed in detail, Alternative A is the environmentally preferable alternative because it would likely result in the least environmental damage. However, Alternative A does not meet the purpose of and need for the action to address the State's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area.

Comments on the Proposed Rule

U.S. Forest Service received approximately 104,500 timely comments in response to the proposed rule and SDEIS. The Forest Service considered and responded to all substantive comments and modified its analysis as appropriate in the Final SEIS. However, the final rule remains the same as the proposed rule. The following section summarizes the major themes from comments received that suggested a change in the rule and the Agency response. Substantive comments not suggesting a change in the rule (that is, changes to analyses, alleged violation of laws, and so forth) are not included here and can be found in the Supplemental Final Environmental Impact Statement SFEIS, Appendix E.

Comment: The Forest Service should not rely on the BLM's methane rulemaking process to determine the Forest Service's policy on methane capture.

Response: The USDA believes the BLM's effort will provide valuable insight into development of sound public policy on mitigating the effects of waste mine methane. Therefore, the USDA is deferring this issue to the required environmental review that is performed when specific lands are being considered for leasing because the analysis will be better informed and more efficient by:

1. A site-specific proposal when unknown factors that influence the selection of potential capture systems are better known,
2. Agencies in charge of mine safety and mine operations can be consulted, and
3. Knowing the results of BLM's waste mine methane rulemaking effort.

Comment: The Forest Service must utilize the original purpose and need as articulated during scoping. The SDEIS purpose and need was arbitrarily modified and expanded to all CRAs and not just the North Fork Coal Mining Area.

If the Forest Service is going to rely on the arbitrarily modified purpose and need statement, then a broader range of alternatives needs to be developed to address protection of all CRAs.

Response: The purpose and need statements in the scoping notice and SDEIS are paraphrased from the 2012 FEIS. As stated on page 1 of the SDEIS, the purpose and need statement is the same as the 2012 purpose and need statement for the rule. To avoid confusion, the 2012 purpose and need statement is now included verbatim in the SFEIS.

Comment: There is no demonstrated need or immediate need for the exception. There is no demonstrated need for leaving the Pilot Knob Roadless Area in for potential coal exploration and development.

Response: The North Fork Coal Mining exception considers the future long-term opportunities for coal exploration and development, not just the current situation or short-term opportunities. The established legal and regulatory framework governing Federal coal resources has not changed; therefore, the USDA retains responsibility within context of these laws and regulations to manage the surface resources in areas where Federal coal occurs. The Colorado Roadless Rule addresses this established and on-going responsibility. Further, the USDA must honor its commitment to address the concerns of the State of Colorado for management of CRAs.

Comment: The bankruptcy of Arch Coal renders some or all of this proposal moot. It is not the Forest Service's job to prevent bankruptcies.

Response: The reinstatement of the North Fork Coal Mining Area exception is not for the benefit of any specific mining company. The State-specific concern is the stability of local economies in the North Fork Valley and recognition of the contributions that coal mining have provided in the past and may provide in the future to those communities.

The commenter is correct that it is not the role of the Forest Service to prevent bankruptcies of any individual company.

Comment: The North Fork Valley is not dependent on the coal industry, a major argument for the proposal.

Response: It is the position of the State of Colorado that providing the North Fork Coal exception provides a major benefit to the North Fork Valley. It was a concern expressed by the State of Colorado when it identified 55,000 acres in this area for exemption from coverage of the roadless rule. In addition, the SEIS highlights the total employment and labor income for the six-county study area as well as the State of Colorado in 2013 for major industry sectors. The largest study area industries in terms of employment include construction, retail trade, real estate, accommodation/food services, and government. In terms of labor income, the SEIS shows that mining, construction, manufacturing, information, transportation, and the government sectors all show higher average labor income than both the State and the study area total employment averages.

The estimated annual average economic impacts by alternative are displayed in the SEIS. Potential loss of jobs and associated labor income with no additional production associated with the North Fork Coal Mining Area have been disclosed. The energy market's fluctuations have been extensively discussed. The SEIS further recognized that layoffs have occurred within the study area for the coal mining, oil/gas, and dairy sectors, and the impact of the loss of direct jobs within any sector would be followed by changes to other sectors as the ripple effects of lost wages work their way through the economy. The SEIS also acknowledged that any new layoffs within a community can be difficult, from the directly affected workers, to real estate values and local school enrollment. Not all communities within the economic study area would be affected the same; for example, some communities have diversified economies, have attracted retiree populations, or are less dependent on coal mining. Those communities that are still dependent on coal mining would be most directly affected.

Comment: The Forest Service must evaluate an alternative that forecloses exploration and mining on some of the North Fork Coal Mining Area to conserve roadless character. Alternative C is not the only reasonable alternative that the Forest Service must analyze to provide the public and decision maker a range of reasonable alternatives.

The SDEIS fails to evaluate a range of reasonable alternatives as required by NEPA and case law.

Response: The Forest Service evaluated a total of 15 alternatives, which included three alternatives considered in detail (the no action alternative and two action alternatives) and 12 alternatives that were considered but eliminated from detailed study. As an SEIS, the scope of this analysis is narrowly focused on the reinstatement of the North Fork Coal Mining Area exception into the Colorado Roadless Rule. The purpose of the Rule is to conserve roadless area characteristics while accommodating State-specific concerns, which include not foreclosing exploration and development of coal resources in the North Fork Valley. The Colorado Roadless Rule is a landscape-level programmatic rule that addresses roadless areas and prohibits road construction and tree cutting. The Colorado Roadless Rule is not a coal-mining regulation but a regulation to manage CRAs. Therefore, many of the alternatives suggested through public comments that would regulate coal mining operations were dismissed from

detailed analyses. These alternatives are better considered when site-specific proposals are submitted and additional necessary information is known. At this time, 80% of the area has not been explored and little is known. Mining may or may not occur throughout the area. It is less speculative and more efficient and practical to evaluate these alternatives in subsequent environmental analyses.

One of the purposes of a range of alternatives is to sharply define the issues and provide a clear basis for choice among options by the decision maker and the public (40 CFR 1502.14). From a roadless conservation standpoint, the primary decision is if and how much the North Fork Coal Mining Area exception should apply to roadless areas under the 2012 Colorado Roadless Rule. The range of alternatives is adequate to define this issue and provides a clear basis for choice; in this case, whether to apply the exception to 0, 12,600, or 19,700 acres.

Comment: The SDEIS fails to evaluate mitigation measures as required by NEPA and case law. The SDEIS contains no mitigation measures, instead asserting measures can wait until later stages of analyses. Then there is no description of what those measures actually are. The SDEIS fails to evaluate alternatives and mitigation measures.

Response: As an initial matter, the Colorado Roadless Rule mitigates for the exceptions that accommodate the State-specific concerns. Specifically, the Colorado Roadless Rule added 409,500 acres into the roadless inventory that were not managed under the 2001 Roadless Rule; designated 1,219,200 acres as upper tier roadless lands where exceptions to tree cutting and road construction are more restrictive and limiting than the 2001 Roadless Rule; and restricted the use of linear construction zones, which were not restricted under the 2001 Roadless Rule. These features offset or mitigated the environmental impacts of the Colorado Roadless Rule exceptions, such as the North Fork Coal Mining Area exception, to provide a final rule that is more protective to CRAs than the 2001 Roadless Rule.

The Colorado Roadless Rule includes regulatory provisions to mitigate impacts of road construction within CRAs. Specifically:

- Within a native cutthroat trout catchment or identified recovery watershed, road construction will not diminish, over the long-term, conditions in the water influence zone and the extent of the occupied native cutthroat trout habitat (36 CFR 294.43(c)(2)(iv)).

- Watershed conservation practices will be applied to all projects occurring in native cutthroat trout habitat (36 CFR 294.43(c)(2)(v)).

- Conduct road construction in a manner that reduces effects on surface resources and prevents unnecessary or unreasonable surface disturbance (36 CFR 294.43(d)(1)).

- Decommission any road and restore the affected landscape when it is determined that the road is no longer needed for the established purpose prior to, or upon termination or expiration of a contract, authorization, or permit, if possible. Require the inclusion of a road decommissioning provision in all contracts or permits. Design decommissioning to stabilize, restore, and revegetate unneeded roads to a more natural state to protect resources and enhance roadless area characteristics (36 CFR 294.43(d)(2)).

Moreover, mitigation measures would be discussed and considered in connection with NEPA compliance at the project-specific stage. Listing of potential mitigation measures that would and could be applied to future coal mining activities and then describing what they are would be redundant, inefficient, and marginally useful at the rulemaking stage. Standard mitigation measures, performance standards, and reclamation requirements applied to coal mining activities by the Forest Service, BLM, Office of Surface Mining Reclamation and Enforcement, and the State of Colorado have proven to be sufficient to protect resources based on the condition of areas previously used for surface activities related to coal mining. Hundreds of standard mitigation measures are applied to mining operations and to describe all of them in this SEIS would be encyclopedic and detract from the primary reason for this SEIS, which is to decide whether or not temporary road construction should be allowed in the North Fork Coal Mining Area.

Comment: Methane flaring should be reconsidered because it is a safe practice, and would reduce 90% of methane emissions.

Response: The Agency reconsidered methane flaring, as well as other capture and reduction measures, and did not carry this alternative through detailed study (See Chapter 2, *Alternatives Considered but Eliminated from Detailed Study* section). Methane flaring (like capture) is best considered at the leasing stage when there is more information on the specific minerals to be developed and the lands that would be impacted by a flaring operation. This decision does not foreclose any future

lease stipulations related to methane capture and use or reduction. Temporary roads authorized under this exception may also be used for collecting and transporting coal mine methane, including any buried infrastructure, such as pipelines needed for the capture, collection, and use of coal mine methane.

In addition, making flaring a regulatory requirement for coal mining operations in the North Fork Coal Mining Area could be problematic because the Mine Safety and Health Administration could ultimately decide not to allow flaring if it determined it jeopardizes the safety of the miners. To date, the Mine Safety and Health Administration has not approved a flaring system for a coal mine in the Western United States. This could result in the coal mining company being required to flare by two agencies but not allowed to flare by another agency charged with miner safety, which would be inappropriate from the perspective of agency-to-agency coordination.

Comment: If an exception is being made for coal mining, then an exception should be made to allow companies to harvest dead and diseased trees in the area.

Response: Tree cutting, including the harvesting of dead and diseased trees, is generally prohibited in CRAs with limited exceptions. The Colorado Roadless Rule allows tree cutting in non-upper tier:

- within the first 0.5 mile of a community protection zone;
- within the first 0.5 to 1.5 miles of a community protection zone if a community wildfire protection plan identifies the area as a need for treatment;
- outside of a community protection zone if there is a significant risk to a municipal water supply;
- to maintain or restore ecosystem composition, structure, and processes;
- incidental to a management activity not otherwise prohibited by the Rule; or
- for personal or administrative use.

Just because an exception is made for temporary road construction for coal removal, it does not follow that an exception should be made for tree removal. The purpose of this rule is to amend the North Fork Coal Mining Area exception by addressing identified analysis deficiencies, not to expand the existing prohibitions or exceptions that have already been decided in the 2012 Colorado Roadless Rule.

Comment: The Roadless Rule is too restrictive. The rule leaves very little flexibility for safety, fire suppression, water demands, or forest health.

Response: The Colorado Roadless Rule has several other exceptions specifically designed to address fire and fuels, water supply, and forest health. The Rule balances the need to address these issues while conserving roadless area characteristics.

Comment: Please also consider allowing bikes on all (or most) trails. The original intent of wilderness was not to preclude human powered exploration of our forests, but rather to encourage it. This rule has been warped over the years and needs to be amended.

Response: This rulemaking does not propose any activity within designated Wilderness areas. The Wilderness Act prohibits mechanized use (including bicycles) in designated Wilderness Areas. The Colorado Roadless Rule only prohibits tree-cutting, sale, or removal and road construction or reconstruction—with some exceptions in CRAs. Mountain biking access is considered as a part of individual forests' travel management plans, but is not necessarily precluded from roadless areas.

Comment: Attempts to create de facto wilderness through alternate means such as removing "wilderness capable lands" from the North Fork Coal Mining Area are beyond the scope of this analysis. For this reason, we find Alternative C to be fatally flawed due to the inclusion of such a provision. We suggest that no special consideration be given to "wilderness capable lands" in any alternatives included in future versions of the SEIS.

Response: Recommendations for Wilderness under the 1982 forest planning regulations were processed through several screens to determine if an area was to be recommended. One of the first screens was "wilderness capable." The polygons identified to be removed from the North Fork Coal Mining Area in Alternative C did not pass through the next wilderness review screen to move forward. The SEIS states that removing these acres from the North Fork Coal Mining Area does not recommend them for Wilderness. The use of the term "wilderness capable" is only a mechanism to identify these lands that were requested for removal in a scoping comment for consideration as an alternative.

Comment: The process used to create the Colorado Roadless Rule revealed that much of the land identified as "roadless" were not in-fact roadless and had contained roads used for mining, grazing, and recreational vehicles. Once, reclamation is completed, there will be more roadless than there was before. As the roaded lands recover, they will serve as a carbon sink.

Response: It is correct that some of the CRAs once contained roads used for mining, grazing, recreation, and other uses. The basis of keeping the North Fork Coal Mining Area within the roadless inventory is recognition that areas with temporary roads can regain roadless character once roads are reclaimed and the area has had time to recover.

Comment: There is increasing pressure on National Forests and wilderness by summer campers and fall hunters seeking, naturalness, solace, isolation, and peace so more roadless areas are needed.

Response: About 29% of NFS lands in Colorado have been identified as roadless and are managed under the Colorado Roadless Rule. About 22% of NFS lands in Colorado have been congressionally designated as Wilderness. Activities in Wilderness are limited to non-motorized uses, while activities in roadless areas can be motorized, mechanized, as well as non-motorized uses. The final rule reasonably balances the multiple use mandate for use of NFS lands and conservation of roadless area characteristics.

Comment: The Pilot, Sunset, and Flatiron Roadless Areas were designated precisely because they meet the criteria for roadless areas and thus should not be opened up for an exception.

Response: During the Governor's petition process, the North Fork Coal Mining area was specifically identified as an area that many interest groups desired to see managed as roadless with an exception for temporary road construction for coal development. USDA evaluated this approach and determined that these lands are best managed as described in the final rule.

Comment: Mining operations should include mitigation strategies that will minimize the environmental impact.

Response: Coal mining operations are subject to performance standards, mitigation measures, and reclamation requirements set forth in the Surface Mining Control and Reclamation Act of 1977, as well as State-specific coal mining statutes, among other Federal and State laws. The Colorado Division of Reclamation, Mining and Safety ensures that coal mining operations in the state comply with these laws. In addition, under its legal and regulatory authority associated with coal leasing, the Forest Service applies mitigation measures in the form of lease stipulations when an application for a new coal lease or lease modification has been received. The Forest Service provides these mitigation measures (stipulations) to the BLM as a condition

of consent to lease (43 CFR 3425.3, 3432.3). At the permitting stage, the Forest Service also brings forward conditions within its jurisdiction to mitigate use and effects on NFS lands for the State to include in coal mine permits.

Comment: Regulatory authorities must conduct due diligence on the financial positions of present and future self-bond guarantors, particularly with respect to prior or duplicate encumbrance of their assets. If surface mine reclamation self-bonds are found to be secured by assets that will not be available in the event of a reclamation claim, State regulatory authorities must require alternative, collateralized financial assurance. The danger of effectively unsecured reclamation bonds is especially acute in a time of significant debt loads and shrinking coal markets.

Response: The State of Colorado administers reclamation bonds under its delegated Surface Mining Control and Reclamation Act authority from Office Surface Management Reclamation and Enforcement.

Comment: The Forest Service and Office of Surface Mining Reclamation and Enforcement should require all bonding as necessary to complete all future reclamation and restoration needs in the exception area considering the company's recent bankruptcy filing will not jeopardize the prior or future commitments to reclamation and restoration associated with any and all operations of the West Elk Mine. The Office of Surface Mining Reclamation and Enforcement has admitted that bonding is not high enough to complete remediation.

Response: Reclamation bonds are required and administered by the State of Colorado under its delegated Surface Mining Control and Reclamation Act authority from the Office Surface Mining Reclamation and Enforcement. It is inefficient and impractical for the Forest Service to engage in this analysis, which is focused on the prohibition of road construction/reconstruction and tree cutting within roadless areas.

Comment: The road construction will open up the area to off road activities. Temporary roads never stay temporary because of things like pipelines and management facilities. The temporary roads should be open to off road vehicles/motorcycles. The temporary roads should only be open to recreational access.

Response: The 2012 Colorado Roadless Rule is specific on future road use in order to maintain the roadless character of the CRAs. For any use of an exception that allows for a temporary

road, those temporary roads are not open to public travel. For further information, please see 36 CFR 294.43(c)(4):

Comment: A legally sufficient analysis would have found that Pilot Knob provides winter range for deer and bald eagles, and that it alone provides the only severe winter range for elk.

Response: The specialist reports, Biological Evaluation, and Biological Assessment for the 2012 Colorado Roadless Rule Final Environmental Impact Statement used explicit information about occurrence of wildlife and special status species by roadless area that were available at the time from accepted reputable sources, including Colorado Parks and Wildlife records, Colorado Natural Heritage Program, and Forest Service records. This included information similar to what the commenter describes for the roadless areas associated with the North Fork Coal Mining Area. The data did inform the evaluation of alternatives for the Colorado Roadless Rule. The Forest Service is unaware of substantial new information since that time for general fish and wildlife resources or concerns, whether for the larger roadless network or specifically for the North Fork exception area. Consequently, the evaluations in the SEIS focus on those species of plants and animals for which there was substantial new information since the 2012 rulemaking, specifically related to more recent Endangered Species Act listings and critical habitat designations affecting National Forests in Colorado. The Agency also reconsidered the effects of the roadless rule and North Fork Coal Mining Area exception and changed the 2012 determination for the endangered fishes of the Upper Colorado River. Wildlife-related concerns like the commenter identified will be addressed and mitigated as appropriate in future NEPA evaluations, forest plan consistency reviews, and Forest Service decisions. Site-specific information existing at the time a proposal is made to explore for or mine coal—which could be 50 years in the future—will better inform the analysis.

Comment: Rural areas could make a lot of money from drought resistant farming if we would fix our rail lines. Make Arch build more rail lines rather than more roads.

Response: The Forest Service is not familiar with the success of drought resistant farming on the privately held lands in and around the North Fork Valley. The Agency is not familiar with problems with the existing rail lines. It is not within the Forest Service's authority to make companies build

infrastructure that is outside the purview of the Forest Service.

Comment: The proposed action is not in the public interest because it would release climate pollution, waste methane, adversely impact the global economy and environment with billions in climate damages, degrade high elevation-forests and wildlife habitat, and benefit only one company—now bankrupt Arch Coal.

The new decision should be based on the SDEIS analysis and not the prior deals made. The SDEIS demonstrates the 2012 FEIS was wrong in its conclusion, and the Rule would have little impact on climate change.

Response: The Secretary of Agriculture or his designee considered the public interest, SFEIS, comments received on the SDEIS, and additional information contained in the project record, as needed, to determine whether to reinstate the North Fork Coal Mining Area exception.

Comment: Many commenters urged the selection of a certain alternative for multiple reasons. Support and opposition were voiced for all the alternatives presented in the SDEIS. The majority of comments urged the selection of Alternative A, the no action alternative, for a wide variety of reasons including, but not limited to:

- Adverse impacts to roadless areas, climate change, local real estate values, wildlife habitat, listed species, recreation values, and human health/safety;
 - Ecosystem services are greater than the benefits of the coal;
 - Social cost and damage to the global environment;
 - Contribution to social unrest;
 - Undermining of the renewable energy industry;
 - Coal is available elsewhere;
 - Lack of rationale presented in the SDEIS for selection of an action alternative; and
 - Lack of need.
- Reasons commenters gave for the selection of Alternative B included, but were not limited to:
- The multi-year collaborative effort to develop the 2012 final rule;
 - Mining jobs are among the highest paying jobs in the area;
 - Quality of North Fork Valley coal;
 - Impacts to local economies; and
 - U.S. energy needs.

Reasons commenters gave for selection of Alternative C included, but were not limited to: It protects the most sensitive and wilderness capable areas while providing economic opportunities, and protects nearly as much resources as Alternative A.

Response: The Secretary of Agriculture or his designee considered

the public interest, SFEIS, and comments received on the SDEIS, and additional information contained in the project record, as needed, to determine whether to reinstate the North Fork Coal Mining Area exception.

Regulatory Certifications

Regulatory Planning and Review

When the proposed rule was circulated for public comment, USDA identified that it had been designated as a non-significant regulatory action under Executive Order 12866. USDA consulted with the Office of Management and Budget (OMB) during the preparation of the final rule, and OMB determined that the regulation was economically significant. The SFEIS includes a detailed benefit-cost analysis.

Regulatory Flexibility Act and Consideration of Small Entities

The USDA certifies that the final regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities as determined in the 2012 Regulatory Flexibility Analysis because the final rule does not subject small entities to regulatory requirements. Therefore, notification to the Small Business Administration's Chief Council for Advocacy is not required pursuant to Executive Order 13272.

Energy Effects

The Colorado Roadless Rule and the North Fork Coal Mining Area exception do not constitute a "significant energy action" as defined by Executive Order 13211. No adverse effects to supply, distribution, or use of energy are anticipated beyond what has been addressed in the 2012 FEIS or the Regulatory Impact Analysis prepared in association with the final 2012 Colorado Roadless Rule. The reinstatement of the North Fork Coal Mining Area exception does not restrict access to privately held mineral rights, or mineral rights held through existing claims or leases, and allows for disposal of mineral materials. The final rule does not prohibit future mineral claims or mineral leasing in areas otherwise open for such. The rule provides a regulatory mechanism for consideration of requests for modification of restriction if adjustments are determined to be necessary in the future.

Federalism

The USDA has determined that the final rule conforms to the Federalism principles set out in Executive Order 13132 and does not have Federalism implications. The rule would not

impose any new compliance costs on any State, and the rule would not have substantial direct effects on States, on the relationship between the National Government and the States, nor on the distribution of power and responsibilities among the various levels of government.

The final rule is based on a petition submitted by the State of Colorado under the Administrative Procedure Act at 5 U.S.C. 553(e) and pursuant to USDA regulations at 7 CFR 1.28. The State's petition was developed through a task force with local government involvement. The State of Colorado is a cooperating agency pursuant to 40 CFR 1501.6 of the Council on Environmental Quality regulations for implementation of NEPA.

Takings of Private Property

The USDA analyzed the final rule in accordance with the principles and criteria contained in Executive Order 12630. The Agency determined that the final rule does not pose the risk of a taking of private property.

Civil Justice Reform

The USDA reviewed the final rule in context of Executive Order 12988. The USDA has not identified any State or local laws or regulations that are in conflict with this final rule or would impede full implementation of this rule. However, if this rule were adopted, (1) all State and local laws and regulations that conflict with this rule or would impede full implementation of this rule would be preempted; (2) no retroactive effect would be given to this rule; and (3) this rule would not require the use of administrative proceedings before parties could file suit in court.

Executive Order 13175/Tribal Consultation

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments". Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.

The Forest Service has assessed the impact of this final rule on Indian tribes and determined that this rule does not,

to our knowledge, have tribal implications that require consultation under E.O. 13175. If a Tribe requests consultation, the Forest Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Unfunded Mandates

The USDA has assessed the effects of the Colorado Roadless Rule on state, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by State, local, or tribal governments, or anyone in the private sector. Therefore, a statement under section 202 of title II of the Unfunded Mandates Reform Act of 1995 is not required.

Paperwork Reduction Act

This final rule does not call for any additional recordkeeping, reporting requirements, or other information collection requirements as defined in 5 CFR 1320 that are not already required by law or not already approved for use. The rule imposes no additional paperwork burden on the public. Therefore the Paperwork Reduction Act of 1995 does not apply to this proposal.

List of Subjects in 36 CFR Part 294

National Forests, Recreation areas, Navigation (air), State petitions for inventoried roadless area management.

For the reasons set forth in the preamble, the Forest Service amends part 294 of title 36 of the Code of Federal Regulations as follows:

PART 294—SPECIAL AREAS

Subpart D—Colorado Roadless Area Management

- 1. The authority citation for part 294, subpart D, continues to read as follows:

Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

- 2. In § 294.43, revise paragraph (c)(1)(ix) to read as follows:

§ 294.43 Prohibition on road construction and reconstruction

(c) * * *

(1) * * *

(ix) A temporary road is needed for coal exploration and/or coal-related surface activities for certain lands with Colorado Roadless Areas within the North Fork Coal Mining Area of the Grand Mesa, Uncompahgre, and Gunnison National Forests as defined by the North Fork Coal Mining Area displayed on the final Colorado

Roadless Areas map. Such roads may also be used for collecting and transporting coal mine methane. Any buried infrastructure, including pipelines, needed for the capture, collection, and use of coal mine methane, will be located within the rights-of-way of temporary roads that are otherwise necessary for coal-related surface activities including the installation and operation of methane venting wells.

* * * * *

Robert Bonnie,

Under Secretary, Natural Resources and Environment.

[FR Doc. 2016-30406 Filed 12-16-16; 8:45 am]

BILLING CODE 3411-15-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA-HQ-OW-2016-0569; FRL-9953-24-OW]

RIN 2040-AF63

Credit Assistance for Water Infrastructure Projects

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule; request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is issuing an interim final rule to implement a new program authorized under Subtitle C of the Water Resources Reform and Development Act of 2014 (WRRDA), which is referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects. Projects will be evaluated and selected by the Administrator of the EPA based on criteria set out in this rule using weightings established in a separate Notice of Funding Availability (NOFA). Following project selection, individual credit agreements will be developed through negotiations between the project sponsors and EPA. EPA is soliciting comments on an interim final rule that establishes the guidelines for the new credit assistance program for water and infrastructure projects and the process by which EPA will administer such credit assistance. The interim final rule primarily restates and clarifies statutory language while establishing approaches to specific procedural issues left to EPA's discretion. This interim final rule pertains to a matter involving a federal

loan and loan guarantee program and is therefore exempt from the rulemaking requirements of the Administrative Procedure Act. As such, EPA is issuing this rule as interim final.

DATES: Effective December 19, 2016.

Comments must be received on or before February 17, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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 <http://www2.epa.gov/dockets/commenting-epa.dockets>.

FOR FURTHER INFORMATION CONTACT:

Jordan Dorfman, Water Infrastructure Division, Office of Wastewater Management, Mail Code 4201C, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC, 20460; telephone number: (202) 564-0614; email address: dorfman.jordan@epa.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Water Infrastructure Needs and Current Sources of Financing
- III. Program Information
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 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
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 - I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - J. National Technology Transfer and Advancement Act (NTTAA)
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 - M. Congressional Review Act

I. Background

Congress enacted the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) as part of the Water Resources Reform and Development Act of 2014, as amended by sec. 1445 of Public Law 114-94¹ and codified at 33 U.S.C. 3901-3914. WIFIA establishes a new federal credit program for water infrastructure projects to be administered by EPA.

Congress authorized EPA to provide federal credit assistance through WIFIA in the form of loans or loan guarantees to eligible entities: Corporations; partnerships; joint ventures; trusts; Federal, State, or local governmental entities, agencies, or instrumentalities; tribal governments or consortiums of tribal governments; or State infrastructure finance authorities.

WIFIA authorizes EPA to provide assistance for a wide variety of projects.

¹ Section 1445 of Public Law 114-94 amends WIFIA by deleting 33 U.S.C. 3907(a)(5) which prohibited EPA from providing credit assistance to a project financed (directly or indirectly) by the proceeds of a tax-exempt obligation.

Eligible projects, as defined in 33 U.S.C. 3905, include:²

- Projects eligible under the Clean Water and Drinking Water State Revolving Fund Programs (SRFs);
- Projects for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;
- Projects for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation);
- Brackish or sea water desalination projects;
- Managed aquifer recharge or water recycling projects;
- Acquisition of real property or an interest in real property if the acquisition is integral to an already eligible project or pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance; and
- A combinations of projects submitted to EPA by an SRF program under a single application; and
- A combination of projects secured by a common security pledge for which there is a single application.

Sections 3902, 3905, and 3907 of title 33, U.S.C., describe the conditions that govern a project's eligibility under WIFIA. Generally, projects must have eligible costs of not less than \$20 million. However, for projects eligible for assistance under categories (1) or (2) below (*i.e.*, SRF eligible projects), that serve a community of not more than 25,000 individuals, eligible project costs must be no less than \$5 million. The types of projects eligible for assistance are listed in 33 U.S.C. 3905 and are also summarized below in 40 CFR 35.10005(m).

II. Water Infrastructure Needs and Current Sources of Financing

In the United States, localities are primarily responsible for providing water infrastructure services and funding these services through user fees. Today, some communities face formidable challenges in providing adequate and reliable water infrastructure services. Existing water infrastructure in some of these

communities is aging, and investment is not always keeping up with the needs. As described in greater detail below, EPA estimates the national funding need for capital improvements for such facilities totals approximately \$660 billion over the next 20 years.³ In many cases, meeting these needs will require significant increases in capital investment.

Water infrastructure capital projects are typically funded with pay-as-you-go or debt financed through the municipal bond market. The U.S. Conference of Mayors estimates that in 2008, local governments invested \$93 billion in their water systems, of which 40% went to capital investments, with the remainder for operations and maintenance.⁴ In 2014, municipal bond issuance for water and sewer projects totaled \$31.9 billion according to the Securities Industry and Financial Markets Association (SIFMA). Total municipal bond issuance in 2014 was \$314.9 billion, of which \$282.8 billion was tax-exempt.⁵ From 2003 through 2012, tax-exempt financing for water and sewer facilities totaled \$258 billion.⁶ While a summary of bond ratings for water and sewer debt is not available, a 2014 analysis of outstanding municipal market debt shows that 19 percent of issues were rated BBB or below, or were unrated.⁷ As such, the potential market for lower-rated investment-grade municipal borrowers, which could benefit most from WIFIA, is significant.

After pay-as-you-go and bonds, the next largest source of water infrastructure financing are the Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) programs. The SRFs are state-operated finance programs that receive capitalization grants from EPA. These capitalization grants, combined with required state match and loan repayments with interest, allow the SRFs to provide a far greater amount of assistance annually than the amount appropriated for the programs. The SRFs provided \$7.9 billion in assistance

to projects across the country in 2015.⁸ In addition, communities also received water infrastructure funding through at least two other federal agencies in 2015. The Department of Housing and Urban Development authorized \$333.4 million in block grants to communities for water infrastructure projects, and the United States Department of Agriculture (USDA) approved \$1.5 billion in grants and loans for small communities.

EPA's 2012 Clean Watersheds Needs Survey (CWNS)⁹ estimated that the total capital wastewater and stormwater treatment and collection needs for the nation are \$271 billion as of January 2012. The CWNS does not represent all needs for the 20-year period from January 2012 through December 2031. Because states often do not have documentation that demonstrates needs that far into the future, nearly all needs included in the CWNS are for projects that will be completed within 5 years (*i.e.*, 2012–2017) and are documented in capital improvement plans and other short term planning documents. Needs without existing independent documentation are not included in the CWNS. In addition, the CWNS does not include information about privately owned wastewater facilities, projects on tribal lands, and operations and maintenance needs. Stormwater management needs are also underestimated due to not all states reporting in this category. For these reasons, actual 20 year needs are likely to be significantly higher.

EPA's 2011 Drinking Water Infrastructure Needs Survey (DWINS)¹⁰ estimates a total capital drinking water infrastructure need of \$384.2 billion for the 20-year period from January 2011 through December 2030. This estimate includes needs for American Indian and Alaska Native Village systems. Like the CWNS, this figure does not represent all of the needs. The scope of the survey is limited to those needs eligible to receive DWSRF assistance—thus excluding some capital projects, including projects related primarily to future population growth. Moreover, needs for which no independent documentation exists are represented in the DWINS by default values which are conservative. The DWINS does not include operations and maintenance needs.

Other studies report significantly larger estimates of needs. For example, the American Society of Civil Engineers estimates approximately 240,000 water

² Projects described by 33 U.S.C. 3905(1) are not eligible for purposes of the WIFIA program as operated by EPA. Section 3902(b)(2) specifies that EPA can provide WIFIA assistance to all eligible projects categories except for (1). The Army Corps of Engineers is responsible for establishing a WIFIA program that provides assistance to such projects.

³ EPA. "Clean Watersheds Needs Survey 2012: Report to Congress." 2012, and "Drinking Water Infrastructure Needs Survey: Fifth Report to Congress." 2011.

⁴ U.S. Conference of Mayors—Mayors Water Council. "Trends in Local Government Expenditures on Public Water and Wastewater Services and Infrastructure: Past, Present and Future." February 2010. <http://www.usmayors.org/publications/201002-mwc-trends.pdf>.

⁵ SIFMA. "Research Report—Municipal Bond Credit Report: Fourth Quarter 2014".

⁶ <http://www.naco.org/sites/default/files/documents/Protecting-Bonds-to-Save-Infrastructure-and-Jobs-2013.pdf>.

⁷ SIFMA. "Research Report—Municipal Bond Credit Report: Fourth Quarter 2014".

⁸ July 1, 2014–June 30, 2015. EPA SRF National Information Management Systems.

⁹ EPA. "Clean Watersheds Needs Survey 2012: Report to Congress." 2012.

¹⁰ EPA. "Drinking Water Infrastructure Needs Survey: Fifth Report to Congress." 2011.

main breaks annually.¹¹ The American Water Works Association estimates that \$1 trillion is needed to restore existing distribution system pipe at the end of its useful life and to expand pipe networks to meet growing population needs between 2011 and 2035.¹²

The Administration has pointed to an increased need for infrastructure financing through its Build America Initiative. In its initial report, the Department of Treasury noted that “increasing fiscal pressures at all levels of government have led to reduced commitments for infrastructure and a greater reliance on debt financing, which, in turn, has contributed to increased debt ratios and reduced debt service coverage levels for certain issuers. At the same time, stagnant economic growth and absence of support for new or increased user fees have curtailed increased debt capacity among many issuers.”¹³ The Build America Initiative aims to make infrastructure financing more affordable and to encourage innovative financing and public-private partnerships.

As suggested by the estimated size of national water infrastructure needs, currently available funding sources are not sufficient. SRF programs under the Clean Water Act and Safe Drinking Water Act are designed to primarily provide a benefit to smaller projects, typically under \$100 million, in communities that often have limited access to funding. There is a large segment of need associated with projects that the SRFs cannot fund due to project size or ownership. The average CWSRF wastewater treatment project is \$3.5 million, while the average DWSRF project is \$2.4 million. According to the most recent data, states issued only 180 CWSRF loans over \$50 million, and 35 of those were over \$100 million, out of over 14,000 loans issued since 2004. Since 2009, states issued only 20 DWSRF loans over \$50 million, and ten of those were over \$100 million, out of over 6,700 loans.¹⁴ Private wastewater treatment facilities are not eligible for most CWSRF financing.

Bond-financing requires strong debt service coverage to benefit from low

interest rates and long tenors. In addition, private entities generally cannot access the tax-exempt bond market. Finally, grant funding and USDA loans are targeted at specific underserved sectors and are generally less applicable to large projects.

Similar to large-scale transportation projects, the financing of large water infrastructure projects can be addressed through the use of several financing tools and techniques that, when combined, can result in a highly efficient capital structure that minimizes the financial impact on system users. WIFIA will assist in delivering on these needs in the water sector. It is in a position to promote the use of public-private partnerships in this area by reducing the cost of private participation. At the same time, WIFIA will have limited impact on the municipal bond market. Total municipal bond issuance was \$314.9 billion in 2014, of which water infrastructure accounted for 10%. Even if WIFIA is able to provide \$1 billion annual assistance, it will account for approximately 3% of the market for water infrastructure bonds such that the program is not expected to impact the municipal bond market.

III. Program Information

A. Funding

The Federal Credit Reform Act of 1990 (FCRA) requires agencies to estimate the long-term cost of providing a direct loan or loan guarantee on a present value basis, and requires that an agency have the necessary budget authority appropriated to the agency before entering into an obligation for a loan or loan guarantee. Section 3912(a) of WIFIA authorizes annual amounts to be appropriated for the cost of loans or loan guarantees in FY2015 through FY2019. However, to date no annual appropriations have been provided for the cost of loans or loan guarantees under WIFIA. EPA will not know the amount of budget authority that will be available until it is appropriated.

B. Applicant Eligibility

Section 3904 of title 33, U.S.C., defines entities that are eligible for WIFIA assistance. To be eligible, an applicant must be one of the following:

1. A corporation;
2. A partnership;
3. A joint venture;
4. A trust;
5. A federal, state, or local governmental entity, agency, or instrumentality;

6. A tribal government or consortium of tribal governments; or

7. A state infrastructure financing authority.

C. Project Eligibility

Section 3905 of title 33, U.S.C., defines projects eligible for assistance. To be eligible, a project must fall under one of the following categories:

1. One or more activities that are eligible for assistance under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)), notwithstanding the public ownership requirement under paragraph (1) of that subsection.

2. One or more activities described in section 1452(a)(2) of the Safe Drinking Water Act (42 U.S.C. 300j-12(a)(2)).

3. A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works.

4. A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation).

5. A brackish or sea water desalination project, a managed aquifer recharge project, or a water recycling project.

6. Acquisition of real property or an interest in real property—

a. If the acquisition is integral to a project described in paragraphs (1) through (5); or

b. Pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance under this section.

7. A combination of projects, each of which is eligible under paragraph (1) or (2), for which a State infrastructure financing authority submits to the Administrator a single application.

8. A combination of projects secured by a common security pledge, each of which is eligible under paragraph (1), (2), (3), (4), (5), or (6), for which an eligible entity, or a combination of eligible entities, submits a single application.

D. Threshold Criteria Required by Statute

The WIFIA statute contains the following requirements, as paraphrased below, that do not require interpretation and are restated in the rule without further explanation:

- Public or private applicants for credit assistance will be required to submit applications to EPA in order to be considered for approval.
- Project financing shall be repayable, in whole or in part, from State or local

¹¹ American Society of Civil Engineers. “2013 Report Card for America’s Infrastructure.” 2013.

¹² American Water Works Association. “Buried No Longer: Confronting America’s Water Infrastructure Challenge.” <http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf>.

¹³ U.S. Department of the Treasury Office of Economic Policy. “Expanding our Nation’s Infrastructure through Innovative Financing.” September 2014.

¹⁴ Collection of project specific data began in 2004 for the CWSRF program and 2009 for the DWSRF program.

taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

- In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a tribal government or consortium of tribal governments, the project that the entity is undertaking must be publicly sponsored. Public sponsorship means that the recipient can demonstrate, to the satisfaction of the Administrator, that it has consulted with the affected state, local, or tribal government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. Support can be shown by a certified letter signed by the approving municipal department or similar agency, mayor or other similar designated authority, local ordinance, or any other means by which local government approval can be evidenced.

- To be eligible for financing, a prospective borrower must have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life.

Further detail will be available in a program handbook that will be posted on the WIFIA program public Web site.

E. Application Process

For each fiscal year for which credit assistance is made available by Congress, EPA will publish a NOFA in the **Federal Register** to solicit letters of interest for credit assistance. EPA will also publish the NOFA on the WIFIA program Web site, at www.epa.gov/wifia. The notice will provide detailed instructions for submitting letters of interest and applications, as well as the respective due dates for submissions. It will advise prospective borrowers of the estimated amount of funding available to support WIFIA credit instruments and information required in a letter of interest and application.

The application process has two steps. The first step requires the submission of a letter of interest prior to the deadline set out in the NOFA. Then, projects selected by EPA to continue in the application process will be invited to submit an application. EPA will only select those projects that it expects might reasonably proceed to closing.

The Letter of Interest has four primary purposes: (i) Validate the eligibility of the prospective borrower and the proposed project, (ii) perform a preliminary creditworthiness assessment, (iii) perform a preliminary engineering feasibility assessment, and (iv) evaluate the project against the selection criteria and identify which projects EPA will invite to submit applications. The Letter of Interest addresses the WIFIA eligibility criteria, WIFIA selection criteria, and identifies other specific information that must be provided to EPA to be considered for credit assistance. This serves to familiarize EPA with basic information relating to the project and the prospective borrower.

The Letter of Interest will require items such as:

1. *Prospective Borrower Information:* The Letter of Interest should describe the proposed obligor's organizational structure, identify the entity that will serve as the applicant, list other significant members of the project team, describe the proposed obligor's relationship to subsidiaries or affiliates, if any, and provide a Web site link where additional information can be found.

2. *Project Plan:* The Letter of Interest should describe the project, including its location, population served, purpose, design features, estimated capital cost, and development schedule. The prospective borrower will also describe how the project fits into one of the eight project types eligible for assistance under WIFIA. The Letter of Interest also requests inclusion of any other relevant information that could affect the development of the project, such as community support, pending legislation, or litigation. The Project Plan section will also serve to summarize the status of the project's environmental review, engineering report, and other approvals necessary to the project.

3. *Project Operations and Maintenance Plan:* The Letter of Interest should describe the project's plan for operating, maintaining, and repairing the project post-completion, and discuss sources of revenue used to finance these activities.

4. *Financing Plan:* The Letter of Interest should include the proposed sources and uses of funds for the project and state the type and amount of credit assistance to be sought from EPA. The discussion of proposed financing should also identify the source(s) of revenue or other security that would be pledged to the WIFIA assistance. Additionally, this section should describe the credit characteristics of the project and how

the senior obligations of the project will achieve an investment-grade rating. The Letter of Interest should also include a summary financial pro forma and up to three years' audited financial statements, if available.

5. *Selection Criteria:* The Letter of Interest should describe the potential benefits to be achieved through the use of WIFIA assistance with respect to each of the WIFIA selection criteria.

6. *Contact Information:* The Letter of Interest should identify the point of contact with whom EPA should communicate regarding the Letter of Interest. For the purpose of completing its evaluation, EPA staff may contact a prospective borrower regarding specific information in the Letter of Interest.

7. *Certifications:* The prospective borrower will certify that it will abide by all applicable laws and regulations.

8. *Notification of State Infrastructure Financing Authority:* The interested party will acknowledge that EPA will notify the appropriate State infrastructure financing authority in the State in which the project is located that the prospective borrower submitted this letter of interest; and provide the submitted letter of interest and source documents with it to that State infrastructure financing authority.

Selected interested parties will be invited to submit an application to EPA. The purpose of the application is to provide EPA with materials necessary to underwrite the proposed WIFIA assistance. The application will require items such as:

1. *Detailed Applicant Information:* The applicant will submit information identifying and describing the applying organization, including the applicant's organizational structure, and the applicant's legal authority to apply for WIFIA credit assistance and undertake the project. The applicant will also have to demonstrate its ability to execute the project through past experiences and qualifications of its personnel.

2. *Detailed Project Information:* Materials submitted under this section will detail the applicant's plan for project construction, projected over several years, to include a description of the facility to be built, including design features, and the intended purpose. The applicant will also submit a project management and compliance monitoring plan, including the project construction timeline, and an assessment of the costs expected at each point in the timeline. The applicant will also submit an analysis of the risks that may be encountered during construction, and steps that will be undertaken to minimize those risks. The

applicant will also submit draft or final bid documents.

3. Detailed Operations and Maintenance Plan: In this section, the applicant will submit materials supporting the applicant's plan to operate the project after construction. This plan should include an operation and maintenance plan for the tenor of the WIFIA assistance, including an estimate of the associated costs. The applicant should also submit materials describing contractual arrangements that the applicant has already made, or plans to make.

4. Comprehensive Financing Plan: The applicant will need to submit a comprehensive plan describing how the project will be financed, and how financing will be repaid over the tenor of the requested WIFIA assistance. This will include a detailed financial model, the sources and seniority of other financing, a description of the dedicated sources of repayment, rate covenants, and security for the proposed credit assistance. The applicant will also submit a preliminary rating letter indicating the possibility of the project's senior obligations obtaining an investment-grade rating from a NRSRO.

5. Final Certifications: The applicant will certify that it will abide by all applicable laws and regulations.

This two-step process limits the time, cost and effort required by prospective borrowers prior to having a reasonable expectation of potential WIFIA funding. EPA plans to develop detailed application information contained in a program handbook and will post it on the WIFIA program public Web site at the time of solicitation for letters of interest. EPA welcomes comment on this application process.

F. Creditworthiness

By statute, at 33 U.S.C. 3907(a)(1), the Administrator must determine that every funded project is creditworthy. Therefore, an overarching goal of the creditworthiness determination process is to ensure that each project that is ultimately offered credit assistance advances the WIFIA Program's mission while providing a level of risk exposure that is suitable to EPA. To that end, the WIFIA Program will evaluate applications for financial assistance based on prudent lending practices for the long-term holding of an illiquid asset. The creditworthiness determination will be based on a review of the following:

- Terms, conditions, financial structure, and security features of the proposed financing;
- Dedicated revenue source(s) securing the financing;

- Financial assumptions surrounding the proposed project;
- Financial soundness and credit history and outlook of the borrower; and
- Technical merits and engineering risks of the proposed financing.

Further information will be available in the WIFIA program handbook.

G. Coordination With SRF Programs

In order to promote coordination between the SRF programs and the WIFIA program, the statute includes procedures on the use of existing funding mechanisms. The statutory procedure requires notification by EPA to the relevant state SRF program of the receipt of applications for SRF-eligible projects. Such notification must occur within 30 days of the receipt of an application submitted to the WIFIA program office. Under the statute, the notified SRF program has 60 days to formally declare an intent to fund the project in the program's intended use plan, in place of EPA in an amount equal to or greater than the amount requested in the WIFIA application. If such a declaration is made, EPA may not provide assistance to the project under WIFIA unless the SRF program fails to provide assistance within 180 days from the date of notification or the terms are less favorable than those offered by the WIFIA program.

Those administering SRF programs have expressed concern that the amount of time within which they must receive and review SRF applications and make funding decisions regarding these applications is too short. EPA will therefore provide notice to SRF programs within 30 days of the receipt of a letter of interest. Such notice will include the letter of interest and supporting documentation provided by the prospective borrower. The letter of interest includes a notice to interested parties explaining the notification procedure and allows the prospective borrower to request that EPA not share the letter of interest with the SRF program, though the SRF program will still be notified of the submission, as required by statute. Providing initial notification within 30 days of the receipt of a letter of interest, as opposed to the application, will provide additional time for SRF programs to communicate with the prospective borrower, for the prospective borrower to apply to the SRF program, for funding decisions to be made, and for a formal declaration of the intent to fund the project with a SRF loan to be made.

EPA welcomes comment on providing notification to SRF programs at an earlier time than required by the statute. Though not addressed through this

implementation rule, EPA also welcomes suggestions on the content of the notification to SRF programs.

H. Fees

Sections 3908(b)(7), 3909(b), and 3909(c)(3) of 33 U.S.C., allow EPA to collect user fees from applicants to defray some or all of the costs associated with administering the program. A separate proposed rule governing applicant fees can be found in the docket for the rule at EPA-HQ-OW-2016-0568. While each rule has a separate process for comments, EPA is aware that the similar timelines for comment and the relationship between the two rules may cause confusion. Therefore, in the event that comments are received for this rule under the heading of the fee rule, or vice versa, EPA will consider all comments and respond accordingly. EPA will not be able to collect user fees until the user fee rule is finalized.

I. Credit Assistance

Two types of credit instruments are permitted under WIFIA: Secured (direct) loans and loan guarantees. General rules concerning the terms governing these credit instruments appear at 33 U.S.C. 3908 and 3909. More specific terms will be determined on a project-specific basis during negotiations between EPA and successful applicants.

In general, WIFIA limits the amount of credit assistance that may be provided to a project to not more than 49% of reasonably anticipated eligible project costs. However, the statute authorizes EPA to use up to 25% of its budget authority appropriated through Fiscal Year 2019 to provide credit assistance to one or more projects of up to no more than 80% (statutory cap on federal participation) of the total costs of any given project. EPA will use its budget authority to provide credit assistance greater than 49% of eligible project costs (*i.e.*, up to 80% of the total project costs) only in extraordinarily exceptional circumstances, such as where a project would be unable to proceed to closing absent such additional assistance due to unforeseen events. Unforeseen events that could prevent a project from going to closure may include, but are not limited to: Unexpected cost revisions, unexpected loss of other sources of financing, increased cost of capital, or acts of nature. In such an event, EPA will reexamine the creditworthiness of the project and only provide funding if the project can still meet all requirements of the program. Such a limitation is necessary because the amount of budget

authority that may be used for such purposes is limited and the use of such authority reduces the agency's ability to support other projects. EPA will not entertain requests for use of this authority in a letter of interest or application.

Costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered in calculating eligible project costs only upon approval by EPA. Prospective borrowers may not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter, as discussed below) in the total project cost, as these expenses are not eligible activities per 33 U.S.C. 3906. No costs financed internally or with interim funding may be refinanced later than 1 year following substantial completion of the project.

EPA will not obligate funds for a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision under the National Environmental Policy Act (NEPA).

For planning purposes, and as is standard in construction loan agreements, the credit agreement will include the anticipated schedule for loan disbursements. However, actual disbursements will be based on costs incurred in accordance with the approved construction plan, as evidenced by paid invoices. This requirement protects EPA in the event of non-performance and is typical of most federal loans and grants.

As required by statute, the interest rate on a secured loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement. The base interest rate can be identified through use of the daily rate tables published by the Bureau of the Fiscal Service for the State and Local Government Series (SLGS) investments. The WIFIA program will estimate the yield on comparable Treasury securities by adding one basis point to the SLGS daily rate with a maturity that is closest to the weighted average loan life of the WIFIA credit assistance, measured from first disbursement.

As allowed by statute at 33 U.S.C. 3908(c)(2), scheduled loan repayments of principal or interest on a secured loan will commence not later than 5 years after the date of substantial completion of the project. However, scheduled loan repayments of principal or interest on a secured loan to a State infrastructure financing authority will commence not

later than 5 years after the date on which amounts are first disbursed.

As required by statute, the final maturity date of a secured loan will be the earlier of the date that is 35 years after the date of substantial completion of the project, or if the useful life of the project is less than 35 years, the useful life of the project. However, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed. In determining the useful life of the project, for the purposes of establishing the final maturity date of the WIFIA credit instrument, the Administrator will consider the useful economic life of the asset(s) being financed, as required under OMB Circular A-129.

As required by statute, EPA's Federal credit instrument may have a junior claim to other debt issued for the project in terms of its priority interest in the project's pledged security. However, EPA's claim on assets will not be subordinated to the claims of other creditors in the event of a default leading to bankruptcy, insolvency, or liquidation of the obligor. The EPA's interest may include collateral other than pledged revenues. EPA welcomes comment on its restricted use of the authority to provide credit assistance greater than 49% of eligible project costs and policy on reimbursing project costs financed internally or through interim funding.

J. Small Community Set-Aside

Each fiscal year for which budget authority is made available by Congress, as required by statute, EPA will set aside at least 15% of its appropriated budget authority for projects that serve communities of no more than 25,000 individuals. The statute requires that set-aside budget authority be obligated to small communities prior to the first day of June each year, after which the budget authority will be made available to all other projects. Small communities are eligible for financing regardless of the set-aside.

K. Rating Requirement

EPA, as required by statute at 33 U.S.C. 3907(a)(1)(D)(i), will require each applicant to furnish a preliminary rating opinion letter as part of the application process. This is required with the submission of the application, not the letter of interest. The applicant is responsible for identifying and approaching one or more Nationally Recognized Statistical Rating Organizations (NRSROs) to obtain such letter. This letter must indicate that the

applicant project's senior obligations have the potential of attaining an investment-grade rating and opine on the default risk of the WIFIA credit instrument. This letter will allow EPA to evaluate the application and execute a term sheet upon which funds are obligated. The disbursement of any funds will be contingent upon the execution of a formal credit agreement between EPA and the project sponsor and the receipt of two formal investment-grade ratings on the project's senior obligations. These ratings must apply to all project obligations with claims senior to that of the Federal credit instrument on the security pledged to the Federal credit instrument. In addition, the ratings must specifically refer to the default risk of the WIFIA instrument itself. If the Federal credit instrument is the project's senior obligation, these ratings must apply to the Federal credit instrument as well as all project obligations with claims at parity to that of the Federal credit instrument on the security pledged to the Federal credit instrument.

EPA will require the credit rating to mention the default risk of the WIFIA loan. Given the WIFIA statutory mandate that the Federal interest will not be subordinated in the event of bankruptcy, insolvency, or liquidation of the project, EPA understands that this analysis would already be imbedded in the rating agency review of the senior debt obligations. Therefore, adding the requirement that the credit rating mentions the default risk of the WIFIA loan primarily serves to clarify EPA's expectations that the rating letters should specifically reference the WIFIA credit as well as the project's senior obligations.

L. Tax Status of Loan Guarantees

Section 103(a) of the Internal Revenue Code (IRC), 26 U.S.C. 103(a), provides that "gross income" does not include interest on any state or local bond, with certain exceptions. Section 149(b) of the IRC, 26 U.S.C. 149(b), however, provides that the section 103(a) exclusion from gross income "shall not apply to a state or local bond if such bond is federally guaranteed." Section 149(b) in effect converts tax exempt debt to taxable debt when such debt is guaranteed by the Federal government. WIFIA did not amend the provisions in section 149(b) of the Internal Revenue Code that prohibit the use of direct or indirect Federal guarantees of tax-exempt obligations. Accordingly, the interest income on any project loan that is directly or indirectly federally

guaranteed under WIFIA is not exempt from Federal income taxation.

M. Federal Requirements

Recipients of WIFIA credit assistance must comply with Federal requirements applicable to all Federally-funded projects. The rule provides a non-exhaustive list of these requirements in Supplementary Information Section V.

N. American Iron and Steel

Recipients of WIFIA credit assistance must comply, by statute at 33 U.S.C. 3914, with American Iron and Steel (AIS) requirements, which requires that if any WIFIA assistance is provided to a project for construction, alteration, maintenance, or repair, all of the iron and steel products used in the project must be produced in the United States. The language in the statute is identical to AIS language applicable to the SRF programs. This requirement applies to all iron and steel products, not only those paid for with proceeds from the WIFIA assistance agreement. A waiver may be issued for a case or category of cases where EPA finds (1) that applying these requirements would be inconsistent with the public interest; (2) iron and steel products are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron and steel products produced in the U.S. will increase the cost of the overall project by more than 25%.

The WIFIA program is adopting all AIS guidance applicable to the SRF programs. Due to the identical nature of the statutory language for each program, as well as the need for consistency between two infrastructure programs administered by EPA, this requirement should be applied to both programs in the same manner. Additionally, the WIFIA program will adopt all relevant national waivers issued by EPA's SRF programs. These waivers allow recipients to purchase certain products from non-American sources. The rationale for these waivers applies equally to both programs. AIS guidance and waivers can be found on EPA's Web site. EPA welcomes comment on the implementation of AIS requirements.

O. Labor Standards

The statute, at 33 U.S.C. 3909(e), requires recipients of WIFIA credit assistance to pay all laborers and mechanics employed by contractors or subcontractors wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor. This is commonly referred to as Davis-Bacon

wage requirements. This requirement applies to all laborers and mechanics working on a project, not only those paid from proceeds of the WIFIA assistance agreement. Further guidance will be made available on EPA's WIFIA Web site.

P. Reporting

EPA requires, at a minimum, any recipient of WIFIA credit assistance to submit an annual project performance report and audited financial statements to EPA within 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. EPA may conduct periodic financial and compliance audits of the recipient, as determined necessary by EPA. The specific credit agreement between the recipient of credit assistance and EPA may contain additional reporting requirements. This is a necessary and important requirement in order to allow EPA to provide proper and sufficient oversight of federally-funded projects and conforms to the requirements of other federal programs. EPA welcomes comment on this requirement.

Q. Selection Criteria

Section 3907(b)(2) of the statute establishes 11 criteria for selecting among eligible projects to receive credit assistance, but allows EPA to identify additional selection criteria. EPA is proposing the following thirteen selection criteria. Eleven are criteria prescribed by the statute (as paraphrased below), and EPA further proposes to supplement certain of those criteria. EPA added criteria (12) and (13) below:

1. The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public health benefits;
2. The likelihood that assistance under this subtitle would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;
3. The extent to which the project uses new or innovative approaches such as the use of energy efficient parts and systems, or the use of renewable or alternate sources of energy; green infrastructure¹⁵; and the development

¹⁵ Green infrastructure includes a wide array of practices at multiple scales that manage wet weather and that maintains and restores natural hydrology by infiltrating, evapotranspiring and harvesting and using stormwater. On a regional scale, green infrastructure is the preservation and restoration of natural landscape features, such as forests, floodplains and wetlands, coupled with policies such as infill and redevelopment that reduce overall imperviousness in a watershed. On

of alternate sources of drinking water through aquifer recharge, water recycling or desalination;

4. The extent to which the project protects against extreme weather events, such as floods or hurricanes, as well as the impacts of climate change;

5. The extent to which the project helps maintain or protect the environment or public health;

6. The extent to which a project serves regions with significant energy exploration, development, or production areas;

7. The extent to which a project serves regions with significant water resource challenges, including the need to address water quality concerns in areas of regional, national, or international significance; water quantity concerns related to groundwater, surface water, or other resources; significant flood risk; water resource challenges identified in existing regional, state, or multistate agreements; and water resources with exceptional recreational value or ecological importance;

8. The extent to which the project addresses identified municipal, state, or regional priorities;

9. The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under this subtitle;

10. The extent to which the project financing plan includes public or private financing in addition to assistance under this subtitle;

11. The extent to which assistance under this subtitle reduces the contribution of Federal assistance to the project;

12. The extent to which the project addresses needs for repair, rehabilitation or replacement of a treatment works, community water system, or aging water distribution or wastewater collection system; and

13. The extent to which the project serves economically stressed communities, or pockets of economically stressed rate payers within otherwise non-economically stressed communities.

EPA supplemented criteria (3) by adding examples to define EPA's expectations for innovation. These examples align this criterion with the particular innovative projects listed as

the local scale, green infrastructure consists of site- and neighborhood-specific practices, such as bioretention, trees, green roofs, permeable pavements and cisterns.

eligible in the statute at 33 U.S.C. 3905 (4) and (6).

EPA added “as well as the impacts of climate change” to the end of criterion (4) in order to reflect the Administration’s priorities as well as align the criteria with the specific priority project type, “adaptation to extreme weather and climate change including enhanced infrastructure resiliency, water recycling and reuse, and managed aquifer recovery,” which is discussed below.

EPA added “or public health” to the end of criterion (5) in order to reflect essential objectives in the public interest under both the Clean Water Act and the Safe Drinking Water Act.

EPA added criterion (12) in order to align project criteria with statutorily defined project eligibilities and to provide credit to those projects that meet the growing need for repair, rehabilitation, or replacement of treatment works, community water systems, or aging water distribution or wastewater collection systems. Addressing these needs is an Agency priority.

EPA added criterion (13) in order to reflect the Agency’s continuing efforts to address the needs of economically stressed communities where access to financing for critical infrastructure is often lacking or difficult to obtain. While the creditworthiness requirement, as well as the requirement to obtain an investment-grade rating on senior obligations, may be a high bar for access to the WIFIA program by economically stressed communities, there are some options that may allow such communities to meet such requirements. For instance, an economically stressed community may seek a guarantee from a State that would bring the required rating up to an investment-grade level. A community may also seek the participation of an SRF program where the SRF program applies for a WIFIA loan and uses its resources as security in order to meet WIFIA’s creditworthiness requirements. The SRF program can then provide funding to the community and as a result take on a level of risk that EPA is statutorily barred from assuming under WIFIA. EPA welcomes comment on the additions and modifications to the default statutory criteria.

EPA is not assigning weights to these priorities in this rule, but rather will make weighting decisions in the first Notice of Funding Availability and adjust such weights as needed in subsequent notices. Assigning criteria weights in the Notice of Funding Availability, rather than through regulation, allows EPA flexibility to

adapt to changing circumstances and priorities in an efficient and timely manner. In addition, the Administrator may include in the notice additional criteria in order to further reflect the Administrator’s priorities. EPA proposes to provide notice and response to comments prior to the issuance of the second Notice of Funding Availability, and subsequent notices thereafter if necessary, in order to allow for public input on additional criteria or changes to non-statutory criteria. EPA will publish a draft NOFA, when necessary to provide public notice of potential criteria changes or additions, in the **Federal Register** and respond to comments on these changes in the final NOFA. This flexibility will allow the Agency to encourage applications that focus on a particular selection criterion for a given funding cycle, *e.g.*, projects that respond to extreme weather events, focus on climate resiliency, serve economically stressed communities, or address other selection criteria priorities. EPA welcomes comment on the decision to apply weights to criteria in the Notice of Funding Availability rather than by regulation. EPA also wishes to ensure that the public has the opportunity to provide input in the development of additional criteria and changes to non-statutory criteria and welcomes comment on the proposal to provide informal notice and comment prior to issuance of the second Notice of Funding Availability and subsequent notices if necessary. EPA also welcomes other ideas that may provide the opportunity for such input while also allowing EPA to efficiently manage the program and provide assistance in a timely manner.

In addition to the criteria set forth above, the statute includes one additional selection criterion, which is directly related to a project’s creditworthiness, financial viability, and EPA’s capacity to make a loan: “The amount of budget authority required to fund the Federal credit instrument made available under this subtitle.” This criterion will be used to assess projects separate from the assessment under the previous thirteen criteria. In particular, it will inform EPA’s ability to provide funding in an equitable manner to prospective borrowers seeking financing. The amount of budget authority used by a project will be an important consideration when selecting projects. The greater the budget authority used by a project, which is a function of both project size and creditworthiness, the less budget authority is available to finance other projects. Selecting projects will be at the

discretion of the Administrator who may decide that a project that uses a proportionally high level of budget authority provides essential environmental or public health benefits and deserves greater consideration.

IV. Priorities

Criteria weights will be assigned in the first Notice of Funding Availability, and may be adjusted in subsequent notices to address changing circumstances and priorities. This discussion highlights important factors that will inform EPA’s decision-making process prior to issuance of the first criteria weights.

Congress enacted WIFIA with the goal of accelerating investment in our nation’s water infrastructure by providing supplemental credit assistance to creditworthy projects of major importance to the water sector. While the list of projects eligible for funding under WIFIA is expansive, EPA has identified the following project priorities for the first Notice of Funding Availability:

- Adaptation to extreme weather and climate change including enhanced infrastructure resiliency, water recycling and reuse, and managed aquifer recovery¹⁶;
- Enhanced energy efficiency of treatment works, public water systems, and conveyance systems, including innovative, energy efficient nutrient treatment;
- Green infrastructure; and
- Repair, rehabilitation, and replacement of infrastructure and conveyance systems.

EPA’s project priorities for the WIFIA program reflect water sector challenges that require innovative tools to assist municipalities in managing and adapting to our most pressing public health and environmental challenges. They are consistent with EPA’s Strategic Plan, which points to the need for the agency to drive innovation in addressing water quality and EPA’s “Blueprint for Integrating Technology Innovation into the National Water Program,” which builds on the strategic plan and calls for the Agency to promote innovation in energy reduction and treatment facilities, nutrient recovery, greening the nation’s infrastructure, water reuse, and resiliency, among other priorities.¹⁷

¹⁶ Managed aquifer recovery: Storage of excess supply to be used during peak periods of demand, drought, or other conditions.

¹⁷ EPA. “Blueprint for Integrating Technology Innovation into the National Water Program.” March 27, 2013. Available at <https://www.epa.gov/sites/production/files/2014-04/documents/blueprintv1.pdf>.

A. Adaptation to Extreme Weather and Climate Change Including Enhanced Infrastructure Resiliency, Water Recycling and Reuse, and Managed Aquifer Recovery

The capital and operations and maintenance costs associated with extreme weather and climate change are estimated to be between \$448 and \$994 billion for water and energy utilities through 2050.¹⁸ This estimate includes the costs associated with adapting to changes in runoff quantity and timing, seawater intrusion, temperature changes, drought, rising sea levels, increased flood events, changes in precipitation quantity and timing, reduction in source water availability and quantity, and other types of changes associated with climate change. Utilities have a suite of options that can be used to adapt to these changes, including investments in resiliency, recycling and reuse, and aquifer recovery.

Enhanced infrastructure resiliency can include moving essential infrastructure to higher ground, installing backup power sources, and other measures to harden the utility against storms. In other areas, droughts will become more frequent and severe. Water recycling and reuse and managed aquifer recovery are some of the adaptation strategies for such extreme events. Aquifer recharge and aquifer storage and recovery are tools to augment water resources and address climate change, including drought, and increased demand on water supplies related to development. With Superstorm Sandy and extreme droughts in the western states occurring since these costs were estimated, the current needs can reasonably be expected to be significantly higher. As communities are increasingly feeling the effects of extreme weather and climate change, demand for projects to adapt to these changes is expected to be significant.

B. Enhanced Energy Efficiency of Treatment Works, Public Water Systems, and Conveyance Systems Including Innovative, Energy Efficient Nutrient Treatment

Drinking water and wastewater systems account for approximately 3–4% of energy use in the United States, adding over 45 million tons of greenhouse gases annually. Further, drinking water and wastewater plants are typically the largest energy

consumers of municipal governments, accounting for 30–40% of total energy consumed. Energy as a percent of operating costs for drinking water systems can also reach as high as 40% and is expected to increase 20% in the next 15 years due to population growth and tightening drinking water regulations. As a result, energy efficiency and alternative energy projects are increasingly being pursued by water systems. Investments in energy efficiency will also help reduce the impacts of climate change.

For example, municipalities face increased costs to upgrade wastewater treatment in order to remove nutrients (nitrogen, phosphorous) to an extent sufficient to protect receiving waters. Nutrients are a significant water quality concern throughout the United States, with 25% of all water body impairments believed to be due to nutrient-related causes. This human-induced nutrient pollution comes from point and non-point sources, such as urban stormwater runoff, wastewater discharges, Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs), agriculture, and atmospheric deposition. The costs of biological nutrient removal vary based on the quality of the source water (for drinking water) and receiving waters (for uses designated in state water quality standards), flows, and whether it is for a new facility or upgrades. Nutrient-induced formation of harmful algal blooms is an additional complicating factor for drinking water treatment. Operations and maintenance costs, particularly energy costs, are one of the primary drivers of the costs associated with nutrient removal. WIFIA can help reduce these costs by driving the development of innovative, energy efficient tools to treat nutrients and assist in their dissemination throughout the country.

While estimates of total energy efficiency needs in treatment works and public water systems are not currently available, recent experience points to a significant demand for these types of projects. SRF programs committed \$1.7 billion of funding received under the American Recovery and Reinvestment Act to Green Project Reserve projects, well above the 20% requirement; 45% of this amount went towards energy efficiency projects.¹⁹ From 2009 through 2015, CWSRF and DWSRF programs have funded \$1.8 billion in energy

efficiency projects. As more utilities seek out energy efficiency improvements, WIFIA can be on the forefront of making these projects come to fruition by reducing the cost of implementing innovative projects.

C. Green Infrastructure

The EPA's CWNS 2012 documented needs of \$48.0 billion for combined sewer overflow (CSO) correction, of which \$4.2 billion was reported for green infrastructure, and \$19.2 billion for stormwater management, of which \$2.8 billion was reported for green infrastructure. Because only 21% of regulated municipal separate storm sewer systems (MS4) submitted data, the actual stormwater needs are likely significantly higher. In 2011, EPA issued a memorandum entitled "Achieving Water Quality through Integrated Municipal Stormwater and Wastewater Plans,"²⁰ which among other options, encourages the integration of green infrastructure in CSO long term control plans. An increasing number of communities are choosing to invest in green infrastructure to manage CSOs and wet weather and to decrease costs and improve livability. Twenty-year investment needs in green infrastructure can reasonably be expected to substantially top the \$7 billion projected by the CWNS 2012.

D. Repair, Rehabilitation, and Replacement of Infrastructure and Conveyance Systems

The EPA's CWNS and DWINS estimate needs of approximately \$660 billion for up to twenty years. The vast majority of that need, 90% or \$591 billion, is for repair, rehabilitation, and replacement of existing infrastructure.

Actual needs in this area are likely even higher than reported to EPA. To calculate water systems' distribution system replacement needs, DWINS applies a default replacement benchmark of 0.5% per year. This default benchmark percentage reflects current replacement rates and assumes water mains have a life expectancy of 200 years though actual life expectancies can be significantly shorter. However, relatively few surveyed systems document needs in excess of the default. Further, the American Water Works Association estimates the total need between 2011 and 2035 for replacement of distribution system is approximately \$526 billion.²¹

¹⁸ National Association of Clean Water Agencies (NACWA) and Association of Metropolitan Water Agencies (AMWA). "Confronting Climate Change: An Early Analysis of Water and Wastewater Adaptation Costs." October 2009.

¹⁹ U.S. EPA. "Implementation of the American Recovery & Reinvestment Act of 2009: Clean Water & Drinking Water State Revolving Fund Programs." May 2011 (EPA-832-K-11-001). Available at nepis.epa.gov/Exec/ZyPURL.cgi?Dockey=P100BEEI.TXT.

²⁰ Available at: https://www.epa.gov/sites/production/files/2015-10/documents/memointegratedmunicipalplans_0.pdf.

²¹ American Water Works Association. "Buried No Longer: Confronting America's Water

This figure does not include the repair, replacement, and upgrade of wastewater collection systems, nor of drinking water and wastewater treatment facilities.

Additionally, the repair, rehabilitation, and replacement of aging infrastructure can support climate change adaptation—for instance, by improvements to increase the flood resilience of facilities and components, including helping to assure the accessibility, uninterrupted operations, and maintaining public services during and following extreme weather events. Other examples include measures to reduce water loss from leaking drinking water distribution systems in communities where the availability of surface or ground water supplies to meet demand is a significant concern. Distribution system projects can similarly support energy efficiency since loss of water that has previously been treated and pumped is in effect energy lost.

V. Statutory and Executive Order Reviews

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This rule has been determined significant because it affects the rights and obligations of recipients of a loan program and raises novel legal or policy issues arising out of a legal mandate. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Orders 11988 and 13690 and the Federal Flood Risk Management Standard

In order to help ensure enhanced resiliency of federally funded projects against floods, and to ensure that those projects do not exacerbate flood risk upstream, downstream, to adjacent properties, or to populations relying on facility services, projects funded under this rule will meet or exceed applicable State, local, Tribal, and Territorial standards for flood risk and floodplain management, as well as Executive Orders 11988 and 13690, the Federal Flood Risk Management Standard, and the Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk

Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines). This rule applies to projects funded by the WIFIA program. Other EPA programs may have other approaches to compliance with these Executive Orders.

Under this rule, projects involving new construction, substantial improvement, or to address substantial damage to structures and facilities will use the expanded floodplain standard described in E.O. 13690. Substantial improvement and substantial damage include projects equaling or exceeding 50 percent of the value of the structure or facility. These project applicants shall determine whether the proposed project will occur in the floodplain using any of the approaches provided in section 6(c) of E.O. 11988, as amended. Applicants for proposed projects that are not new construction, substantial improvement, or to address substantial damage will use, at a minimum, the base 100-year floodplain standard for non-Critical Actions, and the 0.2%-annual chance floodplain for Critical Actions.

The Guidelines include an Eight-Step Decision-Making Process for identifying and addressing flood risks. Through that decision-making process, applicants will consider alternatives, including those that would avoid the floodplain, whenever practicable. Applicants will identify potential impacts, and if the project would result in harm to or within the floodplain, take actions to minimize that harm and restore and protect the natural floodplain environment. Under this rule, projects funded under WIFIA will be considered Critical Actions, as that term is defined in E.O. 11988, unless the Administrator provides written notification to the applicant that the particular project is not considered to be a Critical Action.

Specific procedures and additional information are laid out in the program handbook, to be made available on the WIFIA program Web site. EPA welcomes comment on rule requirements related to Executive Orders 11988 and 13690 and the Federal Flood Risk Management Standard.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2549.01. You can find a copy of the ICR in the docket for this rule.

The collection of information is necessary in order to receive

applications for credit assistance pursuant to section 5024 of the Water Infrastructure Finance and Innovation Act (WIFIA) of 2014, 33 U.S.C. 3903. The purpose of the WIFIA program is to provide Federal credit assistance in the form of direct loans and loan guarantees to eligible clean water and drinking water projects.

WIFIA requires that an eligible entity shall submit to the Administrator an application at such time, in such manner, and containing such information, as the Administrator may require to receive assistance under WIFIA. In order to satisfy these requirements, EPA must collect a letter of interest and an application from entities seeking funding. This collection is necessary to determine whether each proposed project meets creditworthiness and other Federal requirements to receive WIFIA credit assistance. The content of the letter of interest and application are set out in 40 CFR 35.10015(c)(1) and (2), respectively. EPA solicits comments on the information required to be included in this collection.

EPA estimates 25 respondents per year, for a total estimated burden of 1,500 hours (per year) and cost of \$3,064,593.90 (per year) (includes no annualized capital or operation and maintenance costs). This estimate includes the burden for 20 unduplicated respondents for the letter of interest and 5 unduplicated respondents for the application. For the letter of interest, EPA estimates 1,000 annual burden hours and the annualized cost of those hours is \$40,107. EPA used the following median hourly wages from the May 2015 National Occupational Employment and Wage Estimates United States (http://www.bls.gov/oes/current/oes_nat.htm) from the U.S. Bureau of Labor Statistics to calculate the cost of the estimated burden hours: Lawyers = \$55.69; Management = \$47.38; Engineers = \$43.30; and Office and Administrative Support = \$15.96. For the application, EPA estimates 500 annual burden hours and the annualized cost of those hours is \$19,487. EPA estimates 50 legal hours, 55 management hours, 285 technical hours, and 110 clerical hours. As noted, EPA used the median wages from U.S. Bureau of Labor Statistics to calculate the cost of the estimated burden hours.

In addition to the burden hours of compiling the letter of interest and application, EPA estimated that respondents will be charged two fees. An application fee will be due upon submission of the application. The application fee acts as “earnest money” to ensure applicants are committed to

closing the WIFIA credit assistance. This application fee is credited toward the cost of expert services. For applications for projects serving small communities (population of not more than 25,000 people), this application fee is estimated to be \$25,000. For all other applicants, this application fee is estimated to be \$100,000. EPA assumes five applicants, with one being a small community. The annual combined application fee for all five applicants is estimated to be \$425,000.

A credit processing fee will be due at the time of closing for projects selected to receive assistance. The proceeds of any such fees would be used to pay for all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including legal, engineering, and financial advisory services. The fee for each project is directly attributable to the costs incurred by EPA for that project. EPA intends to fund all entities that are invited to apply for WIFIA credit assistance. If the credit agreement is not executed, the applicant must reimburse EPA for costs incurred in negotiating the credit agreement.

The amount for expert firms varies between applicants depending on the complexity of the project. EPA estimates these costs may range from \$350,000 to \$700,000. For the purpose of estimating burden, EPA estimates the cost will be approximately \$400,000. A portion of the credit processing fee may be waived at the discretion of the EPA. EPA will calculate a specific credit processing fee for each project. This credit processing fee will be equal to the cost of expert firms minus the application fee. For example, if the cost of expert firms is \$400,000 and the applicant paid a \$100,000 application fee, a \$300,000 credit processing fee will be due at closing. The total credit processing fee for five applicants will be approximately \$1,575,000.

The cost of general expenses for submitting an application, such as supplies, delivery charges, mailing, copying, and telecommunications, will be \$1,000. The total general expenses will be \$5,000.

WIFIA also requires that an eligible entity shall submit to the Administrator a preliminary rating opinion letter. By statute, applicants are required to submit a preliminary rating letter at the time of application and two (2) final rating letters at the time of closing that indicate that the senior obligation of the project has an investment grade rating. These rating letters must be from a rating a bond rating agency identified by the Securities and Exchange Commission as a nationally recognized

statistical rating organization (NRSRO). The cost of these rating letters vary based on the size and complexity of the project. Based on bond rating agency estimates and industry research, EPA estimates that the final rating letters will cost approximately \$100,000 per letter and that the initial preliminary rating letter is included in the cost of one of the final letters. The total cost for five applicants will be \$1,000,000.

EPA solicits comment on the accuracy of the estimated level of burden of collecting this information and the validity of the assumptions used. EPA also solicits comment on the utility and clarity of the information to be collected and ways EPA can minimize the information collection burden on respondents.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves the ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to loans and loan guarantees, which the APA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2). Moreover, the Water Infrastructure Finance and Innovation Act (sec. 1445 of Pub. L. 114–94) does not require notice and comment rulemaking to take this action.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action 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. While a tribal government, or a consortium of tribal governments, may apply for WIFIA credit assistance, this action does 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.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because this action does not address environmental health or safety risks. This rulemaking provides the procedure to apply for credit assistance; the selection criteria used for evaluating and selecting among eligible projects to receive credit assistance contained in the Supplementary Information section of the preamble includes the extent to which the project generates public health benefits.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking simply provides the procedure to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

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 that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

L. National Environmental Policy Act

Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). These requirements apply at the time of application for assistance. This rulemaking simply provides the procedure to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

M. Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 35

Environmental protection, Reporting and recordkeeping requirements, and Water finance.

Dated: December 6, 2016.

Gina McCarthy,
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 35 as follows:

PART 35—STATE AND LOCAL ASSISTANCE

- 1. The authority citation for part 35 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104–134, 110 Stat. 1321, 1321–299 (1996); Pub. L. 105–65, 111 Stat. 1344, 1373 (1997), 2 CFR 200.

- 2. Add Subpart Q to read as follows:

Subpart Q—Credit Assistance for Water Infrastructure Projects

Sec.	
35.10000	Purpose.
35.10005	Definitions.
35.10010	Limitations on assistance.
35.10015	Application process.
35.10020	Small community set-aside.
35.10025	Federal requirements.
35.10026	Federal flood risk management standard.
35.10030	American iron and steel.
35.10035	Labor standards.
35.10040	Investment-grade ratings.
35.10045	Threshold criteria.
35.10050	Use of existing financing mechanisms.
35.10055	Selection criteria.
35.10060	Term sheets and approvals.
35.10065	Closing on the credit agreement.
35.10070	Credit agreement.
35.10075	Reporting requirements.

Subpart Q—Credit Assistance for Water Infrastructure Projects**§ 35.10000 Purpose.**

This part implements a Federal credit assistance program for water infrastructure projects.

§ 35.10005 Definitions.

The following definitions apply to this part:

Community water system has the meaning given the term in section 1401 of the Safe Drinking Water Act (42 U.S.C. 300f).

Credit assistance means a secured loan or loan guarantee under 33 U.S.C. 3908.

Credit agreement means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that formalizes the terms and conditions established in the term sheet (or conditional term sheet) and authorizes the execution of a secured loan or loan guarantee.

Credit subsidy cost shall have the same meaning as "cost" under section 502(5) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)), which is the net present value at the time the obligation is entered into. The credit subsidy cost for a given project is calculated by EPA in consultation with OMB. The credit subsidy cost must be less than the unobligated subsidy amount that has been appropriated by Congress to date.

Eligible project costs mean amounts, substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of:

(1) Development-phase activities, including planning, feasibility analysis (including any related analysis necessary to carry out an eligible project), revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;

(2) Construction, reconstruction, rehabilitation, and replacement activities;

(3) The acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation (including acquisitions pursuant to section 5026(7)), construction contingencies, and acquisition of equipment; and

(4) Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction. Capitalized interest

on the WIFIA credit instrument is not an eligible project cost.

Federal credit instrument means a secured loan or loan guarantee authorized to be made available under 33 U.S.C. 3901–3914 with respect to a project.

Investment-grade rating means a rating category of BBB minus, Baa3, bbb minus, BBB (low), or higher assigned by a nationally recognized statistical rating organization (NRSRO) to project obligations offered into the capital markets.

Iron and steel products means the following products made primarily of iron or steel: Lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

Lender means any non-Federal qualified institutional buyer (as defined in 17 CFR 230.144A(a)), known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), including:

(1) A qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986, 26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(2) A governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986, 26 U.S.C. 414(d)) that is a qualified institutional buyer.

Loan guarantee means any guarantee or other pledge by the Administrator to pay all or part of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

Nationally recognized statistical rating organization (NRSRO) means a credit rating agency identified and registered by the Office of Credit Ratings in the Securities and Exchange Commission under 15 U.S.C. 78o–7.

Obligor means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation; partnership; joint venture; trust; Federal, State, or local governmental entity, agency, or instrumentality; tribal government or consortium of tribal governments; or a State infrastructure finance authority.

Project means:

(1) One or more activities that are eligible for assistance under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)), notwithstanding the public ownership requirement under paragraph (1) of that subsection;

(2) One or more activities described in section 1452(a)(2) of the Safe Drinking Water Act (42 U.S.C. 300j–12(a)(2));

(3) A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;

(4) A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation).;

(5) A brackish or sea water desalination project, a managed aquifer recharge project, or a water recycling project;

(6) Acquisition of real property or an interest in real property—

(i) If the acquisition is integral to a project described in paragraphs (1) through (5) of this definition; or

(ii) Pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance under this section;

(7) A combination of projects, each of which is eligible under paragraph (1) or (2) of this definition, for which a State infrastructure financing authority submits to the Administrator a single application; or

(8) A combination of projects secured by a common security pledge, each of which is eligible under paragraph (1), (2), (3), (4), (5), or (6) of this definition, for which an eligible entity, or a combination of eligible entities, submits a single application.

Project obligation means any note, bond, debenture, or other debt obligation issued by an obligor in connection with the financing of a project, other than a Federal credit instrument.

Project sponsor, for the purposes of this part, means an applicant for WIFIA assistance or an obligor, as appropriate.

Publicly sponsored means the obligor can demonstrate, to the satisfaction of the Administrator, that it has consulted with the affected state, local, or tribal government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. Support can be shown by a certified letter signed by the approving municipal department or similar agency, mayor or other similar designated authority, local ordinance, or any other means by which local government approval can be evidenced.

Secured loan means a direct loan or other debt obligation issued by an obligor and funded by the Administrator

in connection with the financing of a project under 33 U.S.C. 3908.

State means any one of the fifty states, the District of Columbia, Puerto Rico, or any other territory or possession of the United States.

State infrastructure financing authority means the State entity established or designated by the Governor of a State to receive a capitalization grant provided by, or otherwise carry out the requirements of, title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 *et seq.*) or section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12).

Subsidy amount means the dollar amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*).

Substantial completion means the stage in the progress of the project when the project or designated portion thereof is sufficiently complete in accordance with the contract documents so that the project or a portion thereof can be used for its intended use.

Term sheet means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that sets forth the key business terms and conditions of a Federal credit instrument. Execution of this document represents a legal obligation of budget authority.

Treatment works has the meaning given the term in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292).

WIFIA means the Water Infrastructure Finance and Innovation Act of 2014, Pub. L. 113–121, 128 Stat, 1332, codified at 33 U.S.C. 3901–3914.

§ 35.10010 Limitations on assistance.

(a) The total amount of credit assistance offered to any project under this part shall not exceed 49% of the anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis, or, if the secured loan does not receive an investment-grade rating, the total amount of credit assistance shall not exceed the amount of the senior project obligations of the project.

(b) Notwithstanding paragraph (a) of this section, the Administrator may offer credit assistance in excess of 49% of the anticipated eligible project costs as long as such excess assistance combined for all projects does not require greater than

25% of the subsidy amount made available for the fiscal year.

(1) Credit assistance may not exceed 80% of the total project costs due to a statutory restriction on the maximum extent of federal participation in a project, except in the case of certain rural water projects authorized to be carried out by the Secretary of the Interior that includes among its beneficiaries a federally recognized Indian tribe and for which the authorized Federal share of the total project costs is greater than 80%.

(2) Use of the authority to offer credit assistance in excess of 49% of the anticipated eligible project costs shall be considered only under extraordinarily exceptional circumstances.

(3) In the event this authority is used, all other criteria and requirements described in this part must be met and adhered to.

(c) Costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered in calculating eligible project costs only upon approval of the Administrator. In addition, applicants shall not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter) among the eligible project costs. Capitalized interest on the WIFIA credit instrument is not eligible for calculating project costs.

(d) No costs financed internally or with interim funding may be refinanced under this part later than a year following substantial completion of the project.

(e) The Administrator shall not obligate funds for a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*

(f) The Administrator shall fund a secured loan based on the project's financing needs. The credit agreement shall include the anticipated schedule for such loan disbursements. Actual disbursements will be based on incurred costs, and in accordance with the approved construction plan, as evidenced by paid invoices.

(g) The interest rate on a secured loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement as identified through use of the daily rate tables published by the Bureau of the Fiscal Service for the State and Local Government Series (SLGS) investments. The yield on comparable Treasury

securities will be estimated by adding one basis point to the SLGS daily rate with a maturity that is closest to the weighted average loan life of the WIFIA credit instrument, measured from first disbursement.

(h) The final maturity date of a secured loan will be the earlier of the date that is 35 years after the date of substantial completion of the project, as determined by the Administrator and identified in the assistance agreement, and if the useful life of the project, as determined by the Administrator, is less than 35 years, the useful life the project; however, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed. In determining the useful life of the project, for the purposes of establishing the final maturity date of the WIFIA credit instrument, the Administrator will consider the useful economic life of the asset(s) being financed.

(i) A secured loan will not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor of the project.

(j) EPA will establish a repayment schedule for a secured loan based on the projected cash flow from project revenues and other repayment sources. Scheduled loan repayments of principal or interest on a secured loan will commence not later than 5 years after the date of substantial completion of the project as determined by the Administrator; however, scheduled loan repayments of principal or interest on a secured loan to a State infrastructure financing authority will commence not later than 5 years after the date on which amounts are first disbursed.

§ 35.10015 Application process.

(a) Each fiscal year for which budget authority is made available by Congress, the EPA shall publish a **Federal Register** notice to solicit letters of interest for credit assistance called a Notice of Funding Availability. Such notice will specify the relevant due dates, the estimated amount of funding available to support WIFIA credit instruments for the current and future fiscal years, contact name(s), and other details for submissions and funding approvals.

(b) Public and private applicants for credit assistance under this part will be required to submit letters of interest to the EPA in order to be selected by the Administrator to submit an application.

(c) The application process is divided into two steps: letter of interest and application.

(1) The letter of interest provides enough information for EPA to make a project selection and invite prospective borrowers to submit applications. Such information may include, but is not limited to:

- (i) Prospective borrower information;
- (ii) Project plan;
- (iii) Preliminary project operations and maintenance plan;
- (iv) Proposed financing plan and audited financial statements;
- (v) Contact information;
- (vi) Written responses addressing selection criteria;
- (vii) Certifications; and
- (viii) Notification of state infrastructure financing authority.

(2) The application provides all relevant information for EPA to provide credit assistance. Submission of an application does not guarantee that EPA will award credit assistance to a given applicant. At a minimum, such applications shall provide, in addition to the information provided in the letter of interest:

- (i) Detailed applicant information;
- (ii) Detailed project information;
- (iii) Detailed project operation and maintenance plan;
- (iv) Comprehensive financing plan; and
- (v) Complete certifications.

(d) Following successful submission and approval by EPA of the application, EPA will offer the applicant a term sheet, as described in section 35.10060. The applicant may accept or negotiate terms in the term sheet.

(e) Following acceptance of the term sheet, the applicant will proceed to closing, as described in section 35.10065.

(f) An application for a project located in or sponsored by more than one entity shall be submitted to the EPA by just one entity. The sponsoring entities shall designate a single obligor for purposes of applying for, receiving, and repaying WIFIA credit assistance.

§ 35.10020 Small community set-aside.

(a) Each fiscal year for which budget authority is made available by Congress, EPA shall set aside at least 15% of budget authority for projects that serve communities of not more than 25,000 individuals.

(b) Any set-aside budget authority remaining unobligated on June 1 of the fiscal year for which the budget authority is set aside shall be made available for projects other than small community projects.

§ 35.10025 Federal requirements.

All projects receiving credit assistance under this part shall comply with:

- (a) Environmental authorities:
 - (1) The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*;
 - (2) Archeological and Historic Preservation Act, 16 U.S.C. 469–469c;
 - (3) Clean Air Act, 42 U.S.C. 7401 *et seq.*;
 - (4) Clean Water Act, 33 U.S.C. 1251 *et seq.*;
 - (5) Coastal Barrier Resources Act, 16 U.S.C. 3501 *et seq.*;
 - (6) Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*;
 - (7) Endangered Species Act, 16 U.S.C. 1531 *et seq.*;
 - (8) Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12898, 59 FR 7629, February 16, 1994;
 - (9) Floodplain Management, Executive Order 11988, 42 FR 26951, May 24, 1977, as amended by Executive Order 13690, 80 FR 6425, February 4, 2015;
 - (10) Protection of Wetlands, Executive Order 11990, 42 FR 26961, May 25, 1977, as amended by Executive Order 12608, 52 FR 34617, September 14, 1987;
 - (11) Farmland Protection Policy Act, 7 U.S.C. 4201 *et seq.*;
 - (12) Fish and Wildlife Coordination Act, 16 U.S.C. 661–666c, as amended;
 - (13) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*;
 - (14) National Historic Preservation Act, 16 U.S.C. 470 *et seq.*;
 - (15) Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; and
 - (16) Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*
- (b) Economic and miscellaneous authorities:
 - (1) Debarment and Suspension, Executive Order 12549, 51 FR 6370, February 21, 1986;
 - (2) Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301 *et seq.*, as amended, and Executive Order 12372, 47 FR 30959, July 16, 1982;
 - (3) Drug-Free Workplace Act, 41 U.S.C. 8101 *et seq.*;
 - (4) New Restrictions on Lobbying, 31 U.S.C. 1352;
 - (5) Prohibitions relating to violations of the Clean Water Act or Clean Air Act with respect to Federal contracts, grants, or loans under 42 U.S.C. 7606 and 33 U.S.C. 1368, and Executive Order 11738, 38 FR 25161, September 12, 1973; and
 - (6) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*

(c) Civil Rights, Nondiscrimination, Equal Employment Opportunity Authorities:

(1) Age Discrimination Act, 42 U.S.C. 6101 *et seq.*;

(2) Equal Employment Opportunity, Executive Order 11246, 30 FR 12319, September 28, 1965;

(3) Section 13 of the Clean Water Act, Pub. L. 92-500, codified in 42 U.S.C. 1251;

(4) Section 504 of the Rehabilitation Act, 29 U.S.C. 794, supplemented by Executive Orders 11914, 41 FR 17871, April 29, 1976 and 11250, 30 FR 13003, October 13, 1965;

(5) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; and

(6) Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements, 73 FR 15904.

(d) Other Federal and compliance requirements as may be applicable.

§ 35.10026 Federal flood risk management standard.

(a) In making WIFIA funding decisions under this rule, EPA will follow the requirements of Executive Orders 11988 and 13690, the Federal Flood Risk Management Standard, and the Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines). Applicants shall submit information regarding the project that is sufficient for EPA to determine that the project is in compliance with the standards and requirements of these Executive Orders and Guidelines.

(b) Projects funded under the WIFIA program implemented through this rule must also demonstrate that they will meet or exceed applicable State, local, Tribal, and Territorial standards for flood risk and floodplain management.

(c) As a condition of funding projects involving new construction, substantial improvement, or to address substantial damage to structures and facilities, the project sponsor must demonstrate to EPA that it will use the expanded floodplain standard described in E.O. 13690. Projects involving substantial improvement or addressing substantial damage include projects equaling or exceeding 50 percent of the value of the structure or facility. With regard to projects meeting this definition, the project applicant shall determine whether the proposed project will occur in the floodplain using any of the approaches provided in section 6(c) of

Executive Order 11988, as amended. Applicants for proposed projects that are not new construction, substantial improvement, or projects to address substantial damage shall use at minimum, the base 100-year floodplain standard for actions that are not “critical actions” as defined in Executive Order 11988 Section 6(d) and the 0.2%-annual chance floodplain for critical actions.

(d) For purposes of this section, projects funded under WIFIA will be considered Critical Actions as defined in Executive Order 11988, as amended, unless the Administrator determines and provides written notice to the applicant that the particular project is not considered to be a Critical Action.

(e) All applicants shall follow the Guidelines, including the Eight-Step Decision-Making Process described in the Guidelines, as a means of compliance with the requirements of section 2(a) of Executive Order 11988, as amended. EPA shall provide oversight to ensure that project applicants have complied with this process.

(f) The Administrator will not allow WIFIA funding for new construction, substantial improvement, or to address substantial damage to structures and facilities sited in or encroaching on a Floodway or a Coastal High Hazard Area/V-Zone, except for a functionally dependent use or to facilitate an open space use. The Administrator will make the determination of whether a proposed project is a functionally dependent use or a structure that facilitates an open space use. In addition to compliance with paragraphs (a) through (e) of this section, applicants for projects sited in these zones must include engineering plans demonstrating that the facility will be accessible and operational to the elevation of the applicable level, including elevation or floodproofing of buildings, electronics, and mechanical components.

§ 35.10030 American iron and steel.

(a) All projects receiving credit assistance under this part for the construction, alteration, maintenance, or repair of a project shall use only iron and steel products produced in the United States.

(b) By statute, at 33 U.S.C. 3914(b), “iron and steel products” means the following products made primarily of iron or steel: Lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials. Equipment employed in

construction but does not become part of the project is not an “iron and steel product” for purpose of this section.

(c) EPA may issue a waiver for a case or category of cases where EPA finds:

(1) That applying these requirements would be inconsistent with the public interest;

(2) Iron and steel products are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) Inclusion of iron and steel products produced in the US will increase the cost of the overall project by more than 25%.

(d) All guidance developed for compliance with American Iron and Steel requirements for EPA’s State Revolving Fund programs shall apply to projects receiving credit assistance under this part. Such guidance can be found on EPA’s Web site.

(e) All national waivers issued by EPA in accordance with section 436(b) of Pub. L. 113-76, 128 Stat. 346, 2014, Consolidated Appropriations Act, 2014, shall apply to projects receiving credit assistance under this part in the same manner as they apply to projects receiving assistance under the Clean Water and Drinking Water State Revolving Fund programs, unless such waiver addresses the timing of the submission of engineering plans and specifications as the submission relates to Congressional appropriations for either the Clean Water or Drinking Water State Revolving Fund programs.

§ 35.10035 Labor standards.

All laborers and mechanics employed by contractors or subcontractors on projects receiving credit assistance under this part shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor.

§ 35.10040 Investment-grade ratings.

(a) At the time a project sponsor submits an application, the EPA shall require a preliminary rating opinion letter. This letter is a conditional credit assessment from a NRSRO that provides a preliminary indication of the project’s overall creditworthiness and that specifically addresses the potential of the project’s senior debt obligations (those obligations having a lien senior to that of the WIFIA credit instrument on the pledged security) to achieve an investment-grade rating and the default risk of the WIFIA loan.

(b) The full funding of a secured (direct) loan or loan guarantee shall be contingent on the assignment of an investment-grade rating by two NRSROs

to all project obligations that have a lien senior to that of the Federal credit instrument on the pledged security along with commentary on the default risk of the WIFIA loan.

(c) Neither the preliminary rating opinion letter nor the formal credit ratings should reflect the effect of bond insurance, unless that insurance provides credit enhancement that secures the WIFIA obligation.

§ 35.10045 Threshold criteria.

(a) To be eligible to receive Federal credit assistance under this part, a project shall meet the following six threshold criteria:

(1) The project and obligor shall be creditworthy;

(2) The project sponsor shall submit a project application to the Administrator;

(3) A project shall have eligible project costs that are reasonably anticipated to equal or exceed \$20 million, or for a project eligible under paragraphs (2) or (3) of 33 U.S.C. 3905 serving a community of not more than 25,000 individuals, project costs that are reasonably anticipated to equal or exceed \$5 million;

(4) Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

(5) In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a tribal government or consortium of tribal governments, the project that the entity is undertaking shall be publicly sponsored.

(6) The applicant shall have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life.

(b) With respect to paragraph (a)(4) of this section, the Administrator may accept general obligation pledges or general corporate promissory pledges and will determine the acceptability of other pledges and forms of collateral as dedicated revenue sources on a case-by-case basis. The Administrator shall not accept a pledge of Federal funds, regardless of source, as security for the WIFIA credit instrument.

§ 35.10050 Use of existing financing mechanisms.

(a) Within 30 days of receipt of an application for a project eligible under 33 U.S.C. 3905(2) or (3), EPA shall notify the State infrastructure financing authority in the State in which the applicant's project is located that such an application has been received.

(b) EPA may not provide assistance under this chapter if within 60 days of receipt of a notification described in paragraph (a) of this section, the State infrastructure financing authority notifies EPA that it intends to commit funds in an amount equal to or greater than the amount requested in the application to the applicant for the project, as evidenced by an amendment to the State revolving fund program's intended use plan described in § 35.3150 or § 35.3555 unless:

(1) By the date 180 days after receipt of the notification described in paragraph (a) of this section, the State infrastructure financing authority fails to enter into an assistance agreement with the applicant; or

(2) The financial assistance to be provided by the State infrastructure authority will be at rates and terms that are less favorable than the rates and terms of the assistance agreement to be provided under this chapter.

§ 35.10055 Selection criteria.

(a) The Administrator shall assign weights to selection criteria in the first Notice of Funding Availability published in accordance with section 4(a), and adjusted weights in future Notices of Funding Availability to address changing circumstances and priorities. The following thirteen selection criteria will be used for evaluating and selecting among eligible projects to receive credit assistance:

(1) The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public health benefits;

(2) The likelihood that assistance under this subtitle would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;

(3) The extent to which the project uses new or innovative approaches such as the use of energy efficient parts and systems, or the use of renewable or alternate sources of energy; green infrastructure; and the development of alternate sources of drinking water through desalination, aquifer recharge or water recycling;

(4) The extent to which the project protects against extreme weather events, such as floods or hurricanes, as well as the impacts of climate change;

(5) The extent to which the project helps maintain or protect the environment or public health;

(6) The extent to which a project serves regions with significant energy exploration, development, or production areas;

(7) The extent to which a project serves regions with significant water resource challenges, including the need to address water quality concerns in areas of regional, national, or international significance; water quantity concerns related to groundwater, surface water, or other resources; significant flood risk; water resource challenges identified in existing regional, state, or multistate agreements; and water resources with exceptional recreational value or ecological importance;

(8) The extent to which the project addresses identified municipal, state, or regional priorities;

(9) The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under this subtitle; and

(10) The extent to which the project financing plan includes public or private financing in addition to assistance under this subtitle;

(11) The extent to which assistance under this subtitle reduces the contribution of Federal assistance to the project;

(12) The extent to which the project addresses needs for repair, rehabilitation or replacement of a treatment works, community water system, or aging water distribution or wastewater collection system; and

(13) The extent to which the project serves economically stressed communities, or pockets of economically stressed rate payers within otherwise non-economically stressed communities.

(b) The Administrator may include additional weighted criteria in the Notice of Funding Availability to address changing circumstances and priorities.

(c) In addition, 33 U.S.C. 3907(a)(1)(D)(i) conditions a project's approval for credit assistance on receipt of a preliminary rating opinion letter indicating that the project's senior debt obligations have the potential to attain an investment-grade rating.

§ 35.10060 Term sheets and approvals.

(a) EPA, after review and evaluation of the application, and all other required

documents submitted by the applicant, may offer to an applicant a written Term Sheet signed by the Administrator, including detailed terms and conditions that must be met. The issuance of this Term Sheet represents approval of the application for credit assistance.

(b) To proceed to closing, the applicant must sign the Term Sheet before the expiration date on which the terms offered will expire unless the Administrator agrees in writing to extend the expiration date.

§ 35.10065 Closing on the credit agreement.

(a) Subsequent to the signing of the Term Sheet by the applicant, EPA will set a closing date for execution of a credit agreement, and provide documents articulating the conditions precedent to closing to the applicant.

(b) By the closing date, the applicant must have satisfied all of the detailed terms and conditions required by EPA and all other contractual, statutory, and regulatory requirements. If the applicant has not satisfied all such terms and conditions by the closing date, the Administrator may set a new closing date or rescind the approval of the application.

(c) If at any point following the issuance of the Term Sheet by EPA and prior to the closing date, the terms and conditions of the financing arrangements or the financial status of the obligor change in a material manner from the information used to evaluate the application, the applicant must notify EPA within the time period specified by the Administrator, at which point the Administrator may update the Term Sheet accordingly or rescind the approval of the application.

(d) The Credit Agreement and related documents will include detailed definitions, terms, and conditions necessary and appropriate to protect the interest of the United States over the life of the credit assistance and in the case of default, and will be executed at closing only after EPA has ensured that all requirements and conditions articulated in this rule, the statute, and other relevant laws and regulations have been satisfied.

§ 35.10070 Credit agreement.

(a) Only a credit agreement executed by the Administrator can contractually obligate EPA to provide assistance under WIFIA.

(b) EPA is not bound by oral representations made during the letter of interest step, or application step, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no Federal funds,

proceeds of Federal loans, or proceeds of loans guaranteed by the Federal Government, may be used by a borrower to pay for credit subsidy costs, administrative fees, or other fees charged by or paid to EPA relating to the WIFIA program.

(d) Prior to the execution by EPA of a credit agreement, EPA must ensure that the following requirements and conditions are satisfied:

(1) The project qualifies as an eligible project under WIFIA;

(2) The face value of the credit agreement is limited to no more than 49 percent of total eligible project costs, or if credit assistance in excess of 49% has been approved, no more than the percentage of eligible project costs agreed upon, not to exceed 80% of eligible project costs;

(3) The applicant is obligated to make full repayment of the principal and interest on the credit instrument over a period of up to the lesser of 35 years or the useful life of the project, after substantial completion; however, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed.

(4) If the credit instrument is a loan guarantee, the loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(5) The amount of the credit agreement, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(6) The applicant has pledged project assets and other collateral or surety, including non-project-related assets, determined by EPA to be necessary to secure the repayment of the credit agreement;

(7) The credit agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default;

(8) The credit agreement is not subordinate to any loan or other debt obligation in the event of bankruptcy, insolvency, or liquidation of the obligor of the project;

(9) There is satisfactory evidence that the applicant is willing, competent, and capable of performing the terms and conditions of the credit agreement, and will diligently pursue the project;

(10) The applicant has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are

pledged as security for the credit agreement;

(11) EPA or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(12) EPA and the applicant have reached an agreement as to the information that will be made available to EPA and the information that will be made publicly available;

(13) The applicant has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;

(14) The applicant has no delinquent federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;

(15) The credit agreement and related agreements contain such other terms and conditions as EPA deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the credit agreement, and (ii) such collateral sharing, priorities and voting rights among creditors and other intercreditor arrangements as, in each case, EPA deems reasonable and necessary to protect the interests of the United States; and

(e) The credit agreement must contain audit provisions which provide, in substance, as follows:

(1) The applicant must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project; and

(2) EPA and the Inspector General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the applicant. Examination of records may be made during the regular business hours of the applicant, or at any other time mutually convenient.

§ 35.10075 Reporting requirements.

At a minimum, any recipient of Federal credit assistance under this part shall submit an annual project performance report and audited financial statements to EPA within no more than 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. EPA may conduct periodic financial and compliance audits of the

recipient of credit assistance, as determined necessary by EPA. The specific credit agreement between the recipient of credit assistance and EPA may contain additional reporting requirements.

[FR Doc. 2016–30194 Filed 12–16–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2015–0845; FRL–9956–62–Region 5]

Air Plan Approval; Michigan; Part 9 Miscellaneous Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving administrative revisions for incorporation into the Michigan’s State Implementation Plan (SIP). The submittal, by the Michigan Department of Environmental Quality (MDEQ) on December 21, 2015, makes minor corrections to Michigan’s Air Pollution Control Rules entitled “Emissions Limitations and Prohibitions—Miscellaneous.”

DATES: This rule is effective on February 17, 2017, unless EPA receives adverse written comments by January 18, 2017. If EPA receives adverse comments, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2015–0845 at <http://www.regulations.gov> or via email to blakley.pamela@epa.gov. For comments submitted at [Regulations.gov](http://www.Regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.Regulations.gov). For either manner of submission, 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. EPA will generally not consider comments or comment contents located

outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Charles Hatten, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, hatten.charles@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What did Michigan submit?
- II. What action is EPA taking?
- III. Incorporation by Reference
- IV. Statutory and Executive Order Reviews

I. What did Michigan submit?

On December 21, 2015, MDEQ submitted a request to EPA to make minor administrative revisions to rules in Chapter 336, Part 9. The revisions are described below:

R 336.1906 (rule 906)—This existing rule requires notice to MDEQ for the placement of a device that dilutes or conceals emissions. MDEQ requests the rule that is currently in effect at the state level be incorporated into the SIP. The regulatory text of Michigan’s current rule, effective May 20, 2015, is identical to the text of the SIP approved rule, which became effective March 19, 2002. The only revision to the text is the effective date of the rule. Because there are no substantive changes to language in the current version of the rule promulgated at the state, EPA finds the 2015 version of rule 906 approvable into the SIP.

R 336.1911 (rule 911) and R 336.1912 (rule 912)—The provisions of these rules do not allow emissions or specifically limit emissions from a source, process equipment, or operation. In the existing rule 911, it requires a malfunction abatement plan in certain situations. A person responsible for the operation of a source of an air contaminant shall prepare a malfunction abatement plan to prevent, detect, and correct malfunctions or equipment failures resulting in emissions exceeding any applicable emission limitation. In this rule the

word “commission” was changed to “department.” Malfunction abatement plans are to be submitted to the department because the commission no longer exists.

The existing rule 912 addresses notification and reporting requirements of excess emissions resulting from either an abnormal condition, start-up, shutdown, or malfunction of a source, process equipment, or operation. In section 912(5b), the word “which” was changed to “that.”

Because there are no substantive changes to the language in rules 911 and 912, EPA finds the revisions acceptable for approval into the Michigan SIP.¹

Overall, the revisions to Part 9 make minor corrections to rules 906, 911, and 912. The revisions are solely administrative, and do not make any substantive changes to the language in the rules. The revisions to these rules will not increase emissions of pollutants into the atmosphere.

II. What action is EPA taking?

EPA is approving the December 21, 2015, request to revise Michigan’s air pollution control rules in Part 9. The revisions will not increase emissions of pollutants into the atmosphere.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments.

However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective February 17, 2017 without further notice unless we receive relevant adverse written comments by January 18, 2017. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective February 17, 2017.

¹ On June 12, 2015 (80 FR 33840), EPA finalized a SIP Call to address deficient SIP provisions regarding emissions during facility start-up, shutdown, and malfunctions. In this SIP Call, Michigan was required to revise a rule which allowed an affirmative defense for excess emissions during start-up or shutdown. The SIP Call did not include rule 911 or 912. These two rules address only planning and reporting requirements. Thus, they comply with EPA’s policy on start-up, shutdown, and malfunctions.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Michigan regulations described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.² EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Under the Clean Air Act (CAA), the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 17, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 2, 2016.

Robert A. Kaplan,
Acting Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

- 1. The authority citation for part 52 continues to read as follows:
Authority: 42 U.S.C. 7401 *et seq.*
- 2. In § 52.1170, the table in paragraph (c) is amended by revising the entries for R 336.1906, R 336.1911, and R 336.1912 under the heading “Part 9. Emission Limitations and Prohibitions—Miscellaneous” to read as follows:

§ 52.1170 Identification of plan.
* * * * *
(c) * * *

EPA-APPROVED MICHIGAN REGULATIONS

Michigan citation	Title	State effective date	EPA approval date	Comments
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² 62 FR 27968 (May 22, 1997).

EPA-APPROVED MICHIGAN REGULATIONS—Continued

Michigan citation	Title	State effective date	EPA approval date	Comments
*	*	*	*	*
Part 9. Emission Limitations and Prohibitions—Miscellaneous				
*	*	*	*	*
R 336.1906	Diluting and concealing emissions	5/20/2015	12/19/2016 [insert Federal Register citation].	
*	*	*	*	*
R 336.1911	Malfunction abatement plans	5/20/2015	12/19/2016 [insert Federal Register citation].	
*	*	*	*	*
R 336.1912	Abnormal conditions, start-up, shutdown, and malfunction of a source, process, or process equipment, operating, notification, and reporting requirements.	5/20/2015	12/19/2016 [insert Federal Register citation].	
*	*	*	*	*

[FR Doc. 2016–30195 Filed 12–16–16; 8:45 am]
 BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R05–OAR–2016–0277; FRL–9956–95–Region 5]

Reclassification of the Sheboygan, Wisconsin Area To Moderate Nonattainment for the 2008 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is determining that the Sheboygan, Wisconsin area (Sheboygan County) has failed to attain the 2008 ozone National Ambient Air Quality Standards (NAAQS) by the applicable attainment date of July 20, 2016, and that this area is not eligible for an extension of the attainment date. Thus, EPA is reclassifying this area as “moderate” nonattainment for the 2008 ozone NAAQS. The State of Wisconsin must submit State Implementation Plan (SIP) revisions that meet the statutory and regulatory requirements that apply to areas classified as moderate nonattainment for the 2008 ozone NAAQS by January 1, 2017.

DATES: This final rule is effective December 19, 2016.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2016–0277. All documents in the docket are listed in the <http://www.regulations.gov> Web

site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through <http://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kathleen D’Agostino, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, dagostino.kathleen@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

I. What is being addressed in this document?

Clean Air Act (CAA) section 181(b)(2) requires EPA to determine, based on an area’s ozone design value¹ as of the area’s attainment deadline, whether the area has attained the ozone standard by that date. The statute provides a

¹ An area’s ozone design value for the eight-hour ozone NAAQS is the highest three-year average of the annual fourth-highest daily maximum eight-hour average concentrations of all monitors in the area. To determine whether an area has attained the ozone NAAQS prior to the attainment date, EPA considers the monitor-specific ozone design values in the area for the most recent three years with complete, quality-assured monitored ozone data prior to the attainment deadline.

mechanism by which states that meet certain criteria may request and be granted by the EPA Administrator a one-year extension of an area’s attainment deadline. The CAA also requires that areas that have not attained the standard by their attainment deadlines be reclassified to either the next “highest” classification (*e.g.*, marginal to moderate, moderate to serious, *etc.*) or to the classifications applicable to the areas’ design values.

On April 30, 2012, the Sheboygan area was designated as nonattainment for the 2008 ozone NAAQS and was classified as marginal, effective July 20, 2012 (77 FR 30088, May 21, 2012). Wisconsin submitted a letter to EPA requesting a one-year extension of the attainment deadline for the Sheboygan area under section 181(a)(5) of the CAA. In that letter, Wisconsin certified that the State had complied with all requirements and commitments pertaining to the Sheboygan area in the SIP and that all monitors in the area had a fourth highest daily maximum 8-hour average of 0.075 parts per million (ppm) or less for 2014 (*i.e.*, the last full year of air quality data prior to the July 20, 2015, attainment date). On May 4, 2016 (81 FR 26697), based on EPA’s evaluation and determination that the area met the attainment date extension criteria of CAA section 181(a)(5), EPA granted the Sheboygan area a one-year extension of the marginal area attainment date to July 20, 2016.

Wisconsin did not request a second one-year extension for the Sheboygan area, and the area would not have qualified for one under CAA section 181(a)(5) because, at 0.076 ppm, the average of the 2014 and 2015 annual fourth highest daily maximum eight-

hour average ozone concentrations at a monitor in the area is greater than 0.075 ppm. On September 28, 2016 (81 FR 66617), EPA proposed to determine that the Sheboygan area failed to attain the 2008 ozone NAAQS by the applicable attainment date of July 20, 2016, is not eligible for an additional one-year attainment date extension, and must be reclassified as moderate nonattainment. EPA also proposed to require Wisconsin to submit SIP revisions to address moderate area requirements by January 1, 2017.

II. What comments did we receive on the proposed rule and how are we responding to those comments?

EPA provided a 30-day review and comment period on the proposed action. Adverse comments are summarized and addressed below.

Comment 1: There are two ozone monitoring sites in the Sheboygan area. The first is located at Kohler Andrae State Park along Lake Michigan and southeast of the City of Sheboygan, the main urban area of the county. The ozone detected by the Kohler monitor does not come from the Sheboygan area, but from areas along southern Lake Michigan, namely Chicago, IL and Gary, IN. This site has been operational since June 1997. The second monitoring site, known as Haven, is located northwest and downwind of the City of Sheboygan and has been operational since April 2014.

EPA's nonattainment re-designation is based exclusively on data from the Kohler Andrae monitor. Once 2016 data are certified, the Haven monitor will have three complete years of data for this site. Based on these data, the Haven monitor will have a design value of 0.069 ppm, as compared to 0.079 ppm at the Kohler Andrae monitor.² These data show that actual air quality within the Sheboygan area is in compliance with the 2008 ozone standard. EPA should allow Wisconsin to certify these data and consider all available regulatory data prior to making a re-designation for the entire county.

Response 1: CAA section 181(b)(2) requires EPA to determine, based on an area's ozone design value as of the area's attainment deadline,³ whether the area has attained the ozone standard by that date. The CAA also requires that any

area⁴ that EPA finds has not attained the standard by the attainment deadline shall be reclassified by operation of law to the higher of the next "highest" classification (e.g., marginal to moderate, moderate to serious, etc.) or the classification applicable to the area's design value. Further, the agency's mandatory duty to make determinations of attainment or failure to attain the NAAQS exists regardless of the nature or effect of transported ozone and emissions on monitored air quality data in a given nonattainment area.⁵

Under EPA regulations at 40 CFR part 50, appendix P, the 2008 ozone NAAQS is attained at a monitoring site when the three-year average of the annual fourth-highest daily maximum eight-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm.⁶ This three-year average is referred to as the design value. When the design value is less than or equal to 0.075 ppm at each ambient air quality monitoring site within the area, the area is deemed to be meeting the NAAQS. If the design value is greater than 0.075 ppm at any site in the area, the area is deemed to be violating the NAAQS.

Therefore, even if the Haven monitoring site had three years of complete, quality-assured, and certified ozone data showing a design value below the standard for the 2013–2015 time period, EPA would still be compelled to determine that the area failed to attain the standard due to the violation recorded at the Kohler Andrae monitor.

Comment 2: EPA's guidance on monitoring site selection states, "[f]or regulatory compliance, the principle objective is to measure the ozone concentration in the high population density areas and the maximum downwind concentration from the urban region." The Kohler Andrae monitor is not located downwind from sources in the Sheboygan area. The monitor's location in no way could be seen as measuring ozone concentration in an area with the maximum downwind concentration from the urban region.

Response 2: The siting of the Kohler Andrae monitor is consistent with

EPA's monitoring site selection guidance. EPA's monitoring guidance does not prevent placement of monitors upwind of urban source areas. In addition, the Kohler Andrae monitor was not placed to monitor the maximum downwind impacts from the urbanized portion of the Sheboygan area, but to capture maximum downwind impacts from several urban areas along Lake Michigan, including Milwaukee, Wisconsin; Chicago, Illinois; and Gary, Indiana. The fact that the Kohler Andrae site is monitoring the highest ozone concentrations in Wisconsin supports the appropriateness of its selection as a maximum downwind site.

Comment 3: The Haven monitor is located approximately six miles northwest of the City of Sheboygan. Wisconsin established this monitor specifically to provide accurate downwind measurements of air quality for the Sheboygan area. This monitor's location makes it a much more appropriate monitor to use for compliance with ozone standards because it is placed in a location that will actually monitor ozone generated from Sheboygan area facilities.

Response 3: EPA recognizes that the Haven monitor provides additional air quality data that can be used in conjunction with the air quality data from the Kohler Andrae monitor to form a more complete understanding of ozone values throughout the Sheboygan area. This information can be considered when making nonattainment area boundary decisions for any future ozone designations. The Sheboygan area, consisting of the entirety of Sheboygan County, was designated as nonattainment for the 2008 ozone standard on April 30, 2012. EPA considered the recommendation of the state and the information available at the time to determine the appropriate boundary for the area. At that time, the Haven monitor ozone data were not available for consideration. That designation is not being reevaluated in this rulemaking.

In this action EPA is meeting its statutory obligation under section 181(b)(2) of the CAA to determine, based on the area's ozone design value as of the area's attainment deadline, whether the Sheboygan area has attained the 2008 ozone standard. As discussed more completely in response to Comment 1, if any monitor in an area shows a violation of the ozone NAAQS during the most recent three-year period with complete, quality assured, and certified ozone data before the attainment deadline, and the state fails to meet the requirements for an attainment date extension set forth in

² The level of the 2008 ozone standard is 0.075 ppm.

³ Section 181(a)(5) of the CAA gives the Administrator the discretion to grant up to two one-year extensions of the attainment date upon application by any state if certain criteria are met. Wisconsin did not request a second one-year attainment date extension, and the Sheboygan area would not have met the criteria required for EPA to grant one.

⁴ Except those classified as severe or extreme.

⁵ See *Sierra Club v. EPA*, 294 F.3d 155, 160–62 (D.C. Cir. 2002) (holding that the EPA is not permitted to relax mandatory statutory requirements for downwind areas on the basis of interstate transport).

⁶ The rounding convention under 40 CFR part 50, appendix P, dictates that concentrations shall be reported in ppm to the third decimal place, with additional digits to the right being truncated. Thus, a computed three-year average ozone concentration of 0.076 ppm is greater than 0.075 ppm and, therefore, over the standard.

section 181(a)(5) of the CAA, EPA is obligated to determine that the area has failed to attain the standard by the attainment date. Therefore, even were EPA able to consider data from the Haven monitor, EPA cannot ignore the data recorded at the Kohler Andrae monitor, which is also located within the Sheboygan nonattainment area. Quality assured, certified data from the Kohler Andrae monitor show that the area failed to attain the 2008 ozone standard by its attainment deadline and, thus, EPA is obligated to make that finding. EPA's finding that the area failed to attain the standard by the attainment deadline requires EPA to reclassify the area by operation of law. Further, as discussed above, the agency's mandatory duty to make determinations of attainment or failure to attain the NAAQS exists regardless of the nature or effect of transported emissions on monitored air quality data in a given nonattainment area.

Comment 4: The State of Wisconsin has worked with EPA to address the issue of an upwind compliance monitor unfairly subjecting an entire county to a nonattainment designation in Kenosha County. At the very least, EPA should consider changing the geographic boundaries of the Sheboygan nonattainment area to exclude those portions of the county which are clearly in attainment according to data from the Haven monitor. Reclassifying only part of Sheboygan County would allow for more regulatory certainty for businesses and residents of the area as well as provide a more fair and appropriate regulatory solution than holding the entire county accountable as the air quality data clearly shows substantial attainment with the 2008 standard in large portions of the county.

Response 4: As discussed in the previous response, in this action, EPA is meeting its statutory obligation under section 181(b)(2) of the CAA. This action does not grant EPA the authority to reopen the boundary determinations that were made when the Sheboygan area was designated as nonattainment for the 2008 ozone standard.⁷ However, EPA and the states are currently in the process of designating areas under the 2015 ozone standard. The arguments presented by the commenter as well as other supporting information may be provided by the State to support its boundary recommendations for the 2015 ozone NAAQS and would be considered by EPA when finalizing area designations and boundaries for that ozone standard.

Comment 5: Reclassification to moderate increases the emission offsets required for new and modified major sources, which could restrict future growth for sources in the Sheboygan area. In addition, the majority of ozone precursor emissions in the Sheboygan area are located downwind of the Kohler Andrae ozone monitor. These facilities may be subject to increased regulations even though they are not likely contributing on days with higher ozone concentrations at the Kohler Andrae monitor.

Response 5: EPA acknowledges that a reclassification to moderate increases emission offsets required for new and modified major sources from 1.1 to 1 (for marginal areas) to 1.15 to 1 (for moderate areas). This offset ratio is established by section 181(b)(5) of the CAA. Increased offset ratios are intended to mitigate the impact of new ozone precursor sources to an existing ozone air quality problem and to avoid the propagation of this ozone problem to areas downwind of the violating monitoring site.

Comment 6: EPA should not finalize this action. Wisconsin's lakeshore air quality is heavily impacted by ozone precursors originating from out of state. The Sheboygan area, in particular, has long suffered the consequences of diminished air quality and resulting nonattainment due to emissions originating beyond Wisconsin's borders. To meet its CAA obligations, Wisconsin has already taken a wide range of actions to reduce emissions in order to improve the air quality of the Sheboygan area. Source apportionment modeling from the Lake Michigan Air Directors Consortium (LADCO) has suggested that the entire State of Wisconsin contributes less than 10% of the ozone monitored in the Sheboygan area. Any further actions taken by the state to address moderate area planning requirements for this NAAQS are unlikely to significantly improve the Sheboygan area's air quality. EPA must expeditiously and more completely address the contributions of upwind state emissions to this region of Wisconsin.

Response 6: EPA readily acknowledges the role interstate transport of precursors and ozone pollution plays in the efforts of downwind areas to attain and maintain the NAAQS. Section 110(a)(2)(D) of the CAA specifically contains provisions requiring states to address their contribution to nonattainment and maintenance of the NAAQS in other states. CAA section 110(a)(2)(D)(i)(I) requires each state in its SIP to prohibit emissions that will significantly

contribute to nonattainment of a NAAQS, or interfere with maintenance of a NAAQS, in another state. Under section 110(a)(2)(D)(i)(I), each state is required to submit to the EPA new or revised SIPs that contain adequate provisions "prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard."

EPA has taken a number of steps to fulfill its statutory obligation to enforce CAA section 110(a)(2)(D), or the "good neighbor" provision, including the NO_x SIP Call, the Clean Air Interstate Rule, and the Cross-State Air Pollution Rule (CSAPR). Most recently, on October 26, 2016 (81 FR 74504), EPA updated CSAPR specifically to address the 2008 ozone NAAQS with tightened ozone NO_x emission budgets designed to achieve emission reductions in upwind states before the July 2018 moderate area attainment date.⁸

In addition, in recognition of the regional nature of ozone formation and transport, the Lake Michigan Air Directors Consortium was created to provide a forum for the states surrounding Lake Michigan to work cooperatively to develop attainment strategies for the entire Lake Michigan region. EPA continues to encourage the states to work cooperatively through this forum to reach attainment goals throughout the region.

Nevertheless, as noted previously, the agency's mandatory duty to make determinations of attainment or failure to attain the NAAQS under section 181(b)(2) of the CAA exists regardless of the nature or effect of transported emissions on monitored air quality data in a given nonattainment area.

Comment 7: EPA's proposed rule states "moderate nonattainment areas are required to attain the standard 'as expeditiously as practicable' but no later than six years after the initial designation as nonattainment (which, in the case of the Sheboygan area, would be July 20, 2018)." EPA is proposing to require submission of the necessary

⁸In updating CSAPR to address the 2008 ozone standard, EPA established ozone season NO_x emissions budgets of 14,601 tons for Illinois and 23,303 tons for Indiana. See 81 FR 74504, 74508 (October 26, 2016). This tightened the CSAPR emission budgets of 21,208 tons for Illinois and 46,175 tons for Indiana, which had been established to address the 1997 ozone standard. See 76 FR 48208, 48262-63 (August 8, 2011).

⁷ 77 FR 30088 (May 21, 2012).

moderate area SIP revisions no later than January 1, 2017. EPA is unlikely to finalize a reclassification until just weeks before the proposed January 1, 2017 due date. This is insufficient time for a state to complete all the actions needed to meet moderate nonattainment area requirements for this NAAQS. EPA must finalize a more realistic deadline and ensure the state is not penalized for any deficiency relative to that date.

Response 7: EPA recognizes the extremely tight timeframe and is committed to working with Wisconsin to prepare SIP revisions in a timely manner. EPA's ability to extend deadlines for areas being reclassified as required by CAA section 181(b)(2) is governed by section 182(i) of the CAA, which directs that the state shall meet the new requirements according to the schedules prescribed in those requirements, but provides "that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions." CAA section 182(b), as interpreted by 40 CFR 51.1100 *et seq.*, describes the required SIP revisions and associated deadlines for a nonattainment area classified as moderate at the time of the initial designations. However, these SIP submission deadlines (e.g., three years after the effective date of designation, or July 2015, for submission of an attainment plan and attainment demonstration) have already passed. Accordingly, EPA proposed to exercise its discretion under CAA section 182(i) to adjust the moderate SIP submittal deadlines for the Sheboygan area.

In determining an appropriate deadline for the moderate area SIP revisions for the Sheboygan area, EPA had to consider that pursuant to 40 CFR 51.1108(d), the state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the complete ozone season immediately preceding a nonattainment area's attainment date. In the case of nonattainment areas classified as moderate for the 2008 ozone NAAQS, the attainment year ozone season is the 2017 ozone season (40 CFR 51.1100(h)). Because an extension of the attainment date is not appropriate here, and control measures for other moderate areas are to be implemented no later than the beginning of the 2017 ozone season, EPA determined it would not be appropriate to adjust the attainment date beyond the beginning of the 2017 ozone season for the Sheboygan area.

Further, because ozone seasons begin as early as January 1, EPA determined that a SIP submission deadline of January 1, 2017, is the latest submittal deadline that allows all states to meet 40 CFR 51.1108(d) requirements, and thus assures consistency as directed by 182(i).

While we acknowledge that the timeframe for submitting the required SIP revisions is tight, states have not been prohibited from beginning development of moderate area SIP revisions prior to finalization of the reclassification. In fact, although reclassification of the Sheboygan area is being finalized in this rule, Wisconsin has been aware that EPA would propose to reclassify the Sheboygan area as moderate from the time that 2015 monitoring data became available showing that the Sheboygan area would not qualify for an additional one-year extension. EPA has consistently encouraged states to begin working on moderate area SIP revision requirements ahead of finalization of the reclassification required by the CAA.

Even before the 2015 monitoring data was available, the state was aware that, if a second one-year extension was not appropriate, the state would have very little time to develop and implement an acceptable attainment plan. EPA's policy regarding attainment date extensions and reclassifications of marginal areas⁹ explicitly cautions: "When requesting an extension, States should consider the consequences of eventually not attaining the NAAQS. Although areas can request two 1-year extensions, those that ultimately fail to attain the NAAQS will be bumped up to at least a moderate classification. . . . Consequently, areas that are bumped up will be under very tight timeframes to implement the new SIP requirements, in addition to achieving the reductions to meet the new attainment date." Moreover, in providing the initial one-year extension to the Sheboygan area, EPA was clear that "it would be prudent for the state to begin preparing for the possibility that the area may not attain by the July 20, 2016, attainment date." (81 FR at 26703) Accordingly, we believe the area was provided adequate notice that time to develop and submit a moderate area attainment plan was likely to be short given that the moderate area attainment year ozone season is the 2017 ozone season for the 2008 ozone NAAQS and that other

moderate areas were also required to submit their plans in January 2017.

Comment 8: A reclassification to moderate would require the fourth highest ozone value for 2017 to be at or below 0.059 ppm. This would require ozone values to fall below background levels, and absolutely no action available to either the State of Wisconsin or EPA could achieve such a result. EPA is requiring the State of Wisconsin to undergo a time consuming SIP drafting effort in an extremely limited timeframe with no possibility of success. This requirement is as impractical as it is unfair.

Response 8: As discussed in the response to comment 7, the State of Wisconsin has been aware of its potential obligation to meet moderate SIP requirements from the time that the area failed to attain the 2008 ozone standard and the State requested and qualified for a one-year attainment date extension. Further, EPA disagrees that reclassification to moderate would require the fourth highest 8-hour daily average ozone value for 2017 to be at or below 0.059 ppm at the Kohler Andrae monitor. As discussed more completely in response to comment 1, under EPA regulations at 40 CFR part 50, appendix P, the 2008 ozone NAAQS is attained at a monitoring site when the three-year average of the annual fourth-highest daily maximum eight-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm, when truncated after the third decimal place. The fourth highest 8-hour daily average ozone value for 2015 is 0.081. Preliminary data indicate that the fourth highest 8-hour daily average ozone value for 2016 is 0.085. Thus, providing the preliminary 2016 data remains unchanged upon certification, a fourth highest 8-hour daily average ozone value of 0.061 ppm for 2017 would result in a design value of 0.075 at the Kohler Andres monitor, which would be in attainment of the 2008 ozone standard.

In addition, even if the design value at the Kohler Andres monitor is not attaining the 2008 ozone standard with certified 2015–2017 monitoring data, Wisconsin could still request a one-year extension of the moderate area attainment date for the Sheboygan area. EPA could grant such an extension provided that the State meets the requirements of section 181(a)(5) of the CAA. Subsequently, if the area continued to violate the standard with 2018 data, Wisconsin could request a second one-year attainment date extension, which EPA could grant if the State meets the requirements of section 181(a)(5). It should be noted that, if the

⁹ Memorandum Dated February 3, 1994, from D. Kent Berry entitled "Procedures for Processing Bump Ups and Extension Requests for Marginal Ozone Nonattainment Areas."

Sheboygan area should fail to qualify for a one-year extension (or an additional one-year extension) and/or ultimately fails to attain the 2008 ozone standard by its attainment deadline, EPA would be required to meet its statutory obligation under section 181(b)(2) of the CAA to determine that the area failed to attain the ozone standard by its attainment deadline. This would result in the area being reclassified by operation of law to the next “highest” classification, in this case from moderate to serious.

Alternately, the State of Wisconsin could decide that additional time is needed to adopt the emissions control plan, seek emission controls from upwind states, and implement additional emission controls. In that case, Wisconsin could request that the Sheboygan area be reclassified to serious nonattainment at this time. This would result in establishing a serious area attainment date of July 20, 2021 for the Sheboygan area (rather than the July 20, 2018 moderate attainment deadline), and require the area to meet the serious level requirements of section 182(c) of the CAA while giving the state additional time to develop an ozone attainment plan for the Sheboygan area.

III. What action is EPA taking?

EPA is determining that the Sheboygan area failed to attain the 2008 ozone NAAQS by the applicable attainment date of July 20, 2016, and is not eligible for an additional one-year attainment date extension. Therefore, upon the effective date of this rule, the Sheboygan area will be reclassified by operation of law to moderate nonattainment for the 2008 ozone standard. EPA is requiring Wisconsin to submit SIP revisions to address moderate area requirements by January 1, 2017.

IV. Good Cause Exemption Under the Administrative Procedure Act (APA)

Under APA section 553(d)(3), 5 U.S.C. 553(d)(3), an agency may make a rule immediately effective “for good cause found and published with the rule.” The EPA believes that there is “good cause” to make this rule effective upon publication in the **Federal Register** in order to avoid an impractical outcome and to provide time for the state to meet the relevant statutory and regulatory deadlines. Specifically, for any areas classified as moderate nonattainment for the 2008 ozone NAAQS, the EPA has interpreted CAA section 182, in conjunction with 40 CFR 51.1108(d) and 51.1112(a)(3), to require states to submit their moderate area SIP revisions and comply with RACT implementation

requirements by January 1, 2017. While EPA acknowledges and addresses comments related to the compressed timeline associated with this action elsewhere in this notice, the agency believes that establishing an effective date of this action simultaneous with the date of publication will reconcile the competing statutory interests by eliminating a potentially impractical outcome in which the area might otherwise be subject to moderate nonattainment area statutory and regulatory deadlines that would already have passed prior to the normal 30 days post-publication effective date. EPA made clear in the action providing the initial extension for this area that absent a second extension, a state would be under a tight deadline to develop an acceptable attainment plan. See 81 FR 26703. When 2015 monitoring data became available earlier this year showing that the Sheboygan area would not be eligible for a second one-year extension, the state had every reason to anticipate and prepare for reclassification. In addition, EPA published its proposed rule for this reclassification on September 28, 2016, and is providing direct notice to the state of this final action simultaneous with signature of this rule. Accordingly, the EPA finds that the preparation time actually available to the state and the need to reconcile the statutory interest in reclassification with the deadlines for submission of moderate area SIP revisions and compliance with RACT implementation requirements, constitute good cause under 5 U.S.C. 553(d)(3) to make this final action effective upon publication.

V. Statutory and Executive Order Reviews

Under section 181(b)(2) of the CAA, a determination of nonattainment is a factual determination based upon air quality considerations and the resulting reclassification must occur by operation of law. A determination of nonattainment and the resulting reclassification of a nonattainment area by operation of law under section 181(b)(2) does not in and of itself create any new requirements, but rather applies the requirements contained in the CAA. For these reasons, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications because it will not have a substantial direct effect on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this

action must be filed in the United States Court of Appeals for the appropriate circuit by February 17, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Administrative practice and procedure, Air pollution control, Designations and classifications, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 7, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

Part 81, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 81.350 is amended by revising the entry for Sheboygan County, WI in the table entitled “Wisconsin—2008 8-Hour Ozone NAAQS (Primary and secondary)” to read as follows:

§ 81.350 Wisconsin.

* * * * *

WISCONSIN—2008 8-HOUR OZONE NAAQS
[Primary and secondary]

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Sheboygan County, WI; ² Sheboygan County.	1/18/2017	Nonattainment	Moderate.	
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

¹ This date is July 20, 2012, unless otherwise noted.

² Excludes Indian country located in each area, unless otherwise noted.

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[FR Doc. 2016–30330 Filed 12–16–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0658; FRL–9955–45]

Flumioxazin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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

DATES: This regulation is effective December 19, 2016. Objections and requests for hearings must be received on or before February 17, 2017, 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–2015–0658, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following

list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must

identify docket ID number EPA–HQ–OPP–2015–0658 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 17, 2017. 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–2015–0658, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of November 23, 2015 (80 FR 72941) (FRL–9936–73), 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#5E8399) by Interregional Research No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201–W, Princeton, NJ 08540. The Agency inadvertently republished this notice on March 16, 2016 (81 FR 14030) (FRL–9942–86). The petition requested that 40 CFR 180.568 be amended by establishing tolerances for residues of the herbicide flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione, in or on berry, low growing, subgroup 13–07G at 0.07 parts per million (ppm); caneberry,

subgroup 13–07A at 0.4 ppm; citrus, group 10–10 at 0.02 ppm; citrus oil at 0.1 ppm; clover, forage at 0.02 ppm; clover, hay at 0.15 ppm; fruit, pome, group 11–10 at 0.02 ppm; fruit, small vine climbing, except for fuzzy kiwifruit, subgroup 13–07F at 0.02 ppm; fruit, stone, group 12–12 at 0.02 ppm; head and stem brassica, subgroup 5A at 0.02 ppm; nut, tree, group 14–12 at 0.02 ppm; onion, bulb subgroup 3–07A at 0.02 ppm; and vegetable, fruiting, group 8–10 at 0.02 ppm.

The petitioner also requested the removal of the following established tolerances based on the establishment of tolerances for the commodities established in this action: Cabbage at 0.02 ppm; cabbage, Chinese, napa at 0.02 ppm; fruit, pome group 11 at 0.02 ppm; fruit, stone, group 12 at 0.02 ppm; garlic at 0.02 ppm; grape at 0.02 ppm; nut, tree group 14 at 0.02 ppm; okra at 0.02 ppm; onion, bulb at 0.02 ppm; pistachio at 0.02 ppm; shallot bulb at 0.02 ppm; strawberry at 0.07 ppm; and vegetable, fruiting group 8 at 0.02 ppm. That document referenced a summary of the petition prepared by Valent USA Corporation, the registrant, which is available in the docket, <http://www.regulations.gov>. Comments were received on these notices of filings. EPA's response to these comments is discussed 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 flumioxazin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flumioxazin follows.

A. Toxicological Profile

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

Toxicity associated with flumioxazin includes anemia and effects on the cardiovascular system and liver. Specifically, alterations in hemoglobin parameters were observed in rats, as well as increased renal toxicity in male rats, and increased absolute and relative liver weights and increased alkaline phosphate values were seen in dogs. No evidence of neurotoxicity was seen in male or female rats in the acute or subchronic neurotoxicity studies. The oral and dermal developmental rat studies showed evidence of increased quantitative susceptibility of fetuses, as cardiovascular anomalies (ventral septal defects) were found. These developmental effects in the offspring were more severe and seen at doses lower than those that caused parental and systemic toxicity. The regulatory endpoints for flumioxazin are protective of this increased susceptibility, however, so there is low concern and no residual uncertainties for these effects. Flumioxazin was negative for mutagenicity in most of the available studies, however, there were aberrations in a chromosomal aberration assay. The lack of carcinogenicity in mice and rats permits flumioxazin to be classified as “not likely to be carcinogenic to humans.”

Specific information on the studies received and the nature of the adverse effects caused by flumioxazin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at <http://www.regulations.gov> in document Flumioxazin: Human Health Risk Assessment for the New Uses on Clover Grown for Seed; Citrus Group 10–10; Caneberry Subgroup 13–07A; Head and Stem Brassica Subgroup 5A; and Crop Group Expansion for Fruiting Vegetable Group 8–10; Low Growing Berry Subgroup 13–07G; Nut Tree Group 14–12; Onion Bulb Subgroup 3–07A; Pome

Fruit Group 11–10; Small Fruit, Vine Climbing, Except Fuzzy Kiwifruit Subgroup 13–07F; and Stone Fruit Group 12–12 at pages 15–22 and 42–55 in docket ID number EPA–HQ–OPP–2015–0658.

B. Toxicological Points of Departure/ Levels of Concern

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

A summary of the toxicological endpoints for flumioxazin used for human risk assessment is discussed in Unit III, B of the final rule published in the **Federal Register** of September 21, 2012 (77 FR 58493) (FRL–9358–3).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to flumioxazin, EPA considered exposure under the petitioned-for tolerances as well as all existing flumioxazin tolerances in 40 CFR 180.568. EPA assessed dietary exposures from flumioxazin in food as follows:

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

Such effects were identified for flumioxazin for females 13–49. In estimating acute dietary exposure, EPA used food consumption information from the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID) Version 3.16. This software uses 2003–2008 food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA incorporated tolerance-level residues, 100 percent crop treated (PCT) for all commodities and DEEM–FCID version 3.16.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the DEEM–FCID Version 3.16. This software uses 2003–2008 food consumption data from USDA's NHANES/WWEIA. As to residue levels in food, EPA incorporated tolerance-level residues, 100 PCT for all commodities.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that flumioxazin does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for flumioxazin. Tolerance level residues and/or 100% CT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for flumioxazin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of flumioxazin. The estimated drinking water concentrations (EDWCs) are based on aquatic rates of the residues of concern for flumioxazin and its major degradates (482–HA, and APF), expressed as flumioxazin equivalents. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide>.

Based on the First Index Reservoir Screening Tool (FIRST) model, the EDWCs in surface water for acute exposures are 400 parts per billion (ppb) for flumioxazin only and for chronic exposures are estimated to be 9.4 ppb, 21.6 ppb, and 110.1 ppb for flumioxazin, 482–HA and APF degradates, respectively, for a total

concentration of 141 ppb. Based on the Screening Concentration in Ground Water (SCI–GROW) model, for both acute and chronic (non-cancer) exposures, the EDWCs of 482–HA and APF are estimated to be 45.27 ppb and 2.66 ppb, respectively, for ground water. EDWCs of flumioxazin are estimated to be negligible in ground water for chronic exposures.

Estimates of drinking water concentrations were directly entered into the dietary exposure model as follows. The peak day zero of 0.400 ppm for flumioxazin (degradates 482–HA and APF were not detected) was used to assess the contribution to drinking water for the acute dietary risk assessment, and the day 30 total of 0.141 ppm for flumioxazin, 482–HA and APF degradates was used to assess the contribution to drinking water for the chronic dietary risk assessment.

3. *From non-dietary exposure.* The term “residential exposure” is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Flumioxazin is currently registered for the following uses that could result in residential exposures: Turf, gardens and trees, and aquatic weeds. EPA assessed residential exposure with the assumption that homeowner handlers wear shorts, short-sleeved shirts, socks, and shoes, and that they complete all tasks associated with the use of a pesticide product including mixing/loading, if needed, as well as the application. Residential handler exposure scenarios for both dermal and inhalation are considered to be short-term only, due to the infrequent use patterns associated with homeowner products.

EPA uses the term “post-application” to describe exposure to individuals that occur as a result of being in an environment that has been previously treated with a pesticide. Flumioxazin can be used in many areas that can be frequented by the general population including residential areas, lakes, and ponds. As a result, individuals can be exposed by entering these areas if they have been previously treated. Therefore, short-term and intermediate-term dermal post-application exposures and risks were assessed for adults and children. In addition, oral post-application exposures and risks were assessed for children to be protective of possible hand-to-mouth, object-to-mouth, and soil ingestion activities that may occur on treated turf areas. Further information regarding EPA standard assumptions and generic inputs for

residential exposures may be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide>.

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

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There is evidence of increased quantitative susceptibility of fetuses in the oral and dermal developmental rat studies, where cardiovascular abnormalities occurred in the absence of maternal toxicity. The rat reproduction study also showed evidence of qualitative and quantitative post-natal susceptibility since reproductive effects in offspring were more severe and were seen at lower doses than those that caused parental/systemic toxicity. Even with this observed increased

susceptibility, the Agency has concluded there is a low concern and no residual uncertainties for pre- and/or postnatal toxicity because the developmental toxicity NOAELs/LOAELs are well-characterized after oral and dermal exposure, and the offspring toxicity NOAEL and LOAEL are well characterized in the reproduction study.

Furthermore, the doses and endpoints have been selected from the developmental and reproductive toxicity studies for risk assessment of the relevant exposed populations (e.g., pregnant females and children), with the exception of the chronic dietary endpoint, for which a chronic study was selected. Therefore, regulatory endpoints for flumioxazin are protective of the increased susceptibility and there are no residual concerns for these effects.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X for oral and dermal exposures, but retained at 10X for inhalation exposures due to the lack of an inhalation study. That decision is based on the following findings:

i. The toxicity database for flumioxazin is sufficient for assessing the toxicity and characterizing the hazard of flumioxazin. An inhalation study is needed to characterize more completely the potential for adverse effects associated with the inhalation route of exposure; therefore, in order to account for any uncertainty attending the use of the dose and endpoint from an oral rat developmental toxicity study with an estimated 100% default absorption factor, the Agency is retaining the 10X FQPA safety factor for assessing inhalation risk.

ii. There is no indication that flumioxazin is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is evidence that flumioxazin may result in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study. The Agency concluded that while there is an increased susceptibility, there is a low concern and no residual uncertainties for pre-and/or postnatal toxicity because the developmental toxicity NOAELs/LOAELs are well characterized after oral and dermal exposure; the offspring toxicity NOAEL and LOAEL are well characterized in the reproduction study; and the doses and endpoints have been selected from the developmental and reproductive

toxicity studies for the relevant populations, except for the chronic dietary endpoint, for which a chronic study was chosen. Therefore, the regulatory endpoints for flumioxazin are protective of the increased susceptibility seen in the developmental and reproduction studies, and there are no residual concerns for these effects.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to flumioxazin in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by flumioxazin.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to flumioxazin will occupy 76% of the aPAD for females 13–49 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to flumioxazin from food and water will utilize 44% of the cPAD for all infants <1 year old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of flumioxazin is not expected.

3. *Short and intermediate-term risk.* Short-term and intermediate-term aggregate exposure takes into account short-term and intermediate residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Flumioxazin is currently registered for uses that could result in short-term and

intermediate residential exposures, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term and intermediate-term residential exposures to flumioxazin. Since the Agency has determined that the short-term and intermediate-term points of departure are the same the aggregate risks are the same for both short-term and intermediate-term exposures.

Using the exposure assumptions described in this unit for short-term and intermediate-term exposures, EPA has concluded the combined short-term and intermediate-term food, water, and residential exposures result in aggregate MOEs of 110 for adult females 13–49 years and 200 for children less than two years. Because EPA's level of concern for flumioxazin is a MOE of 100 or below, these MOEs are not of concern.

4. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, flumioxazin is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (gas chromatography (GC) using a nitrogen phosphorous detector (NPD)) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: residuemethods@epa.gov.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting

organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established any MRLs for flumioxazin.

C. Response to Comments

EPA received five comments to the two published Notice of Filings. Two comments stated, in part and without any supporting information, that EPA should deny this petition because it is a harmful and toxic chemical with no benefits. The Agency recognizes that some individuals believe that pesticides should be banned on agricultural crops. The existing legal framework provided by section 408 of the FFDCA, however, states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. EPA has assessed the effects of this chemical on human health and determined that aggregate exposure to it will be safe. These comments provide no information to support an alternative conclusion.

Another comment submitted by the Center for Biological Diversity was primarily concerned about the environmental risks and Agency compliance with any relevant obligations under the Endangered Species Act. This comment is not relevant to the Agency's evaluation of safety of the flumioxazin tolerances; section 408 of the FFDCA focuses on potential harms to human health and does not permit consideration of effects on the environment. Additional comments were submitted in support of this petition by Interregional Research Project Number 4 (IR–4) and Dr. A. Stanley Culpepper from the University of Georgia Cooperative Extension.

D. Revisions to Petitioned-For Tolerances

The petitioner proposed a tolerance of flumioxazin on caneberries at 0.4 ppm. Both the petitioner and the Agency used the Organization for Economic Cooperation & Development (OECD) spreadsheet calculator; however, the Agency did not consider the two Oregon trials to be independent since they were conducted at the same location on the same variety of raspberries and applications were made within 30 days of each other. Therefore, the four samples were accounted as two, resulting in an Agency recommended tolerance of 0.5 ppm. All other

tolerances are recommended to be at the same levels as petitioned.

The petitioner proposed a tolerance for head and stem brassica, subgroup 5A at 0.02 ppm; however, the EPA is establishing a tolerance for Vegetable, brassica, head and stem, group 5–16 at 0.02 ppm. In the **Federal Register** of May 3, 2016 (81 FR 26471) (FRL–9944–87) establishing the Vegetable, brassica, head and stem, group 5–16, EPA indicated that, for existing petitions for which a Notice of Filing had been published, the Agency would attempt to conform these petitions to the rule. Therefore, consistent with this rule, EPA is establishing tolerances on Vegetable, brassica, head and stem, group 5–16 rather than head and stem brassica, subgroup 5A. EPA concludes it is reasonable to revise the petitioned-for tolerance so that they agree with the recent crop grouping revisions because (1) the new crop group includes the same commodities as the subgroup except two commodities are no longer in the group and (2) the representative commodities for the revised crop groups/subgroups have not changed.

Finally, the Agency is establishing tolerances for clover, forage and clover, hay with regional registrations in (c) since residue field trial data were only submitted to support registration in Idaho, Washington, and Oregon.

V. Conclusion

Therefore, tolerances are established for residues of flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione, in or on tolerances for residues of the herbicide flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione, in or on, berry, low growing, subgroup 13–07G at 0.07 parts per million (ppm); caneberry, subgroup 13–07A at 0.5 ppm; citrus, group 10–10 at 0.02 ppm; fruit, pome, group 11 at 0.02 ppm; fruit, stone, group 12 at 0.02 ppm; nut, tree, group 14–12 at 0.02 ppm; onion, bulb subgroup 3–07A at 0.02 ppm; small fruit, vine climbing, except for fuzzy kiwifruit, subgroup 13–07F at 0.02 ppm; vegetable, brassica, head and stem, group 5–16 at 0.02 ppm; and vegetable, fruiting, group 8–10 at 0.02 ppm.

Additionally, EPA is establishing tolerances with regional registrations for clover, forage at 0.02 ppm and clover, hay at 0.15 ppm. Finally, the EPA is removing tolerances for Cabbage at 0.02 ppm; cabbage, Chinese, napa at 0.02 ppm; fruit, pome group 11 at 0.02 ppm; fruit, stone, group 12 at 0.02 ppm; garlic at 0.02 ppm; grape at 0.02 ppm; nut, tree

group 14 at 0.02 ppm; okra at 0.02 ppm; onion, bulb at 0.02 ppm; pistachio at 0.02 ppm; shallot bulb at 0.02 ppm; strawberry at 0.07 ppm and vegetable, fruiting group 8 at 0.02 ppm since these will be superseded by this action.

VI. Statutory and Executive Order Reviews

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

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances 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: December 6, 2016.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Revise § 180.568 to read as follows:

§ 180.568 Flumioxazin; tolerances for residues.

(a) *General.* Tolerances are established for residues of flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only flumioxazin.

Commodity	Parts per million
Alfalfa, forage	3.0
Alfalfa, hay	8.0
Almond, hulls	0.70

Commodity	Parts per million
Artichoke, globe	0.02
Asparagus	0.02
Berry, low growing, subgroup 13-07G	0.07
Bushberry subgroup 13-07B	0.02
Caneberry, subgroup 13-07A	0.50
Citrus, group 10-10	0.02
Citrus, oil	0.1
Corn, field, forage	0.02
Corn, field, grain	0.02
Corn, field, stover	0.02
Cotton, gin byproducts	0.60
Cotton, undelinted seed	0.02
Fish, freshwater	1.5
Fruit, pome, group 11-10	0.02
Fruit, small vine climbing, except for fuzzy kiwifruit, subgroup 13-07F	0.02
Fruit, stone, group 12-12	0.02
Grain, aspirated fractions	100
Hop, dried cones	0.05
Leaf petioles subgroup 4B	0.02
Nut, tree, group 14-12	0.02
Olive	0.02
Onion, bulb subgroup 3-07A	0.02
Pea and bean, dried shelled, except soybean, subgroup 6C	0.07
Peanut	0.02
Peppermint, tops	0.04
Pomegranate	0.02
Prickly pear, fruit	0.07
Prickly pear, pads	0.06
Rapeseed subgroup 20A	0.40
Soybean forage	0.03
Soybean hay	0.02
Soybean, seed	0.02
Spearmint, tops	0.04
Sugarcane, cane	0.20
Sunflower subgroup 20B	0.50
Vegetable, brassica, head and stem, group 5-16	0.02
Vegetable, cucurbit, group 9	0.03
Vegetable, fruiting, group 8-10	0.02
Vegetable, tuberous and corm, subgroup 1C	0.02
Wheat, forage	0.02
Wheat, grain	0.40
Wheat, hay	0.02
Wheat, straw	6.0

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* Tolerances are established for residues of flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only flumioxazin.

Commodity	Parts per million
Clover, forage	0.02
Clover, hay	0.15

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 59

RIN 937–AA04

Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients

AGENCY: Office of Population Affairs, Office of the Secretary, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Department is amending the regulations that apply to Title X Project Grants for Family Planning Services. The final rule amends eligibility requirements to require that no recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons other than its ability to provide Title X services.

DATES: This Rule is effective on January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Susan B. Moskosky, MS, WHNP–BC, Office of Population Affairs (OPA), 200 Independence Avenue SW., Suite 716G, Washington, DC 20201; telephone (240) 453–2800; email: OPA_Resource@hhs.gov.

SUPPLEMENTARY INFORMATION: On September 7, 2016, The Department issued a proposed rule seeking comment on amending eligibility criteria under the Title X family planning services program so that no recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons unrelated to its ability to provide Title X services effectively. 81 FR 61639. As reiterated below, the proposed rule set forth the need for the amendment and sought public input.

I. Background

A. Title X Background

As discussed in the Notice of Proposed Rule Making (NPRM), the Title X Family Planning Program, Public Health Service Act (PHSA) secs. 1001 *et seq.* [42 U.S.C. 300], was enacted in 1970 as part of the Public Health Service Act. Administered by the Office of Population Affairs (OPA) within the Office of the Assistant Secretary for Health (OASH), Title X is the only federal program focused solely on

providing family planning and related preventive services. In 2015, more than 4 million individuals received services through more than 3,900 Title X-funded health centers.¹

Title X serves women, men, and adolescents to enable individuals to determine freely the number and spacing of children. By law, services are provided to low-income individuals at no or reduced cost. Services provided through Title X-funded health centers assist in preventing unintended pregnancies and achieving pregnancies that result in positive birth outcomes. These services include contraceptive services, pregnancy testing and counseling, preconception health services, screening and treatment for sexually transmitted diseases (STD), HIV testing and referral for treatment, services to aid with achieving pregnancy, basic infertility services, and screening for cervical and breast cancer. By statute, Title X funds are not available to programs where abortion is a method of family planning (PHSA sec. 1008). Additionally, Title X implementing regulations require that all pregnancy options counseling shall be neutral and nondirective. 42 CFR 59.5(a)(5)(ii).

The Title X statute authorizes the Secretary “to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).” PHSA sec. 1001(a). In addition, in awarding Title X grants and contracts, the Secretary must “take into account the number of patients to be served, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.” PHSA sec. 1001(b). The statute also requires that local and regional entities “shall be assured the right to apply for direct grants and contracts.” PHSA sec. 1001(b). The statute delegates rulemaking authority to the Secretary to set the terms and conditions of these grants and contracts. PHSA sec. 1006. These regulations were last revised in 2000. 65 FR 41270 (July 3, 2000).

Title X regulations delineating the criteria used to decide which family planning projects to fund and in what amount, include, among other factors,

the extent to which family planning services are needed locally, the number of patients (and, in particular, low-income individuals) to be served, and the adequacy of the applicant’s facilities and staff. 42 CFR 59.7. Project recipients receive funds directly from the federal government following a competitive process. The project recipients may elect to provide Title X services directly, subaward funds to subrecipients, or both. The Department is responsible for monitoring and evaluating the project recipient’s performance and outcomes, and each project recipient that subawards to eligible subrecipients is responsible for monitoring the performance and outcomes of those subrecipients. The subrecipients must meet the same federal requirements as the project recipients, including being a public or private nonprofit entity, and adhering to all Title X and other applicable federal requirements. In the event of poor performance or noncompliance, a project recipient may take enforcement actions as described in the uniform grants rules at 45 CFR 75.371.

B. State Restrictions on Subrecipients

In the past several years, a number of states have taken actions to restrict participation by certain types of providers as subrecipients in the Title X program, for reasons other than the provider’s ability to provide Title X services. In at least several instances, this has led to disruption of services or reduction of services. Since 2011, 13 states have placed restrictions on or eliminated subawards with specific types of providers based on reasons other than their ability to provide Title X services. In several instances, these restrictions have interfered with the “capacity [of the applicant] to make rapid and effective use of [Title X federal] assistance.” PHSA sec. 1001(b). Moreover, states that restrict eligibility of subrecipients have caused limitations in the geographic distribution of services and decreased access to services through trusted providers.

States have restricted subrecipients from participating in the Title X program in several ways. Some states have employed a tiered approach to compete or distribute Title X funds, whereby entities such as comprehensive primary care providers, state health departments, or community health centers receive a preference in the distribution of Title X funds. This approach effectively excludes providers focused on reproductive health from receiving funds, even though they have been shown to provide higher quality services, such as preconception

¹ Fowler, C.I., Gable, J., Wang, J., & Lasater, B. (2016, August). Family Planning Annual Report: 2015 National Summary. Research Triangle Park, NC: RTI International.

services, and accomplish Title X programmatic objectives more effectively.^{2,3} For example, in 2011, Texas reduced its contribution to family planning services, and also re-competed subawards of Title X funds using a tiered approach. The combination of these actions decreased the Title X provider network from 48 to 36 providers, and the number of Title X clients served was reduced dramatically. Although another entity became the statewide project recipient in 2013, the number of Title X clients served decreased from 259,606 in 2011 to 166,538 in 2015.^{4,5} In other cases, states have prohibited specific types of providers from being eligible to receive Title X subawards, which has had a direct impact on service availability, primarily for low-income women. In some cases, experienced providers that have historically served large numbers of patients in major cities or geographic areas have been eliminated from participation in the Title X program. In Kansas, for example, following the exclusion of specific family planning providers in 2011, the number of clients, 87 percent of whom were low income (at or below 200 percent of the Federal Poverty Level), declined from 38,461 in 2011 to 24,047 in 2015, a decrease of more than 37 percent. As with the declines in Texas, this is a far greater decrease than the national average of 20 percent.^{6,7}

In New Hampshire, in 2011, the New Hampshire Executive Council voted not to renew the state's contract with a specific provider that was contracted to provide Title X family planning services for more than half of the state. To restore services to clients in the unserved part of the state, the

Department issued an emergency replacement grant, but there was significant disruption in the delivery of services, and for approximately three months, no Title X services were available to potential clients in a part of the state.

Most recently, in 2016 Florida enacted a law that would have gone into effect on July 1, 2016, prohibiting the state from making Title X subawards to certain family planning providers.⁸ In one county alone, 1,820 clients are served by the family planning provider that would have been excluded, and it is not clear how the needs of those clients would have been met.

None of these state restrictions have been related to the subrecipients' ability to deliver Title X services. Instead, these restrictions are based either on non-Title X funded health services offered or on other activities the providers may separately conduct using non-federal funds, or because of the provider's affiliation. The Title X program provides that the Secretary shall make awards for family planning services based on "the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of [Title X Federal] assistance." PHSA sec. 1001(b). Allowing project recipients, including states and other entities, to impose restrictions on subrecipients for reasons other than their ability to provide Title X services has been shown to have an adverse effect on the number of people receiving Title X services and the fundamental goals of the Title X program.

C. Litigation

As discussed in the NPRM, litigation concerning these restrictions has led to inconsistency across states in how recipients may choose subrecipients. As the restrictions vary, so have the statutory and constitutional issues raised in the cases.

II. Final Rule and Responses to Public Comments

A. Overview of the Final Rule

The Department is finalizing the proposed rule with modifications. After reviewing the relevant comments, the Department is eliminating the qualifier

"effectively" and changing "unrelated to" to "other than" in the regulatory language. The amendment now reads, "No recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons other than its ability to provide Title X services." The Department does not believe that including the term "effectively" is necessary for operation of this rule. Inclusion of "effectively" has the potential for inconsistent application and could create compliance burdens on recipients trying to apply a measure of "effectiveness" across a range of subrecipients. The revised language addresses the Department's concern that certain Title X recipients have imposed restrictions on subrecipients that are designed to further policy objectives other than the delivery of Title X services. Title X is the only federal program focused solely on providing family planning and related preventive services. Restrictions not directly related to that goal hinder the program's statutory mission and adversely affect the program's intended beneficiaries.

For example, as outlined in the NPRM, state restrictions on subrecipients for activities unrelated to Title X-funded services have kept eligible providers from serving priority populations.⁹ Therefore, restricting participation by certain types of providers for such reasons will not be allowable under the rule. Similarly, while tiering Title X subawards may fulfill some state-based policy goals, tiering does not advance the specific Title X goals of providing "a broad range of acceptable and effective family planning methods and services." PHSA sec. 1001(a). Prohibiting recipients from adding eligibility criteria for a reason other than the provision of Title X services ensures the broadest available pool of applicants for subawards and the use of federal resources in furtherance of statutory goals.

As is currently the case, applicants for new and continuing Title X grants that do not provide all services directly will describe the process and criteria by which they select subrecipients. Following implementation of this new rule, the Department will review this information to determine an applicant's eligibility to receive a new or continuing award. For new awards, the Department will assess whether any subrecipient restrictions are for reasons other than the subrecipient's ability to provide

²Robbins, C.L., Gavin, L., Zapata, L.B., Carter, M. W., Lachance, C., Mautone-Smith, N., & Moskosky, S.B. (2016). Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. *American Journal of Preventive Medicine*.

³Carter, M.W., Gavin, L., Zapata, L.B., Bornstein, M., Mautone-Smith, N., & Moskosky, S.B. (2016). Four aspects of the scope and quality of family planning services in US publicly funded health centers: Results from a survey of health center administrators. *Contraception*.

⁴Fowler, C.I., Lloyd, S., Gable, J., Wang, J., and McClure, E. (November 2012). *Family Planning Annual Report: 2011 National Summary*. Research Triangle Park, NC: RTI International.

⁵Fowler, C.I., Gable, J., Wang, J., & Lasater, B. (2016, August). *Family Planning Annual Report: 2015 National Summary*. Research Triangle Park, NC: RTI International.

⁶Fowler, C.I., Lloyd, S., Gable, J., Wang, J., and McClure, E. (November 2012). *Family Planning Annual Report: 2011 National Summary*. Research Triangle Park, NC: RTI International.

⁷Fowler, C.I., Gable, J., Wang, J., & Lasater, B. (2016, August). *Family Planning Annual Report: 2015 National Summary*. Research Triangle Park, NC: RTI International.

⁸H.B. 1411, 2016 Leg., Reg. Sess. (Fla. 2016). The law was preliminarily enjoined on June 30, 2016. *Planned Parenthood of Southwest and Central Florida v. Philip, et al.*, No. 4:16cv321–RH/CAS, 2016 U.S. Lexis 86251 (N.D. Fla. June 30, 2016) ("the defunding provision does not survive the unconstitutional conditions doctrine."). The law was permanently enjoined on August 18, 2016, in an unpublished order.

⁹Stevenson AJ, Flores-Vazquez IM, Allgeyer RL, Schenkan P, Potter JE. Effect of Removal of Planned Parenthood from the Texas Women's Health Program. *N Engl J Med*. 2016 Mar 3;374(9):853–60.

Title X services. For continuing awards, the Department will work with recipients to help entities come into compliance prior to an award being made. If, despite the Department's assistance, compliance is not achieved, the Department will discontinue funding in accordance with all applicable rules and regulations. If available and as appropriate, this will include administrative appeals and a recoupment and re-awarding of funds. Further, if a current recipient amends the scope of its approved project by changing its process for selecting subrecipients, that request requires prior approval and the Department will apply the same review criteria. 45 CFR 75.308.

B. Responses to Public Comments

Overall, 145,303 comments were received. Approximately 91 percent (132,032) of the total comments received were in favor of the proposed rule. The vast majority of comments both favoring and opposing the rule were duplicate comments. Comments came from a wide variety of individuals and organizations, including private citizens, health care providers, religious organizations, patient advocacy groups, professional organizations, research institutions, consumer organizations, and state and federal agencies and representatives. Many of the comments dealt with a range of issues beyond the scope of this rulemaking including, but not limited to, the separation of church and state, additional confidentiality protections, provider fraud, and general opposition to Title X funding. A summary of the applicable comments, and the Department's responses, follows below.

Comment: One commenter stated the comment period was too short for the rule and did not allow enough time for response on its significant economic and federalism impacts.

Response: Given the limited scope of this rulemaking, the Department believes that notice was sufficient because "interested parties [had] a reasonable opportunity to participate in the rulemaking process" and were not "deprived of the opportunity to present relevant information by lack of notice that the issue was there." *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citations omitted). In fact, the Department received over 145,000 responses to the notice of proposed rulemaking, many with detailed suggestions on different aspects of the proposed rule. Therefore, the Department does not believe that extending the comment period was necessary or warranted.

Comment: Several commenters suggested the Department lacks legal authority to issue a rule in this area.

Response: The Department disagrees. The Title X statute explicitly provides rulemaking authority for the making of conditions for grants. 42 U.S.C. 300a-4(a). The Department has engaged in rulemaking for this program on multiple occasions. See, e.g., 65 FR 41270 (July 3, 2000); 65 FR 49057 (Aug. 10, 2000); 53 FR 2922 (Feb. 2, 1988). In addition, courts, including the Supreme Court, have consistently upheld this authority. *Rust v. Sullivan*, 500 U.S. 173 (1991). On the very issue of state legislation affecting Title X, the U.S. Court of Appeals for the Tenth Circuit stated: "HHS has deep experience and expertise in administering Title X, and the great breadth of the statutory language suggests a congressional intent to leave the details to the agency. . . . Of course, administrative actions taken by HHS will often be reviewable under the Administrative Procedure Act, but only after the federal agency has examined the matter and had the opportunity to explain its analysis to a court that must show substantial deference." *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 824-25 (10th Cir. 2014). The Department is choosing to exercise that authority to promulgate a rule that it believes, as discussed above, is "reasonably related to the purposes of the enabling legislation" (the standard to which the Supreme Court has held previous exercises of this authority). *Mourning v. Family Publication Service*, 411 U.S. 356, 369 (1973).

Comment: Commenters stated the rule was not clear in how it applied to recipients who provide some services directly and contract out some services.

Response: The rule applies to all project recipients whenever they make subawards for the provision of Title X services. It is not intended to require those who directly provide all Title X services to start providing subawards. However, if a project recipient makes subawards for any Title X services, it may not prohibit an entity from participating in the program as a subrecipient for reasons other than that entity's ability to provide Title X services.

Comment: Commenters stated clarification is needed about how the proposed rule will affect services at the state level and speculated that the proposed rule will cause a disruption in services.

Response: The primary goals of the rule change are to ensure consistency of subrecipient participation, improve provision of services, and guarantee

Title X resources are used to fulfill Title X goals. The final rule will be applied in a prospective manner, meaning with the submission of new competitive applications or, for recipients applying for non-competing funds, with the initiation of a new budget period. As a result, it is unlikely that the rule will cause disruption during a budget period, as each renewed budget period requires approval prior to an award. In the instance when a recipient makes a change to its process for selecting subrecipients in the middle of a budget period, if found to be out of compliance it may cause an interruption in the provision of services, but such mid-cycle changes are expected to be very rare. As previously stated, the Department will make every effort to help entities come into compliance, and will award replacement grants to other providers when necessary to minimize any disruption of services.

The final regulation will not invalidate conflicting state laws. Instead, the regulation informs states with conflicting laws that if they intend to apply for new or continuing Title X funds, they would need to comply with federal law under which a recipient may not exclude an entity from participating for reasons other than its ability to provide Title X services. The rule will not interfere with statutory requirements in those states where recipients directly provide all Title X services, or where recipients select subrecipients based solely on their ability to provide Title X services.

Comment: Commenters stated the proposed rule would allow Title X service providers that also provide abortion services to redirect their non-Title X funds toward abortion services or use Title X funding to fund abortion.

Response: Title X funds cannot be used for abortions. The Title X statute prohibits any of the funds appropriated under Title X to be used in programs where abortion is a method of family planning. PHSA sec.1008. Title X provides family planning and related reproductive health services such as: testing and counseling for sexually transmitted diseases (STDs), including HIV; contraceptive methods including method-specific counseling; breast and cervical cancer screening; pregnancy tests and counseling, and other related services to over four million low-income women, men, and adolescents each year.

Additionally, beyond cost-sharing and program income requirements, federal grant programs do not generally have the authority to stipulate what recipients do with non-federal funds. See *Planned Parenthood of C. and N.*

Ariz. v. State of Ariz., 718 F.2d 938, 945 (9th Cir. 1983), in which the court stated: “we hold that as a matter of law, the freeing up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state.” The commenters also assume, without substantiation, that federal funding will supplant private funding for family planning, allowing the private funding to be used to fund abortions instead of additional family planning services and programs. According to the uniform grant rules, grants funds and any program-generated income must be used to further the objectives of the Title X program and would not be allowed to be diverted for non-allowable activities. 45 CFR 75.307 (e). Speculation about the indirect effects of Title X funding is not a sufficient basis to justify making subawards based on reasons other than the ability to provide Title X services.

Comment: Commenters stated that Title X should fund sites that provide comprehensive primary care rather than sites providing primarily reproductive health care.

Response: The Department appreciates the value of providers, such as federally qualified health centers (FQHCs), which deliver comprehensive primary care services in communities. The Department also respects states’ rights to spend their own (non-Federal) funds. However, the Title X program was specifically enacted to offer a broad range of family planning services, and not comprehensive primary care. While Title X has neither the authority nor purpose of providing comprehensive primary care, to the extent FQHCs may be the best providers of family planning services in a particular area, there is no prohibition on FQHCs being selected by project recipients as subrecipients.

OPA’s efforts to ensure widespread access to quality family planning services is consistent with efforts to provide comprehensive care. Family planning is a subset of comprehensive care services, which are particularly important for women and men of reproductive age. Given the fact that family planning services are often not provided, or are provided with poor quality in some primary care settings,¹⁰ OPA efforts are focused on ensuring that quality family planning services are included within the broader set of

comprehensive preventive care needs of all Americans.¹¹

In addition, women of reproductive age often report that their family planning provider is also their usual source of health care.¹² Providers of family planning services serve as entry points for their clients to other essential health care services. Preconception care (PCC), which includes screening for obesity, smoking, and mental health, is a key service provided as part of high quality family planning care. PCC improves women and men’s health and can increase a person’s ability to conceive and to have a healthy birth outcome. In a nationally representative sample of publicly funded clinical administrators, conducted in 2013–2014, written protocols for preconception care screening, which serve as instructions for clinicians providing these services, were more common in dedicated reproductive health centers compared with primary care centers and health departments.¹³

Comment: Commenters stated that the proposed rule would be discriminatory against men and adolescents because the “notice shows HHS intends to impose a preference for prioritizing funding to ‘specific providers with a reproductive health focus.’”

Response: Title X regulations require projects to provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status. 42 CFR 59.5(a)(4). The Title X statute specifically mentions adolescents as a priority population for receiving Title X services. In fact, in 2015 approximately 44 percent of the Title X clients served were between the ages of 15 and 24 years. Moreover, OPA funds projects to improve outreach and male-centered services in an effort to increase the number of men who use Title X services. Between 2003 and 2014, Title X providers served a total of 3.8 million males, nearly doubling the percentage of male family planning users from 4.5 percent in 2003 to 8.8 percent in 2014.¹⁴ In addition, the 2014

report *Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs*¹⁵ (QFP) identifies a specific set of family planning and related services that should be provided to men and adolescents.

Comment: Commenters stated that use of the word “effectively” in the proposed rule is vague. The commenters asserted that it would be difficult to determine which policies were allowable under the rule without a clear definition of “effectively.”

Response: As noted previously, after reviewing the relevant comments, the Department recognizes the challenge of measuring effectiveness across all grant recipients and subrecipients as a condition of participation, and is eliminating the qualifier “effectively” from the regulatory language. The amendment now reads, “No recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons other than its ability to provide Title X services.” The Department believes that the revised language addresses the Department’s concern that certain Title X recipients have imposed restrictions on subrecipients that are designed to further policy objectives other than the ability to provide Title X services. A recipient imposing a ban on particular types of providers or imposing a tiering structure is prohibiting subrecipients from participating on factors other than the ability to provide Title X services. Only qualifications of recipients tied to Title X objectives, such as the ability to make rapid and effective use of federal funds and compliance with Title X regulations, are relevant factors. The revised language is clear and does not depend on the meaning of “effectively.”

Comment: Commenters stated that the Title X program lacks a clear evidence-based process for establishing program guidelines.

Response: The Department has adopted an evidence-based approach for defining program guidelines, such as what constitutes “quality” family planning services. Quality family planning services were defined in the 2014 clinical recommendations, *Providing Quality Family Planning*

United States 2003–2014. Morbidity and Mortality Weekly Report, 65(23), 602–605.

¹⁵ Gavin, L., & Pazol, K. (2016). Update: Providing Quality Family Planning Services — Recommendations from CDC and the U.S. Office of Population Affairs, 2015. MMWR. Morbidity and Mortality Weekly Report MMWR Morb. Mortal. Wkly. Rep., 65(9), 231–234.

¹⁰ Wood, S., et al., Scope of family planning services available in Federally Qualified Health Centers. *Contraception*, 2014. 89(2): p. 85–90.

¹¹ CDC, *Providing Quality Family Planning Services: Recommendations of the CDC and the U.S. Office of Population Affairs*. MMWR Recommendations and Reports, 2014. 63(4): p. 1–54.

¹² Frost J. U.S. women’s use of sexual and reproductive health services: Trends, sources of care and factors associated with use, 1995–2010. New York, NY: Guttmacher Institute; 2013.

¹³ Robbins CL, Gavin L, Zapata LB, Carter MW, Lachance C, Mautone-Smith N, Moskosky SB. Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. *Am J Prev Med*. 2016 Sep;51(3):336–43.

¹⁴ Besera, G, Moskosky, S., Et. Al. (2016), Male Attendance at Title X Family Planning Clinics—

Services (QFP).¹⁶ These recommendations were developed using an evidence-based approach, and adopted the Institute of Medicine's (IOM) definition of health care "quality," which is:

"The degree to which health care services for individuals and populations increase the likelihood of desired health outcomes and are consistent with current professional knowledge."¹⁷

The process of developing QFP recommendations was rigorous and aligned with current national and international standards for guidelines development; a priority was placed on clinical services for which there was evidence of effectiveness as defined by the presence of research demonstrating a protective impact on a behavioral or health outcome.^{18 19}

For this reason, the provision of quality care is very likely to result in a change in health outcomes. This emphasis on improving the quality of care is consistent with global and national efforts that have highlighted its importance to achieving key outcomes. For example, quality care has been identified by the Institute of Medicine (IOM) and other leaders in health care delivery as the driving factor that will achieve the goals of improved health, client experience and cost savings.^{20 21}

OPA's development and implementation of the QFP recommendations in the Title X program also demonstrates that steps have been taken to address comments from another IOM report published in 2009.²² The 2009 report urged OPA to

ensure that its recipients follow "current evidence-based professional clinical recommendations," and consider "making the Title X guidelines the standard used by all federal health programs."

Comment: Commenters questioned the legitimacy of the findings of the study by Robbins et al.²³ related to Title X service providers cited by the Department including challenging the assumption that the existence of written clinical protocols indicated higher quality care.

Response: Regarding the findings of the study by Robbins et al.,²⁴ the Department clarifies that written clinical protocols are not printed worksheets given to clients. Rather, they are explicit guidance that clinicians use to provide services in accordance with nationally recognized standards of care. Furthermore, written clinical protocols are associated with higher quality care.²⁵

Comment: Commenters requested information about how OPA will ensure that compliance with and enforcement of the proposed rule are integrated into the final rule and Title X award process.

Response: The Department believes that relying on our existing enforcement mechanisms rather than developing new reporting requirements or new certification requirements will be the most efficient means of ensuring compliance. The primary goals of the rule change are to ensure consistency of subrecipient participation, improve provision of services, and guarantee Title X resources are used to fulfill Title X goals. As part of the funding opportunity announcement (FOA) for each grant cycle, applicants are required to describe how their projects will address Title X requirements. This includes, but is not limited to, fully describing if they will not provide all services directly, the process and selection criteria used, or to be used, to select subrecipients, service sites and providers, including a description of eligible entities for funding as

subrecipients.²⁶ Recipients applying for non-competing continuation funds (those with part of their project period remaining after their current budget period, for example, in year one or two of a three-year project period) will also be required to describe, if they will not provide all services directly, the process and selection criteria used or to be used for selection of service sites and providers, including a description of eligible entities for funding as subrecipients. For recipients applying for non-competing continuation funds, the Department will work with them to help entities come into compliance prior to an award being made. If, despite the Department's assistance, compliance is not achieved, the Department will discontinue funding in accordance with all applicable rules and regulations. If available and as appropriate, this will include administrative appeals and a recoupment and re-awarding of funds. Further, if a current recipient amends the scope of its approved project by changing its process for selecting subrecipients, that request requires prior approval and the Department will apply the same review criteria. 45 CFR 75. Additionally, recipients are subject to uniform grant rule requirements related to subawards, 45 CFR 75.352, and all other applicable rules.

Comment: Commenters stated concern that the Department did not consider the alternative of modifying the grant process to make it easier for providers restricted from being eligible as a subrecipient in specific states to receive grants directly from Title X.

Response: The grants process is established by the Department to ensure integrity and accountability in the award and administration of grants, and to protect federal resources across all Departmental programs. As a result, the Department does not consider suggestions to change the grants process for specific applicants under Title X a viable alternative to this rule.

Applicants who meet the eligibility criteria in the funding opportunity announcement (FOA) may submit, directly, an application for consideration as a Title X recipient, independent of the size of the entity. Applicants should also have the option to be considered eligible as a subrecipient. The rule addresses recipients or applicants that propose excluding potential subrecipient entities

¹⁶ CDC, Providing Quality Family Planning Services: Recommendations of the CDC and the U.S. Office of Population Affairs. MMWR Recommendations and Reports, 2014. 63(4): p. 1–54.

¹⁷ Institute of Medicine, Crossing the quality chasm: A new health system for the 21st century, ed. Committee on Quality of Health Care in America. 2001, Washington, DC: National Academies of Science.

¹⁸ CDC, Providing Quality Family Planning Services: Recommendations of the CDC and the U.S. Office of Population Affairs. MMWR Recommendations and Reports, 2014. 63(4): p. 1–54.

¹⁹ Gavin, L., S.B. Moskosky, and W. Barfield, Developing U.S. Recommendations for Providing Quality Family Planning Services. American Journal of Preventive Medicine, 2015. 49(2) Supplement 1).

²⁰ Institute of Medicine, Crossing the quality chasm: A new health system for the 21st century, ed. Committee on Quality of Health Care in America. 2001, Washington, DC: National Academies of Science.

²¹ Berwick, D., T. Nolan, and J. Whittington, The Triple Aim: Care, Health, and Cost. Health Affairs, 2008. 27(3): p. 759–769.

²² Institute of Medicine, A Review of the HHS Family Planning Program: Mission, Management, and Measurement of Results, ed. A. Stith Butler and E. Clayton. 2009, Washington, DC: National Academies Press.

²³ Robbins, C.L., Gavin, L., Zapata, L.B., Carter, M.W., Lachance, C., Mautone-Smith, N., & Moskosky, S.B. (2016). Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. American Journal of Preventive Medicine.

²⁴ Robbins, C.L., Gavin, L., Zapata, L.B., Carter, M.W., Lachance, C., Mautone-Smith, N., & Moskosky, S.B. (2016). Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. American Journal of Preventive Medicine.

²⁵ Committee on Patient Safety and Quality Improvement. Committee Opinion No. 629: Clinical guidelines and standardization of practice to improve outcomes. Obstet Gynecol. 2015 Apr;125(4):1027–9.

²⁶ United States of America. Office of the Assistant Secretary for Health. Office of Population Affairs. Announcement of Anticipated Availability of Funds for Family Planning Services Grants. 5 Oct. 2016. Accessed on 2 Dec. 2016 at <http://www.hhs.gov/opa/sites/default/files/FY-17-Title-X-FOA-New-Competitions.pdf>.

based on criteria other than the entity's ability to provide Title X services.

Comment: Commenters stated that states should not have to fund Planned Parenthood because these commenters claim the organization has perpetuated Medicaid fraud. Commenters also stated that the proposed rule would allow for preferential treatment of Planned Parenthood and that by allowing Title X funds to be awarded to Planned Parenthood it could create a monopoly in family planning service providers.

Response: No comment provided evidence to support allegations that any Title X provider has engaged in Medicaid fraud. Entities that are suspended, excluded or debarred from participation in federal health care programs are not eligible to receive awards under the Title X program. Furthermore, the Uniform Administrative Requirements, Cost Principles and Audit Requirements for HHS Awards stipulate requirements for making financial assistance awards to applicants and existing recipients that include the need to take into consideration the ability of the applicant to use federal funds properly in the manner intended. 45 CFR 75.205. These rules also require an assessment of the applicant's ability to meet legal, financial, and administrative obligations prior to receiving federal funds, as well as during the entire duration of the project period in which the federal funds are expended. This is accomplished by several methods, including, but not limited to, the awarding program office and grants management office conducting a risk assessment, which directly assesses the applicant for financial stability, quality of management systems, history of performance, audit reports and findings, and ability to implement effectively statutory, regulatory, and other requirements. The awarding program office and the grants management office also evaluate the applicant using the Federal Awardee Performance and Integrity Information System (FAPIS). These steps must be completed prior to the initial award and are assessed throughout the entire project period. Additionally, Government-wide suspension and debarment activities are used to safeguard federal funds by disallowing awards to organizations and their principals based on a lack of business honesty or integrity. Federal agencies only do business with those organizations, and only provide funding for those principals, that have a satisfactory record of business ethics and integrity. 2 CFR part 180, subpart D. The rule will not provide any preferential treatment, nor disadvantage

any applicant, from receiving Title X family planning service grants. In contrast to the assertion made by the commenter, this final rule encourages providers to compete based on their ability to provide Title X services. The rule will ensure consistent opportunity of subrecipient participation across geographic areas, and guarantee Title X resources are allocated on the basis of fulfilling Title X goals.

This final rule does not favor particular providers, and does not deter competition between providers; it requires recipients to evaluate potential subrecipients based on their ability to provide Title X services. As a result, new and existing providers will be able to receive Title X funding based on their ability to provide Title X services.

III. Regulatory Impact Analysis

A. Comments Received in Response to Executive Order 13132 Federalism Review

Comment: Several commenters were critical of the Federalism analysis performed under Executive Order 13132. These commenters stated the rule was targeted at states and their traditional authority over health care. Additionally, many commenters suggested the proposed program requirement violated the Tenth Amendment, the Spending Clause, and preemption principles. Several commenters additionally asserted that Title X federal funding conditions should not interfere with state priorities, even when using federal funds.

Response: Title X was enacted in order for family planning projects to offer a broad range of family planning methods and services. It was not enacted as a federal-state cooperative statute, as is evidenced by the eligibility of nonprofit, private entities to apply for grants directly. Currently, 40 nonprofit entities receive Title X funding directly from the Department. Further, every state has at least one Title X recipient, and 13 states and the District of Columbia, have only nonprofit, private recipients.

The Supreme Court has long been clear that the Tenth Amendment limitation on the Congressional regulation of state affairs does not limit the range of conditions legitimately placed on federal grants. *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947). The Department may attach conditions to the awarding of funds to carry out best its statutory goals. *South Dakota v. Dole*, 483 U.S. 203 (1987); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("We have recognized that Congress' power to allocate funds for

public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.") The possible loss of future Title X grants does not amount to coercing the states (or nonprofit private entities) to capitulate to program requirements. Similarly, as the rule only attaches requirements to the receipt of federal funds, it would not invalidate any state laws with which it conflicts. States often opt not to apply for federal grant funds where the federal program requirement conflicts with state law priorities. Therefore, there is no preemption of state laws caused by this rule.

It must also be emphasized that this rule applies to all Title X project recipients, not only to project recipients that represent state health departments. As the NPRM explained, "All project recipients that do not provide services directly must only choose subrecipients on the basis of their ability to deliver Title X required services. Nonprofit recipients that do not provide all services directly must also allow any eligible providers that can provide Title X services in a given area to apply to provide those services, and they may not continue or begin contracting (or subawarding) with providers simply because they are affiliated in some way that is unrelated to the programmatic objectives of Title X." 81 FR at 61643.

Comment: One commenter also suggested that the proposed rule violated spending clause principles. Specifically, the commenter argued, given the vagueness of "effectively," grant recipients would not be on clear notice of what would be expected of them.

Response: As noted above, the Department eliminated the qualifier "effectively" from the regulatory language. The amendment now reads, "No recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons other than its ability to provide Title X services." As explained previously in this preamble, restrictions placed on organizations unrelated to the delivery of Title X services and tiering approaches would not be allowed. As this requirement will only be applied in future FOAs and continuation funding applications, there will be additional opportunities for the Department to provide guidance consistent with this final rule and entities may seek further guidance from the Department as to what other practices may be problematic before applying before applying for funds. Thus, applicants will have the option to

apply for funds knowing the relevant conditions, or to decline to do so.

As stated in the NPRM, Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This rule will not cause substantial economic impact on states or nonprofit private entities. It may implicate state laws only if those states with contrary laws wish to apply for federal Title X funds. States that choose to do so and also choose to subaward Title X funds will be required to do so in a manner that considers only the ability of the subrecipients to meet the statutory objectives of Title X.

B. Comments Received in Response to Economic Impact Analysis Under E.O. 12866

Comment: Commenters stated concern that the Department did not consider regulatory alternatives.

Response: This regulation is the simplest way to achieve the goal of ensuring that Title X recipients determine subrecipients based on their ability to provide Title X services. As a result, more complex regulatory alternatives in the impact analysis were not discussed. The Department did consider the no action alternative, but concluded that it would not further the statutory goals served by the regulation. These commenters and others described various regulatory alternatives, and these alternatives, such as direct grants, are discussed in the final rule.

Comment: Commenters stated concern that the impact analysis did not address impacts to states and service providers affected by the rule.

Response: Contrary to the assertions made by the commenters, the impact analysis did estimate costs borne by recipients, including recipients that represented state health departments, associated with evaluating the rule and modifying policies to ensure compliance with the rule, and the impact analysis noted that the rule may result in some shifts in funding from some family planning services providers to other family planning services providers.

Comment: Commenters stated concern that the impact analysis did not address the consequences of states electing not to participate in Title X.

Response: The primary goal of the impact analysis was to determine the societal impact of the rule. If a potential recipient decides not to participate in Title X as a result of the rule, this may result in a reallocation of resources, and

under certain circumstances this could result in a reduction in the utilization of services in some areas. If Title X funding and the associated services declined in a specific area, this would correspond with a commensurate increase in services in other areas due to the reallocation of funding. Although the Department does not anticipate this to occur widely, this shift would represent an indirect transfer of federal funding for health care services from individuals in some areas to individuals in other areas, which the Department estimates would have no net effect on total Title X expenditures by the United States.

1. Introduction

The Department has examined the impact of this final rule under Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, September 19, 1980), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866. The Department expects that this final rule will not have an annual effect on the economy of \$100 million or more in any one year. Therefore, this rule is not an economically significant regulatory action as defined by Executive Order 12866 or a major rule under either the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, or the Congressional Review Act, 5 U.S.C. 801.

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The RFA generally defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration; (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are

not included in the definition of “small entity”). For similar rules, the Department considers a rule to have a significant economic impact on a substantial number of small entities if at least five percent of small entities experience an impact of more than three percent of revenue. The Department anticipates that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) implicit price deflator for the gross domestic product. This final rule would not trigger the Unfunded Mandate Reform Act because it will not result in any expenditure by states or other government entities.

2. Summary of the Final Rule

Since 2011, 13 states have taken actions to restrict participation by certain types of providers as subrecipients in the Title X program based on reasons other than the providers’ ability to provide Title X services. In at least several instances, this has led to disruption of services or reduction of services in instances where a public entity, such as a state health department, is a Title X recipient and makes subawards to subrecipients for the provision of services. In response to these actions, this final rule requires that any Title X recipient subawarding funds for the provision of Title X services not prohibit an entity from participating as a subrecipient for reasons other than its ability to provide Title X services.

3. Need for the Final Rule

Certain states have policies in place that limit access to family planning services by restricting specific types of providers from participating as subrecipients in the Title X program. These policies, and varying court decisions on their legality, have led to uncertainty among recipients, inconsistency in program administration, and reduced access to services for Title X priority populations. These restrictive state policies exclude certain entities for reasons other than their ability to provide Title X services.

As a result of these state policies, providers previously determined by Title X recipients to be eligible providers of family planning services have been excluded from participation in the Title X program. In turn, the exclusion of these providers is associated with a reduction in the number of Title X service sites, reduced geographic availability of Title X services, and fewer Title X clients served between 2011 and 2014.^{27 28} This final regulation seeks to ensure that state and nonprofit private entity policies regarding Title X do not direct or restrict funding to subrecipients for reasons other than their ability to provide Title X services.

Reducing access to Title X services has many adverse effects. Title X services have a large effect on reducing the number of unintended pregnancies and unplanned births in the United States. For example, the Guttmacher Institute estimates that in 2014 publicly funded contraceptive care at Title X-funded clinics has helped women to prevent approximately 50 percent of an estimated total 1.9 million unintended pregnancies prevented by publically supported services nationally, and 70 percent (904,000) of the 1.3 million unintended pregnancies prevented by women with the help of publicly funded providers. The 904,000 unintended pregnancies would have resulted in an estimated 439,000 unplanned births, 326,000 abortions, and 139,000 miscarriages.²⁹ The Title X program also helps prevent the spread of STDs by providing screening and treatment.³⁰ The program helps reduce maternal morbidity and mortality, as well as low birth weight, preterm birth, and infant mortality.^{31 32} Title X, as it exists today,

is also very cost beneficial: every grant dollar spent on family planning saves an average of \$7.09 in Medicaid-related costs.³³

In addition to reducing access to the Title X program, these policies that restrict specific types of providers from being eligible to participate in the Title X project may reduce the quality of Title X services, as described previously. Research has shown that providers with a reproductive health focus provide services that more closely align with the statutory and regulatory goals and purposes of the Title X program.³⁴ In particular, these entities provide a broader range of contraceptive methods on-site, are more likely to have written protocols that assist clients with initiating and continuing contraceptive use without barriers, disproportionately serve more clients in need of family planning services, and may provide higher quality services.³⁵

The Department is concerned that policies that restrict certain types of entities from becoming subrecipients for reasons other than their ability to provide Title X services could limit the set of available providers for reasons unrelated to the quality of family planning services they provide. This, in turn, could reduce access to care and may reduce the availability of high quality family planning services. This regulation takes the simplest approach to reverse the adverse effects of policies that have excluded certain entities for reasons other than their ability to provide Title X services.

4. Analysis of Benefits and Costs

a. Benefits to Potential Title X Clients and Reduced Federal Expenditures

This final rule directly prohibits Title X recipients that subaward funds for the provision of Title X services from excluding an entity from participating for reasons other than its ability to provide Title X services. Following the implementation of policies this regulation would address, states shifted funding away from family planning

service providers previously determined to be eligible. The Department believes that this final rule is likely to undo these effects. To the extent that a state may come into compliance with this regulation by relinquishing its Title X grant or not applying to continue a Title X grant, other organizations could compete for Title X funding to deliver services in areas where a state entity previously subawarded funds for the delivery of Title X services. In turn, the Department expects that this has the potential to reverse the associated reduction in access to Title X services and deterioration of outcomes for affected populations.

As previously stated, research has shown that every grant dollar spent on family planning saves an average of \$7.09 in Medicaid-related expenditures.³⁶ In addition to reducing spending, these services improve the health and quality of life for affected individuals, suggesting that the return on investment to these family planning services is even higher. For example, these services reduce the incidence of invasive cervical cancer and sexually transmitted infections in addition to improving birth outcomes through reductions in preterm and low birthweight births.³⁷ Data show that specific provider types with a reproductive health focus have been shown to serve disproportionately more clients in need of publicly funded family planning services than do public health departments and FQHCs.³⁸ Therefore, eliminating restrictions against certain providers has the potential to result in an increased number of clients served and services delivered by the Title X program.

b. Costs to the Federal Government Associated With Disseminating Information About the Rule and Evaluating Grant Applications for Conformance With Policy

Following publication of the final rule, OPA will educate Title X program recipients and applicants about the requirement not to prohibit an entity from participating for reasons other than

²⁷ Fowler, CI, Lloyd, S, Gable, J, Wang, J, and McClure, E. (November 2012). Family Planning Annual Report: 2011 National Summary. Research Triangle Park, NC: RTI International.

²⁸ Fowler, C. I., Gable, J., Wang, J., & Lasater, B. (2015, August). Family Planning Annual Report: 2014 National Summary. Research Triangle Park, NC: RTI International.

²⁹ Frost JJ, Frohwirth L, and Zolna MR. Contraceptive Needs and Services, 2014. New York: Guttmacher Institute, 2015. <<https://www.guttmacher.org/report/contraceptive-needs-and-services-2014-update>>.

³⁰ Fowler, CI, Gable, J, Wang, J, and McClure, E. (November 2013). Family Planning Annual Report: 2012 National Summary. Research Triangle Park, NC: RTI International.

³¹ Kavanaugh ML and Anderson RM, Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers, New York: Guttmacher Institute, 2013 <https://www.guttmacher.org/sites/default/files/report_pdf/health-benefits.pdf>.

³² Preconception Health and Reproductive Life Plan. (n.d.). Retrieved May 18, 2016, from <http://www.hhs.gov/opa/title-x-family-planning/initiatives-and-resources/preconception-reproductive-life-plan/>.

³³ Frost, J.J., Sonfield, A., Zolna, M.R., & Finer, L.B. (2014). Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program. *Milbank Quarterly*, 92(4), 696–749.

³⁴ Robbins, C.L., Gavin, L., Zapata, L.B., Carter, M.W., Lachance, C., Mautone-Smith, N., & Moskosky, S.B. (2016). Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. *American Journal of Preventive Medicine*.

³⁵ Robbins, C.L., Gavin, L., Zapata, L.B., Carter, M.W., Lachance, C., Mautone-Smith, N., & Moskosky, S.B. (2016). Preconception Care in Publicly Funded U.S. Clinics That Provide Family Planning Services. *American Journal of Preventive Medicine*.

³⁶ Frost, J.J., Sonfield, A., Zolna, M.R., & Finer, L.B. (2014). Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program. *Milbank Quarterly*, 92(4), 696–749.

³⁷ Frost, J.J., Sonfield, A., Zolna, M.R., & Finer, L.B. (2014). Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program. *Milbank Quarterly*, 92(4), 696–749.

³⁸ Frost JJ, Zolna MR and Frohwirth L, Contraceptive Needs and Services, 2010. New York: Guttmacher Institute, 2013, <<http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf>>.

its ability to provide Title X services. OPA will send a letter summarizing the change to current recipients of Title X funds and post the letter to its Web site. Language conforming to this final rule will be included in forthcoming FOAs and continuation application guidance. OPA also has other existing channels for disseminating information to stakeholders. Therefore, based on previous experience, the Department estimates that preparing and disseminating these materials will require approximately one to three percent of a full-time equivalent OPA employee at the GS-12 step 5 level. Based on federal wage schedule for 2016 in the Washington, DC area, GS-12 step 5 level corresponds to an annual salary of \$87,821. The salary cost is doubled to account for overhead and benefits. As a result, the Department estimates a cost of approximately \$1,800–\$5,300 to disseminate information following publication of the final rule.

c. Grant Recipient Costs To Evaluate and Implement the Policy Change

The Department expects that stakeholders, including grant applicants and recipients potentially affected by this final policy change, will process the information and decide how to respond. This change will not affect the majority of current recipients and, as a result, the majority of current recipients will spend very little time reviewing these changes before deciding that no change on their part is required. For the states that currently hold Title X grants and have laws or policies restricting eligibility of Title X subrecipients based on reasons other than their ability to deliver Title X services, the final rule may implicate the state's law or policy. State agencies that currently restrict subrecipients would need to consider their current practices carefully in order to comply with this final rule if they wish to continue obtaining Title X grants and engaging subrecipients.

The Department estimates that current and potential recipients will spend an average of one to two hours processing the information and deciding what action to take. The Department notes that individual responses are likely to vary, as many parties unaffected by these changes will spend a negligible amount of time in response to these changes. According to the U.S. Bureau of Labor Statistics,¹ the average hourly wage for a chief executive in state government is \$54.26, which the Department believes is a good proxy for the individuals who will spend time on these activities. After adjusting upward by 100 percent to account for overhead and benefits, it is estimated that the per-

hour cost of a state government executive's time is \$108.52. Thus, the average cost per current or potential grant recipient to process this information and decide upon a course of action is estimated to be \$108.52–\$217.04. OPA will disseminate information to an estimated 89 Title X grant recipients. As a result, it is estimated that dissemination will result in a total cost of approximately \$9,700–\$19,300.

d. Summary of Impacts

Public funding for family planning services has the potential to shift to providers that see a higher number of patients and provide higher quality services. Increases in the quantity and quality of Title X service utilization could lead to fewer unintended pregnancies, improved health outcomes, reduced Medicaid costs, and increased quality of life for many individuals and families. The final rule's impacts will take place over a long period of time, as it will allow for the continued flow of funding to provide family planning services for those most in need, and it will prevent future attempts to prohibit Title X funding to current and potential subrecipients for reasons other than their ability to meet the objectives of the Title X program.

The Department estimates approximate costs in the range of \$11,400–\$24,600 in the first year following publication of the final rule. This rule is beneficial to society in increasing access to and quality of care.

e. Analysis of Regulatory Alternatives

The Department carefully considered the option of not pursuing regulatory action. However, as discussed previously, not pursuing regulatory action would allow the continued denial of Title X funds to entities for reasons other than their ability to provide Title X services. This, in turn, means accepting reductions in access to and quality of services to populations who rely on Title X. As a result, the Department chose to pursue regulatory action.

C. Paperwork Reduction Act of 1995

The amendments in this rule will not impose any additional data collection requirements beyond those already imposed under the current information collection requirements that have been approved by the Office of Management and Budget.

Date: December 12, 2016.

Sylvia M. Burwell,
Secretary.

List of Subjects in 42 CFR part 59

Birth control, Family planning, Grant programs.

Therefore, under the authority of section 1006 of the Public Health Service Act as amended, and for the reasons stated in the preamble, the Department amends 42 CFR part 59 as follows:

PART 59—GRANTS FOR FAMILY PLANNING SERVICES

■ 1. The authority citation for Part 59 continues to read as follows:

Authority: 42 U.S.C. 300a–4.

■ 2. Section 59.3 is revised to read as follows:

§ 59.3 Who is eligible to apply for a family planning services grant or to participate as a subrecipient as part of a family planning project?

(a) Any public or nonprofit private entity in a State may apply for a grant under this subpart.

(b) No recipient making subawards for the provision of services as part of its Title X project may prohibit an entity from participating for reasons other than its ability to provide Title X services.
[FR Doc. 2016–30276 Filed 12–14–16; 8:45 am]

BILLING CODE 5140–34–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191 and 192

[Docket No. PHMSA–2016–0016; Amdt. Nos. 191–24; 192–122]

RIN 2137–AF22

Pipeline Safety: Safety of Underground Natural Gas Storage Facilities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Interim final rule.

SUMMARY: This interim final rule (IFR) revises the Federal pipeline safety regulations to address critical safety issues related to downhole facilities, including wells, wellbore tubing, and casing, at underground natural gas storage facilities. This IFR responds to Section 12 of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016, which was enacted following the serious

natural gas leak at the Aliso Canyon facility in California on October 23, 2015. This IFR incorporates by reference two American Petroleum Institute (API) Recommended Practices (RP): API RP 1170, "Design and Operation of Solution-mined Salt Caverns used for Natural Gas Storage," issued in July 2015; and API RP 1171, "Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs," issued in September 2015.

DATES: Effective Date: This IFR is effective January 18, 2017. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 18, 2017.

Comments Date: Comments must be received by February 17, 2017.

ADDRESSES: You may submit comments identified by the docket number PHMSA-2016-0016 by 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:** Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- **Hand Delivery or Courier:** Bring comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: If you submit your comments by mail, submit two copies. To receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard.

Note: Comments are posted without changes or edits to <http://www.regulations.gov>, including any personal information provided. There is a privacy statement published on <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kenneth Lee, by telephone at 202-366-2694, by fax at 202-366-4566, or by mail at U.S. DOT, PHMSA, 1200 New Jersey Avenue SE., PHP-80, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

A. Underground Natural Gas Storage Facilities

According to the Energy Information Administration,¹ there are approximately 400 interstate and intrastate underground natural gas storage facilities currently in operation in the United States, with more than four trillion cubic feet of natural gas working capacity. Three hundred twenty-six (326) of those facilities store natural gas in depleted hydrocarbon reservoirs, while the remainder store natural gas in salt caverns (31) and depleted aquifers (43). The recent failure of Well SS25 at the Aliso Canyon facility, an intrastate regulated facility located in Southern California, and its aftermath have revealed the need for minimum federal standards for the wells and downhole facilities located at both intrastate and interstate underground storage facilities. The promulgation of minimum federal standards would, for the first time, establish safety standards under the Pipeline Safety Regulations at title 49, CFR parts 191 and 192, for the currently unregulated downhole facilities at 197 interstate underground gas storage facilities and provide consistent, minimum standards for the remaining 203 intrastate facilities.

While there are DOT safety regulations in part 192 that apply to the surface piping at these facilities, there are no regulations in part 192 covering downhole facilities—such as wells, wellbore tubing, and casing—or the operations, maintenance, integrity management, public awareness, and emergency response activities associated with these downhole facilities. Therefore, even if all states had effective regulations for their intrastate facilities, 197 interstate facilities (that cumulatively have several thousand individual wells) would not be subject to any safety regulatory requirements with respect to their downhole facilities in the absence of federal action. In the event of a well failure, the interstate underground storage facilities could have consequences of a similar or even greater magnitude as the Aliso Canyon intrastate facility. The pipe at these facilities is threaded, rather than welded like a pipeline, making the pipe more susceptible to breaks. A broken pipe at any facility would allow gas to escape at a much higher rate and would be

more likely to catch fire, leading to a greater risk to life and property. However, these underground storage facilities are currently not required to meet any part 192 design, operations, or maintenance standards to ensure the integrity and safety of these wells and downhole facilities.

Most of the states that regulate underground gas storage have agencies separate and apart from the PHMSA-certified agency that regulates intrastate pipeline safety. Under the interim final rule, all intrastate transportation-related underground gas storage facilities will become subject to minimum federal safety standards and be inspected either by PHMSA or by a state entity that has chosen to expand its authority to regulate these facilities under a certification filed with PHMSA pursuant to 49 U.S.C. 60105.

Because state regulation of intrastate facilities is done through an annual certification under 49 U.S.C. 60105 and involves state adoption of the minimum federal standards, federal regulations are needed as the basis for effective state regulation as well. While many states have underground storage regulations with material integrity testing components to ascertain a well's condition, most states do not have specific and consistent regulations that include operating procedures and remediation for operations, maintenance, integrity demonstration and verification, monitoring, threat and hazard identification, assessment, remediation, site security, emergency response and preparedness, and recordkeeping requirements. The minimum federal standards will set baseline fitness for service requirements for all interstate and intrastate facilities and will allow state regulators to go above and beyond the minimum federal standards to require additional or more stringent safety safeguards at intrastate facilities. In other words, the regulation of intrastate underground gas storage facilities operates in the same manner as the existing federal-state regulatory scheme for gas and hazardous liquid pipelines.

After issuance of the IFR, PHMSA will further evaluate the need for any additional regulatory requirements for underground storage facilities. PHMSA encourages persons to participate in this rulemaking by submitting comments containing relevant information, data, or views. We will consider all comments received on or before the closing date for comments in finalizing this rule. We will consider late filed comments to the extent practicable.

¹ The Energy Information Administration is part of the U.S. Department of Energy. See http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrnd_storage.html.

B. Aliso Canyon and Other Incidents

On October 23, 2015, Southern California Gas Company's (SoCal Gas) Aliso Canyon Well SS25 developed a natural gas leak near an area known as Porter Ranch in Los Angeles, CA. The well leak is believed to have originated from the subsurface (downhole) well casing. The well was drilled in 1953 and converted to natural gas storage in 1972. On January 6, California Governor Jerry Brown issued a proclamation declaring the Aliso Canyon incident a state emergency. Before the leak was finally stopped (cement plugged), approximately 5.7 billion cubic feet (BCF) of natural gas had been released into the atmosphere, a volume equivalent to the yearly greenhouse gas emissions of approximately a half-million cars. PHMSA estimates the social costs of the climate-related impacts from these emissions at approximately \$123 million (with a range of \$55 million to \$344 million, depending on the discount rate). Additional operator-reported costs were approximately \$763 million as of November 2, 2016. Over 5,790 households (families) were relocated due to the co-release of natural gas odorant (mercaptans), according to the Aliso Canyon Incident Command briefing report issued on February 16, 2016.

The Aliso Canyon facility has 115 storage wells, and is the second-largest storage facility of its kind in the United States. It is an intrastate facility that is subject to the authority of the California Public Utility Commission (CPUC), which is certified by PHMSA to regulate the intrastate gas pipeline facilities in California in accordance with 49 U.S.C. 60105.

While the root cause of the failure of Well SS25 is the subject of ongoing investigations and assessments, the serious nature of the harm suffered by the public is widely recognized. The initial investigations by the CPUC and its partner agencies indicate that the risk of potential harm to the public could be addressed, at least in part, through the incorporation by reference of API RPs 1170 and 1171 into the pipeline safety regulations and requiring that underground gas storage facilities adopt minimum procedures for operations, maintenance, integrity demonstration and verification, monitoring, threat and hazard identification, assessment, and anomalies that affect safety.

The Aliso Canyon incident is not the only high-profile underground gas storage incident to occur in recent years. On January 17 and 18, 2001, a wellbore failure at an underground storage

facility near Hutchinson, Kansas, caused a natural gas leak from a gas storage field. The gas traveled approximately nine miles underground and exploded under some buildings, killing two people in a mobile home park and destroying two businesses in downtown Hutchinson. Approximately 143 million cubic feet of natural gas escaped from the storage field.²

Similarly, in 2004, a well at an underground storage facility in Liberty County, TX, malfunctioned, resulting in a fire that burned for six and one half days and released approximately 6 BCF of natural gas.³ These incidents have also resulted in heightened awareness from governmental officials and the general public about the safety of these facilities, including the potential for explosions and uncontrolled burns, and the potentially immense environmental damage associated with the uncontrolled release of natural gas into the atmosphere from the failure of even a single one of the thousands of wells at the underground gas storage facilities across the country.

In addition to threatening public safety and causing disruptive evacuations of large areas, when a natural gas storage well such as Well SS25 fails, the very process of attempting a "well kill," which is intended to stop the flow of natural gas from the well by pumping a weighted fluid down the wellbore, puts company workers and first responders directly in life-threatening situations.⁴ Fortunately, an errant spark did not ignite the gas at Aliso Canyon, but well failures often involve such ignition, which can result in flame jets that can be seen from many miles away and take weeks to extinguish.

Based on its field experience and knowledge of the industry, PHMSA is aware that many of the existing underground natural gas storage facilities across the country have wells with characteristics similar to Well SS25. Many wells, like Well SS25, are over 50 years old and were originally designed for petroleum production, where the flow of crude oil from

underground depths actually *reduced* the pressure on the casing pipe as it flowed toward the ground surface. Natural gas storage, in contrast, often has a much lower pressure drop when flowing to the ground surface. These converted facilities also were originally constructed using certain techniques that are different from typical pipeline industry construction, such as having pipe sections joined by threaded coupling, not welds.⁵ They also generally do not have a corrosion-resistant internal or external protective coating, which is required for all new pipelines.

The combined effects of a lack of corrosion-resistant coating, no effective cathodic protection, and a corrosive flow product that includes a mixture of water and other corrosive components presents a serious risk of leakage at some point in the life span of these wells. These risks can be significantly mitigated by an effective operations and maintenance program that includes reassessments and preventive and mitigation measures based upon unique conditions and threats to the well casing, tubing, and wellhead.

Most underground natural gas storage wells operate at pressures ranging from 200 pounds per square inch (psi) to about 4500 psi. By comparison, the maximum U.S. interstate transmission pipeline pressures are about 2000 psi, with most below 1000 psi. Underground storage wells also lack consistent standards for design safety factors to contain the well pressure, which provides a margin of yield strength. If a given grade of steel would deform or yield at 1.00 of its specified minimum yield strength, a safety margin of 25% would equate to a 0.80 design factor. For example, a pipeline generally has a design factor of 0.72 or less (safety margin of 39%), whereas a well casing may not have any safety factor. This means that corrosion of well casing pipe used with no safety factor would need the maximum operating pressure of the casing pipe to be reduced in order to "maintain safety" whenever a loss of wall thickness was found in the casing pipe.

Preventing well-failure incidents is not only a matter of public safety and protecting the environment from methane leaks and catastrophic failures, such as those that have occurred at Aliso Canyon, CA; Liberty County, TX; and Hutchinson, KS, but is also a key part of ensuring the reliable transportation of the nation's energy

² Allison, M. Lee, 2001, The Hutchinson Gas Explosions: Unraveling a Geologic Mystery, Kansas Bar Association, 26th Annual KBA/KIOGA Oil and Gas Law Conference, V1, pg 3-1 to 3-29. http://www.kgs.ku.edu/Hydro/Hutch/Refs/Hutch_KBA_final.pdf.

³ October 7, 2004 news release by Duke Energy Partners, owner of the facility in 2004. <https://www.duke-energy.com/news/releases/2004/Oct/2004100702.asp>.

⁴ PHMSA maintains "Underground Natural Gas Storage" informational Web pages, which explain underground storage operations. These pages are available to the public at <http://primis.phmsa.dot.gov/ung/index.htm>.

⁵ Threaded casing pipe connections have less strength than a welded connection and are more prone to corrode during the life of the casing pipe.

supplies. If storage facility operators need to rapidly draw down their supplies of gas to reduce the leak rate at a failed well or experience complete interruptions of operations, the public may suffer serious natural gas supply outages. When large underground natural gas storage facilities such as Aliso Canyon fail, the interruption in supply can have a major impact on the availability of heating fuel in colder climates and electricity in hot summer months. Businesses, hospitals, and governmental facilities also rely on the supply and distribution of gas as well as the energy produced by gas turbine electric power plants to keep the economy moving.

C. PHMSA Actions

Recently, PHMSA, along with the Federal Energy Regulatory Commission (FERC), five state regulatory agencies, and numerous industry representatives, participated in the development of two American Petroleum Institute (API) Recommended Practices (RP): API RP 1170, "Design and Operation of Solution-mined Salt Caverns used for Natural Gas Storage" (July 2015), and API RP 1171, "Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs" (September 2015).⁶ Both API RPs 1170 and 1171 recommend that operators of underground natural gas storage facilities implement a wide range of current recommended practices, including construction, maintenance, risk-management, and integrity-management procedures.

On February 5, 2016, PHMSA issued Advisory Bulletin ADB-2016-02 (81 FR 6334).⁷ The advisory bulletin recommended that operators of underground natural gas storage facilities review their operating, maintenance, and emergency response activities to ensure that the integrity of underground natural gas storage facilities is properly maintained. This bulletin informed operators about certain recommended practices and urged operators to take all necessary actions to prevent and mitigate breaches of integrity, leaks, or failures at their underground natural gas storage facilities, to ensure the safety of the public and operating personnel, and to protect the environment. Operators were advised to:

(1) Verify that the pressure required to inject intended natural gas volumes does not exceed the design pressure

limits of the reservoir, wells, wellheads, piping, casing, tubing, or associated facilities;

(2) monitor all wells for the presence of annular gas or liquids on a periodic basis;

(3) inspect the wellhead assembly and attached pipelines for each of the wells used;

(4) conduct periodic functional tests of all surface and subsurface safety valve systems and wellhead pipeline isolation valve(s) for proper function and ability to shut-off or isolate the well and remediate improperly functioning valves;

(5) perform risk assessments in a manner that reviews, at a minimum, the API RP 1171 criteria to evaluate the need for subsurface safety valves on new, removed, or replaced tubing strings or production casing;

(6) conduct ongoing assessments for the verification and demonstration of the mechanical integrity of each well and related piping and equipment;

(7) develop and implement a corrosion monitoring and integrity evaluation program for piping, wellhead, casing, and tubing including the usage of appropriate well log evaluations;

(8) develop and implement procedures for the evaluation of well and attendant storage facilities that include analysis of facility flow erosion, hydrate potential, individual facility component capacity and fluid disposal capability at intended gas flow rates and pressures, and analysis of the specific impacts that the intended operating pressure range could have on the corrosive potential of fluids in the system;

(9) identify potential threats and hazards associated with operation of the underground storage facility;

(10) perform ongoing verification and demonstration of the integrity of the underground storage reservoir or cavern using appropriate monitoring techniques for integrity changes, such as the monitoring of pressure and periodic pressure surveys, inventory (injection and withdrawal of all products), product levels, cavern subsidence, and the findings from adjacent production and water wells, and observation wells;

(11) ensure that emergency procedures are reviewed, conducted, and updated at least annually; and

(12) ensure that records of the processes, procedures, assessments, reassessments, and mitigation measures are maintained for the life of the storage well.

On July 14, 2016, PHMSA held a public meeting on the topic of potentially extending federal pipeline

safety regulations to include transportation-related underground gas storage facilities. The discussion covered both interstate and intrastate storage facilities, including wells and wellbore tubing. PHMSA heard from a diverse group of stakeholders, including state and federal regulators, emergency responders, and residents of the Aliso Canyon area who were directly impacted by the 2015 incident. PHMSA also heard from facility operators and technology experts. Based on its knowledge of storage well facilities across the country, available information concerning the Aliso Canyon accident, and other aspects of the record developed at this public meeting, PHMSA has concluded that the two recently adopted industry recommended practices, developed through the API consensus process, should be incorporated into part 192 of the federal pipeline safety regulations as an urgent first step in preventing similar incidents in the future. If an operator fails to take any measures recommended by API RP 1170 or 1171, then it would need to justify in its written procedures why the measure is impracticable and unnecessary.

Rapid incorporation of API RP 1170 and 1171 into PHMSA's regulations will require operators to assess the operational safety of their underground natural gas storage facilities and document the implementation of identified safety solutions. PHMSA and its state partners will monitor operators' implementation of the requirements in the interim, and once the requirements become effective PHMSA will begin inspecting facilities to enforce the requirements. Based upon facility inspections by PHMSA and its state partners and input from the public, PHMSA plans to continue to monitor and evaluate the safety of underground storage facilities and plans to incrementally build on the framework of the IFR as necessary in order to ensure that operators fully address the safety issues presented by underground natural gas storage.

II. Justification

A. PHMSA Authority and Regulatory History

Under 49 U.S.C. 60101 and 60102, PHMSA sets minimum safety standards for the transportation of natural gas, which includes underground natural gas storage facilities incidental to transportation. While PHMSA's existing part 192 regulations cover much of the surface piping up to the wellhead at underground natural gas storage facilities served by pipeline, PHMSA

⁶ Available at: <http://publications.api.org/IBR-Documents-Under-Consideration.aspx>.

⁷ <http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Advisory%20Notices/2016-02228.pdf>.

has not previously issued regulations for the “downhole” portion of these facilities. Accordingly, the only specific regulatory requirements for operators to inspect the safety of their underground natural gas storage facility wellheads, casings, and tubing strings are state standards that apply to intrastate facilities. Not all states have adopted safety standards for underground storage facilities, and while in some cases states that are certified by PHMSA to regulate their intrastate gas pipeline facilities can and have issued state standards for these wells and wellbores, the absence of a minimum federal standard has led to a regulatory gap for the wells and downhole pipe and tubing for the interstate facilities and a lack of adequate, consistent standards for all intrastate facilities.

PHMSA considered regulating the wells and downhole pipe and tubing at underground storage facilities more than 20 years before the Aliso Canyon incident. In 1994, PHMSA’s predecessor agency, the Research and Special Programs Administration (RSPA) held a public meeting (Docket PS–137; 59 FR 30567; June 14, 1994) on underground storage of gas and hazardous liquids, in order to gather information on the extent of then-current regulation and to determine what action RSPA should take on underground storage regulation. At the meeting, representatives of industry, state governments, and the public presented statements on safety issues, industry practices, the status of state underground storage regulations, and the need for additional federal regulations. While different views were expressed on whether RSPA should begin to regulate the wells and downhole pipe and tubing, RSPA’s regulation of the surface piping at these facilities appeared sufficient and further federal regulatory action on the wells was not seen as an immediate need. At that time, however, no widely accepted industry standards existed for the underground storage of natural gas. In addition, much of the underground storage well piping and components, which do not have external coatings and cathodic protection, have aged another 22 years since RSPA conducted the 1994 review. Finally, there have been three significant accidents in the last 15 years, including Aliso Canyon. Taken together, these are compelling factors warranting regulatory action by PHMSA, as discussed more fully in Section D below.

On June 22, 2016, the “Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016” (the Act), became law (Pub. L. 114–183). Section 12 of the Act mandates that PHMSA

issue regulations for underground gas storage facilities within two years from the date of enactment and that PHMSA “shall, to the extent practicable—

(1) Consider consensus standards for the operation, environmental protection, and integrity management of underground natural gas storage facilities;

(2) Consider the economic impacts of the regulations on individual gas customers;

(3) Ensure that the regulations do not have a significant economic impact on end users; and

(4) Consider the recommendations of the Aliso Canyon natural gas leak task force established under section 31” of the Act.

The Act further provides that PHMSA may allow state authorities to continue exercising their traditional role in the oversight of intrastate gas pipeline facilities and gas transportation, including underground gas storage facilities, in the same manner through an annual certification process under 49 U.S.C. 60105 and the interstate agent provisions of 49 U.S.C. 60106. This mandate reflects the seriousness with which Congress has focused on underground storage facility safety following the Aliso Canyon accident. It also reflects Congress’ desire for states to maintain their role as strong federal partners in protecting the safety of underground gas storage facilities. While the RPs do include material that is relevant to determining whether a given geologic formation or depleted reservoir is suitable for gas storage use, permitting is not a PHMSA function. PHMSA is not authorized to prescribe the location of an underground gas storage facility or to require the Secretary of Transportation’s permission to construct such a facility. Therefore, Congress has preserved the traditional permitting role of the states in the case of intrastate facilities and the Federal Energy Regulatory Commission in the case of interstate facilities.

This latest accident has made PHMSA and other stakeholders, including the public, acutely aware of both the safety and environmental hazards of underground gas storage. Moreover, there is generally a greater awareness on the part of the public of greenhouse gas emissions. The external cost of not regulating such emissions must now be considered by agencies, including PHMSA, as part of executive branch policy governing agency regulatory actions.

Section 31 of the PIPES Act also created the Aliso Canyon Natural Gas Leak Task Force (Task Force), co-chaired by the U.S. Departments of

Energy (DOE) and DOT. The Task Force has provided a mechanism for interagency consultations that has included the U.S. Departments of Health and Human Services, Interior, Commerce, the Environmental Protection Agency, and the Federal Energy Regulatory Commission. The Task Force Report, entitled “Ensuring Safe and Reliable Underground Natural Gas Storage,” was issued by DOT and DOE on October 18, 2016 (Report). PHMSA worked closely with DOE in preparing the Report, which has informed PHMSA’s development of the IFR.

Widely accepted industry standards now exist with the recent development of API RPs 1170 and 1171, both of which were finalized about one year ago. API RPs 1170 and 1171, developed over the course of more than 4 years, are suitable for mandatory incorporation-by-reference into the operating procedures of these facilities, at least as a first step to address safety and environmental concerns with underground storage. This avenue would provide an immediate and reasonable means by which PHMSA would begin to regulate the downhole portions of underground storage of natural gas and respond to emerging risks in the area of underground gas storage, while at the same time implementing section 31 of the PIPES Act.

B. Industry and Public Support for Rulemaking

The recent history of serious underground storage incidents, including the Aliso Canyon incident, has made PHMSA and the public acutely aware of both the safety and environmental hazards of underground natural gas storage. Representatives of both industry and the public have recently requested that PHMSA promulgate minimum federal regulations.

On January 20, 2016, the Interstate Natural Gas Association of America (INGAA), a major industry trade association representing the vast majority of interstate natural gas pipeline transmission companies in the United States and a participant in the development of API RPs 1170 and 1171, petitioned PHMSA to incorporate both API RPs by reference into 49 CFR part 192. In the petition, INGAA supported federal safety regulation and oversight of natural gas storage facilities over the current patchwork of state regulations.

That petition, along with a February 11, 2016, letter from INGAA, urged PHMSA to adopt API RPs 1170 and 1171 as quickly as possible in order to

put into place a set of consensus standards for operators of underground storage facilities to follow in assessing their facilities and establishing procedures to ensure safety. INGAA, the American Petroleum Institute (API), and the American Gas Association (AGA) have all reached out to PHMSA in the aftermath of the Aliso Canyon incident and expressed support from their member companies for the rapid adoption of the API RPs. API recommended practices are frequently adopted by a majority of the industry, and PHMSA has previously adopted other industry consensus standards into the pipeline safety regulations.

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) directs federal agencies to use voluntary consensus standards in lieu of government-written standards whenever possible. Voluntary consensus standards are standards developed or adopted by voluntary bodies that develop, establish, or coordinate technical standards using agreed-upon procedures. In addition, Office of Management and Budget (OMB) issued OMB Circular A–119 to implement section 12(d) of Public Law 104–113 relative to the utilization of consensus technical standards by federal agencies. This circular provides guidance for agencies participating in voluntary consensus standards bodies and describes procedures for satisfying the reporting requirements in Public Law 104–113.

API elected to issue RPs 1170 and 1171 in the form of “recommended practices,” as opposed to “standards.” This presented PHMSA with the challenge of dealing with concerns about the enforceability of these practices. Accordingly, as part of incorporating the API RPs by reference, PHMSA is adopting the non-mandatory provisions of API RPs 1170 and 1171 in a manner that would make them mandatory (*i.e.*, API provisions containing the word “should” or other non-mandatory language will be considered mandatory), except that operators will be permitted to deviate from the API RPs if they provide a sufficient technical and safety justification in their program or procedural manuals as to why compliance with a provision of the recommended practice is not practicable and not necessary for the safety of a particular facility. PHMSA will evaluate these justifications as part of its compliance inspection process, taking into account whether the operator’s procedures reflect sound engineering principles and achieved acceptable performance as demonstrated by annual reports and incident data. PHMSA will

incorporate lessons learned from these compliance reviews of underground storage facility operations into inspection protocols and inspector training programs.

State pipeline regulators also support the issuance of underground gas storage facility regulations by PHMSA. In 2010, the National Association of Pipeline State Representatives (NAPSR), which represents PHMSA’s state pipeline regulatory partners, submitted a resolution to PHMSA supporting underground natural gas storage facility regulations.⁸ PHMSA’s state partners are a vital element in helping to protect the integrity of the nation’s gas transmission and distribution systems. PHMSA’s expanded role in underground natural gas storage facilities will produce a safer and more environmentally sound system.

C. Good Cause Basis for an IFR

Under the Administrative Procedure Act (APA) and the Federal Pipeline Safety Law, PHMSA may issue an IFR when there is “good cause” to find that the notice-and-comment process would be “impracticable, unnecessary, or contrary to the public interest,” and the agency incorporates that finding and a brief statement of the reasons supporting the finding in the rulemaking document. *See* 5 U.S.C. 553(b)(3)(B), and 49 U.S.C. 60102(b)(6)(C). PHMSA’s pipeline safety regulations similarly recognize this exception at 49 CFR 190.311. However, PHMSA may modify aspects of the IFR issuing the final rule after receiving and reviewing public comments, as well as any other relevant documents. The good cause exception allows PHMSA to respond to safety risks quickly when delay would jeopardize the public interest through risks to public safety and the environment.

PHMSA finds that good cause exists to proceed with this IFR. Normal notice and comment procedures are impracticable and not in the public interest because PHMSA knows, as evidenced by the release at Well SS25 in Aliso Canyon, that existing facilities operating without minimum federal PHMSA safety standards are prone to corrosion due to the combined risks of a lack of corrosion-resistant coating, no effective cathodic protection, and a corrosive flow product that includes a

mixture of water and other corrosive components. The RP’s have sections concerning integrity monitoring methods for safety threats from corrosion of the wellbore piping and wellhead. The other 114 wells at the Aliso Canyon facility are currently being evaluated for integrity deficiencies. However, the concerns about well integrity are not limited to Aliso Canyon. They are national in scope. The lack of applicable PHMSA federal regulations for the downhole facilities presents an immediate threat to safety, public health, and the environment because there is currently no effective means for the agency to ensure compliance with safety standards at underground natural gas storage facilities.

Given the nature of the safety and environmental threat posed by the current lack of federal regulations for underground gas wells, any delay in adopting the API recommended practices would be impracticable and contrary to the public interest. The failure of a single well can cause substantial environmental harm and put populated areas at risk. The Aliso Canyon facility, for example, was located near a densely populated area and resulted in approximately 5,790 households being relocated due to the co-release of natural gas odorant (mercaptans), according to the Aliso Canyon Incident Command briefing report issued on February 17, 2016. Further, while the full extent of the damage caused by the Aliso Canyon incident will not be known until much later, as of June 30, 2016, SoCalGas had made provisions for expenses of nearly \$763 million to control the release, monitor air emissions, relocate residents, and cover its legal and other expenses (Sempra, 2016).⁹ These costs are those incurred by Sempra and do not include additional costs to society as a result of the release.¹⁰ For example,

⁹ Of the \$763 million, Sempra Energy notes “approximately 70% is for the temporary relocation program (including cleaning costs and certain labor costs) and approximately 20% is for efforts to control the well, stop the leak, stop or reduce emissions, and the estimated cost of the root cause investigation. The remaining amount includes legal costs incurred to defend litigation, the value of lost gas, the costs to mitigate the actual natural gas released and other costs. Cost estimate excludes any potential damage awards, restitution and any civil, administrative or criminal fines and other penalties that may be imposed, as well as any additional costs to clean homes and future legal costs necessary to defend litigation, among other potential costs, as we cannot estimate what amounts, if any, will be incurred for such matter.” (Sempra Energy, 2016).

¹⁰ On August 17, 2016, SoCal Gas provided PHMSA with a supplemental data response

⁸ NAPSR Resolution 2010–03 AC.2. The NAPSR resolution contained recommendation including the development of regulations to assess the integrity of existing wellbores used to store natural gas and the safety of operations for geologic formations used to store natural gas. <http://www.napsr.org/SiteAssets/NAPSR-Resolutions-Open/201003%20Storage%20Field%20Wellbores%20Resolution.pdf>.

this figure does not include \$123 million in estimated social costs (ranging from \$55 million to \$344 million) from the climate impacts of approximately 5.7 BCF of gas released into the atmosphere.¹¹

There is also a major public interest in preventing supply interruptions for hundreds of thousands of consumers who need gas to heat their homes. Potential interruptions in the supply of gas can also impact the reliable operation of gas turbine electrical power plants that power businesses and the U.S. economy. The Aliso Canyon incident highlights the need for explicit PHMSA standards relating to the safety of these facilities, and as noted above many of the approximately 400 existing facilities across the country have wells that have similar characteristics to Well SS25.

Upon the effective date of the final rule, PHMSA will move expeditiously to institute a program for identifying, inspecting and enforcing the new standards for all interstate facilities. Implementation at the state level will also involve time for states to update their state codes and in some cases certify additional agencies. Conducting a full notice and comment rulemaking proceeding prior to the incorporation of the API RPs would potentially leave the public unprotected and without any safety standards for underground natural gas storage for months or years to come. It would also leave PHMSA without any enforceable regulations for interstate underground natural gas storage wells and downhole facilities during the rulemaking process. However, in the absence of advance public notice and comment, PHMSA is providing for a post-promulgation comment period and will consider subsequent amendments or modifications in the final rule based on the comments received.

The rapid incorporation of API RPs 1170 and 1171 into part 192 provides PHMSA with an immediate tool to begin inspection and enforcement for interstate underground storage facilities and provides the foundation for states to begin adopting the minimum federal standards for intrastate underground storage facilities for prevention and response to future incidents. PHMSA understands that implementation at the state level will involve time for states to update their state codes and in some cases certify additional agencies, but the

incorporation of the API RPs into the part 192 regulations will not prevent states from adopting additional or more stringent regulations on underground gas storage facilities, provided they are compatible with the new minimum federal standards.

D. The American Petroleum Institute Recommended Practices 1170 and 1171

PHMSA reviewed API RPs 1170 and 1171 for requirements covering design, construction, material, testing, commissioning, reservoir monitoring, and recordkeeping for existing and newly constructed underground natural gas storage facilities. API RPs 1170 and 1171 have operations and maintenance (O&M) procedures and practices for newly constructed and existing underground natural gas storage facilities that include operations, maintenance, threat identification, monitoring, assessment, site security, emergency response and preparedness, training, and recordkeeping. The standards are available for public viewing in a read-only format at <http://publications.api.org/IBR-Documents-Under-Consideration.aspx>.

API RP 1170, “Design and Operation of Solution-mined Salt Caverns Used for Natural Gas Storage, First Edition” provides the functional recommendations for salt cavern facilities used for natural gas storage service and covers facility geomechanical assessments, cavern well design and drilling, solution mining techniques and operations, including monitoring and maintenance practices. This RP is based on the accumulated knowledge and experience of geologists, engineers, and other personnel in the petroleum and gas storage industries and promotes public safety by providing a comprehensive set of design guidelines. This RP recognizes the nature of subsurface geological diversity and stresses the need for in-depth, site specific geomechanical assessments with a goal of long-term facility integrity and safety. This RP includes the cavern well system from the emergency shutdown (ESD) valve, though the well, including wellhead, casing, tubing, cement, and completion techniques, to the design and construction of the cavern itself.

API RP 1171, “Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs, First Edition” applies to natural gas storage in depleted oil and gas reservoirs and aquifer reservoirs, and focuses on storage well, reservoir, and fluid management for functional integrity in design, construction, operation, monitoring, maintenance,

and documentation practices. Storage design, construction, operation, and maintenance include activities in risk management, site security, safety, emergency preparedness, and procedural documentation and training to embed human and organizational competence in the management of storage facilities. This RP embodies historical knowledge and experience and emphasizes the need for case-by-case and site-specific conditional assessments. This RP applies to both existing and newly constructed facilities. This document recommends that operators manage integrity through monitoring, maintenance, and remediation practices and apply specific integrity assessments on a case-by-case basis.

PHMSA has also added reporting requirements for underground natural gas storage facilities in 49 CFR part 191. Four types of reports are required from operators for underground natural gas storage facilities: Annual reports, incident reports, safety-related condition reports, and National Registry information. PHMSA is requiring this information because there currently are no annual submittal requirements for underground natural gas storage facilities in PHMSA’s regulations that include information about the wells and reservoirs. The first type of report noted is an “annual report,” which is needed to collect operator name, address and contact information; location of the facility; number of wells including injection, withdrawal and observation wells; and facility operational information such as gas storage volumes, gas storage pressures, well depths, gas injection and withdrawal rates, and maintenance information that is conducted to ensure the safety of the facility. The second type of report is an “incident report” that is needed for operator reporting of an event that involves a release of gas, death or personal injury necessitating in-patient hospitalization, estimated property damage of \$50,000 or more, or unintentional estimated gas loss of three million cubic feet or more. The third type report noted is a “safety-related condition report” that is used to report findings that compromise the safety of the well or reservoir such as casing or tubing corrosion, cracks or other material defects, earthquakes, leaks, or anything that compromises the structural integrity or reliability of an underground natural gas storage facility. Lastly, National Registry information is needed by PHMSA to identify the facility operator that has primary responsibility for operations through an

regarding Aliso Canyon remediation costs as of August 15, 2016.

¹¹ The range reflects different assumptions on the discount rate used in estimating the social cost of methane. See Section 6 in RIA for details.

assigned Operator Identification Number (OPIID).

API elected to publish 1170 and 1171 in the form of “Recommended Practices,” as opposed to “Standards.” This presented PHMSA with the problem of how to ensure that the industry practices therein were enforceable as opposed to mere guidance about what operators “should” do. Accordingly, PHMSA is making the API RPs mandatory out of concern that failure to do so would weaken many important safety provisions. However, PHMSA will allow operators to vary from the API RPs when compliance with a provision of the recommended practice is not practicable and not necessary for safety with respect to specified underground storage facilities or equipment as long as they document the technical and safety justification for making such determinations. PHMSA or its state partner would review such justifications during compliance inspections and utilize our range of enforcement tools as necessary to ensure variances are not utilized inappropriately. In addition, PHMSA is able to issue advisory bulletins or otherwise notify operators advising them of variances that have frequently been deemed objectionable and should be avoided under most circumstances. This approach has worked well in pipeline regulation involving incorporation by reference. Therefore, we do not believe this manner of adoption will be a significant departure from expected industry practices. In

addition, operators may submit an application for a special permit under 49 CFR 190.341 that would waive a given requirement or extend a deadline applicable to its facility if PHMSA determined that such waiver would not be inconsistent with safety.

III. Rulemaking Analysis and Notices

A. Statutory/Legal Authority for This Rulemaking

This IFR is published under the authority of the Federal Pipeline Safety Law (49 U.S.C. 60101 *et seq.*). Section 60102 authorizes the Secretary of Transportation to issue regulations governing design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. The amendments to the requirements for underground gas storage facilities involved in pipeline transportation addressed in this rulemaking are issued under this authority.

B. Executive Orders 12866 and 13563, and DOT Regulatory Policies and Procedures

Under title 5, United States Code, 553(b)(3)(B) and title 49, United States Code, 60102(b)(6)(C), advance notice, public procedure, and analysis of benefits and costs specified in 49 U.S.C. 60102(b)(2)(D) and (E) is not required when PHMSA for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rulemakings issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

PHMSA has determined that the underground storage of natural gas is an immediate safety and environmental threat. Therefore, this IFR is being issued to address an emergency situation within the meaning of section 6(a)(3)(D) of Executive Order (E.O.) 12866 (58 FR 51735). Under section 6(a)(3)(D), in emergency situations, an agency must notify the Office of Management and Budget (OMB) as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of section 6 of E.O. 12866. PHMSA has notified and consulted with OMB on this IFR.

The IFR has been designated by OMB as a significant regulatory action under Section 3(f) of E.O. 12866, and therefore was reviewed by OMB. This IFR also is considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) because of substantial congressional, State, industry, and public interest in pipeline safety. PHMSA has prepared a regulatory impact analysis (RIA) for the IFR, which details the potential for incremental benefits and costs. The RIA in the docket for this IFR describes the baseline for the analysis, potential unit costs and benefits from compliance actions, and aggregate compliance costs. A table of the incremental annualized costs, from the RIA, is below:

INCREMENTAL ANNUALIZED COSTS OF THE IFR
[Million 2015\$]¹

Cost component	Incremental costs relative to API RPs implementation baseline					
	Full compliance baseline		Partial compliance baseline		Regulatory compliance only baseline	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Mechanical integrity testing ²	\$0.0	\$0.0	\$27.2	\$31.7	\$170.6	\$193.6
Other RP elements	0.0	0.0	0.0	0.0	0.0	0.0
Reporting	<0.1	<0.1	<0.1	<0.1	<0.1	<0.1
Total ¹	<0.1	<0.1	27.2	31.7	170.6	193.6

¹ Range reflects the assumed baseline level of compliance with API RPs in absence of regulatory requirements.
² Based on 10-year phase-in of integrity tests and a 10-year interval between tests. See Section 4 for details.

To the degree that the IFR promotes implementation of safer practices by making them mandatory and enforceable, PHMSA expects the benefits of the IFR in general, and of the mechanical integrity testing requirements in particular, to derive from preventing catastrophic natural gas releases due to the failure of storage

wells or of fugitive and vented emissions ancillary to the operation of storage facilities. These benefits include avoided property damage, loss of product, injuries and fatalities, methane emissions, adverse health effects, and others.

PHMSA expects mechanical integrity tests and other measures mandated by

the IFR to reduce the likelihood of well failures in the future by detecting conditions that precede the failures. PHMSA did not find data to estimate quantitatively the reduction in risk that will result from conducting mechanical integrity tests on storage wells but notes that the tests are used to establish existing conditions and to monitor

development of corrosion or other conditions (e.g., mechanical defects or damages) that could lead to a release or other consequences. Corrosion poses a serious threat to maintaining natural gas containment. Without proactive tests, serious integrity conditions may be discovered and addressed only after containment has already been compromised and the casing is leaking.

Reporting requirements incorporated in the IFR will help ensure compliance with the minimum safety measures specified in the API RPs and will provide data PHMSA needs to evaluate whether more stringent safety requirements are warranted to protect people and the environment.

PHMSA requests information from the public that could be used to estimate risk reduction from conducting mechanical integrity tests and the benefits of the IFR.

C. Executive Order 13132

PHMSA has analyzed this IFR according to Executive Order 13132 (“Federalism”). The IFR could impact state requirements because it sets a minimum federal standard applicable to both intrastate and interstate underground storage facilities (see 49 U.S.C. 60104), but the IFR does not have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. This IFR does not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

PHMSA has analyzed this IFR according to the principles and criteria in Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Because this IFR would not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply. We invite Tribes to comment on the IFR and PHMSA will take any Tribal comments and impacts into account when the final rule making the IFR permanent is issued.

E. Regulatory Flexibility Act and Executive Order 13272

Section 603 of the Regulatory Flexibility Act (RFA), Public Law 96–354, requires an agency to prepare an initial regulatory flexibility analysis

describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a notice of proposed rulemaking for any rulemaking. Similarly, section 604 of the RFA requires an agency to prepare a final regulatory flexibility analysis when an agency issues a rulemaking under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking. Because of the need to move quickly to address the identified risk, prior notice and comment would be contrary to the public interest. As prior notice and comment under 5 U.S.C. 553 are not required to be provided in this situation, the analyses in 5 U.S.C. 603 and 604 are not required. Nonetheless, PHMSA conducted a screening analysis of the impact of the rule on small entities which is included in the RIA for the rulemaking. The results support a determination that the IFR will not have a “significant impact on a substantial number of small entities” (SISNOSE). PHMSA invites comments on the costs and impact of this rule on small entities.

F. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, Public Law 104–4, requires that federal agencies assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under UMRA section 202, PHMSA generally must prepare a written statement, including a cost-benefit analysis, for rulemakings with “Federal mandates” that might result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million (adjusted annually for inflation) or more in any one year (i.e., \$151 million in 2015 dollars).

Based on the cost estimates detailed in the RIA for the most likely scenario in which a substantial fraction of the industry is already implementing API RPs 1170 and 1171 in the baseline, PHMSA determined that compliance costs in any given year will be below the threshold set in UMRA.

G. Paperwork Reduction Act

Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. As a result of the requirements of this rulemaking, the following information collection impacts are expected:

Recordkeeping Requirements for Operators With Underground Storage Facilities

PHMSA is revising § 192.7 to incorporate by reference American Petroleum Institute (API) Recommended Practices (RP): API RP 1170, “Design and Operation of Solution-mined Salt Caverns used for Natural Gas Storage” (July 2015), and API RP 1171, “Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs” (September 2015). Both API RPs recommend that operators of underground natural gas storage facilities should implement a wide range of actions to maintain safety, including the lifetime maintenance of certain records. PHMSA understands that the assessment, monitoring, planning, and recordkeeping activities are already conducted as part of normal business operations and may simply need to be modified and formalized to comply with the RPs. Accordingly, PHMSA estimates that all (estimated 124) owners and operators of underground natural gas storage facilities will take no more than 1 hour annually to comply with these recordkeeping requirements. The general recordkeeping requirements for operators of gas pipeline facilities are contained within the information collection under OMB Control No. 2137–0049. This information collection is being revised to account for the burden associated with these new recordkeeping requirements.

Reporting of Safety-Related Conditions in Underground Storage Facilities

PHMSA is revising § 191.23 to require operators of underground storage facilities to report certain safety-related conditions to PHMSA. PHMSA expects to receive four (4) of these safety-related condition reports annually from operators of underground storage facilities. This information collection is contained under OMB Control No. 2137–0578 which is being revised to account for the increased burden stemming from this requirement.

Incident and Annual Reporting Requirements for Operators With Underground Storage Facilities

PHMSA is revising § 191.15 to require each operator of an underground natural gas storage facility to submit DOT Form PHMSA F7100.2 as soon as practicable but not more than 30 days after detection of an incident. This form is contained under OMB Control No. 2137–0522 which is being revised to account for the estimated additional

burden resulting from this requirement. Currently, PHMSA expects to receive four (4) incident reports involving an underground storage facility each year.

PHMSA is also revising § 191.17 to require each operator of an underground natural gas storage facility to submit an annual report on DOT PHMSA Form 7100.4-1 by March 15, for the preceding calendar year except that the first report must be submitted by July 18, 2017. PHMSA is requesting OMB's approval of this new form which will be contained under OMB Control No. 2137-0522. Currently, PHMSA expects to receive 124 annual report submissions from operators with underground storage facilities. PHMSA expects each operator to spend 8 hours compiling and submitting the requested data.

Operator Registry and Notification Requirements for Underground Storage Facilities

PHMSA is revising § 191.22 to require operators of facilities to obtain, or validate, an Operator Identification Number (OPID) and to notify PHMSA, no less than 60 days prior, of certain events such as construction of a new facility, well drilling, well workover, change of primary entity responsible for the facility and acquisition or divestiture of the facility as fully described in § 191.22(c). This information collection is contained under OMB Control No. 2137-0627 which is being revised to account for the additional burden expected to come from this requirement. As a result of the provisions in this rule, PHMSA expects to receive 24 new OPID requests and 25 ad hoc notifications from operators of underground storage facilities.

PHMSA will submit these information collection revision requests to OMB for approval. These information collections are contained in the pipeline safety regulations, 49 CFR parts 190-199. The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection.

The information collection burden for the following information collections are estimated to be revised as follows:

1. *Title:* Recordkeeping Requirements for Gas Pipeline Operators.

OMB Control Number: 2137-0049.

Current Expiration Date: 04/30/2018.

Abstract: A person owning or operating an underground natural gas

storage facility is required to maintain records, make reports, and provide information to the Secretary of Transportation at the Secretary's request. The types of records involved would include records for design activities, construction, maintenance activities, mechanical integrity tests and repairs, and other operation activities. As these activities have been widely adopted across the industry as RPs, PHMSA expects there to be minimal incremental burden.

Additionally, each operator of a pipeline facility (except master meter operators) must document the justification if it plans to deviate from a provision of the RPs. PHMSA expects 10 percent of the affected community (approx. 12 operators) will make these deviations each year. PHMSA believes it will take operators 8 hours to complete such documentation. This includes the time to gather and draft the information necessary for sufficiently demonstrating that compliance with a RP is not practicable and not necessary for safety with respect to specified underground storage facilities or equipment. This also includes the time necessary to have any deviation technically reviewed and documented by a subject matter expert to ensure there will be no adverse impact on design, construction, operations, maintenance, integrity, emergency preparedness and response, and overall safety; the time to have the deviation dated and approved by a senior executive officer, vice president, or higher office with responsibility of the underground natural gas storage facility; and the time to incorporate such deviations into the operator's program or procedural manual. This will result in an annual burden of 12 responses and 96 hours for this provision and an overall burden increase of 136 responses and 220 hours (124 hours for general recordkeeping + 96 hours to document deviations) for this information collection.

Affected Public: Operators of Underground Natural Gas Storage Facilities.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 12,436.

Total Annual Burden Hours: 940,674.

Frequency of Collection: Annual.

2. *Title:* Reporting Safety-Related Conditions on Gas, Hazardous Liquid, and Carbon Dioxide Pipelines and Liquefied Natural Gas Facilities.

OMB Control Number: 2137-0578.

Current Expiration Date: 07/31/2017.

Abstract: Each operator of a pipeline facility (except master meter operators) must submit to DOT a written report on

any safety-related condition that causes or has caused a significant change or restriction in the operation of a pipeline facility or a condition that is a hazard to life, property or the environment. See 49 U.S.C. 60102. Based on the proposed revisions in this rule, the burden associated with this information collection is increasing by 4 responses and 24 burden hours.

Affected Public: Operators of Underground Natural Gas Storage Facilities.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 146.

Total Annual Burden Hours: 876.

Frequency of Collection: On occasion.

3. *Title:* Incident and Annual Reports for Gas Pipeline Operators.

OMB Control Number: 2137-0522.

Current Expiration Date: 10/31/2017

Abstract: This information collection covers the collection of information from Gas pipeline operators for Incidents and Annual reports. Based on the proposals in the rule the burden associated with this information collection will increase by 128 responses (124 annual report submissions and 4 incident report submissions). PHMSA expects each of the 124 operators who submit the annual report to spend eight (8) hours completing this form, including the time for reviewing instructions, gathering the data needed, and completing and reviewing the collection of information, for an overall burden of 992 hours for annual report submissions. Based on current reporting trends, PHMSA expects to receive four (4) incident reports per year from operators of underground storage facilities. PHMSA expects operators who are required to submit an incident report to spend 10 hours per submission resulting in a burden of 40 hours for incident reporting. These two requirements, combined, will result in an overall burden increase of 128 responses and 1,032 burden hours.

Affected Public: Operators of Underground Natural Gas Storage Facilities.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 12,292.

Total Annual Burden Hours: 93,353.

Frequency of Collection: On occasion.

4. *Title:* National Registry of Pipeline and Liquefied Natural Gas (LNG) Operators.

OMB Control Number: 2137-0627.

Current Expiration Date: 5/31/2018.

Abstract: The National Registry of Pipeline and LNG Operators serves as the storehouse for the reporting

requirements for an operator regulated or subject to reporting requirements under 49 CFR part 192, 193, or 195. This registry incorporates the use of two forms. The forms for assigning and maintaining OPID information are the Operator Assignment Request Form (PHMSA F 1000.1) and National Registry Notification Form (PHMSA F 1000.2). Based on the proposals in this IFR this information collection will increase by 49 responses and 49 burden hours.

Affected Public: Operators of Underground Natural Gas Storage Facilities.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 679.

Total Annual Burden Hours: 679.

Frequency of Collection: On occasion.

Requests for copies of these information collections should be directed to Angela Dow or Cameron Satterthwaite, Office of Pipeline Safety (PHP-30), Pipeline Hazardous Materials Safety Administration (PHMSA), 2nd Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, Telephone (202) 366-4595.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Send comments directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attn: Desk Officer for the Department of Transportation, 725 17th Street NW., Washington, DC 20503. Comments can be emailed to OMB using the following email address: OIRA_Submission@omb.eop.gov. Comments on the collections of information associated with this IFR should be received by OMB on or prior to January 18, 2017.

H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified

Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

I. National Environmental Policy Act

PHMSA analyzed this IFR in accordance with section 102(2)(c) of the National Environmental Policy Act (42 U.S.C. 4321-4347), the Council on Environmental Quality regulations (40 CFR parts 1500 through 1508), and DOT Order 5610.1C, and has preliminarily determined that this action will not significantly affect the quality of the human environment. A preliminary environmental assessment of this rulemaking is available in the docket.

J. Executive Order 13211

This IFR is not a "significant energy action" under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). See additional details Section 8.5 of the RIA report. It is not likely to have a significant adverse effect on supply, distribution, or energy use. Further, the Office of Information and Regulatory Affairs has not designated this IFR as a significant energy action.

K. Privacy Act Statement

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (70 FR 19477).

L. Availability of Materials to Interested Parties

PHMSA currently incorporates by reference into 49 CFR parts 192, 193, and 195 all or parts of more than 60 standards and specifications developed and published by standard developing organizations (SDOs). In general, SDOs update and revise their published standards every 3 to 5 years to reflect modern technology and best technical practices.

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104-113) directs federal agencies to use voluntary consensus standards in lieu of government-written standards whenever possible. Voluntary consensus standards are standards developed or adopted by voluntary bodies that develop, establish, or coordinate technical standards using

agreed-upon procedures. In addition, Office of Management and Budget (OMB) issued OMB Circular A-119 to implement Section 12 (d) of Public Law 104-113 relative to the utilization of consensus technical standards by Federal agencies. This circular provides guidance for agencies participating in voluntary consensus standards bodies and describes procedures for satisfying the reporting requirements in Public Law 104-113.

In accordance with the preceding provisions, PHMSA has the responsibility for determining, via petitions or otherwise, which currently referenced standards should be updated, revised, or removed, and which standards should be added to 49 CFR parts 192, 193, and 195. Revisions to incorporate by reference materials in 49 CFR parts 192, 193, and 195 are handled via the rulemaking process, which allows for the public and regulated entities to provide input. During the rulemaking process, PHMSA must also obtain approval from the Office of the Federal Register to incorporate by reference any new materials.

PHMSA has worked to make the materials to be incorporated by reference reasonably available to interested parties. Section 24 of the "Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011" (Pub. L. 112-90, January 3, 2012), amended 49 U.S.C. 60102 by adding a new public availability requirement for documents incorporated by reference after January 3, 2013. The law states: "Beginning 1 year after the date of enactment of this subsection, the Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." This section was further amended on August 9, 2013. The current law continues to prohibit the Secretary from issuing a regulation that incorporates by reference any document unless that document is available to the public, free of charge, but removes the Internet Web site requirements (Pub. L. 113-30, August 9, 2013).

Further, the Office of the Federal Register issued a November 7, 2014, rulemaking (79 FR 66278) that revised 1 CFR 51.5 to require that agencies detail in the preamble of a proposed rulemaking the ways the materials it proposes to incorporate by reference are reasonably available to interested parties, or how the agency worked to make those materials reasonably available to interested parties.

To meet the requirements of section 24, PHMSA negotiated agreements with all but one of the standards-setting organizations with standards already incorporated by reference in the pipeline safety regulations to make viewable copies of those standards available to the public at no cost. One organization with which PHMSA has an agreement is API, which will voluntarily make these recommended practices available to the public on its read-only Web site. API's mailing address and Web site is listed in 49 CFR part 192.

List of Subjects

49 CFR Part 191

Underground natural gas storage facility reporting requirements.

49 CFR Part 192

Incorporation by reference, Underground natural gas storage facility safety.

In consideration of the foregoing, PHMSA amends 49 CFR parts 191 and 192 as follows:

PART 191—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE; ANNUAL, INCIDENT REPORTS, AND SAFETY-RELATED CONDITION REPORTS

■ 1. The authority citation for part 191 is revised to read as follows:

Authority: 49 U.S.C. 5121, 60102, 60103, 60104, 60108, 60117, 60118, 60124, 60132, and 60141; and 49 CFR 1.97.

■ 2. In § 191.1, paragraph (a) is revised to read as follows:

§ 191.1 Scope.

(a) This part prescribes requirements for the reporting of incidents, safety-related conditions, annual pipeline summary data, National Operator Registry information, and other miscellaneous conditions by operators

of underground natural gas storage facilities and natural gas pipeline facilities located in the United States or Puerto Rico, including underground natural gas storage facilities and pipelines within the limits of the Outer Continental Shelf as that term is defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

* * * * *

■ 3. In § 191.3, the definition for *Incident* is revised and the definition for *Underground natural gas storage facility* is added in alphabetical order to read as follows:

§ 191.3 Definitions.

* * * * *

Incident means any of the following events:

(1) An event that involves a release of gas from a pipeline, gas from an underground natural gas storage facility, liquefied natural gas, liquefied petroleum gas, refrigerant gas, or gas from an LNG facility, and that results in one or more of the following consequences:

- (i) A death, or personal injury necessitating in-patient hospitalization;
- (ii) Estimated property damage of \$50,000 or more, including loss to the operator and others, or both, but excluding cost of gas lost; or
- (iii) Unintentional estimated gas loss of three million cubic feet or more.

(2) An event that results in an emergency shutdown of an LNG facility or an underground natural gas storage facility. Activation of an emergency shutdown system for reasons other than an actual emergency does not constitute an incident.

(3) An event that is significant in the judgment of the operator, even though it did not meet the criteria of paragraph (1) or (2) of this definition.

* * * * *

Underground natural gas storage facility means an underground natural

gas storage facility as defined in § 192.3 of this chapter.

■ 4. In § 191.15, the section heading and paragraph (c) are revised and paragraph (d) is added to read as follows:

§ 191.15 Transmission systems; gathering systems; liquefied natural gas facilities; and underground natural gas storage facilities: Incident report.

* * * * *

(c) *Underground natural gas storage facility.* Each operator of an underground natural gas storage facility must submit DOT Form PHMSA F7100.2 as soon as practicable but not more than 30 days after detection of an incident required to be reported under § 191.5.

(d) *Supplemental report.* Where additional related information is obtained after a report is submitted under paragraph (a), (b) or (c) of this section, the operator must make a supplemental report as soon as practicable with a clear reference by date to the original report.

■ 5. In § 191.17, the section heading is revised and paragraph (c) is added to read as follows:

§ 191.17 Transmission systems; gathering systems; liquefied natural gas facilities; and underground natural gas storage facilities: Annual report.

* * * * *

(c) *Underground natural gas storage facility.* Each operator of an underground natural gas storage facility must submit an annual report on DOT PHMSA Form 7100.4–1 by March 15, for the preceding calendar year except that the first report must be submitted by July 18, 2017.

■ 6. In § 191.21, the table is revised to read as follows:

§ 191.21 OMB control number assigned to information collection.

* * * * *

OMB CONTROL NUMBER 2137–0522

Section of 49 CFR part 191 where identified	Form No.
191.5	Telephonic.
191.9	PHMSA 7100.1, PHMSA 7100.3.
191.11	PHMSA 7100.1–1, PHMSA 7100.3–1.
191.12	PHMSA 7100.1–2.
191.15	PHMSA 7100.2, PHMSA 7100.3.
191.17	PHMSA 7100.2–1, PHMSA 7100.3–1. PHMSA 7100.4–1.
191.22	PHMSA 1000.1, PHMSA 1000.2.

■ 7. In § 191.22:

- i. Revise paragraphs (a), (b), and (c) introductory text;
- ii. Remove the “or” at the end of paragraph (c)(1)(ii);

- iii. Remove the period at the end of paragraph (c)(1)(iii) and add “; or” in its place;
- iv. Add paragraph (c)(1)(iv);
- v. Revise paragraph (c)(2)(iii);

- vi. Remove the “or” at the end of paragraph (c)(2)(iv);
- vii. Remove the period at the end of paragraph (c)(2)(v) and add “; or” in its place;

- viii. Add paragraph (c)(2)(vi); and
- ix. Revising the heading for paragraph (d).

The revisions and additions read as follows:

§ 191.22 National Registry of Pipeline and LNG operators.

(a) *OPID request.* Effective January 1, 2012, each operator of a gas pipeline, gas pipeline facility, underground natural gas storage facility, LNG plant or LNG facility must obtain from PHMSA an Operator Identification Number (OPID). An OPID is assigned to an operator for the pipeline or pipeline system for which the operator has primary responsibility. To obtain an OPID, an operator must complete an OPID Assignment Request DOT Form PHMSA F 1000.1 through the National Registry of Pipeline, Underground Natural Gas Storage Facility, and LNG Operators in accordance with § 191.7.

(b) *OPID validation.* An operator who has already been assigned one or more OPID by January 1, 2011, must validate the information associated with each OPID through the National Registry of Pipeline, Underground Natural Gas Storage Facility, and LNG Operators at <http://opsweb.phmsa.dot.gov>, and correct that information as necessary, no later than June 30, 2012.

(c) *Changes.* Each operator of a gas pipeline, gas pipeline facility, underground natural gas storage facility, LNG plant, or LNG facility must notify PHMSA electronically through the National Registry of Pipeline, Underground Natural Gas Storage Facility, and LNG Operators at <http://opsweb.phmsa.dot.gov> of certain events.

(1) * * *

(iv) Construction of a new underground natural gas storage facility or the abandonment, drilling or well workover (including replacement of wellhead, tubing, or a new casing) of an injection, withdrawal, monitoring, or observation well for an underground natural gas storage facility.

(2) * * *

(iii) A change in the entity (*e.g.*, company, municipality) responsible for an existing pipeline, pipeline segment, pipeline facility, underground natural gas storage facility, or LNG facility;

(vi) The acquisition or divestiture of an existing underground natural gas storage facility subject to part 192 of this subchapter.

(d) *Reporting.* * * *

- 8. In § 191.23, paragraphs (a)(2) through (8) and (b)(3) are revised and paragraph (a)(9) is added to read as follows:

§ 191.23 Reporting safety-related conditions.

(a) * * *

(2) In the case of an underground natural gas storage facility, including injection, withdrawal, monitoring, or observation well, general corrosion that has reduced the wall thickness to less than that required for the maximum well operating pressure, and localized corrosion pitting to a degree where leakage might result.

(3) Unintended movement or abnormal loading by environmental causes, such as an earthquake, landslide, or flood, that impairs the serviceability of a pipeline or the structural integrity or reliability of an underground natural gas storage facility, including injection, withdrawal, monitoring, or observation well for an underground natural gas storage facility, or LNG facility that contains, controls, or processes gas or LNG.

(4) Any crack or other material defect that impairs the structural integrity or reliability of an underground natural gas storage facility or LNG facility that contains, controls, or processes gas or LNG.

(5) Any material defect or physical damage that impairs the serviceability of a pipeline that operates at a hoop stress of 20% or more of its specified minimum yield strength or underground natural gas storage facility, including injection, withdrawal, monitoring, or observations well for an underground natural gas storage facility.

(6) Any malfunction or operating error that causes the pressure of a pipeline or underground natural gas storage facility or LNG facility that contains or processes gas or LNG to rise above its maximum well operating pressure (or working pressure for LNG facilities) plus the margin (build-up) allowed for operation of pressure limiting or control devices.

(7) A leak in a pipeline or an underground natural gas storage facility, including injection, withdrawal, monitoring, or observation well for an underground natural gas storage facility, or LNG facility that contains or processes gas or LNG that constitutes an emergency.

(8) Inner tank leakage, ineffective insulation, or frost heave that impairs the structural integrity of an LNG storage tank.

(9) Any safety-related condition that could lead to an imminent hazard and causes (either directly or indirectly by remedial action of the operator), for purposes other than abandonment, a 20% or more reduction in operating pressure or shutdown of operation of a pipeline or an underground natural gas

storage facility, including injection, withdrawal, monitoring, or observation well for an underground natural gas storage facility, or an LNG facility that contains or processes gas or LNG.

(b) * * *

(3) Exists on a pipeline (other than an LNG facility or Underground Natural Gas Storage facility) that is more than 220 yards (200 meters) from any building intended for human occupancy or outdoor place of assembly, except that reports are required for conditions within the right-of-way of an active railroad, paved road, street, or highway; or

* * * * *

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

- 9. The authority citation for part 192 is revised to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, 60116, 60118, 60137, and 60141; and 49 CFR 1.97.

- 10. In § 192.3, a definition for *Underground natural gas storage facility* is added in alphabetical order to read as follows:

§ 192.3 Definitions.

* * * * *

Underground natural gas storage facility means a facility that stores natural gas in an underground facility incident to natural gas transportation, including—

- (1) A depleted hydrocarbon reservoir;
- (2) An aquifer reservoir; or
- (3) A solution-mined salt cavern reservoir, including associated material and equipment used for injection, withdrawal, monitoring, or observation wells, and wellhead equipment, piping, rights-of-way, property, buildings, compressor units, separators, metering equipment, and regulator equipment.

* * * * *

- 11. In § 192.7, paragraphs (b)(10) and (11) are added to read as follows:

§ 192.7 What documents are incorporated by reference partly or wholly in this part?

* * * * *

(b) * * *

(10) API Recommended Practice 1170, “Design and Operation of Solution-mined Salt Caverns Used for Natural Gas Storage,” First edition, July 2015 (API RP 1170), IBR approved for § 192.12.

(11) API Recommended Practice 1171, “Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs,”

First edition, September 2015, (API RP 1171), IBR approved for § 192.12.

* * * * *

■ 12. Section 192.12 is added to read as follows:

§ 192.12 Underground natural gas storage facilities.

Underground natural gas storage facilities must meet the following requirements:

(a) Each underground natural gas storage facility that uses a solution-mined salt cavern reservoir for gas storage constructed after July 18, 2017 must meet all requirements and recommendations of API RP 1170 (incorporated by reference, see § 192.7).

(b) Each underground natural gas storage facility that uses a solution-mined salt cavern reservoir for storage including those constructed not later than July 18, 2017 must meet the operations, maintenance, integrity demonstration and verification, monitoring, threat and hazard identification, assessment, remediation, site security, emergency response and preparedness, and recordkeeping requirements and recommendations of API RP 1170, sections 9, 10, and 11 (incorporated by reference, see § 192.7) by January 18, 2018.

(c) Each underground natural gas storage facility that uses a depleted hydrocarbon reservoir or an aquifer reservoir for storage constructed after July 18, 2017 must meet all requirements and recommendations of API RP 1171 (incorporated by reference, see § 192.7).

(d) Each underground natural gas storage facility that uses a depleted hydrocarbon reservoir or an aquifer reservoir for gas storage, including those constructed not later than July 18, 2017 must meet the operations, maintenance, integrity demonstration and verification, monitoring, threat and hazard identification, assessment, remediation, site security, emergency response and preparedness, and recordkeeping requirements and recommendations of API RP 1171, sections 8, 9, 10, and 11 (incorporated by reference, see § 192.7) by January 18, 2018.

(e) Operators of underground gas storage facilities must establish and follow written procedures for operations, maintenance, and emergencies implementing the requirements of API RP 1170 and API RP 1171, as required under this section, including the effective dates as applicable, and incorporate such procedures into their written procedures for operations, maintenance, and emergencies established pursuant to § 192.605.

(f) With respect to the incorporation by reference of API RP 1170 and API RP 1171 in this section, the non-mandatory provisions (*i.e.*, provisions containing the word “should” or other non-mandatory language) are adopted as mandatory provisions under the authority of the pipeline safety laws except when the operator includes or references written technical justifications in its program or procedural manual, described in paragraph (a)(5) of this section, as to why compliance with a provision of the recommended practice is not practicable and not necessary for safety with respect to specified underground storage facilities or equipment. The justifications for any deviation from any provision of API RP 1170 and API RP 1171 must be technically reviewed and documented by a subject matter expert to ensure there will be no adverse impact on design, construction, operations, maintenance, integrity, emergency preparedness and response, and overall safety and must be dated and approved by a senior executive officer, vice president, or higher office with responsibility of the underground natural gas storage facility. An operator must discontinue use of any variance where PHMSA determines and provides notice that the variance adversely impacts design, construction, operations, maintenance, integrity, emergency preparedness and response, or overall safety.

Issued in Washington, DC, on December 9, 2016, under authority delegated in 49 CFR 1.97.

Marie Therese Dominguez,
Administrator.

[FR Doc. 2016–30045 Filed 12–16–16; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 150121066–5717–02]

RIN 0648–XF067

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; inseason General category bluefin tuna quota transfer and retention limit adjustment.

SUMMARY: NMFS is transferring 16.3 metric tons (mt) of Atlantic bluefin tuna (BFT) quota from the 24.3-mt General category December 2017 subquota to the January 2017 subquota period (from January 1 through March 31, 2017, or until the available subquota for this period is reached, whichever comes first). NMFS also is adjusting the Atlantic tunas General category BFT daily retention limit for the January 2017 subquota period to three large medium or giant BFT from the default retention limit of one. This action is based on consideration of the regulatory determination criteria regarding inseason adjustments and applies to Atlantic tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels when fishing commercially for BFT.

DATES: The quota transfer is effective January 1, 2017, through March 31, 2017. The General category retention limit adjustment is effective January 1, 2017, through March 31, 2017.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006), as amended by Amendment 7 to the 2006 Consolidated HMS FMP (Amendment 7) (79 FR 71510, December 2, 2014). NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

The base quota for the General category is 466.7 mt. See § 635.27(a). Each of the General category time periods (January, June through August, September, October through November, and December) is allocated a portion of the annual General category quota. Although it is called the “January”

subquota, the regulations allow the General category fishery under this quota to continue until the subquota is reached or March 31, whichever comes first. Based on the General category base quota of 466.7 mt, the subquotas for each time period are as follows: 24.7 mt for January; 233.3 mt for June through August; 123.7 mt for September; 60.7 mt for October through November; and 24.3 mt for December. Any unused General category quota rolls forward within the fishing year, which coincides with the calendar year, from one time period to the next, and is available for use in subsequent time periods.

Quota Transfer

Under § 635.27(a)(9), NMFS has the authority to transfer quota among fishing categories or subcategories, after considering regulatory determination criteria provided under § 635.27(a)(8).

NMFS has considered all of the relevant determination criteria and their applicability to this inseason quota transfer and change in retention limit in the General category fishery. The criteria and their application are discussed below.

Transfer of 16.3 mt From the December Subquota to the January Subquota

For the inseason quota transfer, NMFS considered the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock (§ 635.27(a)(8)(i)). Biological samples collected from BFT landed by General category fishermen and provided by tuna dealers provide NMFS with valuable parts and data for ongoing scientific studies of BFT age and growth, migration, and reproductive status.

NMFS also considered the catches of the General category quota to date (including during the winter fishery in the last several years), and the likelihood of closure of that segment of the fishery if no adjustment is made (§ 635.27(a)(8)(ii)). Without a quota transfer from December 2017 to January 2017 for the General category at this time, the quota available for the January period would be 24.7 mt (5.3 percent of the General category quota), and participants would have to stop BFT fishing activities once that amount is met, while commercial-sized BFT may remain available in the areas where General category permitted vessels operate. Transferring 16.3 mt of the 24.3-mt quota available for December 2017 (with 24.3 mt representing 5.2 percent of the General category quota) would result in 41 mt (8.8 percent of the General category quota) being available

for the January subquota period. This quota transfer would provide additional opportunities to harvest the U.S. BFT quota without exceeding it, while preserving the opportunity for General category fishermen to participate in the winter BFT fishery at both the beginning and end of the calendar year.

Regarding the projected ability of the vessels fishing under the particular category quota (here, the General category) to harvest the additional amount of BFT before the end of the fishing year (§ 635.27(a)(8)(iii)), NMFS considered General category landings in the last several years. General category landings in the winter BFT fishery tend to straddle the calendar year as BFT may be available in late November/December and into January of the following year or later. Landings are highly variable and depend on access to commercial-sized BFT and fishing conditions, among other factors. Any unused General category quota from the January subperiod that remains as of March 31 will roll forward to the next subperiod within the calendar year (*i.e.*, the June-August time period). In 2016, NMFS transferred the entire 24.3-mt December subquota to the January time period, for an adjusted January 2016 subquota of 49 mt. Under a three-fish General category daily retention limit, that adjusted subquota allowed the fishery to continue through the end of March.

NMFS also considered the estimated amounts by which quotas for other gear categories of the fishery might be exceeded (§ 635.27(a)(8)(iv)) and the ability to account for all 2017 landings and dead discards. In the last several years, total U.S. BFT landings have been below the available U.S. quota such that the United States has carried forward the maximum amount of underharvest allowed by ICCAT from one year to the next. In 2016, the General category exceeded its adjusted quota (discussed below) but sufficient quota was available to cover the exceedance without affecting the other categories. NMFS will need to account for 2017 landings and dead discards within the adjusted U.S. quota, consistent with ICCAT recommendations, and anticipates having sufficient quota to do that.

This transfer would be consistent with the current quotas, which were established and analyzed in the 2015 BFT quota final rule (80 FR 52198, August 28, 2015), and with objectives of the 2006 Consolidated HMS FMP and amendments. (§ 635.27(a)(8)(v) and (vi)). Another principal consideration is the objective of providing opportunities to harvest the full annual U.S. BFT quota

without exceeding it based on the goals of the 2006 Consolidated HMS FMP and Amendment 7, including to achieve optimum yield on a continuing basis and to optimize the ability of all permit categories to harvest their full BFT quota allocations (related to § 635.27(a)(8)(x)).

NMFS also anticipates that some underharvest of the 2016 adjusted U.S. BFT quota will be carried forward to 2017 and placed in the Reserve category, in accordance with the regulations. This, in addition to the fact that any unused General category quota will roll forward to the next subperiod within the calendar year, along with NMFS' plan to actively manage the subquotas to avoid any exceedances, makes it likely that General category quota will remain available through the end of 2017 for December fishery participants, even with the quota transfer. NMFS also may choose to transfer unused quota from the Reserve or other categories, inseason, based on consideration of the determination criteria, as NMFS did for late 2016, (*i.e.*, transferred 125 mt from the Reserve category (81 FR 70369, October 12, 2016) and later transferred another 85 mt (18 mt from the Harpoon category and 67 mt from the Reserve category) (81 FR 71639, October 18, 2016).

In 2016, NMFS closed the General category quota effective November 4 to prevent further overharvest of the adjusted General category quota. General category landings were relatively high in the fall of 2016, due to a combination of fish availability, favorable fishing conditions, and higher daily retention limits (described below). NMFS anticipates that General category participants in all areas and time periods will have opportunities to harvest the General category quota in 2017, through active inseason management such as retention limit adjustments and/or the timing of quota transfers, as practicable. Thus, this quota transfer would allow fishermen to take advantage of the availability of fish on the fishing grounds, consider the expected increases in available 2017 quota later in the year, and provide a reasonable opportunity to harvest the full U.S. BFT quota.

Based on the considerations above, NMFS is transferring 16.3 mt of the 24.3-mt General category quota allocated for the December 2017 period to the January 2017 period, resulting in a subquota of 41 mt for the January 2017 period and a subquota of 8 mt for the December 2017 period. NMFS will close the General category fishery when the adjusted January period subquota of 41 mt has been reached, or it will close

automatically on March 31, 2017, whichever comes first, and it will remain closed until the General category fishery reopens on June 1, 2017.

Adjustment of General Category Daily Retention Limit

Unless changed, the General category daily retention limit starting on January 1 would be the default retention limit of one large medium or giant BFT (measuring 73 inches (185 cm) curved fork length (CFL) or greater) per vessel per day/trip (§ 635.23(a)(2)). This default retention limit would apply to General category permitted vessels and to HMS Charter/Headboat category permitted vessels when fishing commercially for BFT.

Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of five per vessel based on consideration of the relevant criteria provided under § 635.27(a)(8), and listed above. For the 2016 fishing year, NMFS adjusted the daily retention limit from the default level of one large medium or giant BFT to three large medium or giant BFT for the January 2016 subquota period (80 FR 77264, December 14, 2015); and five large medium or giant BFT for the June through August 2016 subquota period (81 FR 29501, May 12, 2016). Although NMFS initially adjusted the daily retention limit for the September, October through November, and December periods to five large medium or giant BFT (81 FR 59153, August 29, 2016), NMFS later decreased the limit to four fish effective October 9 (81 FR 70369, October 12, 2016) and to two fish effective October 17 (81 FR 71639, October 18, 2016). NMFS closed the 2016 General category quota effective November 4, 2016. NMFS has considered the relevant criteria and their applicability to the General category BFT retention limit for the January 2017 subquota period.

As described above with regard to the quota transfer, additional opportunity to land BFT would support the collection of a broad range of data for biological studies and for stock monitoring purposes. Regarding the effects of the adjustment on BFT rebuilding and overfishing and the effects of the adjustment on accomplishing the objectives of the fishery management plan, this action would be taken consistent with the previously implemented and analyzed quotas, and it is not expected to negatively impact stock health or otherwise affect the stock in ways not previously analyzed. It is also supported by the 2011

final rule regarding General and Harpoon category management measures, which increased the General category maximum daily retention limit from three to five fish (76 FR 74003, November 30, 2011).

Regarding the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made, in 2012, 2013, and 2014, the available January subquota (23.1 mt) was reached on January 22, February 15, and March 21, respectively, under a limit of two large medium or giant BFT, and in each of these years, the General category did not reach its available quota by the end of the year. For 2015, the adjusted January subquota of 45.7 was not met under a daily retention limit of three large medium or giant BFT, whereas for 2016, the adjusted subquota of 49 mt was reached, and slightly exceeded, as of March 31 under a three-fish limit.

As noted above, commercial-sized BFT are typically available in January and may continue to be available through March. Considering this information and the transfer of 16.3 mt of the 24.3-mt December 2017 subquota to the January 2017 subquota period (for an adjusted total of 41 mt), the default one-fish limit likely would be overly restrictive. Increasing the daily retention limit from the default may mitigate rolling an excessive amount of unused quota from one time-period subquota to the next and thus help maintain an equitable distribution of fishing opportunities. Although NMFS has the authority to set the daily retention limit up to five fish, the rate of harvest of the January subquota could be accelerated under a high limit (and higher fish availability), and result in a relatively short fishing season or quota exceedance. A short fishing season may preclude or reduce fishing opportunities for some individuals or geographic areas because of the migratory nature and seasonal distribution of BFT.

Based on these considerations, NMFS has determined that a three-fish General category retention limit is warranted for the January 2017 subquota period. It would provide a reasonable opportunity to harvest the U.S. quota of BFT without exceeding it, while maintaining an equitable distribution of fishing opportunities, help optimize the ability of the General category to harvest its available quota, allow collection of a broad range of data for stock monitoring purposes, and be consistent with the objectives of the 2006 Consolidated HMS FMP and amendments. Therefore, NMFS increases the General category retention limit from the default limit (one) to three large medium or giant

BFT per vessel per day/trip, effective January 1, 2017, through March 31, 2017, or until the 41-mt January subquota is harvested, whichever comes first.

Regardless of the duration of a fishing trip, the daily retention limit applies upon landing. For example, during the January 2017 subquota period, whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the day/trip limit of three fish applies and may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, where NMFS prohibits targeted fishing for BFT, and applies to those vessels permitted in the General category, as well as to those HMS Charter/Headboat permitted vessels fishing commercially for BFT.

Monitoring and Reporting

NMFS will continue to monitor the BFT fishery closely. Dealers are required to submit landing reports within 24 hours of a dealer receiving BFT. General, HMS Charter/Headboat, Harpoon, and Angling category vessel owners are required to report the catch of all BFT retained or discarded dead, within 24 hours of the landing(s) or end of each trip, by accessing hmspermits.noaa.gov. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional action (*i.e.*, quota and/or daily retention limit adjustment, or closure) is necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas. If needed, subsequent adjustments will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (978) 281-9260, or access hmspermits.noaa.gov, for updates on quota monitoring and inseason adjustments.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Affording prior notice and opportunity for public comment to implement the

quota transfer and daily retention limit for the January 2017 subquota period at this time is impracticable. NMFS could not have proposed these actions earlier, as it needed to consider and respond to updated data and information from the 2016 General category fishery, including during late 2016, in deciding to transfer the December 2017 quota to the January 2017 subquota period and selecting the appropriate retention limit for the January 2017 subquota period. If NMFS was to offer a public comment period now, after having appropriately considered that data, it would preclude fishermen from harvesting BFT that are legally available consistent with all of the regulatory criteria, and/or could result in selection of a retention limit inappropriately high for the amount of quota available for the period.

Delays in increasing the daily retention limit would adversely affect those General and HMS Charter/Headboat category vessels that would otherwise have an opportunity to harvest more than the default retention limit of one BFT per day/trip and may exacerbate the problem of low catch rates and quota rollovers. Limited opportunities to harvest the respective quotas may have negative social and economic impacts for U.S. fishermen that depend upon catching the available quota within the time periods designated in the 2006 Consolidated HMS FMP, as amended. Adjustment of the retention limit needs to be effective January 1, 2017, or as soon as possible thereafter, to minimize any unnecessary disruption in fishing patterns, to allow the impacted sectors to benefit from the adjustment, and to provide fishing opportunities for fishermen in geographic areas with access to the fishery only during this time period. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For these reasons, there also is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under §§ 635.23(a)(4) and 635.27(a)(9), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 14, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2016-30481 Filed 12-14-16; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120627194-3657-02]

RIN 0648-XF062

Atlantic Highly Migratory Species; North Atlantic Swordfish Fishery

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

ACTION: Temporary rule; Swordfish General Commercial permit retention limit inseason adjustment for the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions.

SUMMARY: NMFS is adjusting the Swordfish (SWO) General Commercial permit retention limits for the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions for January through June of the 2017 fishing year, unless otherwise later noticed. The SWO General Commercial permit retention limit in each of these regions is increased from the regulatory default limits to six swordfish per vessel per trip. The SWO General Commercial permit retention limit in the Florida SWO Management Area will remain unchanged at the default limit of zero swordfish per vessel per trip. These adjustments apply to SWO General Commercial permitted vessels and Highly Migratory Species (HMS) Charter/Headboat permitted vessels when on a non-for-hire trip. This action is based upon consideration of the applicable inseason regional retention limit adjustment criteria.

DATES: The adjusted SWO General Commercial permit retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions are effective from January 1, 2017, through June 30, 2017.

FOR FURTHER INFORMATION CONTACT: Rick Pearson or Randy Blankinship, 727-824-5399.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of North Atlantic swordfish by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. North Atlantic swordfish quota recommended

by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and implemented by the United States into two equal semi-annual directed fishery quotas, an annual incidental catch quota for fishermen targeting other species or taking swordfish recreationally, and a reserve category, according to the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006), as amended, and in accordance with implementing regulations. NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

ICCAT Recommendation 13-02 set the North Atlantic swordfish total allowable catch (TAC) at 10,301 metric tons (mt) dressed weight (dw) (13,700 mt whole weight (ww)) through 2016. Of this TAC, the United States' baseline quota is 2,937.6 mt dw (3,907 mt ww) per year. The Recommendation also included an 18.8 mt dw (25 mt ww) annual quota transfer from the United States to Mauritania and limited underharvest carryover to 15 percent of a contracting party's baseline quota. Thus, the United States could carry over a maximum of 440.6 mt dw (586.0 mt ww) of underharvest. A new Recommendation was adopted at the 2016 ICCAT annual meeting, maintaining the provisions related to quota, the transfer to Mauritania, and the carryover limit. Absent adjustments, the codified baseline quota is 2,937 mt dw for the directed fishery in 2017, split equally (1,468.5 mt dw) between two semi-annual periods in 2017 (January through June, and July through December). We anticipate, however, that the 2017 adjusted North Atlantic swordfish quota will be 3,359.4 mt dw (equivalent to the 2016 adjusted quota) when we adjust the quota. At this time, given the extent of underharvest in 2016, we anticipate again carrying over the maximum allowable 15 percent (440.6 mt dw) which, with the Mauritania transfer, would result in a final adjusted North Atlantic swordfish quota for the 2017 fishing year equal to that from last year 3,359.4 mt dw (2,937.6-18.8 + 440.6 = 3,359.4 mt dw). Also as in past years, we anticipate allocating from the adjusted quota, 50 mt dw to the Reserve category for inseason adjustments and research, and 300 mt dw to the incidental category, which includes recreational landings and landings by incidental swordfish permit holders, per § 635.27(c)(1)(i).

This would result in an allocation of 3,009.4 mt dw for the directed fishery, which would be split equally (1,504.7 mt dw) between two semi-annual periods in 2017 (January through June, and July through December).

Adjustment of SWO General Commercial Permit Vessel Retention Limits

The 2017 North Atlantic swordfish fishing year, which is managed on a calendar-year basis and divided into two equal semi-annual quotas, begins on January 1, 2017. Landings attributable to the SWO General Commercial permit are counted against the applicable semi-annual directed fishery quota. Regional default retention limits for this permit have been established and are automatically effective from January 1 through December 31 each year, unless changed based on the inseason regional retention limit adjustment criteria at § 635.24(b)(4)(iv). The default retention limits established for the SWO General Commercial permit are: (1) Northwest Atlantic region—three swordfish per vessel per trip; (2) Gulf of Mexico region—three swordfish per vessel per trip; (3) U.S. Caribbean region—two swordfish per vessel per trip; and, (4) Florida SWO Management Area—zero swordfish per vessel per trip. The default retention limits apply to SWO General Commercial permitted vessels and to HMS Charter/Headboat permitted vessels when fishing on non for-hire trips. As a condition of these permits, vessels may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located.

Under § 635.24(b)(4)(iii), NMFS may increase or decrease the SWO General Commercial permit vessel retention limit in any region within a range from zero to a maximum of six swordfish per vessel per trip. Any adjustments to the retention limits must be based upon a consideration of the relevant criteria provided in § 635.24(b)(4)(iv), which include: the usefulness of information obtained from biological sampling and monitoring of the North Atlantic swordfish stock; the estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year; the estimated amounts by which quotas for other categories of the fishery might be exceeded; effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments; variations in seasonal distribution, abundance, or migration patterns of swordfish; effects of catch rates in one region precluding vessels in another region from having a

reasonable opportunity to harvest a portion of the overall swordfish quota; and, review of dealer reports, landing trends, and the availability of swordfish on the fishing grounds.

NMFS has considered these criteria as discussed below and their applicability to the SWO General Commercial permit retention limit in all regions for January through June of the 2017 North Atlantic swordfish fishing year, and has determined that the SWO General Commercial permit vessel retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions applicable to persons issued a SWO General Commercial permit or HMS Charter/Headboat permit (when on a non for-hire trip) should be increased from the default levels that would otherwise automatically become effective on January 1, 2017.

Among the regulatory criteria for inseason adjustments to retention limits is the requirement that NMFS consider the “effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments.” Thus, a principal consideration in deciding whether to increase the retention limit is the objective of providing opportunities to harvest the full North Atlantic directed swordfish quota without exceeding it based upon the 2006 Consolidated HMS FMP goal to, consistent with other objectives of this FMP, “manage Atlantic HMS fisheries for continuing optimum yield so as to provide the greatest overall benefit to the Nation, particularly with respect to food production, providing recreational opportunities, preserving traditional fisheries, and taking into account the protection of marine ecosystems.” Consistent with the FMP and its amendments, it is also important for NMFS to continue to provide protection to important swordfish juvenile areas and migratory corridors.

The regulatory criteria also require NMFS to consider the estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year. In considering these criteria and their application here, NMFS examined electronic dealer reports, which provide accurate and timely monitoring of landings, and considered recent landing trends and information obtained from biological sampling and monitoring of the North Atlantic swordfish stock. A six swordfish per vessel per trip limit for SWO General Commercial permit holders was in effect in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions for the entire 2016 fishing season as a result of actions

adjusting those limits upwards in January and July (80 FR 81770 and 81 FR 38966). Even with these higher retention limits, directed swordfish landings for the January through June 2016 semi-annual period were approximately 465.7 mt dw (30.9 percent of the adjusted directed sub-quota). Preliminary 2016 total annual directed swordfish landings through October 31, 2016, are approximately 844.7 mt dw, or 28.1 percent of the 3,009.4 mt dw annual adjusted directed swordfish quota.

The directed swordfish quota has not been harvested for several years and, based upon current landing trends, is not likely to be harvested or exceeded during 2017. This information indicates that sufficient directed swordfish quota should be available from January 1 through June 30, 2017, at the higher retention levels, within the limits of the scientifically-supported TAC and consistent with the goals of the FMP.

The regulatory criteria for inseason adjustments also require us to consider the estimated amounts by which quotas for other categories of the fishery might be exceeded. Based upon recent landings rates from dealer reports, an increase in the vessel retention limit for SWO General Commercial permit holders is not likely to cause quotas for other categories of the fishery to be exceeded as the directed category quota has been significantly underharvested in recent years and landings trends are not expected to vary significantly in 2017. Similarly, regarding the criteria that NMFS consider the effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota, NMFS expects there to be sufficient swordfish quota for 2017, and thus increased catch rates in these three regions would not be expected to preclude vessels in the other region (the Florida SWO Management Area) from having a reasonable opportunity to harvest a portion of the overall swordfish quota. This issue is largely moot, however, because the retention limit in the Florida Swordfish Management Area is set at zero for biological and ecological reasons related to the stock, as discussed below.)

Finally, in making adjustments to the retention limits NMFS must consider variations in seasonal distribution, abundance, or migration patterns of swordfish, and the availability of swordfish on the fishing grounds. With regard to swordfish abundance, the 2016 report by ICCAT’s Standing Committee on Research and Statistics indicated that the North Atlantic swordfish stock is

not overfished ($B_{2011}/B_{msy} = 1.14$), and overfishing is not occurring ($F_{2011}/F_{msy} = 0.82$). Increasing the retention limits for this U.S. handgear fishery is not expected to affect the swordfish stock status determination because any additional landings would be within the established overall U.S. North Atlantic swordfish quota allocation recommended by ICCAT. Increasing opportunity beginning on January 1, 2017, is also important because of the migratory nature and seasonal distribution of swordfish. In a particular geographic region, or waters accessible from a particular port, the amount of fishing opportunity for swordfish may be constrained by the short amount of time the swordfish are present as they migrate.

NMFS also has determined that the retention limit will remain at zero swordfish per vessel per trip in the Florida SWO Management Area at this time. As discussed above, NMFS considered consistency with the 2006 HMS FMP and its amendments and the importance for NMFS to continue to provide protection to important swordfish juvenile areas and migratory corridors. As described in Amendment 8 to the 2006 Consolidated HMS FMP (78 FR 52012), the area off the southeastern coast of Florida, particularly the Florida Straits, contains oceanographic features that make the area biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who may fish for them. Public comment on Amendment 8, including from the Florida Fish and Wildlife Conservation Commission, indicated concern about the resultant high potential for the improper rapid growth of a commercial fishery, increased catches of undersized swordfish, the potential for larger numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to gear and user conflicts. These concerns remain valid. NMFS will continue to collect information to evaluate the appropriateness of the retention limit in the Florida SWO Management Area and other regional retention limits. This action therefore maintains a zero-fish retention limit in the Florida Swordfish Management Area.

These adjustments are consistent with the 2006 Consolidated HMS FMP as amended, ATCA, and the Magnuson-Stevens Act, and are not expected to negatively impact stock health.

Monitoring and Reporting

NMFS will continue to monitor the swordfish fishery closely during 2017 through mandatory landings and catch reports. Dealers are required to submit landing reports and negative reports (if no swordfish were purchased) on a weekly basis.

Depending upon the level of fishing effort and catch rates of swordfish, NMFS may determine that additional retention limit adjustments or closures are necessary to ensure that available quota is not exceeded or to enhance fishing opportunities. Subsequent actions, if any, will be published in the **Federal Register**. In addition, fishermen may access <http://www.nmfs.noaa.gov/sfa/hms/species/swordfish/landings/index.html> for updates on quota monitoring.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP, as amended, provide for inseason retention limit adjustments to respond to changes in swordfish landings, the availability of swordfish on the fishing grounds, the migratory nature of this species, and regional variations in the fishery. Based on available swordfish quota, stock abundance, fishery performance in recent years, and the availability of swordfish on the fishing grounds, among other considerations, adjustment to the SWO General Commercial permit retention limits from the default levels as discussed above is warranted, except that it maintains a zero-fish retention limit in the Florida SWO Management Area. Analysis of available data shows that adjustment to the swordfish daily retention limit from the default levels would result in minimal risks of exceeding the ICCAT-allocated quota. NMFS provides notification of retention limit adjustments by publishing the notice in the **Federal Register**, emailing individuals who have subscribed to the Atlantic HMS News electronic newsletter, and updating the information posted on the "Atlantic HMS Breaking News" Web site at http://www.nmfs.noaa.gov/sfa/hms/news/breaking_news.html. Delays in temporarily increasing these retention limits caused by the time required to publish a proposed rule and accept public comment would adversely and unnecessarily affect those SWO General Commercial permit holders and HMS

Charter/Headboat permit holders that would otherwise have an opportunity to harvest more than the default retention limits of three swordfish per vessel per trip in the Northwest Atlantic and Gulf of Mexico regions, and two swordfish per vessel per trip in the U.S. Caribbean region. Further, any delay beyond January 1, 2017, the start of the first semi-annual directed fishing period, could exacerbate the problem of low swordfish landings and subsequent quota rollovers. Limited opportunities to harvest the directed swordfish quota may have negative social and economic impacts for U.S. fishermen. Adjustment of the retention limits needs to be effective on January 1, 2017, to allow all of the affected sectors to benefit from the adjustment during the relevant time period, which could pass by for some fishermen if the action is delayed for notice and public comment, and to not preclude fishing opportunities for fishermen, particularly in the Gulf of Mexico and U.S. Caribbean regions, who have access to the fishery during a short time period because of seasonal fish migration. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.24(b)(4) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 9, 2016.

Emily H. Menashes,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016-30042 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 150903814-5999-02]

RIN 0648-XF073

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of Maine is transferring a portion of its 2016 commercial summer flounder quota to the State of Connecticut. These quota adjustments are necessary to comply with the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan quota transfer provision. This announcement informs the public of the revised commercial quotas for Maine and Connecticut.

DATES: Effective December 16, 2016, through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Cynthia Hanson, Fishery Management Specialist, (978) 281-9180.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.110. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The

process to set the annual commercial quota and the percent allocated to each state are described in § 648.102, and the initial 2016 allocations were published on December 28, 2015 (80 FR 80689).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan, as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider the criteria in § 648.102(c)(2)(i)(A) through (C) in the evaluation of requests for quota transfers or combinations.

Maine is transferring 3,800 lb (1,724 kg) of summer flounder commercial

quota to Connecticut. This transfer was prompted by state officials in Connecticut to ensure their commercial summer flounder quota is not exceeded. The revised summer flounder quotas for calendar year 2016 are now: Maine, 64 lb (29 kg); and Connecticut, 187,166 lb (84,897 kg); based on the initial quotas published in the 2016-2018 Summer Flounder, Scup, and Black Sea Bass Specifications on December 28, 2015 (80 FR 80689).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 9, 2016.

Emily H. Menashes,

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

[FR Doc. 2016-30041 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 81, No. 243

Monday, December 19, 2016

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2015-7491; Directorate Identifier 2015-NE-39-AD]

RIN 2120-AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede airworthiness directive (AD) 2016-13-05, which applies to all General Electric Company (GE) GE90-76B, GE90-77B, GE90-85B, GE90-90B, and GE90-94B turbofan engines. AD 2016-13-05 requires eddy current inspection (ECI) of the high-pressure compressor (HPC) stage 8-10 spool at each shop visit for all affected engines and ECI or ultrasonic inspection (USI) for certain affected engines. Since we issued AD 2016-13-05, we determined that the risk of the failure of an HPC stage 8-10 spool was excessive without repetitive USI prior to shop visit. This proposed AD would require initial and repetitive on-wing USIs of the HPC stage 8-10 spool for certain engines prior to shop visit and ECI of all affected engines at each shop visit. We are proposing this AD to correct the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 2, 2017.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor,

Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact General Electric Company, GE-Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, phone: 513-552-3272; fax: 513-552-3329; email: geae.aoc@ge.com. You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781-238-7125.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-7491; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: John Frost, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781-238-7756; fax: 781-238-7199; email: john.frost@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2015-7491; Directorate Identifier 2015-NE-39-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On June 15, 2016, we issued AD 2016-13-05, Amendment 39-18569 (81 FR 41208, June 24, 2016; corrected 81 FR 42475, June 30, 2016) ("AD 2016-13-05"), for GE GE90-76B, GE90-77B, GE90-85B, GE90-90B, and GE90-94B turbofan engines. AD 2016-13-05 requires an ECI or USI of the HPC stage 8-10 spool and removing from service those parts that fail inspection. AD 2016-13-05 resulted from an uncontained failure of the HPC stage 8-10 spool, leading to an airplane fire. We issued AD 2016-13-05 to prevent failure of the HPC stage 8-10 spool, uncontained rotor release, damage to the engine, and damage to the airplane.

Actions Since AD 2016-13-05 Was Issued

We issued AD 2016-13-05 without including the repetitive USI prior to shop visit to expedite introduction of the corrective actions to the fleet. Since we issued AD 2016-13-05, we determined that a repetitive USI is required based on analysis that the risk of the failure of an HPC stage 8-10 spool is excessive without this inspection.

Related Service Information

We reviewed GE GE90 Service Bulletin (SB) SB 72-1151 R00, dated June 10, 2016. This SB describes procedures for an on-wing USI of the stage 8 web of the stage 8-10 spool.

We also reviewed Chapter 72-31-08, Special Procedures 003; and Chapter 72-00-31, Special Procedures 006, in the GE GE90 Engine Manual, GEK100700, Revision 68, dated September 1, 2016. These procedures describe how to perform ECI of the stage 8 aft web of the stage 8-10 spool.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain all the requirements of AD 2016–13–05. This proposed AD would also require repetitive USI of the HPC 8–10 spool.

Interim Action

We consider this proposed AD interim action. GE is determining the root cause for the unsafe condition identified in this proposed AD. Once a root cause is identified, we will consider additional rulemaking.

Costs of Compliance

We estimate that this proposed AD affects 54 engines installed on airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	7 work-hours × \$85 per hour = \$595 per inspection cycle.	\$0	\$595 per inspection cycle	\$32,130 per inspection cycle.

We estimate the following costs to do any necessary replacements that would

be required based on the results of the proposed inspection. We have no way of

determining the number of engines that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of spool	0 work-hours × \$85 per hour = \$0	\$780,000	\$780,000

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2016–13–05, Amendment 39–18569 (81 FR 41208, June 24, 2016; corrected 81 FR 42475, June 30, 2016), and adding the following new AD:

General Electric Company: Docket No. FAA–2015–7491; Directorate Identifier 2015–NE–39–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by February 2, 2017.

(b) Affected ADs

This AD replaces AD 2016–13–05, Amendment 39–18569 (81 FR 41208, June 24, 2016; corrected 81 FR 42475, June 30, 2016).

(c) Applicability

This AD applies to General Electric Company (GE) GE90–76B, GE90–77B, GE90–85B, GE90–90B, and GE90–94B turbofan engines with a high-pressure compressor (HPC) stage 8–10 spool, part numbers (P/Ns) 1694M80G04, 1844M90G01, or 1844M90G02, installed.

(d) Subject

Air Transport Association (ATA) of America Code 72, Engine General.

(e) Unsafe Condition

This AD was prompted by an uncontained failure of the HPC stage 8–10 spool. We are issuing this AD to prevent failure of the HPC stage 8–10 spool, uncontained rotor release, damage to the engine, and damage to the airplane.

(f) Compliance

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

(1) For HPC stage 8–10 spool, P/N 1694M80G04, all serial numbers (S/Ns), or HPC stage 8–10 spool, P/N 1844M90G01 or 1844M90G02, with a S/N listed in Figure 1 to paragraph (f) of this AD; perform an on-wing ultrasonic inspection (USI) of the stage 8 aft web upper face as follows:

(i) Perform an initial USI after reaching 8,000 cycles since new (CSN), but, before exceeding 9,000 CSN, or within 500 cycles in

service after July 29, 2016, whichever occurs later.

(ii) Thereafter, perform a USI of the stage 8 aft web upper face every 500 cycles since last inspection.

(iii) Compliance with paragraph (f)(2)(i) of this AD is terminating action for the initial and repetitive USIs specified by paragraphs (f)(1)(i) and (f)(1)(ii) of this AD.

FIGURE 1 TO PARAGRAPH (f)—HPC STAGE 8–10 SPOOL S/Ns

Part Nos.	Serial Nos.					
1844M90G01	GWN005MF	GWNBK753	GWNBS077	GWNBS497	GWNBS724	
	GWN005MG	GWNBK754	GWNBS078	GWNBS499	GWNBS794	
	GWN0087M	GWNBK841	GWNBS079	GWNBS500	GWNBS810	
	GWN0087N	GWNBK842	GWNBS080	GWNBS501	GWNBS811	
	GWN00DGK	GWNBK843	GWNBS081	GWNBS502	GWNBS812	
	GWN00DGL	GWNBK844	GWNBS157	GWNBS609	GWNBS813	
	GWNB992	GWNBK952	GWNBS158	GWNBS610	GWNBS814	
	GWNBK667	GWNBK953	GWNBS159	GWNBS611	GWNBS910	
	GWNBK674	GWNBK954	GWNBS160	GWNBS612	GWNBS911	
	GWNBK675	GWNBK955	GWNBS266	GWNBS613	GWNBS912	
	GWNBK743	GWNBK956	GWNBS267	GWNBS614	GWNBS914	
	GWNBK744	GWNBK957	GWNBS268	GWNBS721	GWNBS915	
	GWNBK751	GWNBK958	GWNBS269	GWNBS722	GWNBS982	
	GWNBK752	GWNBK959	GWNBS270	GWNBS723	GWNBS983	
	1844M90G02	GWN00C2T	GWN01C5N	GWN02N8D	GWN03RTM	GWN04E21
		GWN00C2V	GWN01GE2	GWN02T3R	GWN03RTP	GWN04GHT
		GWN00G2N	GWN01GE3	GWN02WGM	GWN040RL	GWN04GHW
GWN00G2P		GWN01GE4	GWN0311K	GWN040RM	GWN04GJ0	
GWN00PPF		GWN01GE6	GWN035PP	GWN040RN	GWN04JW6	
GWN00PFR		GWN01WH1	GWN038TD	GWN040RP	GWN04JW7	
GWN00T2N		GWN02688	GWN039TG	GWN04202	GWN04JW8	
GWN00YHV		GWN02689	GWN03G2R	GWN0435W	GWN04L7K	
GWN0125G		GWN0268A	GWN03G2W	GWN04360	GWN04L7L	
GWN0125H		GWN02DP2	GWN03G30	GWN04361	GWN04MT7	
GWN0166K		GWN02DP3	GWN03JPC	GWN04362	GWN04MT8	
GWN01C5K		GWN02F9F	GWN03JPD	GWN04ATG	GWNBS984	
GWN01C5L		GWN02F9G	GWN03N8P	GWN04ATH		
GWN01C5M		GWN02L9T	GWN03N8R	GWN04E20		

(2) For all HPC stage 8–10 spools, P/N 1694M80G04, 1844M90G01, or 1844M90G02, perform an eddy current inspection (ECI) of the stage 8 aft upper face as follows:

(i) Perform an initial ECI of the stage 8 aft web upper face at the next shop visit after the effective date of this AD.

(ii) Thereafter, perform an ECI of the stage 8 aft web upper face at each subsequent shop visit.

(3) Remove from service any HPC stage 8–10 spool that fails the inspection required by paragraphs (f)(1) or (f)(2) of this AD, and replace with a spool eligible for installation.

(g) Definition

For the purpose of this AD, an engine shop visit is the induction of an engine into the shop for maintenance during which the compressor discharge pressure seal face is exposed.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: ANE-AD-AMOC@faa.gov.

(i) Related Information

(1) For more information about this AD, contact John Frost, Aerospace Engineer, Engine Certification Office, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7756; fax: 781–238–7199; email: john.frost@faa.gov.

(2) GE GE90 Service Bulletin (SB) SB 72–1151 R00, dated June 10, 2016, and Chapter 72–31–08, Special Procedures 003, and Chapter 72–00–31, Special Procedures 006, in GE GE90 Engine Manual, GEK100700, Revision 68, dated September 1, 2016, can be obtained from GE using the contact information in paragraph (i)(3) of this AD. This SB describes procedures for an on-wing USI of the stage 8 web of the stage 8–10 spool. These engine manual procedures describe how to perform ECI of the stage 8 aft web of the stage 8–10 spool.

(3) For service information identified in this proposed AD, contact General Electric Company, GE-Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, phone: 513–552–3272; fax: 513–552–3329; email: geae.aoc@ge.com.

(4) You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(j) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on November 29, 2016.

Colleen M. D'Alessandro,
Manager, Engine & Propeller Directorate,
Aircraft Certification Service.

[FR Doc. 2016–29679 Filed 12–16–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9393; Directorate Identifier 2014–NM–199–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2013–13–16, which applies to all Airbus Model A330–200, A330–200 Freighter, A330–300 series airplanes, and all Airbus Model A340–200, –300, –500, and –600 series airplanes. AD 2013–13–16 currently requires repetitive inspections for discrepancies of the ball-screw assembly of the trimmable horizontal stabilizer actuator (THSA), repetitive greasing of the THSA ball-nut, and replacement of the THSA if necessary; and modification or replacement (as applicable) of the ball-nut assembly,

which ends certain repetitive inspections. Since we issued AD 2013–13–16, we have determined that a modification that automatically detects failure of the ball-screw assembly is necessary. This proposed AD would require an inspection, corrective actions if necessary, lubrication of the ball-nut, modification of the THSA, and removal of certain airplanes from the applicability. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 2, 2017.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this NPRM, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; Internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–9393; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116,

Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2016–9393; Directorate Identifier 2014–NM–199–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On June 21, 2013, we issued AD 2013–13–16, Amendment 39–17504 (78 FR 47537, August 6, 2013) (“AD 2013–13–16”). AD 2013–13–16 requires actions intended to address an unsafe condition on all Airbus Model A330–200, A330–200 Freighter, and A330–300 series airplanes, and all Airbus Model A340–200, –300, –500, and –600 series airplanes.

Since we issued AD 2013–13–16, Airbus transferred most of the requirements of AD 2013–13–16 into airworthiness limitations, except the requirements for ECAM fault messages.

The European Aviation Safety Agency (EASA) which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2014–0219, dated September 29, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition on all Airbus Model A330 and Model A340 series airplanes. The MCAI states:

Several cases of transfer tube disconnection from the ball-nut of the trimmable horizontal stabilizer actuator (THSA) part number (P/N) 47172 and 47147–400 were detected on the ground during greasing and maintenance. Investigation results showed that this was caused by water ingress into the ball-nut, resulting in the jamming of the ball transfer circuit when the water froze. If the three (independent) ball circuits fail, then the THSA operates on a fail-safe nut (which operates without balls), which jams after several movements on the ball-screw of the THSA.

This condition, if not detected and corrected, could damage the ball-screw and the fail-safe nut, possibly resulting in jamming of the THSA and consequent reduced control of the aeroplane.

To detect at an early stage any distortion or initiation of disconnection, [Directorate General for Civil Aviation] DGAC France issued AD 2001–356 and AD 2001–357 to require repetitive inspections of the transfer tubes and their collars and, depending on findings, corrective action(s).

Prompted by another case of transfer tube disconnection, DGAC France issued AD 2001–356R2 and AD 2001–357R2 to require additional repetitive greasing and reinforcement of the ball-nut maintenance greasing instructions.

Subsequently, DGAC France issued AD 2002–037 and AD 2002–038 to require a modification that was also terminating action for the repetitive inspections and greasing tasks required by DGAC France AD 2001–356R2 and AD 2001–357R2 for the THSA P/N 47172 by application of Service Bulletin (SB) A330–27–3085 or SB A340–27–4089 (equivalent to Airbus production modification 49590), as applicable, changing the THSA P/N from 47172 to 47172–300.

Later on, DGAC France issued AD 2002–414 (later revised to R3) and AD 2002–415 (later revised to R2), which superseded the DGAC France AD 2001–356R2, AD 2001–357R2, AD 2002–037, and AD 2002–038, requiring:

- Repetitive inspections of all THSA P/N in service,
- repetitive lubrication of some THSA P/N, and
- replacement of THSA P/N 47172, 47147–400 and 47147–2XX/–3XX.

In addition, the electrical flight control computers monitor the operation of the THSA and the jamming of this actuator could be detected and indicated by messages on the maintenance system and on the [electronic centralized aircraft monitor] ECAM. For that reason, DGAC France AD 2002–414 and AD 2002–415 also required inspection of the THSA after display of such message(s).

After those [DGAC France] ADs were issued, Airbus introduced 4 new THSA, P/N 47172–500, P/N 47172–510, P/N 47172–520 and P/N 47172–530.

As these new THSA also needed to be inspected/lubricated, EASA issued [EASA] AD 2010–0192 and [EASA] AD 2010–0193, which retained the requirements of DGAC France AD F–2002–414R3 and AD F–2002–415R2 respectively, which were superseded, to add required repetitive inspections and lubrications of the new THSA P/N.

Since those [EASA] ADs were issued, all requirements of EASA AD 2010–0192 and AD 2010–0193 were transferred into Airbus Airworthiness Limitations Section (ALS) Part 4, except the requirement of paragraph (2.3) of those [EASA] ADs. At this time, compliance with ALS Part 4 tasks is required by EASA AD 2013–0268 (A330 aeroplanes) and [EASA] AD 2013–0269 (A340 aeroplanes), respectively [which correspond to FAA AD 2015–16–02, Amendment 39–18227 (80 FR 48019, August 11, 2015); and AD 2014–23–17, Amendment 39–18033 (79 FR 71304, December 2, 2014) (A340 aeroplanes); respectively.]

In addition, Airbus developed a Checkable Shear Pin (CSP) for the THSA and an associated additional electrical harness, which consists of installation of two Electrical Detection Devices (EDD) on the lower attachment secondary load path, which gives an indication to the Flight Control Primary Computers of secondary load path engagement.

After embodiment of these modifications on an aeroplane, the repetitive inspections of the ball-screw assembly for integrity of the primary and secondary load paths is no longer required, because the failure is detected automatically by this new device.

For the reasons described above, this [EASA] AD retains only the requirement of paragraph (2.3) of EASA AD 2010-0192 and 2010-0193 [actions following ECAM fault messages], which are superseded, and requires the installation of CSP and associated additional electrical harness on the THSA of the aeroplane. This [EASA] AD also requires, for A340-500/-600 aeroplanes that are post-SB A340-92-5008 (at Revision 06 or earlier), accomplishment of A340 ALS Part 3 task 274000-B0002-1-C, providing a grace period of 3 months for aeroplanes that have exceeded the applicable threshold or interval.

The unsafe condition is the degraded operation of the THSA, which could result in reduced control of the airplane.

Model A330-223F and A330-243F airplanes have been removed from the applicability of this proposed AD to correspond with the MCAI.

Required actions include a detailed inspection and corrective actions if an ECAM fault message is displayed, repetitive lubrication of the THSA ball-nut, and a modification of the THSA by installing a CSP and associated electrical harness.

Required actions also include certain "Additional Work" that is described in the following service information.

- "Additional Work" in Airbus Service Bulletin A330-27-3143, Revision 01, dated July 10, 2012, is described as removing the closing plug from the electrical harness 4515VB and connecting the electrical harness 4515VB to the THSA.

- "Additional Work" in Airbus Service Bulletin A330-92-3046, Revision 06, dated November 15, 2013; and Airbus Service Bulletin A340-92-4056, Revision 04, dated December 5, 2013; is described as replacement of a certain harness item, installation of placards and cable support, modification of a certain bracket, and installation of a certain spacer.

- "Additional Work" in Airbus Service Bulletin A340-92-5008, Revision 07, dated February 8, 2013, is described as replacing a certain wiring harness, replacing a certain THSA harness, installing additional placards, and modifying a certain wire harness installation order.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9393.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information.

The following service information describes procedures for doing repetitive inspections for integrity of the primary and secondary load paths of the ball-screw assembly of the THSA. These service bulletins are distinct because they apply to different airplane models.

- Airbus Service Bulletin A330-27-3102, Revision 09, dated March 29, 2016.
- Airbus Service Bulletin A340-27-4107, Revision 09, dated March 29, 2016.

The following service information describes procedures for installing two electrical detection devices, also called CSPs, on the lower attachment secondary load path of the THSA, and modifying the THSA. These service bulletins are distinct because they apply to different airplane models equipped with THS actuators having different part numbers.

- Airbus Service Bulletin A330-27-3137, dated March 20, 2007; Revision 01, dated December 6, 2007; and Revision 02, dated January 18, 2010. These service bulletins are distinct because each revision contains unique editorial changes.

- Airbus Service Bulletin A330-27-3143, Revision 01, dated July 10, 2012.
- Airbus Service Bulletin A340-27-4136, including Appendix 1, dated March 20, 2007; Revision 01, including Appendix 1, dated December 6, 2007; and Revision 02, including Appendix 1, dated February 24, 2010. These service bulletins are distinct because each revision contains unique editorial changes.

- Airbus Service Bulletin A340-27-4143, dated February 21, 2012.

- Airbus Service Bulletin A340-27-5030, Revision 01, including Appendix 1, dated November 20, 2009.

The following service information describes procedures for installing electrical wiring harnesses and brackets to connect the secondary nut detection device to the monitoring systems. These service bulletins are distinct because they apply to different airplane models.

- Airbus Service Bulletin A330-92-3046, Revision 04, dated July 15, 2010; Revision 05, dated November 7, 2011; and Revision 06, dated November 15, 2013. These service bulletins are

distinct because each revision contains unique editorial changes.

- Airbus Service Bulletin A340-92-4056, Revision 03, dated July 16, 2010; and Revision 04, dated December 5, 2013. These service bulletins are distinct because each revision contains unique editorial changes.

- Airbus Service Bulletin A340-92-5008, Revision 07, dated February 8, 2013.

This service information describes procedures for lubrication of the THSA ball-nut. These documents are distinct because they apply to different airplane models.

- Airbus A330 Airworthiness Limitations Section (ALS) Part 4—System Equipment Maintenance Requirements (SEMRs), Revision 05, dated October 19, 2015, Task 274400-00002-1-E, Lubrication of the THSA ball-nut.

- Airbus A340 ALS Part 4—SEMRs, Revision 04, dated October 19, 2015, Task 274400-00002-1-E, Lubrication of the THSA ball-nut.

- Airbus A340 ALS Part 3—Certification Maintenance Requirements (CMRs), Revision 03, dated October 19, 2015, Task 274000-B0003-1-C, Lubrication of THS Actuator Ball-screw Nut.

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

FAA's Determination and Requirements of This Proposed AD

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

Explanation of Proposed Compliance Times

The MCAI requires operators to modify certain airplanes by installing a CSP by a certain date. In order to provide operators with sufficient time to accomplish the modification, we have determined that a 12-month period from the effective date of this AD is acceptable. This difference had been coordinated with the EASA.

Costs of Compliance

We estimate that this proposed AD affects 33 airplanes of U.S. registry.

The actions required by AD 2013–13–16, and retained in this proposed AD take about 1 work-hour per product, at an average labor rate of \$85 per work-hour. Based on these figures, the estimated cost of the actions that are required by AD 2013–13–16 is \$85 per product.

We also estimate that it would take about 67 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$14,198 per product. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$656,469, or \$19,893 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2013–13–16, Amendment 39–17504 (78 FR 47537, August 6, 2013), and adding the following new AD:

Airbus: Docket No. FAA–2016–9393; Directorate Identifier 2014–NM–199–AD.

(a) Comments Due Date

We must receive comments by February 2, 2017.

(b) Affected ADs

This AD replaces AD 2013–13–16, Amendment 39–17504 (78 FR 47537, August 6, 2013) ("AD 2013–13–16").

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, all manufacturer serial numbers.

(2) Airbus Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Reason

This AD was prompted by the determination that a modification that automatically detects failure of the ball-screw assembly is necessary. We are issuing this AD to detect and correct wear on the trimmable horizontal stabilizer actuator (THSA), possibly resulting in damage to the ball-screw and fail-safe nut, which could jam the THSA and result in reduced control of the airplane.

(f) Compliance

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

(g) Actions for Electronic Centralized Aircraft Monitor (ECAM) Fault Messages

For airplanes other than those identified in figure 1 to paragraphs (g), (h), and (p) of this AD: If, during any flight, one of the "PRIM X PITCH FAULT" or "STAB CTL FAULT" messages is displayed on the ECAM associated with the "PITCH TRIM ACTR (1CS)" maintenance message, before further flight after each time the message is displayed on the ECAM, do the actions specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Do the applicable detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path; check the checkable shear pins (CSP), if installed; and do all applicable corrective actions; as specified in paragraph (g)(1)(i), (g)(1)(ii), or (g)(1)(iii) of this AD. Do all applicable corrective actions before further flight.

(i) For Model A330 series airplanes: Do the actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–27–3102, Revision 09, dated March 29, 2016, except as required by paragraph (n)(1) of this AD.

(ii) For Model A340–200 and –300 series airplanes: Do the actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–27–4107, Revision 09, dated March 29, 2016, except as required by paragraph (n)(1) of this AD.

(iii) For Model A340–500 and –600 series airplanes: Do the actions using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

Note 1 to paragraph (g)(1)(iii) of this AD: Guidance for the inspection of the ball-screw assembly can be found in Task 274000–B0002–1–C, Inspection of the Ball-screw Assembly for Integrity of the Primary and Secondary Load Paths, of the Airbus A340 Airworthiness Limitations Section (ALS) Part 3—Certification Maintenance Requirements (CMR), Revision 03, dated October 19, 2015.

(2) Lubricate the THSA ball-nut in accordance with the applicable service information specified in paragraph (g)(2)(i), (g)(2)(ii), or (g)(2)(iii) of this AD.

(i) Task 274400–00002–1–E, Lubrication of the THSA ball-nut, of Airbus A330 ALS Part 4—System Equipment Maintenance Requirements (SEMR), Revision 05, dated October 19, 2015 (for Model A330 series airplanes).

(ii) Task 274400–00002–1–E, Lubrication of the THSA ball-nut, of Airbus A340 ALS Part 4—SEMR, Revision 04, dated October 19, 2015 (for Model A340–200 and –300 series airplanes).

(iii) Task 274000–B0003–1–C, Lubrication of THS Actuator Ball-screw Nut, of Airbus A340 ALS Part 3—CMR, Revision 03, dated October 19, 2015 (for Model A340–500 and –600 series airplanes).

FIGURE 1 TO PARAGRAPHS (g), (h), AND (p) OF THIS AD—DEFINITION OF AIRPLANE GROUPS

Group	Airplane models	On which the following actions or modifications have been done
Group 1 airplanes	Airbus Model A330–200 and –300 series airplanes.	On which the actions specified in Airbus Service Bulletin A330–27–3137, dated March 20, 2007, or Revision 01, dated December 6, 2007; and Airbus Service Bulletin A330–92–3046, Revision 04, dated July 16, 2010, or Revision 05, dated November 7, 2011; have been embodied in service.
	Airbus Model A340–200 and –300 series airplanes.	On which the actions specified in Airbus Service Bulletin A340–27–4136, including Appendix 1, dated March 20, 2007, or Revision 01, including Appendix 1, dated December 6, 2007; and Airbus Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010; have been embodied in service.
Group 2 airplanes	Airbus Model A330–200 and –300 series airplanes and Model A340–200 and –300 series airplanes.	On which Airbus Modifications 55780, 52269, and 56056 have been embodied in production.
	Airbus Model A340–500 and –600 series airplanes.	On which Airbus Modifications 54882, 52191, and 56058 have been embodied in production.
Group 3 airplanes	Airbus Model A330–200 and –300 series airplanes.	On which Airbus Service Bulletin A330–27–3137, dated March 20, 2007; or Revision 01, dated December 6, 2007; has been embodied in service and Airbus Modifications 52269 and 56056 have been embodied in production.
	Airbus Model A330–200 and –300 series airplanes.	On which Airbus Modification 55780 has been embodied in production and Airbus Service Bulletin A330–92–3046 Revision 04, dated July 16, 2010; or Revision 05, dated November 07, 2011 has been embodied in service.
	Airbus Model A340–200 and –300 series airplanes.	On which Airbus Service Bulletin A340–27–4136, including Appendix 1, dated March 20, 2007; or Revision 01, including Appendix 1, dated December 6, 2007; has been embodied in service and Airbus Modifications 52269 and 56056 have been embodied in production.
	Airbus Model A340–200 and –300 series airplanes.	On which Airbus Modification 55780 has been embodied in production and Airbus Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010, has been embodied in service.

(h) Installation of CSP and Electrical Harness

For all airplanes, except Group 2 airplanes specified in figure 1 to paragraphs (g), (h), and (p) of this AD, and except for airplanes

identified in paragraphs (i), (j), and (n)(2) of this AD: Within 12 months after the effective date of this AD, modify the airplane by installing a CSP on the THSA and an additional electrical harness, in accordance with the Accomplishment Instructions of the

Airbus service information specified in figure 2 to paragraph (h) of this AD, as applicable to the part number of the THSA installed on the airplane, except as provided by paragraph (n)(2) of this AD.

FIGURE 2 TO PARAGRAPH (h) OF THIS AD—APPLICABLE SERVICE INFORMATION FOR MODIFICATION

THSA Part No. (P/N)	Service Bulletin for CSP installation	Service Bulletin for electrical harness installation
47172–300	Airbus Service Bulletin A330–27–3137, Revision 02, dated January 18, 2010, for Airbus Model A330–200 and –300 series airplanes; and Airbus Service Bulletin A330–27–4136, including Appendix 1, Revision 02, dated February 24, 2010, for Airbus Model A340–200 and –300 series airplanes	Airbus Service Bulletin A330–92–3046, Revision 06, dated November 15, 2013, for Airbus Model A330–200 and –300 series airplanes; and
47147–500	Airbus Service Bulletin A330–27–3143, Revision 01, dated July 10, 2012, for Airbus Model A330–200 and –300 series airplanes; and Airbus Service Bulletin A340–27–4143, dated February 21, 2012, for Airbus Model A340–200 and –300 series airplanes.	Airbus Service Bulletin A340–92–4056, Revision 04, dated December 5, 2013, for Airbus Model A340–200 and –300 series airplanes.
47175–200	Airbus Service Bulletin A340–27–5030, Revision 01, including Appendix 1, dated November 20, 2009, for Airbus Model A340–541 and –642 airplanes.	Airbus Service Bulletin A340–92–5008, Revision 07, dated February 8, 2013, for Airbus Model A340–541 and –642 airplanes.
47175–300		

(i) “Additional Work” on Previously Modified Airplanes

For airplanes that have already been modified (installation of CSP on the THSA and electrical harness) before the effective date of this AD in accordance with the Accomplishment Instructions of any previous revision of an Airbus service

bulletin specified in figure 2 to paragraph (h) of this AD, as applicable: Within 12 months after the effective date of this AD, do the “Additional Work” specified in, and in accordance with, the Accomplishment Instructions of the applicable Airbus service information specified in figure 2 to paragraph (h) of this AD.

(j) Installation of Electrical Harness on Airplanes Equipped With a CSP

For airplanes having one of the THSAs installed with a part number listed in figure 3 to paragraph (j) of this AD, and which have been modified by installing a CSP on the THSA as required by paragraph (h) of this AD: Within 12 months after the effective date

of this AD, inspect to determine if the electrical harness identified in the applicable Airbus service information specified in figure 3 to paragraph (j) of this AD is installed on the airplane, and if found not to be installed, modify the airplane by installing an electrical

harness, in accordance with the Accomplishment Instructions of the Airbus service information specified in figure 3 to paragraph (j) of this AD, as applicable to the part number of the THSA installed on the airplane. Airplanes having one of the THSAs

installed with a part number listed in figure 3 to paragraph (j) of this AD already have the CSP installed on the THSA, and only the electrical harness must be installed on the airplane.

FIGURE 3 TO PARAGRAPH (j) OF THIS AD—ELECTRICAL HARNESS INSTALLATION

THSA P/N	Service Information for Electrical Harness Installation
47172–500, 47172–510, 47172–520, 47172–530, 47147–700, 47147–710.	Airbus Service Bulletin A330–92–3046, Revision 06, dated November 15, 2013, for Airbus Model A330–200 and –300 series airplanes. Airbus Service Bulletin A340–92–4056, Revision 04, dated December 5, 2013, for Airbus Model A340–200 and –300 series airplanes.
47175–500, 47175–520, 47175–530	Airbus Service Bulletin A340–92–5008, Revision 07, dated February 8, 2013, for Airbus Model A340–541 and –642 airplanes.

(k) Terminating Action for Repetitive Inspections of Airbus Model A330–200 and –300 Series Airplanes

Accomplishment of a modification before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–27–3137, dated March 20, 2007, or Revision 01, dated December 6, 2007; and Airbus Service Bulletin A330–92–3046, Revision 04, dated July 15, 2010, or Revision 05, dated November 7, 2011; terminates the repetitive inspections specified in paragraphs (k)(1) through (k)(4) of this AD. Modification of an airplane as required by this paragraph does not constitute terminating action for the actions specified in paragraph (g)(2) of this AD or the additional work specified in paragraph (i) of this AD.

(1) Task 274400–00001–1–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and check the gap at the secondary nut trunnion, of Airbus A330 ALS Part 4—SEMR, Revision 05, dated October 19, 2015.

(2) Task 274400–00001–2–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and check the CSPs, of Airbus A330 ALS Part 4—SEMR, Revision 05, dated October 19, 2015.

(3) Task 274400–00001–3–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and check the CSPs, of Airbus A330 ALS Part 4—SEMR, Revision 05, dated October 19, 2015.

(4) Task 274400–00001–4–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and check the CSPs, of Airbus A330 ALS Part 4—SEMR, Revision 05, dated October 19, 2015.

(l) Terminating Action for Repetitive Inspections of Airbus Model A340–200 and –300 Series Airplanes

Accomplishment of a modification in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–27–4143, dated February 21, 2012; and Airbus Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010; terminates the actions required by paragraph (g)(1) of this AD for modified Airbus Model A340–200 and –300 series airplanes only. Modification of an airplane as specified in

this paragraph does not constitute terminating action for the actions specified in paragraph (g)(2) of this AD, or the additional work specified in paragraph (i) of this AD.

(m) Terminating Action for Repetitive Inspections of Airbus Model A340–200 and –300 Series Airplanes

Accomplishment of a modification before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–27–4136, including Appendix 1, dated March 20, 2007, or Revision 01, including Appendix 1, dated December 6, 2007; and Airbus Service Bulletin A340–92–4056, Revision 03, dated July 16, 2010; terminates the repetitive inspections specified in paragraphs (m)(1) through (m)(4) of this AD. Modification of an airplane as required by this paragraph does not constitute terminating action for the actions specified in paragraph (g)(2) of this AD, or the additional work specified in paragraph (i) of this AD.

(1) Task 274400–00001–1–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and gap check at the secondary nut trunnion, of Airbus A340 ALS Part 4—SEMR, Revision 04, dated October 19, 2015.

(2) Task 274400–00001–2–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and CSP check, of Airbus A340 ALS Part 4—SEMR, Revision 04, dated October 19, 2015.

(3) Task 274400–00001–3–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and CSP check, of Airbus A340 ALS Part 4—SEMR, Revision 04, dated October 19, 2015.

(4) Task 274400–00001–4–E, Detailed inspection of the ball-screw assembly for integrity of the primary and secondary load path and CSP check, of A340 ALS Part 4—SEMR, Revision 04, dated October 19, 2015.

(n) Exceptions to the Actions in Certain Service Information and Paragraph (h) of This AD

(1) Where Airbus Service Bulletin A330–27–3102, Revision 09, dated March 29, 2016 (for Model A330 series airplanes); or Airbus Service Bulletin A340–27–4107, Revision 09, dated March 29, 2016 (for Model A340 series airplanes); specifies to contact Airbus for a

damage assessment: Before further flight, accomplish the required actions in accordance with the procedures specified in paragraph (s)(2) of this AD.

(2) For airplanes that already had the electrical harness installed during production using Airbus Modifications 52269 and 56056 for Airbus Model A330–200 and –300 series airplanes and Airbus Model A340–200 and –300 series airplanes, and using Airbus Modifications 52191 and 56058 for Model A340–500 and –600 series airplanes: Only the CSP must be installed on the THSA in accordance with applicable Airbus service bulletins and within the compliance time specified in paragraph (h) of this AD.

(o) Terminating Action for Repetitive Inspections for Airplanes on Which Actions Required by Paragraph (h), (i), or (j) of This AD Are Done

Modification of an airplane as required by paragraph (h), (i), or (j) of this AD, as applicable, constitutes terminating action for that airplane for the applicable actions identified in paragraphs (o)(1) through (o)(4) of this AD.

(1) For all airplanes: The actions required by paragraph (g) of this AD.

(2) For Model A340–500 and –600 series airplanes: Task 274000–B0002–1–C, Inspection of the Ball-screw Assembly for Integrity of the Primary and Secondary Load Paths, of Airbus A340 ALS Part 3—CMR, Revision 03, dated October 19, 2015.

(3) For Model A330–200 and –300 series airplanes: The ALS tasks identified in paragraphs (k)(1) through (k)(4) of this AD.

(4) For Model A340–200 and –300 series airplanes: The ALS tasks identified in paragraphs (m)(1) through (m)(4) of this AD.

(p) Ball-Screw Assembly Inspection for Certain Airplanes

For Model A340–500 and –600 airplanes that are in post-Airbus Service Bulletin A340–92–5008, at Revision 06 or earlier, configuration: Before exceeding the threshold or interval, as applicable, of Task 274000–B0002–1–C, Inspection of the Ball-screw Assembly for Integrity of the Primary and Secondary Load Paths, of Airbus A340 ALS Part 3—CMR, Revision 03, dated October 19, 2015, or within 3 months after the effective date of this AD, whichever occurs later, accomplish Task 274000–B0002–1–C, Inspection of the Ball-screw Assembly for

Integrity of the Primary and Secondary Load Paths, of Airbus A340 ALS Part 3—CMR, Revision 03, dated October 19, 2015; and do all applicable corrective actions. Do all applicable corrective actions before further flight using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. Repeat Task 274000-B0002-1-C, Inspection of the Ball-screw Assembly for Integrity of the Primary and Secondary Load Paths, thereafter at the applicable intervals specified in Airbus A340 ALS Part 3—CMR, Revision 03, dated October 19, 2015.

(q) Parts Installation Prohibitions

(1) For all airplanes except Group 2 airplanes as identified in figure 1 to paragraphs (g), (h), and (p) of this AD: After modification of the airplane as required by paragraph (h), (i), or (j) of this AD, as applicable, no person may install any THSA having P/N 47172-300, P/N 47147-500, P/N 47175-200, or P/N 47175-300.

(2) For Group 2 airplanes, as identified in figure 1 to paragraphs (g), (h), and (p) of this AD: As of the effective date of this AD, no person may install on any Group 2 airplane any THSA having P/N 47172-300, P/N 47147-500, P/N 47175-200, or P/N 47175-300.

(r) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g)(2) of this AD, if those actions were performed before the effective date of this AD using the applicable service information specified in paragraphs (r)(1) through (r)(4) of this AD.

(1) Task 274400-00002-1-E, Lubrication of the THSA ball-nut, of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated September 9, 2011 (for Model A330 series airplanes).

(2) Task 274400-00002-1-E, Lubrication of the THSA ball-nut, of Airbus A330 ALS Part 4—Ageing Systems Maintenance, Revision 04, dated August 27, 2013 (for Model A330 series airplanes).

(3) Task 274400-00002-1-E, Lubrication of the THSA ball-nut, of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 02, dated October 12, 2011 (for Model A340-200 and -300 series airplanes).

(4) Task 274400-00002-1-E, Lubrication of the THSA ball-nut, of Airbus A340 ALS Part 4—Ageing Systems Maintenance, Revision 03, dated November 15, 2012 (for Model A340-200 and -300 series airplanes).

(s) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport

Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1138; fax 425-227-1149. Information may be emailed to: 9-ANM-116-ACO-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) Contacting the Manufacturer: As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(t) Related Information

(1) Refer to Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2014-0219, dated September 29, 2014, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9393.

(2) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; Internet <http://www.airbus.com>.

(3) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

Issued in Renton, Washington, on November 10, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016-29683 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-140328-15]

RIN 1545-BN17

Guidance Regarding Predecessors and Successors Under Section 355(e); Limitation on Gain Recognition; Guidance Under Section 355(f)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking, notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations that provide guidance regarding the distribution by a distributing corporation of stock or securities of a controlled corporation without the recognition of income, gain, or loss. The temporary regulations provide guidance in determining whether a corporation is a predecessor or successor of a distributing or controlled corporation for purposes of the exception under section 355(e) of the Internal Revenue Code to the nonrecognition treatment afforded qualifying distributions, and they provide certain limitations on the recognition of gain in certain cases involving a predecessor of a distributing corporation. The temporary regulations also provide rules regarding the extent to which section 355(f) causes a distributing corporation (and in certain cases its shareholders) to recognize income or gain on the distribution of stock or securities of a controlled corporation. Those temporary regulations affect corporations that distribute the stock or securities of controlled corporations and their shareholders or security holders of those distributing corporations. The text of those temporary regulations serves as the text of these proposed regulations.

DATES: Comments and requests for a public hearing must be received by March 20, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-140328-15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-140328-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at <http://www.regulations.gov/> (REG-140328-15).

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Richard K. Passales at (202) 317-5024 or Marie C. Milnes-Vasquez, (202) 317-7700; concerning submission of comments, and/or requests for public hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

On November 22, 2004, the Treasury Department and the IRS published in the **Federal Register** (69 FR 67873) a

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA-HQ-OW-2016-0568; FRL 9953-23-OW]

RIN 2040-AF64

Fees for Water Infrastructure Project Applications Under WIFIA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to establish fees related to the provision of federal credit assistance under Subtitle C of the Water Resources Reform and Development Act of 2014 (WRRDA), which is referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects and to charge fees to recover all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. The agency seeks comment on all aspects of this proposal.

DATES: Comments must be received on or before February 17, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0568, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Jordan Dorfman, Water Infrastructure Division, Office of Wastewater Management, Mail Code 4201C, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC, 20460; telephone number: (202)564-0614; email address: dorfman.jordan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action only applies to entities seeking credit assistance under the WIFIA program for the development and construction of a water infrastructure project. EPA has published an interim final rule to implement this new credit assistance program in the "Rules and Regulations" section of this **Federal Register**. A list of eligible entities and eligible projects can be found in the Interim Final Rule entitled, "Credit Assistance for Water Infrastructure Projects." This interim final rule is available at Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>.

B. What should I consider as I prepare my comments for EPA?

Submitting Confidential Business Information (CBI). Do not submit this information to EPA through [regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk, CD-ROM, or flash drive that you mail to EPA, mark the outside of the disk, CD-ROM, or flash drive as CBI and then identify electronically within the disk, CD-ROM, or flash drive the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Tips for preparing your comments. When submitting comments, remember to:

- Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The Agency may ask you to respond to specific questions.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns and suggest alternatives.

- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the Agency taking?

EPA is proposing to establish fees associated with the provision of federal credit assistance under the WIFIA program. WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects. EPA has published an Interim Final Rule entitled, "Credit Assistance for Water Infrastructure Projects" to establish procedures for the implementation of the WIFIA Program. As specified under 33 U.S.C. 3908(b)(7), 3909(b), and 3909(c)(3), Congress in WIFIA authorizes EPA to charge fees to recover all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. EPA is proposing an application fee, credit processing fee, servicing fee, and fee for extraordinary expenses to cover these costs to the extent not covered by congressional appropriations.

B. What is the Agency's authority for taking this action?

This proposed rule is issued under the authority of 33 U.S.C. 3908(b)(7), 3909(b), 3909(c)(3), and 3911.

C. What fees are being proposed?

In the Interim Final Rule entitled, "Credit Assistance for Water Infrastructure Projects," EPA established an application process for WIFIA credit assistance that is divided into two steps. The first step requires the submission of a letter of interest. No fees are proposed for the letter of interest step. Projects selected to continue in the application process will then be invited to submit an application at which time the application fee must be paid. For this second step, EPA will

only select those projects that it expects might reasonably proceed to closing. For more information on this process, please refer to the WIFIA Implementation Rule at 40 CFR part 35 subpart Q or in Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>.

Consequently, EPA anticipates that the fees proposed in this notice would apply only to projects the Agency expects are likely to proceed to closing. Detailed application information will be contained in a program guide developed by EPA and will be posted on the WIFIA Web site and made available to the public at the time a solicitation for letters of interest is published. This two-step process limits the time, cost and effort required to be expended by prospective borrowers prior to having a reasonable expectation of funding by WIFIA.

While this rule, and the interim final WIFIA Implementation Rule, have separate processes for comments, EPA is aware that the similar timelines for comment and the relationship between the two rules may cause confusion. Therefore, in the event that comments are received for this rule under the heading of the interim final rule, or vice versa, EPA will consider all comments and respond accordingly.

As described in greater detail below, the types of fees EPA is proposing to establish are consistent with other Federal Credit programs. In particular, the WIFIA program was designed by Congress to resemble the Transportation Infrastructure Finance and Innovation Act program, commonly known as TIFIA. Accordingly, to the extent practicable, the WIFIA program has been crafted by EPA to be implemented in a similar manner as the Department of Transportation implements the TIFIA program. The rationale for establishing these fees is to cover EPA's costs of administering the program to the extent these costs are not covered by congressional appropriations. To effectively administer the program, EPA will incur both internal administrative costs (staffing, program support contracts, and other costs) as well as the costs of retaining expert firms, including legal, engineering, and financial advisory services, in the field of municipal and project finance, to assist in the underwriting of the Federal credit instrument. As explained in greater detail below, the latter costs may range from \$350,000–\$700,000 per project, though EPA cannot provide assurance that costs will not exceed this range. Assuming 10 loans at an average of \$100 million per loan, external expert costs alone could be in the range of \$3.5 million to \$7 million, and those costs

could be higher if a larger number of loans (with a smaller average loan size) were made. The combination of EPA's internal administrative costs and these external expert costs would not be fully covered by the \$2.2 million set aside for administrative costs in WIFIA. To the extent Congress does not appropriate funds to cover these program costs, EPA will need to exercise its authority under WIFIA to recover such costs through fees in order to effectively administer the program.

In many lending contexts, such fees can be reimbursed as part of the principal of the loan. WIFIA, however, prohibits this by not including such fees as eligible project costs. However, other sources of financing can finance the fees. WIFIA assistance can only pay for up to 49% of eligible project costs. The remaining costs must be borne by the borrower, either internally or through another financing source. While fees cannot be used to calculate the amount eligible for WIFIA financing, the fees can still be reimbursed from other sources. While the ability to finance fees with a WIFIA loan could reduce the burden on applicants by allowing the reimbursement for these costs by the loan proceeds, EPA's reading of the statute is that this would require amendment to the WIFIA statute or specific authorizing language in an appropriations bill.

Application Fee

EPA is proposing to require a non-refundable fee for each project that is invited to submit a full application (second step following submission of letter of interest) for credit assistance under WIFIA. EPA is proposing that an application fee will be due upon submission of the application. For fiscal year 2017, EPA is proposing an application fee of \$25,000 for applications for projects serving small communities (population of not more than 25,000 people). For all other project applications, EPA is proposing an application fee of \$100,000. As proposed, these application fees represent an amount equal to 0.5 percent of the minimum threshold project cost (\$5 million for small communities and \$20 million for larger communities, 33 U.S.C. 3907(a)(2)), which EPA considers to be sufficient for the Agency to begin the financial and legal analysis of the project while providing assurance that the applicant intends to proceed to closing, and therefore costs incurred by the Agency may be recovered. EPA will undertake significant costs to evaluate applications and hire expert firms for underwriting and considers an application fee

essential for applicants to show good faith in applying for assistance, to help cover the agency's administrative costs in processing applications, and to ensure effective administration of the program. EPA proposes that these fees be required at the time of submission of the full application and that the full application will not be reviewed without fee payment. Because EPA will only invite projects to submit an application and application fee if the project is expected to proceed to closing, no applicant would pay a fee without a reasonable expectation that the project could receive funding.

For fiscal years 2018 and beyond, the Agency may need to adjust the amount of the application fee based on early program implementation experience. A change in the application fee will not change the total fees charged, only the initial fee which is credited to the final fee at closing, or in the event that the project does not proceed to closing, withdrawal of the application, or denial. EPA seeks comment on proposed regulatory language that would authorize the Agency to change the default application fee in subsequent years through the NOFA. In addition, EPA seeks comment on whether changes to the application fee should be made through notice and comment or, alternatively, whether the agency should establish any criteria or constraints for adjustment of this fee through NOFAs and, if so, what those should be.

Credit Processing Fee

EPA is also proposing to require a credit processing fee at the time of closing, or in the event that the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied, for projects selected to receive assistance in the form of a direct cash payment. The proceeds of any such fees would be used to pay the remaining portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including legal, engineering, and financial advisory services, in the field of municipal and project finance to assist in the underwriting of the Federal credit instrument. EPA proposes that the initial application fee described above would be credited to the credit processing fee. For example, if the total credit processing fee is \$400,000 and the applicant paid \$100,000 with the application, \$300,000 would be due at closing, or in the event that the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied. The fee for each project would be set based on the costs incurred by EPA for that

specific project. Due to the nature of credit processing, the amount is expected to vary among applicants. This variation is a reflection of the amount of time taken to process a loan, which may not directly correlate with the size of the loan. More complicated transactions with lengthy negotiations will have higher costs. EPA estimates these costs could be in the range of approximately \$350,000–\$700,000 per project, broken down as follows:

- *Financial advisor*: \$100,000 to \$250,000 per project;
- *Law firm*: \$200,000 to \$350,000 per project; and
- *Engineering firm*: \$50,000 to \$100,000 per project.

EPA is proposing to authorize the waiver of a portion of the fee charged to an applicant in the event that Congress appropriates resources adequate to pay for EPA's cost of administering the WIFIA program as well as additional funding to pay for loan processing. WIFIA currently provides that EPA may retain \$2.2 million annually from funds appropriated to the program to pay for the administration of the program, including internal administrative costs of staffing, program support contracts (separate from the expert advisory services described previously), and other internal administrative needs. EPA requests comment on including a provision in the final rule allowing EPA to waive fees.

To the extent Congress appropriates administrative funds in excess of those needed for EPA's internal administrative costs, EPA is proposing to authorize the use of the remaining available administrative allowance (less any amount needed for future years' administration) to reduce fees. EPA is proposing three alternative methods by which the Agency could allocate additional administrative funds to reduce fees:

- By reducing fees by an equal amount per loan in the relevant year;
- By reducing fees by an equal amount per loan for those projects serving a population of not more than 25,000; or
- By reducing fees by an equal amount per loan for those projects that serve a population with a median household income that is 80 percent or less of the state median household income.

Alternatively, EPA could allocate such fee reductions through a combination of these three methods. EPA requests comment on each of these potential options or other potential approaches not discussed here. In the final rule, the Agency would expect to

include regulatory text addressing criteria for allocating fee reductions.

Servicing Fee

EPA is also proposing to charge an annual servicing fee during repayment of the loan. The fee will be dependent on the costs of servicing the credit instrument as determined by the Administrator. EPA proposes that such fees would be set at a level to enable the Agency to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments and will be determined at the time of closing. EPA expects such fees to range from \$12,000 to \$15,000 annually per loan.

Extraordinary Expenses

EPA is also proposing a fee to cover extraordinary expenses. In the event that a borrower experiences difficulty relating to technical, financial, or legal matters or other events (e.g., engineering failure or financial workouts) which require EPA to incur time or expenses beyond standard monitoring, EPA will be entitled to payment in full from the borrower of additional fees in an amount determined by EPA and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower.

Optional Supplemental Fee

EPA is also proposing to allow a separate fee to be charged, with agreement of the applicant, to reduce the budget authority required to fund the credit instrument. Although EPA considers it unlikely that a scenario will arise under which it would assess such a fee, the Agency sees benefit in establishing the flexibility to allow an applicant to "buy down" the budget authority required for the credit instrument. This could allow an applicant to proceed to closing in the event that sufficient budget authority would not otherwise be available. EPA proposes that any such fee would only be charged upon agreement by an applicant.

Request for Comment

EPA requests comment on each of the proposed fees described above, including whether to establish such fees, proposed fee levels or approaches for calculating fees, and potential criteria and methodologies for waiving all or a portion of such fees in the event that Congress appropriates sufficient funds to permit such a waiver. In particular, EPA requests comments on

prospective borrowers' ability to pay these fees, the use of an upfront application fee, and options for applicants to finance fees. EPA also requests comment on the proposed reduced application fee for small communities and the extent to which this fee reduction is adequate to ensure small communities can effectively access the WIFIA program. EPA understands that payment of fees may be difficult for some applicants and requests comment on potential approaches that could address such concerns while allowing EPA to recover its costs to ensure effective and sustainable administration of the WIFIA program.

III. Statutory and Executive Orders Reviews

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This rule has been determined significant because it affects the rights and obligations of recipients of a loan program and raises novel legal or policy issues arising out of a legal mandate. Any changes made in response to OMB recommendations have been documented in the docket.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA because this proposal would merely establish fees associated with a previously promulgated rule.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a

substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. Participation in the WIFIA loan program is voluntary. While many projects serving small communities are potentially eligible for WIFIA loans, we anticipate only one to two small community applications per year as small communities have access to below market rate loans and other subsidies through the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, and other funding sources. A small community will only apply and undertake a WIFIA loan in cases where the WIFIA loan provides positive economic benefits relative to other potential funding sources, based upon consideration of relevant economic factors, including loan rate, loan terms, fees and other transaction costs. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action 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.

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

This action does not have tribal implications as specified in Executive Order 13175. While a tribal government, or a consortium of tribal governments may apply for WIFIA credit assistance, this action does 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.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because environmental health or safety risks are not addressed by this action.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This rulemaking simply imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

K. National Environmental Policy Act

Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). This rulemaking simply imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

List of Subjects in 40 CFR Part 35

Environmental protection, Reporting and recordkeeping requirements, and Water finance.

Dated: December 6, 2016.

Gina McCarthy,
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 35 as follows:

PART 35—STATE AND LOCAL ASSISTANCE

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15

U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104–134, 110 Stat. 1321, 1321–299 (1996); Pub. L. 105–65, 111 Stat. 1344, 1373 (1997), 2 CFR 200.

■ 2. Add § 35.10080 to read as follows:

§ 35.10080 Fees.

(a) *Application fee.* EPA will require a non-refundable application fee for each project applying for credit assistance under the WIFIA program. An application fee will be due upon submission of the complete application. For applications for projects serving small communities (population of not more than 25,000 people), this application fee will be \$25,000. For all other applications, this application fee will be \$100,000. The initial application fee will be credited to the credit processing fee required under subsection (c).

(b) *Adjustment of application fee.* For each application and approval cycle, EPA may adjust the amount of the application fee described in subsection (a) based on program implementation experience and cost expectations. EPA will publish this amount in each **Federal Register** solicitation for letters of interest.

(c) *Credit processing fee.* Except as otherwise provided in subsection (f), EPA will require an additional credit processing fee for projects selected to receive WIFIA assistance upon closing, or in the event that the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied. The proceeds of any such fees will be used to pay the remaining portion of the Agency’s cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance, to assist in the underwriting of the Federal credit instrument. All of, or a portion of, this fee may be waived.

(d) *Servicing fee.* EPA will require borrowers to pay a servicing fee for each credit instrument approved for funding. Separate fees may apply for each type of credit instrument (*e.g.*, a loan guarantee, a secured loan with a single disbursement, or a secured loan with multiple disbursements), depending on the costs of servicing the credit instrument as determined by the Administrator. Such fees will be set at a level sufficient to enable the EPA to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments.

(e) *Optional supplemental fee.* If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance

under WIFIA, EPA and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. No such fee may be included among eligible project costs.

(f) *Reduced fees.* To the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs, EPA may utilize such appropriated funds to reduce fees that would otherwise be charged under subsection (c).

(g) *Extraordinary expenses.* EPA may require payment in full by the borrower of additional fees, in an amount determined by EPA, and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower, in the event that a borrower experiences difficulty relating to technical, financial, or legal matters or other events (e.g., engineering failure or financial workouts) which require EPA to incur time or expenses beyond standard monitoring.

[FR Doc. 2016-30192 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA-HQ-OAR-2016-0202; FRL-9956-97-OAR]

RIN 2060-AS82

Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public hearing and extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing that a public hearing will be held for the proposed rule titled, "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements," which published in the *Federal Register* on November 17, 2016. The hearing will be held on Thursday, January 12, 2017, in Washington, DC. The EPA is also announcing extension of the comment period for the proposed

rule to February 13, 2017, to allow sufficient time after the public hearing for commenters to submit comments.

DATES: *Public Hearing.* The public hearing will be held on January 12, 2017, in Washington, DC. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the public hearing.

Comments. Comments must be received on or before February 13, 2017.

ADDRESSES: *Public Hearing.* The January 12, 2017, public hearing will be held at the EPA, William Jefferson Clinton East Building, Room 1117A, 1201 Constitution Avenue NW., Washington, DC 20004. Identification is required. If your driver's license is issued by Kentucky, Maine, Minnesota, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina or the state of Washington, you must present an additional form of identification to enter (see **SUPPLEMENTARY INFORMATION** for additional information on this location).

Comments. Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2016-0202, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, Cloud or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/comments.html>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www2.epa.gov/dockets/comments.html>

or in hard copy at the EPA Docket Center Reading Room, in the William Jefferson Clinton West Building, Room 3334, located at 1301 Constitution Avenue NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The phone number for the Public Reading Room is (202) 566-1744. **FOR FURTHER INFORMATION CONTACT:** If you would like to speak at the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (OAQPS), Air Quality Planning Division (C504-01), Research Triangle Park, NC 27711, telephone (919) 541-0641, fax number (919) 541-5509, email address long.pam@epa.gov, no later than January 10, 2017. If you have any questions relating to the public hearing, please contact Ms. Long at the above number.

If you have questions concerning the November 17, 2016, proposed rule, please contact Mr. Robert Lingard, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, at (919) 541-5272 or lingard.robert@epa.gov; or Mr. Lynn Dail, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, at (919) 541-2363 or dail.lynn@epa.gov. For information on the Information Collection Request (ICR), contact Mr. Butch Stackhouse, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, at (919) 541-5208 or stackhouse.butch@epa.gov.

SUPPLEMENTARY INFORMATION: The proposal for which the EPA is holding the public hearing was published in the *Federal Register* on November 17, 2016 (81 FR 81276), and is available at: <http://www.epa.gov/ozone-pollution> and also in Docket ID No. EPA-HQ-OAR-2016-0202. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposal. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information that are submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. Written comments must be postmarked by the last day of the comment period.

The public hearing will convene at 9:00 a.m. and end at 5:00 p.m. Eastern Time (ET). The EPA will make every effort to accommodate all individuals interested in providing oral testimony. A lunch break is scheduled from 12:00 p.m. until 1:00 p.m. Please note that this

hearing will be held at a U.S. government facility. Individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. The REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. These requirements took effect July 21, 2014. If your driver's license is issued by Kentucky, Maine, Minnesota, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina or the state of Washington, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: federal employee badges, passports, enhanced driver's licenses and military identification cards. For additional information for the status of your state regarding REAL ID, go to <http://www.dhs.gov/real-id-enforcement-brief>. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building, and demonstrations will not be allowed on federal property for security reasons.

If you would like to present oral testimony at the hearing, please notify Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (OAQPS), Air Quality Planning Division (C504-01), Research Triangle Park, NC 27711, telephone (919) 541-0641, fax number (919) 541-5509, email address long.pam@epa.gov, no later than 4:00 p.m. ET on January 10, 2017. Ms. Long will arrange a general time slot for you to speak. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing.

Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) or in hard copy form. The EPA will not provide audiovisual equipment for presentations unless we receive special requests in advance. Commenters should notify Ms. Long if they will need specific equipment. Commenters should also notify Ms. Long if they need specific translation services for non-English speaking commenters.

The hearing schedule, including the list of speakers, will be posted on the EPA's Web site at: <http://www.epa.gov/ozone-pollution> prior to the hearing. Verbatim transcripts of the hearing and

written statements will be included in the docket for the rulemaking.

How can I get copies of this document and other related information?

The EPA has established a docket for the proposed rule "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements" under Docket ID No. EPA-HQ-OAR-2016-0202 (available at <http://www.regulations.gov>). The EPA has made available information related to the proposed rule at: <http://www.epa.gov/ozone-pollution>.

Dated: December 13, 2016.

Stephen Page,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2016-30365 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2015-0621; FRL-9956-96-Region 9]

Revisions to the California State Implementation Plan; Imperial County Air Pollution Control District; Stationary Sources Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on revisions to the Imperial County Air Pollution Control District (ICAPCD or District) portion of the California State Implementation Plan (SIP). We are proposing full approval of two rules and a limited approval and limited disapproval of one rule. All three rules update and revise the District's New Source Review (NSR) permitting program for new and modified sources of air pollution. We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by January 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R09-OAR-2015-0621 at <http://www.regulations.gov>, or via email to R9AirPermits@epa.gov. For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). For either manner of

submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972-3534, yannayon.laura@epa.gov.

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

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The word or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The initials *CARB* mean or refer to the California Air Resources Board.
- (iii) The initials *CFR* mean or refer to Code of Federal Regulations.
- (iv) The initials or words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- (v) The initials *FR* mean or refer to **Federal Register**.

(vi) The word or initials *ICAPCD* or *District* mean or refer to the Imperial County Air Pollution Control District, the agency with jurisdiction over stationary sources within Imperial County.

(vii) The initials *NAAQS* mean or refer to National Ambient Air Quality Standards.
 (viii) The initials *NSR* mean or refer to New Source Review.
 (ix) The initials *PM₁₀* mean or refer to particulate matter with an aerodynamic diameter of less than or equal to 10 micrometers (coarse particulate matter).

(x) The initials *PM_{2.5}* mean or refer to particulate matter with an aerodynamic diameter of less than or equal to 2.5 micrometers (fine particulate matter).
 (xi) The initials *SIP* mean or refer to State Implementation Plan.
 (xii) The initials *TSD* mean or refer to the technical support document for this action.

I. The State’s Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this proposal, including the dates they were adopted by ICAPCD and submitted by CARB, which is the governor’s designee for California SIP submittals.

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted/revised	Submitted
ICAPCD	204	Applications	9/14/99	05/26/00
ICAPCD	206	Processing of Applications	10/22/13	02/10/14
ICAPCD	207	New and Modified Stationary Source Review	10/22/13	1/21/14

On April 9, 2014 and March 7, 2014, EPA determined that the submittals for ICAPCD Rules 206 and 207, respectively, met the completeness criteria in 40 CFR part 51 Appendix V. The submittal for ICAPCD Rule 204 was deemed by operation of law to meet the completeness criteria in 40 CFR part 51 Appendix V as of October 6, 2000. The completeness criteria in 40 CFR part 51, Appendix V must be met before formal EPA review.

B. Are there other versions of these rules?

There is no previous version of Rule 204 in the SIP; EPA approved previous versions of Rules 206 and 207 into the SIP on January 3, 2007 (72 FR 9) and November 10, 1980 (45 FR 74480), respectively.¹ Section D.1.a of submitted Rule 207 is contained in SIP-approved Rule 209 (Implementation Plans), which was also approved on November 10, 1980.²

C. What is the purpose of the submitted rules?

Section 110(a) of the CAA requires states to submit regulations that include a pre-construction permit program for certain new or modified stationary sources of pollutants, including a permit program as required by Part D of Title I of the CAA.

The purpose of District Rule 204 (Applications), Rule 206 (Processing of Applications) and Rule 207 (New and Modified Stationary Source Review) is

to implement a federal preconstruction permit program for new and modified minor sources of criteria pollutants and new and modified major sources of criteria pollutants for which the area is designated nonattainment. Imperial County is currently designated as a moderate nonattainment area for the 2008 8-hr ozone NAAQS.³ Portions of the county are designated as a serious nonattainment area for the 1987 24-hr PM₁₀ NAAQS, as a moderate nonattainment area for the 2006 24-hr PM_{2.5} NAAQS and as a moderate nonattainment area for the 2012 annual PM_{2.5} NAAQS. We present our evaluation under the CAA and EPA’s regulations of the amended NSR rules submitted by CARB, as identified in Table 1 and provide our reasoning in general terms below and a more detailed analysis in our TSD, which is available in the docket for this proposed rulemaking.

II. EPA’s Evaluation and Action

A. How is EPA evaluating the rules?

The submitted rules must meet the CAA’s general requirements for SIPs and SIP revisions in CAA sections 110(a)(2), 110(l), and 193, as well as the applicable requirements contained in part D of title I of the Act (sections 172, and 173) for a nonattainment NSR permit program. In addition, the submitted rules must contain the applicable regulatory provisions of 40 CFR 51.160–51.165 and 40 CFR 51.307.

Among other things, section 110 of the Act requires that SIP rules be enforceable and provides that EPA may not approve a SIP revision if it would interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the CAA. In addition, section 110(a)(2) and section 110(l) of the Act require that each SIP or revision to a SIP submitted by a state must be adopted after reasonable notice and public hearing.

Section 110(a)(2)(c) of the Act requires each SIP to include a permit program to regulate the modification and construction of any stationary source within the areas covered by the SIP as necessary to assure attainment and maintenance of the NAAQS. EPA’s regulations at 40 CFR 51.160–51.164 provide general programmatic requirements to implement this statutory mandate commonly referred to as the “minor NSR” or “general NSR” permit program. These NSR program regulations impose requirements for SIP approval of state and local programs that are more general in nature as compared to the specific statutory and regulatory requirements for nonattainment NSR permitting programs under Part D of title I of the Act.

Part D of title I of the Act contains the general requirements for areas designated nonattainment for a NAAQS (section 172), including preconstruction permit requirements for new major sources and major modifications proposing to construct in nonattainment areas (section 173).

Part D of title I of the Act also includes section 182(b), which contains the additional requirements for areas designated as a moderate ozone nonattainment area, and section 189(e), which requires the control of major stationary sources of PM₁₀ precursors (and hence PM_{2.5} precursors) “except

¹ EPA disapproved subparagraph C.5 of SIP-approved Rule 207 because it exempted some sources from the requirement to apply LAER. See 40 CFR 52.233(a)(1).

² EPA’s approval of Rule 206 would supersede our prior approval of Rule 206 in the SIP. Likewise, approval of Rule 207 would supersede our prior approval of SIP-approved Rules 207 and 209 and will supersede our prior disapproval of Rule 207, subparagraph C.5 and our Part D conditional approval. We intend to make conforming changes to the regulatory text codified in 40 CFR 52.220, 40 CFR 52.232 and 40 CFR 52.233.

³ Effective March 14, 2008 (73 FR 8209, February 13, 2008), the EPA reclassified Imperial County to a moderate ozone nonattainment area for the 1997 ozone NAAQS. In 2012, EPA designated Imperial County as a nonattainment area for the 2008 ozone NAAQS and classified the area as marginal. 77 FR 30088 (May 21, 2012). The SIP submittal that EPA is now evaluating via this proposal addresses the NNSR requirement for the Imperial County ozone nonattainment area for a moderate classification under the 1997 ozone NAAQS as well as a marginal classification under the 2008 ozone NAAQS.

where the Administrator determines that such sources do not contribute significantly to PM₁₀ [and PM_{2.5}] levels which exceed the standard in the area.” Additionally, 40 CFR 51.165 sets forth EPA’s regulatory requirements for SIP-approval of a nonattainment NSR permit program.

The protection of visibility requirements that apply to New Source Review programs are contained in 40 CFR 51.307. This provision requires that certain actions be taken in consultation with the local Federal Land Manager if a new major source or major modification may have an impact on visibility in any mandatory Class I Federal Area.

Section 110(l) of the Act prohibits EPA from approving any SIP revisions that would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any other applicable requirement of the CAA. Section 193 of the Act, which only applies in nonattainment areas, prohibits the modification of a SIP-approved control requirement in effect before November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

Our TSD, which can be found in the docket for this rule, contains a more detailed discussion of the approval criteria.

B. Do the rules meet the evaluation criteria?

EPA has reviewed the submitted rules in accordance with the rule evaluation criteria described above. With respect to procedures, based on our review of the public process documentation included in the May 26, 2000, January 21, 2014, and February 10, 2014 submittals, we are proposing to approve the submitted rules in part because we have determined that ICAPCD has provided sufficient evidence of public notice and opportunity for comment and public hearings prior to adoption and submittal of these rules, in accordance with the requirements of CAA sections 110(a)(2) and 110(l).

With respect to substantive requirements, we have reviewed the submitted rules in accordance with evaluation criteria discussed above. We are proposing to approve Rules 204 and 206 as part of ICAPCD’s general NSR permitting program because we have determined that these rules, together with Rule 207, satisfy the substantive statutory and regulatory requirements for a general NSR permit program as contained in CAA section 110(a)(2)(c) and 40 CFR 51.160–51.164.

In addition, we are proposing a limited approval/limited disapproval of Rule 207. We are proposing a limited approval because we have determined that Rule 207 (i) satisfies the statutory and regulatory requirements for a general NSR permit program as set forth in CAA section 110(a)(2)(c) and 40 CFR 51.160–51.164; and (ii) mostly satisfies the statutory and regulatory requirements for a nonattainment NSR permit program for moderate ozone, serious PM₁₀, and moderate PM_{2.5} nonattainment areas as set forth in the applicable provisions of part D of title I of the Act (sections 172 and 173) and in 40 CFR 51.165 and 40 CFR 51.307. We are also proposing a limited disapproval of Rule 207 because we have determined that the rule does not regulate ammonia as a PM_{2.5} precursor consistent with the requirements of 40 CFR 51.165(a)(13). While the District provided a demonstration to support their contention that ammonia is a not a significant contributor to the areas PM_{2.5} nonattainment status, the demonstration was not consistent with EPA’s newly promulgated nonattainment NSR precursor demonstration requirements as set forth in 40 CFR 51.1006(a)(3). Our TSD contains a more detailed discussion of this disapproval issue.

EPA is also proposing to find that it is acceptable for ICAPCD to not incorporate the NSR Reform provisions of 40 CFR 51.165 into its NSR permit program because ICAPCD’s permitting program will not be any less stringent than the federal permitting program.

In addition, EPA is proposing to find that Rules 204, 206 and 207 meet the statutory requirements for SIP revisions as specified in sections 110(l) and 193 of the CAA.

Please see our TSD for more information regarding our evaluation of Rules 204, 206 and 207.

C. Public Comment and Proposed Action

As authorized by CAA section 110(k)(3) and 301(a), we are proposing approval of Rule 204 (Applications) and Rule 206 (Processing of Applications), and we are proposing limited approval of Rule 207 (New and Modified Stationary Source Review) into the ICAPCD portion of the California SIP. If finalized, this action would incorporate the submitted rules into the SIP, including those provisions identified as deficient. The approval of Rule 207 is limited because EPA is simultaneously proposing a limited disapproval of Rule 207 under section 110(k)(3). If finalized, this disapproval would trigger the two-year clock for the federal

implementation plan (FIP) requirement under section 110(c). In addition, final disapproval would trigger sanctions under CAA section 179 and 40 CFR 52.31 unless the EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of the final action.

We will accept comments from the public on the proposed approvals of Rules 204 and 206 and the proposed limited approval and limited disapproval of Rule 207 for the next 30 days.

In today’s action we are also notifying the public that we intend to make a technical correction to our previous action approving Rule 202—*Exemptions* into the ICAPCD portion of the California SIP.⁴ In that action we stated that approval of Rule 202 into the SIP would supersede and remove Rule 103—*Exemptions*, which EPA has previously approved on May 31, 1972 (37 FR 10832), but we failed to include the necessary regulatory text to effect this change. Our final rulemaking for our action on Rules 204, 206 and 207 will include the necessary regulatory text to remove Rule 103 from the California SIP. We are not seeking public comment on this technical correction because public participation requirements were satisfied as part of our action approving Rule 202 into the SIP.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the ICAPCD rules listed in Table 1 of this notice. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.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

⁴ 76 FR 26615 (May 9, 2011).

submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. 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 beyond those imposed by state law.

D. 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 does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action 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.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks 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 it does not impose additional requirements beyond those imposed by state law.

H. 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.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, New Source Review, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 8, 2016.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2016–30327 Filed 12–16–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2015–0845; FRL–9956–61–Region 5]

Air Plan Approval; Michigan; Part 9 Miscellaneous Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve administrative revisions for incorporation into the Michigan’s State

Implementation Plan (SIP). The submittal, by the Michigan Department of Environmental Quality (MDEQ) on December 21, 2015, makes minor corrections to Michigan’s Air Pollution Control Rules entitled “Emission Limitations and Prohibitions—Miscellaneous.”

DATES: Comments must be received on or before January 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2015–0845 at <http://www.regulations.gov> or via email to blakley.pamela@epa.gov. For comments submitted at [Regulations.gov](http://www.Regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.Regulations.gov). For either manner of submission, 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. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Charles Hatten, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, hatten.charles@epa.gov.

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving Michigan’s SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If EPA does not receive adverse comments in response to this rule, no further activity is contemplated. If EPA receives adverse comments, EPA will withdraw the direct final rule and will

address all public comments received in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, and if that provision can be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: December 2, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

[FR Doc. 2016-30199 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 10 and 11

[PS Docket No. 15-91, PS Docket No. 15-94; Report No. 3061]

Petition for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration.

SUMMARY: A Petition for Reconsideration (Petition) has been filed in the Commission's rulemaking proceeding by Brian M. Josef, on behalf of CTIA.

DATES: Oppositions to the Petition must be filed on or before January 3, 2017. Replies to an opposition must be filed on or before January 13, 2017.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: James Wiley, Public Safety and Homeland Security Bureau, phone: (202) 418-1678; email: *James.Wiley@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3061, released

December 8, 2016. The full text of the Petition is available for viewing and copying at the FCC Reference Information Center, 445 12th Street SW., Room CY-A257, Washington, DC 20554. It also may be accessed online via the Commission's Electronic Comment Filing System at: <https://www.fcc.gov/ecfs/filing/10919110011734/document/10919110011734e7d2>. The Commission will not send a copy of this document pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because this document does not have an impact on any rules of particular applicability.

Subject: Wireless Emergency Alerts; Amendments to part 11 of the Commission's Rules Regarding the Emergency Alert System, FCC 16-127, Report and Order, in PS Docket Nos. 15-91 and 15-94, published at 81 FR 75710, November 1, 2016. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 1.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2016-30168 Filed 12-16-16; 8:45 am]

BILLING CODE 6712-01-P

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

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0095]

Notice of Request for an Extension of Approval of an Information Collection; Interstate Movement of Certain Land Tortoises

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the interstate movement of certain land tortoises.

DATES: We will consider all comments that we receive on or before February 17, 2017.

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

- Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0095>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2016-0095, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0095> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 7997039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the interstate movement of certain land tortoises, contact Dr. Christa Speekmann, Import-Export Specialist-Aquaculture, NIES, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD, 20737; (301) 851-3365. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at 301-851-2483.

SUPPLEMENTARY INFORMATION:

Title: Interstate Movement of Certain Land Tortoises.

OMB Control Number: 0579-0156.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture is authorized, among other things, to prohibit or restrict the interstate movement of animals and animal products to prevent the dissemination within the United States of animal diseases and pests.

APHIS' regulations currently prohibit the importation and restrict the interstate movement of certain land tortoises. The regulations in 9 CFR part 93 prohibit the importation of the leopard tortoise, the African spurred tortoise, and the Bell's hingeback tortoise to prevent the introduction and spread of exotic ticks known to be vectors of heartwater disease, an acute, infectious disease of cattle and other ruminants. The regulations in 9 CFR part 74 prohibit the interstate movement of those tortoises that are already in the United States unless they are accompanied by a health certificate that must be signed by a Federal or accredited veterinarian, and must state that the tortoises have been examined by that veterinarian and found free of ticks. Animal owners may use one of several different types of State health certificates that are issued at the State level. All documents request the same data and can be used and submitted to APHIS. The tortoises are usually moved interstate for sale, health care, adoption, or export to another country.

We are asking OMB to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our

information collection. These comments will help us:

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

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

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

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

Estimate of burden: The public reporting burden for this collection of information is estimated to average 1.5 hours per response.

Respondents: U.S. tortoise breeders, members of tortoise adoption organizations, and Federal or accredited veterinarians.

Estimated annual number of respondents: 50.

Estimated annual number of responses per respondent: 5.

Estimated annual number of responses: 250.

Estimated total annual burden on respondents: 375 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 13th day of December 2016.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016-30458 Filed 12-16-16; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service**

[Docket No. APHIS–2016–0100]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Table Eggs From Regions Where Newcastle Disease Exists and Exportation of Poultry and Hatching Eggs**AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the importation of table eggs from regions where Newcastle disease exists and exportation of poultry and hatching eggs from the United States.

DATES: We will consider all comments that we receive on or before February 17, 2017.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0100>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2016–0100, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0100> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the importation of table eggs and exportation of poultry and hatching eggs, contact Dr. Antonio Ramirez, Senior Staff Veterinary Medical Officer, NIES, APHIS, 4700 River Road, Unit 39, Riverdale MD 20737; (301) 851–3355. For copies of more detailed information

on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Table Eggs From Regions Where Newcastle Disease Exists and Exportation of Poultry and Hatching Eggs.

OMB Control Number: 0579–0328.

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

Abstract: Under the Animal Health Protection Act (the Act, 7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. In addition, under the Act, APHIS collects information and conducts inspections to ensure that poultry and hatching eggs exported from the United States are free of communicable diseases.

In 9 CFR part 94, § 94.6 governs the importation of carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, and other birds to prevent the introduction of Newcastle disease and highly pathogenic avian influenza into the United States. Various conditions for the importation of table eggs from regions where Newcastle disease exists, including Mexico, apply and involve information collection activities, including the issuance of certificates and application of seals by foreign national or accredited veterinarians. APHIS requires certain information for the importation of table eggs that includes a certificate for table eggs from Newcastle disease-affected regions and a government seal issued by the veterinarian accredited by the national government who signed the certificate.

For the export of poultry and hatching eggs from the United States to other countries, receiving countries have specific health requirements. Most importing countries require a certification that our poultry and hatching eggs are free of diseases that are of concern to them. This certification generally must carry a USDA seal and be endorsed by an authorized APHIS veterinarian. In addition, APHIS requires owners and exporters of poultry and hatching eggs

to provide health and identification information, which is supplied by completing a Veterinary Services form entitled "Certificate for Poultry and Hatching Eggs for Export."

This notice includes a description of the information collection requirements currently approved by the Office of Management and Budget (OMB) for the importation of table eggs from regions where Newcastle disease exists under number 0579–0328, and for requirements for poultry and hatching eggs for export, under number 0579–0048. After OMB approves and combines the burden for both collections under one collection (number 0579–0328), the Department will retire number 0579–0048.

We are asking OMB to approve our use of these information collection activities, as described, for an additional 3 years.

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

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

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

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

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

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Respondents: Owners of poultry and hatching egg operations, and exporters of these products, as well as national animal health authorities who will complete the certificate necessary to export table eggs from certain regions that may pose a risk of introducing Newcastle disease to the United States.

Estimated Annual Number of Respondents: 201.

Estimated Annual Number of Responses per Respondent: 34.

Estimated Annual Number of Responses: 6,803.

Estimated Total Annual Burden on Respondents: 3,405 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual

number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 13th day of December 2016.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016-30456 Filed 12-16-16; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Forest Service

Deschutes Provincial Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Deschutes Provincial Advisory Committee (PAC) will meet in Bend, Oregon. The committee is authorized pursuant to the implementation of E-19 of the Record of Decision and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to provide advice and make recommendations to promote a better integration of forest management activities between Federal and non-Federal entities to ensure that such activities are complementary. PAC information can be found at the following Web site: <http://www.fs.usda.gov/detail/deschutes/workingtogether/advisorycommittees>.

DATES: The meeting will be held on January 20, 2017, from 9:00 a.m. to 4:00 p.m.

All PAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

CONTACT:

ADDRESSES: The meeting will be held at the Deschutes National Forest Headquarters Office, 63095 Deschutes Market Road, Bend, Oregon.

Written comments may be submitted as described under *Supplementary Information*. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Deschutes National Forest Headquarters Office. Please call ahead at 541-383-4761 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Beth Peer, Deschutes PAC Coordinator by

phone at 541-383-4761, or via email at bpeer@fs.fed.us.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and

8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

(1) Work on setting goals for committee accomplishments for 2017, particularly in the area of sustainable recreation;

(2) To identify any needs for expanding education on focus topics; and

(3) To address committee rechartering process and membership.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by January 6, 2017, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Beth Peer, Deschutes PAC Coordinator, 63095 Deschutes Market Road, Bend, Oregon, 97701; or by email to bpeer@fs.fed.us, or via facsimile to 541-383-4755.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled *For Further Information Contact*. All reasonable accommodation requests are managed on a case by case basis.

Dated: December 5, 2016.

John Allen,

Forest Supervisor, Deschutes National Forest.

[FR Doc. 2016-30449 Filed 12-16-16; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF AGRICULTURE

Forest Service

Medicine Bow-Routt National Forests and Thunder Basin National Grassland; Wyoming; Thunder Basin National Grassland Prairie Dog Amendment Environmental Impact Statement; Cancellation

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement; cancellation notice

SUMMARY: On September 13, 2013, a Notice of Intent (NOI) to prepare an environmental impact statement (EIS) for the Thunder Basin National Grassland Prairie Dog Amendment on the Medicine Bow-Routt National Forests and Thunder Basin National Grassland was published in the **Federal Register** (78 FR 56650). The Forest Service has decided to cancel the preparation of this EIS. The NOI is hereby rescinded.

FOR FURTHER INFORMATION CONTACT: Shane Walker, District Ranger, Douglas Ranger District, Medicine Bow-Routt National Forests and Thunder Basin National Grassland. Telephone: (307) 358-4690. Email: mwalker@fs.fed.us.

Dated: December 13, 2016.

Dennis L. Jaeger,

Forest Supervisor.

[FR Doc. 2016-30440 Filed 12-16-16; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Current Population Surveys (CPS) Housing Vacancy Survey (HVS)

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written comments must be submitted on or before February 17, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at jjessup@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Kyra Linse, U.S. Census Bureau, 7H045, Washington, DC 20233-8400 at (301) 763-9280.

SUPPLEMENTARY INFORMATION:**I. Abstract**

The Census Bureau plans to request clearance for the collection of data concerning the Housing Vacancy Survey (HVS). The current clearance expires August 31, 2017.

Collection of the HVS in conjunction with the Current Population Survey began in 1956, and serves a broad array of data users. We conduct the HVS interviews with landlords or other knowledgeable people concerning vacant housing units identified in the monthly CPS sample and meeting certain criteria. The HVS provides the only quarterly statistics on rental vacancy rates and homeownership rates for the United States, the four census regions, the 50 states and the District of Columbia, and the 75 largest metropolitan areas (MAs). Private and public sector organizations use these rates extensively to gauge and analyze the housing market with regard to supply, cost, and affordability at various points in time.

In addition, the rental vacancy rate is a component of the index of leading economic indicators published by the Department of Commerce.

Policy analysts, program managers, budget analysts, and congressional staff use these data to advise the executive and legislative branches of government with respect to the number and characteristics of units available for occupancy and the suitability of housing initiatives. Several other government agencies use these data on a continuing basis in calculating consumer expenditures for housing as a component of the gross national product; to project mortgage demands; and to measure the adequacy of the supply of rental and homeowner units. In addition, investment firms use the HVS data to analyze market trends and for economic forecasting.

II. Method of Collection

Field representatives collect this HVS information by personal-visit interviews in conjunction with the regular monthly CPS interviewing. We collect HVS data concerning units that are vacant and intended for year-round occupancy as determined during the CPS interview. Approximately 9,000 units in the CPS sample meet these criteria each month. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Control Number: 0607-0179.

Form Number: HVS-600 (Fact Sheet for the Housing Vacancy Survey).

Type of Review: Regular submission.

Affected Public: Individuals who have knowledge of the vacant sample unit (e.g., landlord, rental agents, neighbors).

Estimated Number of Respondents: 9,000 per month.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 5400 hours.

Estimated Total Annual Cost: There is no cost to the respondents other than their time.

Respondents Obligation: Voluntary.

Legal Authority: Title 13, U.S.C., Section 182 and Title 29, U.S.C., Sections 1-9.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016-30461 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A-533-824]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2014-2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 3, 2016, the Department of Commerce (the Department) published the preliminary results of the 2014-2015 administrative review of the antidumping duty (AD) order on polyethylene terephthalate film, sheet, and strip (PET Film) from

India. The period of review (POR) is July 1, 2014, through June 30, 2015. Based on comments received from interested parties, we have made changes to the preliminary results. For the final results of this review, we find that neither Jindal Poly Films Limited (Jindal) nor SRF Limited (SRF) made sales of subject merchandise at less than normal value.

DATES: Effective December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Jacqueline Arrowsmith, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-5255.

SUPPLEMENTARY INFORMATION:**Background**

On August 2, 2016, the Department of Commerce (the Department) published the *Preliminary Results*.¹ For events that have occurred since the *Preliminary Results*, see the Issues and Decision Memorandum.² 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>, and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at <http://trade.gov/login.aspx>. The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Scope of the Order

The products covered by the order are all gauges of raw, pretreated, or primed PET Film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 50684 (August 2, 2016) (*Preliminary Results*).

² See Department Memorandum, "Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film from India; 2014-2015 Administrative Review" (Issues and Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

inches thick. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in the case brief and rebuttal briefs are addressed in the Issues and Decision Memorandum, which is attached to this notice as an Appendix.

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties regarding our *Preliminary Results*, we made changes to SRF's and Jindal's margin calculations.³ The margins for both SRF and Jindal are now zero. In addition, we adjusted Jindal's reported U.S. prices to account for changes in its export subsidies in the final results of the companion countervailing duty administrative review.⁴ Additionally, for companies not selected for individual review, we have assigned a zero rate in the final results of this review, in accordance with section 735(c)(5) of the Tariff Act of 1930, as amended (the Act).

Final Results of Review

As a result of our review, we determine the following weighted-average dumping margins exist for the period July 1, 2014, through June 30, 2015.

Producer or Exporter	Weighted-average dumping margin (percent)
Jindal Poly Films Limited ⁵ ...	0.00
SRF Limited	0.00
Garware Polyester Ltd	0.00
Vacmet India	0.00

³ See Memoranda to Thomas Gilgunn, Program Manager "Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Jindal Poly Films Limited, and "Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: SRF Limited," both dated concurrently with these final results.

⁴ See *Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review*; 2014, 81 FR 51186 (August 3, 2016).

⁵ The Initiation Notice lists the company as Jindal Poly Films Limited of India. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 FR 53106 (September 2, 2015).

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days after the public announcement of the final results, in accordance with section 735(a) of the Act, and 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), the Department 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. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Because we have calculated zero margins in the final results of this review for both mandatory respondents during this POR, in accordance with 19 CFR 351.212 we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries produced and/or exported by Garware, Jindal, SRF, or Vacmet during the POR.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of PET Film from India entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies under review will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period for that company; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established in the completed segment for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any other completed segment of this proceeding, then the cash deposit rate will be the all others rate for this proceeding, 5.71 percent. These 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 prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notifications to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

The Department is issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221.

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

APPENDIX

- I. Summary
- II. Background
 - Scope of the Order
- III. Discussion of the Issues
 - Comment 1: Issues Requiring Revision to SRF's Program
 - Comment 2: Whether the Department Should Include Sample Sales in the Margin Calculation for the Final Results
 - Comment 3: Issue Requiring Revision Jindal's Program

[FR Doc. 2016-30425 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-849]

Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2014-2015 Antidumping Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the "Department") has conducted an

administrative review of the antidumping duty order on certain cut-to-length carbon steel plate (“CTL plate”) from the People’s Republic of China (“PRC”), covering the period November 1, 2014, through October 31, 2015.

DATES: Effective December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Jonathan Hill, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3518.

Background

On August 12, 2016, the Department of Commerce (“Department”) published its *Preliminary Results* of the review of the antidumping duty order on CTL plate from the PRC for Hunan Valin Xiangtan Iron and Steel Co., Ltd. (“Hunan Valin”) and Wuyang Iron & Steel Co., Ltd. (“Wuyang Steel”).¹ Although invited to do so, interested parties did not comment on our *Preliminary Results*. Thus, we have adopted the *Preliminary Results* as the final results.

Scope of the Order

The product covered by the order is certain cut-to-length carbon steel plate from the PRC. Included in this description is hot-rolled iron and non-alloy steel universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters (“mm”) but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns of relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain iron and non-alloy steel flat-rolled products not in coils, of rectangular shape, hot-rolled, neither clad, plated nor coated with metal, whether or not painted, varnished, or covered with plastics or other nonmetallic substances, 4.75 mm or more in thickness and of a width which exceeds 150mm and measures at least twice the thickness. Included as subject merchandise in this order are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been “worked

after rolling”)—for example, products which have been beveled or rounded at the edges. This merchandise is currently classified in the Harmonized Tariff Schedule of the United States (“HTSUS”) under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7212.40.5000, and 7212.50.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive. Specifically excluded from subject merchandise within the scope of the order is grade X–70 steel plate.

Analysis

In the *Preliminary Results*, the Department determined that Hunan Valin was not eligible for separate rate status and was considered part of the PRC-wide entity, and that Wuyang Steel did not have reviewable transactions during the POR.² No parties commented on the *Preliminary Results*. For these final results of review, we have continued to treat Hunan Valin as part of the PRC-wide entity, and continued to find that Wuyang Steel did not have reviewable transactions during the POR. We are adopting the Preliminary Decision Memorandum for these final results of review.³ The Preliminary 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> and in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at <http://enforcement.trade.gov/frn/index.html>. The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Assessment Rates

Upon issuance of the final results, the Department will determine, and U.S.

² See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance “Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China,” dated August 5, 2016 (“Preliminary Decision Memorandum”) at 4–5.

³ See Preliminary Decision Memorandum.

Customs and Border Protection (“CBP”) shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. The Department intends to instruct CBP to liquidate any entries of subject merchandise exported by Hunan Valin at 128.59 percent (the PRC-wide rate).

Additionally, pursuant to the Department’s practice in non-market economy cases, given that we have continued to find that Wuyang Steel had no shipments of subject merchandise during the POR, any suspended entries of subject merchandise exported by Wuyang Steel will be liquidated at the PRC-wide rate.⁴

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review 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 review, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the “Act”): (1) For previously investigated or reviewed PRC and non-PRC exporters, which are not under review in this segment of the proceeding, but which have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (2) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including Hunan Valin, the cash deposit rate will be the PRC-wide rate of 128.59 percent; and (3) for all non-PRC exporters of subject merchandise, which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification of Interested Parties

This notice also 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 prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary’s presumption that reimbursement of the antidumping

⁴ For a full discussion of this practice, see *NME AD Assessment*, 76 FR 65694 (October 24, 2011).

¹ See *Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China: Preliminary Results of Antidumping Administrative Review, and Preliminary Determination of No Shipments, in Part, and Partial Rescission; 2014–2015*, 81 FR 53412 (August 12, 2016) (“*Preliminary Results*”).

duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (“APOs”) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This notice of the final results of this antidumping duty administrative review is issued and published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213 and 19 CFR 351.221(b)(5).

Dated: December 7, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016-30427 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-523-812, A-535-903, A-520-807]

Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (the Department) and the International Trade Commission (the ITC), the Department is issuing antidumping duty orders on circular welded carbon-quality steel pipe from the Sultanate of Oman (Oman), Pakistan, and the United Arab Emirates (UAE). In addition, as explained in this notice, the Department is amending its final affirmative determination with respect to Oman as a result of a ministerial error.

DATES: Effective December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Kate Johnson at (202) 482-4949 (Oman), David Lindgren at (202) 482-3870 (Pakistan), or Blaine Wiltse at (202) 482-6345 (UAE), AD/CVD Operations,

Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), on October 28, 2016, the Department published its affirmative final determinations in the less-than-fair-value (LTFV) investigations of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE.¹ On December 12, 2016, the ITC notified the Department of its affirmative determinations that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act, by reason of the LTFV imports of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE.²

Scope of the Orders

The merchandise covered by these orders is welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube, sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term “carbon quality” includes products in which:

- (a) iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
 - (i) 1.80 percent of manganese;

¹ See *Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 81 FR 75026 (October 28, 2016) (*Oman Final Determination*); *Circular Welded Carbon-Quality Steel Pipe From Pakistan: Final Determination of Sales at Less Than Fair Value*, 81 FR 75028 (October 28, 2016); and *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 81 FR 75030 (October 28, 2016).

² See ITC Notification Letter to the Deputy Assistant Secretary for Enforcement and Compliance, referencing ITC Investigation Nos. 701-TA-549 and 731-TA-1229, 1300, 1302, and 1303 (December 12, 2016) (ITC Notification).

- (ii) 2.25 percent of silicon;
- (iii) 1.00 percent of copper;
- (iv) 0.50 percent of aluminum;
- (v) 1.25 percent of molybdenum;
- (vi) 0.30 percent of cobalt;
- (vii) 0.40 percent of lead;
- (viii) 1.25 percent of nickel;
- (ix) 0.30 percent of tungsten;
- (x) 0.15 percent of molybdenum;
- (xi) 0.10 percent of niobium;
- (xii) 0.41 percent of titanium;
- (xiii) 0.15 percent of vanadium; or
- (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of these investigations. In particular, such multi-stenciled merchandise is covered when it meets the physical description set forth above, and also has one or more of the following characteristics: is 32 feet in length or less; Is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications. Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.315	0.035	20
1.315	0.047	18
1.315	0.055	17
1.315	0.065	16
1.315	0.072	15
1.315	0.083	14
1.315	0.095	13

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.660	0.055	17
1.660	0.065	16
1.660	0.083	14
1.660	0.095	13
1.660	0.109	12
1.900	0.047	18
1.900	0.055	17
1.900	0.065	16
1.900	0.072	15
1.900	0.095	13
1.900	0.109	12
2.375	0.047	18
2.375	0.055	17
2.375	0.065	16
2.375	0.072	15
2.375	0.095	13
2.375	0.109	12
2.375	0.120	11
2.875	0.109	12
2.875	0.165	8
3.500	0.109	12
3.500	0.165	8
4.000	0.148	9
4.000	0.165	8
4.500	0.203	7

The scope of these orders does not include:

(a) pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;

(b) finished electrical conduit, *i.e.*, Electrical Rigid Steel Conduit (also known as Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1–2005, ANSI C80.3–2005, or ANSI C80.6–2005, and Underwriters Laboratories Inc. (UL) UL–6, UL–797, or UL–1242;

(c) finished scaffolding, *i.e.*, component parts of final, finished scaffolding that enter the United States unassembled as a “kit.” A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;

(d) tube and pipe hollows for redrawing;

(e) oil country tubular goods produced to API specifications;

(f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and

(g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to these orders are currently classifiable in Harmonized

Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the orders is dispositive.

Amendment to Oman Final Determination

By statute, the term ministerial error includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the Secretary considers ministerial.³

Pursuant to section 735(e) of the Act and 19 CFR 351.224 (e) and (f), the Department is amending the *Oman Final Determination* to reflect the correction of a ministerial error it made in calculating the final margin assigned to Al Jazeera Steel Products Co. SAOG (Al Jazeera). In addition, because the Oman all-others rate is based solely on Al Jazeera’s dumping margin, we are revising the all-others rate.⁴

Al Jazeera reported its cost of production (COP) data on a different weight basis than its sales data.⁵ In the final determination, we revised Al Jazeera’s COP data, consistent with the sales data.⁶ On November 1, 2016, the petitioners⁷ submitted a ministerial error allegation claiming that, in implementing this change, the Department recalculated the total cost of manufacturing of each control number, but neglected to make the same adjustment to the fixed overhead field. We reviewed the record, and agree that we made a ministerial error within the meaning of section 735(e) and 19 CFR 351.224(f). Specifically, we made an unintentional error with regard to the calculation of Al Jazeera’s per-unit costs.⁸ Pursuant to 351.224(e), we have corrected this error in this notice.

³ See section 735(e) of the Act.

⁴ See the “Estimated Weighted-Average Dumping Margins” section below.

⁵ See the *Oman Final Determination* and accompanying Issues and Decision Memorandum at Comment 4.

⁶ *Id.*

⁷ The petitioners are Bull Moose Tube Company, EXLTUBE, Wheatland Tube Company, and Western Tube and Conduit (collectively, the petitioners).

⁸ See Memorandum to Christian Marsh, Deputy Assistant Secretary, AD/CVD Operations, entitled

Antidumping Duty Orders

As stated above, on December 12, 2016, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determinations in these investigations, in which it found material injury with respect to circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE.⁹ Therefore, in accordance with section 735(c)(2) of the Act, we are issuing these antidumping duty orders. Because the ITC determined that imports of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE are materially injuring a U.S. industry, unliquidated entries of such merchandise from Oman, Pakistan, and the UAE entered or withdrawn from warehouse for consumption, are subject to the assessment of antidumping duties.

Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise, for all relevant entries of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE. Antidumping duties will be assessed on unliquidated entries of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE entered, or withdrawn from warehouse, for consumption on or after June 8, 2016, the date of publication of the preliminary determinations.¹⁰

Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct CBP to continue to suspend liquidation on all relevant entries of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE. These

“Allegation of a Ministerial Error in the Final Determination,” dated November 18, 2016.

⁹ See ITC Notification.

¹⁰ See *Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36871 (June 8, 2016) (*Oman Preliminary Determination*); *Circular Welded Carbon-Quality Steel Pipe from Pakistan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 81 FR 36867 (June 8, 2016) (*Pakistan Preliminary Determination*); and *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36881 (June 8, 2016) (*UAE Final Determination*).

instructions suspending liquidation will remain in effect until further notice.

We will also instruct CBP to require cash deposits equal to the amounts as indicated below. Accordingly, effective on the date of publication of the ITC's final affirmative injury determinations, CBP will require, at the same time as importers would normally deposit estimated duties on this subject merchandise, a cash deposit equal to the estimated weighted-average dumping margins listed below.¹¹ The relevant all-others rates apply to all producers or exporters not specifically listed.

Provisional Measures

Section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months, except where exporters representing a significant proportion of

exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of exporters that account for a significant proportion of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE, we extended the four-month period to six months in each case.¹² In the underlying investigations, the Department published the preliminary determinations on June 8, 2016. Therefore, the extended period, beginning on the date of publication of the preliminary determinations, ended December 5, 2016. Furthermore, section 737(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Therefore, in accordance with section 733(d) of the Act and our practice, we

will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE entered, or withdrawn from warehouse, for consumption on or after December 5, 2016, the date on which the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determinations in the **Federal Register**. Suspension of liquidation will resume on the date of publication of the ITC's final determinations in the **Federal Register**.

Estimated Weighted-Average Dumping Margins

The weighted-average dumping margins percentages are as follows:

	Exporter/producer	Dumping margins (percent)
Oman	Al Jazeera Steel Products Co. SAOG	7.36
	All Others	7.36
	Exporter/producer	Dumping margins (percent)
Pakistan	International Industries Limited	11.80
	All Others	11.80
	Exporter/producer	Dumping margins (percent)
United Arab Emirates	Ajmal Steel Tubes & Pipes Ind. L.L.C	6.43
	Universal Tube and Plastic Industries, LLC—Jebel Ali Branch/Universal Tube and Pipe Industries, Ltd./KHK Scaffolding and Framework LLC.	5.58
	All Others	5.95

This notice constitutes the antidumping duty orders with respect to circular welded carbon-quality steel pipe from Oman, Pakistan, and the UAE pursuant to section 736(a) of the Act. Interested parties can find a list of antidumping duty orders currently in effect at <http://enforcement.trade.gov/stats/iastats1.html>.

These orders are published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: December 13, 2016.

Paul Piquado,

Assistant Secretary, for Enforcement and Compliance.

[FR Doc. 2016-30535 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Caribbean Basin Economic Recovery Act (CBERA), as Amended by the Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE)

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notification of Annual Quantitative Limit on Imports of Certain Apparel from Haiti.

SUMMARY: CBERA, as amended, provides duty-free treatment for certain apparel articles imported directly from Haiti. One of the preferences is known as the “value-added” provision, which requires that apparel meet a minimum threshold percentage of value added in Haiti, the United States, and/or certain beneficiary countries. The provision is subject to a quantitative limitation, which is calculated as a percentage of total apparel imports into the United States for each 12-month annual period. For the annual period from December 20, 2016 through December 19, 2017, the quantity of imports eligible for preferential treatment under the value-

¹¹ See section 736(a)(3) of the Act.

¹² See *Oman Preliminary Determination; Pakistan Preliminary Determination; and UAE Preliminary Determination.*

added provision is 337,117,964 square meters equivalent.

DATES: *Effective Date:* December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Maria Goodman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3651.

SUPPLEMENTARY INFORMATION:

Authority: Section 213A of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703a) (“CBERA”), as amended by the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (“HOPE”) (Title V of the Tax Relief and Health Care Act of 2006), the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (“HOPE II”) (Subtitle D of Title XV of the Food, Conservation, and Energy Act of 2008), the Haiti Economic Lift Program Act of 2010 (“HELP”), and the Trade Preferences Extension Act of 2015; and as implemented by Presidential Proc. No. 8114, 72 FR 13655 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

Background: Section 213A(b)(1)(B) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(B)), outlines the requirements for certain apparel articles imported directly from Haiti to qualify for duty-free treatment under a “value-added” provision. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to CBERA, as amended, the applicable percentage for the period December 20, 2016 through December 19, 2017, is 55 percent.

For every twelve month period following the effective date of CBERA, as amended, duty-free treatment under the value-added provision is subject to a quantitative limitation. CBERA, as amended provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A (b)(1)(C) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(C)), requires that, for the twelve-month period beginning

on December 20, 2016, the quantitative limitation for qualifying apparel imported from Haiti under the value-added provision will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (“ATC”), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2016 is the 12-month period ending on October 31, 2016.

Therefore, for the one-year period beginning on December 20, 2016 and extending through December 19, 2017, the quantity of imports eligible for preferential treatment under the value-added provision is 337,117,964 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

Dated: December 13, 2016.

Felicia Pullam,

Deputy Assistant Secretary for Textiles, Consumer Goods and Materials.

[FR Doc. 2016-30383 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 3, 2016, the Department of Commerce (the “Department”) published its notice of initiation and preliminary results of a changed circumstances review of the antidumping duty (“AD”) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”), from the People’s Republic of China (“PRC”) (*Preliminary Results*). The Department preliminarily determined that Zhejiang ERA Solar

Technology Co., Ltd. (“Zhejiang ERA”) is the successor-in-interest to Era Solar Co., Ltd. (“Era Solar”) for purposes of the AD order on solar cells from the PRC and, as such, is entitled to Era Solar’s antidumping duty cash deposit rate with respect to entries of subject merchandise. We invited interested parties to comment on the *Preliminary Results*. As no parties submitted comments, and there is no other information or evidence on the record calling into question our *Preliminary Results*, the Department is making no changes to the *Preliminary Results*. For these final results, the Department continues to find that Zhejiang ERA is the successor-in-interest to Era Solar.

DATES: Effective December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, 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) 482-2769.

SUPPLEMENTARY INFORMATION:

Background

On December 7, 2012, the Department published the AD Order on solar cells from the PRC in the **Federal Register**.¹ On August 31, 2016, Zhejiang ERA requested that the Department initiate an expedited changed circumstances review to determine it as the successor-in-interest to Era Solar for AD purposes.² On November 3, 2016, the Department initiated a changed circumstances review and made a preliminary finding that Zhejiang ERA is the successor-in-interest to Era Solar, and is entitled to Era Solar’s cash deposit rate with respect to entries of merchandise subject to the AD Order on solar cells from the PRC.³ We provided interested parties 14 days from the date of publication of the *Preliminary Results* to submit case briefs. No interested parties submitted case briefs or requested a hearing.

¹ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 77 FR 73018 (December 7, 2012) (“Order”).

² See Letter from Zhejiang ERA to the Department regarding, “Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People’s Republic of China: Request for Expedited Changed Circumstances Review” (August 31, 2016) (“CCR Request”).

³ See *Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules From the People’s Republic of China*, 81 FR 76561 (November 3, 2016) (“*Preliminary Results*”) and accompanying Preliminary Decision Memorandum.

Scope of the Order

The merchandise covered by the Order is crystalline silicon photovoltaic cells, whether or not assembled into modules, subject to certain exceptions.⁴ Merchandise covered by this Order is currently classified in the Harmonized Tariff System of the United States (“HTSUS”) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. While these HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this Order is dispositive.

Final Results of Changed Circumstances Review

Because the record contains no information or evidence that calls into question the *Preliminary Results*, for the reasons stated in the *Preliminary Results*, the Department continues to find that Zhejiang ERA is the successor-in-interest to Era Solar, and is entitled to Era Solar’s cash deposit rate with respect to entries of merchandise subject to the AD Order on solar cells from the PRC.⁵

Instructions to U.S. Customs and Border Protection

Based on these final results, we will instruct U.S. Customs and Border Protection to collect estimated antidumping duties for all shipments of subject merchandise exported by Zhejiang ERA and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at the current AD cash deposit rate for Era Solar (*i.e.*, 8.52 percent).⁶ This cash deposit requirement shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a final 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). Timely written notification of the return/destruction of APO materials or

conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this final results notice in accordance with sections 751(b) and 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.216 and 351.221(c)(3).

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–30426 Filed 12–16–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Conference on Weights and Measures Interim Meeting

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The Interim Meeting of the National Conference on Weights and Measures (NCWM) will be held in San Antonio, Texas, from Sunday, January 8, 2017, through Wednesday, January 11, 2017. This notice contains information about significant items on the NCWM Committee agendas but does not include all agenda items. As a result, the items are not consecutively numbered.

DATES: The meeting will be held from Sunday, January 8, 2017, through Wednesday, January 11, 2017, Sunday through Tuesday from 8:00 a.m. to 5:00 p.m. Central Time, and on Wednesday, from 9:00 a.m. to 12:00 p.m. Central Time. The meeting schedule is available at www.ncwm.net.

ADDRESSES: This meeting will be held at the Hyatt Regency San Antonio, 123 Losoya Street, San Antonio, Texas 78205.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Butcher, NIST, Office of Weights and Measures, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600. You may also contact Mr. Butcher at (301) 975–4859 or by email at kenneth.butcher@nist.gov. The meeting is open to the public, but a paid registration is required. Please see the NCWM Web site (www.ncwm.net) to view the meeting agendas, registration forms, and hotel reservation information.

SUPPLEMENTARY INFORMATION: Publication of this notice on the NCWM’s behalf is undertaken as a public service; NIST does not endorse,

approve, or recommend any of the proposals or other information contained in this notice or in the publications produced by the NCWM.

The NCWM is an organization of weights and measures officials of the states, counties, and cities of the United States, federal agencies, and representatives from the private sector. These meetings bring together government officials and representatives of business, industry, trade associations, and consumer organizations on subjects related to the field of weights and measures technology, administration, and enforcement. NIST participates to encourage cooperation between federal agencies and the states in the development of legal metrology requirements. NIST also promotes uniformity among the states in laws, regulations, methods, and testing equipment that comprise the regulatory control of commercial weighing and measuring devices, packaged goods, and other trade and commerce issues.

The following are brief descriptions of some of the significant agenda items that will be considered at the NCWM Interim Meeting. Comments will be taken on these and other issues during several public comment sessions. At this stage, the items are proposals. This meeting also includes work sessions in which the Committees may also accept comments, and where recommendations will be developed for consideration and possible adoption at the NCWM 2017 Annual Meeting. The Committees may withdraw or carryover items that need additional development.

Some of the items listed below provide notice of projects under development by groups working to develop specifications, tolerances, and other requirements for devices such as those used in weigh-in-motion systems for vehicle enforcement screening. These notices are intended to make interested parties aware of these development projects and to make them aware that reports on the status of the project will be given at the Interim Meeting. The notices are also presented to invite the participation of manufacturers, experts, consumers, users, and others who may be interested in these efforts.

The Specifications and Tolerances Committee (S&T Committee) will consider proposed amendments to NIST Handbook 44, “Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices.” Those items address weighing and measuring devices used in commercial applications, that is, devices that are used to buy from or sell to the public

⁴ For a complete description of the scope of the Order, see Preliminary Decision Memorandum.

⁵ For a complete discussion of the Department’s findings, which remain unchanged in these final results and which are herein incorporated by reference and adopted by this notice, see generally the Preliminary Decision Memorandum accompanying the *Preliminary Results*.

⁶ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013–2014*, 81 FR 39905 (June 20, 2016).

or used for determining the quantity of products or services sold among businesses. Issues on the agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST Handbook 130, "Uniform Laws and Regulations in the area of Legal Metrology and Engine Fuel Quality" and NIST Handbook 133, "Checking the Net Contents of Packaged Goods."

NCWM S&T Committee

The following items are proposals to amend NIST Handbook 44:

General Code

Item 3100–2 G–UR.3.3. Position of Equipment

A weighing and measuring device or system equipped with a primary indicating element and used in a direct sale application must be positioned that its indication can be accurately read and the weighing or measuring operation observed from some reasonable customer and operator position. That is, both the customer and user must be able to observe the operation of the equipment and be provided a view of the indication from some reasonable position. The existing paragraph provides officials the discretion necessary to determine on a case by case basis whether or not these conditions are satisfied. The proposed changes, if adopted, would require officials to base their determination solely on customer readability and ease of being able to conduct a performance test on the equipment. Additionally, in the case of vehicle scales, the changes proposed require that a driver of a vehicle being weighed be able to observe the weight indication from inside the cab of the vehicle. If adopted, this would retroactively require a display on some vehicle scale systems, including mechanical types with beam or dial indication.

Scales

Item 3200–2 S.1.2.2. Verification Scale Interval

Class I and II scales and dynamic monorail scales, any of which that are provided with a scale division value (d) that differs from the verification scale interval (e) must currently comply with the expression: $d < e \leq 10 d$

The S&T Committee will consider a proposal that adds a new subparagraph beneath the Section heading S.1.2.2. Verification Scale Interval which would require the value of "e" to be less than or equal to "d" on Class I and II scales used in a direct sale application (*i.e.*, an application in which both parties, for

example, buyer and seller, are present when the quantity is determined). The new subparagraph being proposed is nonretroactive with no enforcement date yet specified, making evident the submitter's intention that it not apply to equipment already in commercial service.

Item 3200–3 S.1.8.5. Recorded Representations, Point-of-Sale Systems and S.1.9.3. Recorded Representations, Random Weight Packages Labels

The S&T Committee will consider a proposal requiring additional sales information be recorded by cash registers interfaced with a weighing element for items that are weighed at a checkout stand. These systems are currently required to record the net weight, unit price, total price, and the product class or, in a system equipped with price look-up capability, the product name or code number. The change proposed adds "gross weight or tare weight" to the list of sales information already required.

Additionally, the proposal adds a new paragraph requiring a prepackaging scale or device that produces a label for a random weight package to generate labels that contain this same sales information.

Weigh-In-Motion Systems Used for Vehicle Enforcement Screening

Item 3205–1 A. Application and Sections Throughout the Code to Address Commercial and Law Enforcement Applications

In February 2016, the NCWM formed a new task group (TG) to consider a proposal to expand the NIST Handbook 44, Weigh-In-Motion (WIM) Systems Used for Vehicle Enforcement Screening—Tentative Code to also apply to legal-for-trade (commercial) and law enforcement applications. The TG is made up of representatives of WIM equipment manufacturers; the U.S. Department of Transportation Federal Highway Administration; truck weight enforcement agencies; state weights and measures agencies; and others. Mr. Alan Walker (State of Florida) serves as Chair of the TG.

Members of the TG met face to face for the first time at the NCWM Annual Meeting in July 2016. It was agreed at that meeting to eliminate from the proposal any mention of a law enforcement application and focus solely on WIM systems intended for use in commercial applications. The main focus of the TG since the July 2016 meeting has been to concentrate on the development of test procedures that can be used to verify the accuracy of a slow-

speed WIM system while taking into consideration the different axle and tandem axle configurations of the vehicles that will typically be weighed by the system.

Liquefied Petroleum Gas and Anhydrous Ammonia Liquid-Measuring Devices

Item 3302–1 N.3. Test Drafts

The S&T Committee will continue to hear updates on the progress of a "Developing" item on its agenda (carried over from its 2016 agenda) that would propose recognizing the use of calibrated transfer standards (also called "master meters") in the verification and calibration of Liquefied Petroleum Gas and Anhydrous Ammonia Liquid-Measuring Devices. Currently, most official tests of these devices are conducted using volumetric test measures or using gravimetric testing. The proposal outlined in this item includes requirements for a minimum test draft and would recognize the use of "master meters" in both service-related and official testing. This item is also intended to explore the possibility of expanding the use of transfer standards to other types of measuring devices, including those used to measure petroleum at terminals and retail outlets, and to meters used to deliver home heating fuel and other products.

Mass Flow Meters

Item 3307–2 N.3. Test Drafts

The S&T Committee will continue to hear updates on the progress of a "Developing" item on its agenda (also carried over from its 2016 agenda) that would propose recognizing the use of calibrated transfer standards (also called "master meters") in the verification and calibration of Mass Flow Meters. Currently, most official tests of these devices are conducted using gravimetric test procedures. The proposal outlined in this item includes requirements for a minimum test draft, and would recognize the use of "master meters" in both service-related and official testing.

Taximeters

Item 3504–1 A.2. Exemptions;

Item 3504–2 U.S. National Work Group (USNWG) on Taximeters—Taximeter Code Revisions and Global Positioning System (GPS)-Based Systems for Time and Distance Measurement; and

Item 3600–6 5.XX. Transportation Network Systems—Tentative Code and Appendix D. Definitions

For several years, the NIST USNWG on Taximeters has discussed possible

approaches for amending the NIST Handbook 44, Taximeters Code to specifically recognize GPS-based time and distance measuring systems that are used to assess charges for transportation services such as those provided by taxicabs and limousines. Appropriate specifications, tolerances, and other technical requirements for these devices must be developed for manufacturers and users of these devices, as well for weights and measures officials. Such requirements help ensure accuracy and transparency for customers and a level playing field for transportation service companies, enabling consumers to make value comparisons between competing services. In 2016, the USNWG on Taximeters submitted a proposal through multiple regional weights and measures associations to establish a separate NIST Handbook 44 code to address "Transportation Network Measurement Systems (TNMS)." Changes to the current NIST Handbook 44, Taximeters Code are also needed to recognize taximeters that are now being designed to operate using similar features and functionality as TNMS; these changes have been proposed in a separate item. The S&T Committee will examine these proposals to assess how to best address these systems.

NCWM L&R Committee

The following items are proposals to amend NIST Handbook 130 or NIST Handbook 133:

NIST Handbook 130—Section on Uniform Regulation for the Method of Sale of Commodities:

Item 2302-6 Section 2.17. Precious Metals

The L&R Committee will consider a proposal to recommend adoption of a uniform method of sale for precious metals that will enhance the ability of consumers to whether they are getting a fair price for their precious metals. This proposal will allow a consumer to make an informed decision in doing an equitable trade or purchase and also make value comparisons. This proposal is not for precious metals traded on the commodity market. If adopted, the proposal will require sellers to prominently display conversion factors and the unit price they will pay for items containing various amounts of precious metals.

NIST Handbook 133—"Checking the Net Contents of Packaged Goods:"

Item 2600-4 Section 4.5. Polyethylene Sheeting

The current test procedure in NIST Handbook 133, Section 4. Polyethylene

Sheeting has provided a test procedure for only polyethylene sheeting and some bag type products. The L&R Committee will consider a proposal to expand the requirements to also include polyethylene bags (e.g., t-shirt bags that retail stores put consumer goods in for carry-out) and can liners. If adopted, this proposal would clarify the test procedure and improve the accuracy of length determinations when determining test measurements for bags and liners, including bags with a cut out (t-shirt bags).

Authority: 15 U.S.C. 272(b).

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2016-30436 Filed 12-16-16; 8:45 am]

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: [161207999-6999-01]

Announcement of Requirements and Registration for National Institute of Standards and Technology Prize Competition—Reusable Abstractions of Manufacturing Processes (RAMP) Challenge

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: In March 2016, National Institute of Standards and Technology (NIST) and ASTM International announced a new international standard that can "map" the critically important environmental aspects of manufacturing processes, leading to significant improvements in sustainability while keeping a product's life cycle low cost and efficient. Sustainability for manufacturing is beginning to be addressed through the recently approved ASTM Standard Guide for Characterizing Environmental Aspects of Manufacturing Processes (ASTM E60.13 E3012-16). The standard provides a science-based, systematic approach to capture and describe information about the environmental aspects for any manufacturing production process or group of processes, and then use that data to make informed decisions on improvements.

NIST is announcing the Reusable Abstractions of Manufacturing Processes (RAMP) Challenge, with support from ASTM International, the National Science Foundation (NSF), and the American Society of Mechanical

Engineers (ASME) Manufacturing Science and Engineering Conference (MSEC) Organizing Committee, to familiarize the community with a recent standard for modeling manufacturing processes that was developed under the ASTM's E60.13 Subcommittee on Sustainable Manufacturing. The RAMP Challenge calls on participants (either as an individual or as a team) to model any manufacturing process and demonstrate application of the ASTM E3012-16 Unit Manufacturing Process (UMP) representation for purposes of information sharing and sustainability assessment. The RAMP Challenge will provide an opportunity for participants to put this standard into practice in modeling a process of their own interest, and to share experiences in applying the standard across a variety of processes. Formal methods for acquiring and exchanging information about manufacturing processes will lead to consistent characterizations and help establish a collection for reuse of these models. Standard methods will ensure effective communication of computational analytics and sharing of sustainability performance data. Results of the competition will assist in demonstrating the use of a reusable standard format leading to models suitable for automated inclusion in a system analysis, such as a system simulation model or an optimization program.

DATES: *Submission Period:* December 19, 2016 to March 20, 2017

Announcement of Finalists: April 17, 2017

Announcement of Winners: June 8, 2017

The Submission Period begins December 19, 2016 at 9:00 a.m. Eastern Time (ET) and ends March 20, 2017, at 5:00 p.m. ET. Prize competition dates are subject to change at the discretion of NIST. Entries submitted before or after the Submission Period will not be reviewed or considered for award.

ADDRESSES: Changes or updates to the prize competition rules will be posted and can be viewed at the Event Web site: <https://www.challenge.gov/challenge/ramp-reusable-abstractions-of-manufacturing-processes/>

Results of the prize competition will be announced on the Event Web site and on the NIST Web site, www.nist.gov. Additional information is located at: <https://www.nist.gov/el/systems-integration-division/astm-sustainable-manufacturing-standards>.

FOR FURTHER INFORMATION CONTACT: Questions about the prize competition can be directed to NIST via the Event

Web site or by email to Swee Leong, swee.leong@nist.gov.

SUPPLEMENTARY INFORMATION:

RAMP Challenge Sponsor

The National Institute of Standards and Technology (NIST; www.nist.gov) is a non-regulatory Federal agency within the United States Department of Commerce. Founded in 1901, NIST's mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life. NIST carries out its mission through its programs, which include: The NIST Laboratories, conducting world-class research, often in close collaboration with industry, that advances the Nation's technology infrastructure and helps U.S. companies continually improve products and services; the Hollings Manufacturing Extension Partnership (MEP), a nationwide network of local centers offering technical and business assistance to smaller manufacturers to help them create and retain jobs, increase profits, and save time and money; and the Baldrige Performance Excellence Program, which promotes performance excellence among U.S. manufacturers, service companies, educational institutions, health care providers, and nonprofit organizations, conducts outreach programs, and manages the annual Malcolm Baldrige National Quality Award, which recognizes performance excellence and quality achievement.

RAMP Challenge Supporting Organizations

ASTM International is a globally recognized leader in the development and delivery of voluntary consensus standards. Today, over 12,000 ASTM standards are used around the world to improve product quality, enhance health and safety, strengthen market access and trade, and build consumer confidence.

The National Science Foundation is an independent federal agency created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense. . . ." NSF's goals—discovery, learning, research infrastructure and stewardship—provide an integrated strategy to advance the frontiers of knowledge, cultivate a world-class, broadly inclusive science and engineering workforce and expand the scientific literacy of all citizens, build the nation's research capability through

investments in advanced instrumentation and facilities, and support excellence in science and engineering research and education through a capable and responsive organization.

The ASME MSEC is held annually and will take place this year at the University of Southern California, June 4–8, 2017. The conference, sponsored by the Manufacturing Engineering Division (MED) of ASME, provides a forum to highlight and disseminate the most recent and cutting edge manufacturing research through both technical presentations, papers, posters, and panel sessions. The ASME is a not-for-profit membership organization that enables collaboration, knowledge sharing, career enrichment, and skills development across all engineering disciplines, toward a goal of helping the global engineering community develop solutions to benefit lives and livelihoods.

Eligibility Rules for Participating in the RAMP Challenge

At the time of Entry, participants must meet the following Eligibility Rules:

To be eligible for a cash prize, the Official Representative (individual or team lead, in the case of a group project) must be age 18 at the time of entry and a U.S. citizen or permanent resident of the United States. In the case of a private entity, the business shall be incorporated in and maintain a primary place of business in the United States or its territories. Participants may not be a Federal entity or Federal employee acting within the scope of their employment. Eligibility excludes NIST employees and NIST Researcher Associates as well as direct recipients of NIST funding awards to collaborate on the development of the ASTM standard E3012–16. Non-NIST Federal employees acting in their personal capacities should consult with their respective agency ethics officials to determine whether their participation in this Competition is permissible. Employees of the NSF, the ASTM, and the ASME Manufacturing Science and Engineering Conference (MSEC) Conference Organizers are excluded from participating but members of these organizations are eligible to enter. Any other individuals or legal entities involved with the design, production, execution, distribution or evaluation of the RAMP Challenge are not eligible to participate.

To be eligible to win a prize, a Participant (whether an individual or legal entity) must register to participate and must comply with all requirements

under section 3719 of title 15, United States Code ("Prize competitions").

A Participant shall not be deemed ineligible because the Participant consulted with Federal employees or used Federal facilities in preparing its submission to the RAMP Challenge if the employees and facilities are made available to all Participants on an equitable basis. Multiple entries are permitted. Each entry will be reviewed independently. Multiple individuals and/or legal entities may collaborate as a group to submit a single entry, in which case a single individual from the group must be designated as the Official Representative and must satisfy all of the eligibility requirements. That designated individual will be responsible for determining eligibility and for meeting all entry and evaluation requirements. Participation is subject to all U.S. federal, state and local laws and regulations. Individuals entering on behalf of or representing a company, institution or other legal entity are responsible for confirming that their entry does not violate any policies of that company, institution or legal entity.

Entry Process for Participants

As stated earlier, the RAMP Challenge calls on participants to model any manufacturing process for purposes of information sharing and sustainability assessment. The modeled process can be one that the submitter has uniquely studied, or from open literature or other 3rd party sources. Any size scale and manufacturing process type (batch, continuous, and discrete event) is acceptable. Entry processes can span sizes from traditional scale down to nanoscale and be based on mechanical, electrical, chemical, biochemical, and bio technologies. Note that sustainability is a balance of competing objectives, including cost and time as well as environmental considerations, so many different types of process performance metrics may be considered. In addition, the use of the models for system-level sustainability performance is encouraged.

To enter, the participant must create an account at challenge.gov and visit the Event Web site, <https://www.challenge.gov/challenge/ramp-reusable-abstracts-of-manufacturing-processes/>. Each entry must characterize one process yet participants can submit more than one entry. The participant must submit an analysis of a Unit Manufacturing Process that uses the ASTM E60.13 E3012–16 Standard Guide for Characterizing Environmental Aspects of Manufacturing Processes, and that meets the criteria described herein.

A complete Entry must be in pdf format and include your analysis (including any figures, tables, and references), the name and email address of the Participant who is officially representing the Entry, names of any additional team members and a team name (if applicable) that is chosen by the team members, and confirmation that you have read and agree to the Competition Rules contained in this Notice. Participants may provide submissions beginning at 9:00 a.m. ET on December 19, 2016, to the Event Web site. Submissions can be made no later than 5:00 p.m. ET on March 20, 2017, to the Event Web site.

Entries submitted before the start date and time, or after the end date and time, will not be evaluated or considered for award. Entries sent to NIST in any manner other than through the Event Web site will not be evaluated or considered for award. Entries that do not comply with the formatting requirements set forth in this Notice will not be evaluated or considered for award. Entries must be complete, must not contain any confidential information and must be in English.

In general, each Entry must:

(a) affirmatively represent that the Participant (and each Participant if more than one) has read and consents to be governed by the Competition rules and that the Official Representative satisfies all of the eligibility requirements to win a prize under 15 U.S.C. 3719;

(b) include an original model of the manufacturing process by application of ASTM E60.13 E3012–16 Standard Guide for Characterizing Environmental Aspects of Manufacturing Processes. Specifically, the Entry must include:

1. A project title page including project name, the name(s) of Participant(s), and the email address and phone number of the Participant who is officially representing the Entry,

2. a Unit Manufacturing Process (UMP) information model. A UMP is defined as the smallest element or sub-process in manufacturing that adds value through the modification or transformation of shape, structure, or property of input material or workpiece. Examples of a UMP are injection molding, die-casting and machining. A die-casting UMP can have individual operations such as die-preparation, clamping, injection, cooling, and ejection. A machining UMP can have multiple operations such as drilling, milling, or grinding.

3. a written narrative (fewer than 1500 words) describing how the Entry meets the Review Criteria described below in the Review Criteria section, and

4. an optional brief description of relevant case studies (fewer than 750 words) and/or a weblink (YouTube or Vimeo) to an original short (fewer than five minutes) video that describes the Entry. Participants must have permission to use all content in the video, including footage, music and images.

Guidelines for UMP Representation to be Provided in the Entry

Participants should choose any manufacturing process to demonstrate the application of a UMP representation using ASTM E60.13 E3012–16. ASTM is providing access to this standard free of charge for the purpose of the RAMP Challenge. To obtain a copy of the standard for use in the RAMP Challenge, Participants should email a request to Stephen Mawn (smawn@astm.org). The standard is further described in a Journal of Manufacturing Science and Engineering paper titled “Standard representations for sustainability characterization of industrial processes.” The paper may be downloaded from the NIST Web site: <https://www.nist.gov/node/1090636>. Examples of typical representations will be posted at the Event Web site.

For the identified UMP information model described in Section b-2 above, include:

(a) Graphical Representation: The four elements shown in the E3012–16 standard must be clearly identified in the graphical representation:

a. Inputs: Identify inputs. Create an example of inputs represented in a structured form such as JSON or XML.

b. Outputs: Identify outputs. Output must include 1 or more metrics, such as energy, cost, tear and wear, and CO₂ emissions. Create an example of output represented in a structured form such as JSON or XML.

c. Product and Process Information: Identify the necessary product and process information that would be required to instantiate the transformation functions, such as CAD files, CAM files, technical drawings, and specifications sheets.

d. Resources: Identify specific manufacturing assets, such as machines, tools, and operators, that would be required to instantiate the transformation functions.

(b) Transformation Function: Describe a series of equations that compute the output from the input. The transformation function can be expressed in any readable mathematical format, such as using MS Word, LaTeX, ASCII text, or more formally in a language such as JSONiq or Matlab.

(c) Nomenclature: Describe the nomenclature of the inputs/outputs represented in the structured form as well as the computed values in the transformation functions. This should include information such as names of the computed values, its meaning, type of the input variable, and the unit in which the data is represented in the model.

(d) Validation: Explain how the model is validated. An example of validation includes procuring the data (*i.e.*, inputs and outputs) from a physical (or virtual) manufacturing setting and validate this output against the computed output from the transformation function that is run with inputs from the real manufacturing setting. Compute the degree of error between the outputs from the model and the real manufacturing setting. Other approaches may be taken.

(e) Novelty of UMP analysis: The main category is listed in bold type with various examples included for clarity.

a. Advancements to knowledge and understanding of UMP modeling through innovative and expressive representations and methodologies, novel formal representations, more accurate or specialized metric, metric representations that support cascading to higher production levels, or exploration of variations for families of UMP models.

b. Advancements to standards supporting reuse models. This may include automated methods that allow linking of UMP models into systems, facilitating system composition through naming conventions or other methods, generalization that unifies a collection of processes, or standards-based methods for integration with applications.

c. Advancement of techniques for development and validation of UMP models. This may include demonstration of validation techniques for the effectiveness and accuracy of the UMP models or techniques for producing useful derivatives of UMP models or creative methods for mining documentary model descriptions into formal representations.

(f) Information sources: Source of the information used to define the UMP models, such as existing literature, industry case studies, and textbooks.

(g) Multiple files may be submitted, but should be uploaded as a single file submission (.zip or .pdf.) A template formatted to capture entry requirements is provided on the Event Web site for the submission.

RAMP Challenge Award(s)

The Prize Purse for the RAMP Challenge is a total of \$3,250. The Prize Purse may increase, but will not decrease. Any increases in the Prize Purse will be posted on the Event Web site and published in the **Federal Register**. The Prize Purse will be used to fund one or more awards.

NIST will announce via the Event Web site any Entry(ies) the finalists and those entries to which the Judges have made a cash award (each, an "Award"). The anticipated number and amount of the Awards that will be awarded for this Competition is set forth in this **Federal Register** Notice; however, the Judges are not obligated to make all or any Awards, and reserve the right to award fewer than the anticipated number of Awards in the event an insufficient number of eligible Entries meet any one or more of the Judging Criteria for this Competition, based on the Judges' evaluation of the quality of Entries and in their sole discretion. Awards will be made based on the Judges' evaluation of an Entry's compliance with the Judging Criteria for this Competition.

The designated Official Representative of all finalist entries will be notified in an email from NIST to the email address provided in the submission document that they have been selected as a finalist. Finalists will be required to respond affirmatively and complete further documentation within 5 business days that they meet the eligibility criteria set forth in this notice and they (in the case of a team, one designated representative) are able to participate in person at the 2017 ASME International Manufacturing Science and Engineering Conference (MSEC) June 4–8, 2017, at the University of Southern California. Travel supplements to defray costs of travel and conference participation may be made available as needed. Return of any notification as "undeliverable" will result in disqualification. If a finalist indicates they are unable to participate in the conference or does not respond within 5 business days, NIST reserves the right to invite the next highest ranked entrant (who is not already a finalist), as determined by the subject matter experts, to participate as a finalist.

To win an Award, finalists must give a brief in-person presentation to the Judges during the MSEC conference in a special session dedicated to the RAMP Challenge. Winners will be determined by the Judging Panel at the MSEC Conference, and further verified by NIST. The winner verification process with NIST includes providing the full

legal name, tax identification number or social security number, routing number and banking account to which the prize money can be deposited directly. Return of any notification as "undeliverable" will result in disqualification. After verification of eligibility, Awards will be distributed in the form of electronic funds transfer addressed to the Official Representative specified in the winning Entry. That Official Representative will have sole responsibility for further distribution of any Award among Participants in a group Entry or within a company or institution that has submitted an Entry through that representative. Each list of Entries receiving Awards for the Competition will be made public according to the timeline outlined on the Event Web site. Winners are responsible for all taxes and reporting related to any Award received as part of the Competition.

All costs incurred in the preparation of Competition Entries are to be borne by Participants.

Evaluation, Judging, and Selection of Winner(s)*Submission Evaluation Criteria*

This section discusses how Participant submissions will be evaluated.

Entry Submission and Review

The requirements for submission of a complete Entry are detailed in the section "Entry Process for Participants." Each Entry will be reviewed by subject matter experts, who will assess how well the Entry addressed each of the following evaluation criteria. For each Entry, subject matter experts will generate a numerical rating from 0 to 100 based on the five (5) equally weighted review criteria listed below. This rating will be supported by a brief narrative (fewer than 500 words) of the technical merits of the submission in terms of the review criteria. Subject matter experts will provide their individual assessments to the NIST Challenge Manager. The NIST Challenge Manager will identify the top eight submissions ("finalist entries"). The finalist entries and the accompanying subject matter expert evaluations, both the rating and narrative, will be provided to the Judging Panel for their deliberation.

Review Criteria

Subject matter experts will consider five equally weighted review criteria when evaluating submissions:

1. **Completeness:** Submission follows the guidelines and includes all necessary components. All submissions

must describe the approach taken to validate the work and provide both a graphical and formal representation of the UMP information model. An example will be posted on the competition Web site.

2. **Complexity:** Model reflects the complexities of the manufacturing process, especially those which influence sustainability indicators such as energy and material consumption.

3. **Clarity:** Model is clear in describing the process and the process-related information.

4. **Accuracy:** Submission accurately models the process as shown through validation.

5. **Novelty:** Approach taken develops new techniques to advance model reusability or reliability.

Judging Criteria

Eight finalist entries will be evaluated by the Judges in advance of and during the Finalist Presentations to take place at the 2017 ASME International Manufacturing Science and Engineering Conference. NIST reserves the right to name fewer than eight finalists. A panel of three (3) to five (5) judges will then be convened to rank the finalist entries and determine the winners. Judges will review each of the Entries and any corresponding technical assessments provided by subject matter experts. Judges will participate in a session at the 2017 ASME International Manufacturing Science and Engineering Conference where the finalists will give a 10–15 minute in-person presentation describing their submission and how well it meets the judging criteria. Time permitting, this will include a question and answer session after each presentation. Judges will deliberate and then rank the finalist entries using the weighted Judging Criteria (percentage in parentheses):

1. **Complexity:** Model reflects the complexities of the manufacturing process, especially those which influence sustainability indicators such as energy and material consumption. (10%)

2. **Clarity:** Model is clear in describing the process and the process-related information. (10%)

3. **Accuracy:** Submission accurately models the process as shown through validation. (35%)

4. **Novelty:** Approach taken develops new techniques to advance model reusability or reliability. (35%)

5. **Presentation:** Quality and content conveyed in a brief in-person presentation at the 2017 MESC Conference. (10%)

Awards

First, Second, and Third Place Prizes, and up to five runners-up, will be selected by the Judges.

- First Place Prize is \$1,000
- Second Place Prize is \$750
- Third Place Prize is \$500
- Runners Up Prize is \$200

Subject Matter Experts and Judging Panel

Subject Matter Experts, to be selected by the NIST with assistance from Challenge supporters, will, as a body, represent a high degree of experience with manufacturing processes, process modeling, and sustainability assessment of manufacturing processes, and a balance of perspectives from relevant manufacturing sectors. Subject Matter Experts may consist of NIST Federal Employees, NIST Associates, employees of RAMP Challenge supporters, or their representatives. Subject Matter Experts will not select winners of any awards.

The NIST Director will appoint a panel of highly qualified Judges. The Judging Panel will consist of individuals who are experts in the field of sustainability of manufacturing processes. Judges will deliberate and rank finalist entries according to the Judging Criteria described above. The top (up to eight) Entries ranked by the Judges will be selected to receive an Award. Judges may not have personal or financial interests in, or be an employee, officer, director, or agent of, any entity that is a registered Participant in this Competition and may not have a familial or financial relationship with an individual who is a registered Participant. In the event of such a conflict, a Judge must recuse himself or herself. Should this occur, a new Judge may be appointed to the panel.

Intellectual Property Rights

Other than as set forth herein, NIST does not make any claim to ownership of your Entry or any of your intellectual property or third party intellectual property that it may contain. By participating in the Competition, you are not granting any rights in any patents or pending patent applications related to your Entry; provided that by submitting an Entry, you are granting NIST certain limited rights as set forth herein.

By submitting an Entry, you grant to NIST the right to review your Entry as described above in the section "Entry Submission and Review," to describe your Entry in connection with any materials created in connection with the Competition and to have the Subject Matter Experts, Judges, Competition

administrators, and the designees of any of them, review your Entry.

By submitting an Entry, you grant a non-exclusive, irrevocable, paid up right and license to NIST to use your name, likeness, biographical information, image, any other personal data submitted with your Entry and the contents in your Entry, in connection with the RAMP Challenge for any purpose, including promotion and advertisement of the Challenge and future challenges.

You agree that nothing in this Notice grants you a right or license to use any names or logos of NIST or the Department of Commerce or any supporting agency or entity, or any other intellectual property or proprietary rights of NIST or the Department of Commerce or any supporting agency or entity or their employees or contractors. You grant to NIST the right to include your name and your company or institution name and logo (if your Entry is from a company or institution) as a Participant on the Event Web site and in materials from NIST announcing winners of or Participants in the Competition. Other than these uses or as otherwise set forth herein, you are not granting NIST any rights to your trademarks.

Entries containing any matter, including team names, which, in the sole discretion of NIST, is indecent, defamatory, in obvious bad taste, which demonstrates a lack of respect for public morals or conduct, which promotes discrimination in any form, which shows unlawful acts being performed, which is slanderous or libelous, or which adversely affects the reputation of NIST, will not be accepted. If NIST, in its sole discretion, finds any Entry to be unacceptable, then such Entry shall be deemed disqualified and will not be evaluated or considered for award. NIST shall have the right to remove any content from the Event Web site in its sole discretion at any time and for any reason, including, but not limited to, any online comment or posting related to the Competition.

Confidential Information

By making a submission to the RAMP Challenge, you agree that no part of your submission includes any confidential or proprietary information, ideas or products, including but not limited to information, ideas or products within the scope of the Trade Secrets Act, 18 U.S.C. 1905. Because NIST will not receive or hold any submitted materials "in confidence," it is agreed that, with respect to your Entry, no confidential or fiduciary relationship or obligation of secrecy is established between NIST and

you, your Entry team, the company or institution you represent when submitting an Entry, or any other person or entity associated with any part of your Entry.

Warranties

By submitting an Entry, you represent and warrant that all information you submit is true and complete to the best of your knowledge, that you have the right and authority to submit the Entry on your own behalf or on behalf of the persons and entities that you specify within the Entry, and that your Entry (both the information and software submitted in the Entry and the underlying technologies or concepts described in the Entry):

(a) is your own original work, or is submitted by permission with full and proper credit given within your Entry;

(b) does not contain confidential information or trade secrets (yours or anyone else's);

(c) does not knowingly violate or infringe upon the patent rights, industrial design rights, copyrights, trademarks, rights in technical data, rights of privacy, publicity or other intellectual property or other rights of any person or entity;

(d) does not contain malicious code, such as viruses, malware, timebombs, cancelbots, worms, Trojan horses or other potentially harmful programs or other material or information;

(e) does not and will not violate any applicable law, statute, ordinance, rule or regulation, including, without limitation, United States export laws and regulations, including, but not limited to, the International Traffic in Arms Regulations and the Department of Commerce Export Administration Regulations; and

(f) does not trigger any reporting or royalty or other obligation to any third party; and

(g) does not contain any statement that is abusive, defamatory, libelous, obscene, fraudulent, or is in any other way unlawful or in violation of applicable laws.

Limitation of Liability

By participating in the RAMP Challenge, you agree to assume any and all risks and to release, indemnify and hold harmless NIST or any supporting agency or entity from and against any injuries, losses, damages, claims, actions and any liability of any kind (including attorneys' fees) resulting from or arising out of your participation in, association with or submission to the RAMP Challenge (including any claims alleging that your Entry infringes, misappropriates or violates any third

party's intellectual property rights). In addition, you agree to waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from your participation in the RAMP Challenge, whether the injury, death, damage, or loss arises through negligence or otherwise.

NIST is not responsible for any miscommunications such as technical failures related to computer, telephone, cable, and unavailable network or server connections, related technical failures, or other failures related to hardware, software or virus, or incomplete or late Entries. Any compromise to the fair and proper conduct of the RAMP Challenge may result in the disqualification of an Entry or Participant, termination of the RAMP Challenge, or other remedial action, at the sole discretion of NIST. NIST reserves the right in its sole discretion to extend or modify the dates of the RAMP Challenge, and to change the terms set forth herein governing any phases taking place after the effective date of any such change. By entering, you agree to the terms set forth herein and to all decisions of NIST and/or all of their respective agents, which are final and binding in all respects.

NIST is not responsible for: (1) Any incorrect or inaccurate information, whether caused by a Participant, printing errors, or by any of the equipment or programming associated with or used in the RAMP Challenge; (2) unauthorized human intervention in any part of the Entry Process for the RAMP Challenge; (3) technical or human error that may occur in the administration of the RAMP Challenge or the processing of Entries; or (4) any injury or damage to persons or property that may be caused, directly or indirectly, in whole or in part, from a Participant's participation in the RAMP Challenge or receipt or use or misuse of an Award. If for any reason an Entry is confirmed to have been deleted erroneously, lost, or otherwise destroyed or corrupted, the Participant's sole remedy is to submit another Entry in the RAMP Challenge.

Termination and Disqualification

NIST reserves the authority to cancel, suspend, and/or modify the RAMP Challenge, or any part of it, if any fraud, technical failures, or any other factor beyond NIST's reasonable control impairs the integrity or proper functioning of the RAMP Challenge, as determined by NIST in its sole discretion.

NIST reserves the right to disqualify any Participant or Participant team it believes to be tampering with the Entry process or the operation of the RAMP Challenge or to be acting in violation of any applicable rule or condition.

Any attempt by any person to undermine the legitimate operation of the RAMP Challenge may be a violation of criminal and civil law, and, should such an attempt be made, NIST reserves the authority to seek damages from any such person to the fullest extent permitted by law.

Verification of Potential Winner(s)

All potential winners are subject to verification by NIST, whose decisions are final and binding in all matters related to the RAMP Challenge.

Potential winner(s) must continue to comply with all terms and conditions of the RAMP Challenge Rules described in this notice, and winning is contingent upon fulfilling all requirements. In the event that a potential winner, or an announced winner, is found to be ineligible or is disqualified for any reason, NIST may make an award, instead, to another Participant.

Privacy and Disclosure under FOIA

Except as provided herein, information submitted throughout the RAMP Challenge will be used only to communicate with Participants regarding Entries and/or the RAMP Challenge. Participant Entries and submissions to the RAMP Challenge may be subject to disclosure under the Freedom of Information Act ("FOIA").

Authority: 15 U.S.C. 3719.

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2016-30437 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-13-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 161116999-6999-01]

National Cybersecurity Center of Excellence (NCCoE) Multifactor Authentication for e-Commerce Project for the Retail Sector

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) invites organizations to provide products and technical expertise to

support and demonstrate security platforms for the Multifactor Authentication for e-Commerce Project for the retail sector. This notice is the initial step for the National Cybersecurity Center of Excellence (NCCoE) in collaborating with technology companies to address cybersecurity challenges identified under the retail sector program. Participation in the Multifactor Authentication for e-Commerce Project is open to all interested organizations.

DATES: Interested parties must contact NIST to request a letter of interest template to be completed and submitted to NIST. Letters of interest will be accepted on a first come, first served basis. Collaborative activities will commence as soon as enough completed and signed letters of interest have been returned to address all the necessary components and capabilities, but no earlier than January 18, 2017. When the Multifactor Authentication for e-Commerce Project search for collaborators has been completed, NIST will post a notice on the NCCoE retail sector program Web site at https://nccoe.nist.gov/projects/use_cases/multifactor-authentication-ecommerce announcing the completion of the search for collaborators and informing the public that it will no longer accept letters of interest for this Multifactor Authentication for e-Commerce Project.

ADDRESSES: The NCCoE is located at 9700 Great Seneca Highway, Rockville, MD 20850. Letters of interest must be submitted to consumer-nccoe@nist.gov or via hardcopy to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Organizations whose letters of interest are accepted in accordance with the process set forth in the **SUPPLEMENTARY INFORMATION** section of this notice will be asked to sign a Cooperative Research and Development Agreement (CRADA) with NIST. A CRADA template can be found at: <https://nccoe.nist.gov/library/nccoe-consortium-crada-example>.

FOR FURTHER INFORMATION CONTACT: William Newhouse via email to william.newhouse@nist.gov; by telephone 301-975-0232; or by mail to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Additional details about the Multifactor Authentication for e-Commerce Project are available at https://nccoe.nist.gov/projects/use_cases/multifactor-authentication-ecommerce.

SUPPLEMENTARY INFORMATION:

Background: The NCCoE, part of NIST, is a public-private collaboration

for accelerating the widespread adoption of integrated cybersecurity tools and technologies. The NCCoE brings together experts from industry, government, and academia under one roof to develop practical, interoperable cybersecurity approaches that address the real-world needs of complex Information Technology (IT) systems. By accelerating dissemination and use of these integrated tools and technologies for protecting IT assets, the NCCoE will enhance trust in U.S. IT communications, data, and storage systems; reduce risk for companies and individuals using IT systems; and encourage development of innovative, job-creating cybersecurity products and services.

Process: NIST is soliciting responses from all sources of relevant security capabilities (see below) to enter into a Cooperative Research and Development Agreement (CRADA) to provide products and technical expertise to support and demonstrate security platforms for the Multifactor Authentication for e-Commerce Project for the retail sector. The full Multifactor Authentication for e-Commerce Project Description can be viewed at: https://nccoe.nist.gov/projects/use_cases/multifactor-authentication-ecommerce.

Interested parties should contact NIST using the information provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. NIST will then provide each interested party with a letter of interest template, which the party must complete, certify that it is accurate, and submit to NIST. NIST will contact interested parties if there are questions regarding the responsiveness of the letters of interest to the Multifactor Authentication for e-Commerce Project objective or requirements identified below. NIST will select participants who have submitted complete letters of interest on a first come, first served basis within each category of product components or capabilities listed below up to the number of participants in each category necessary to carry out this Multifactor Authentication for e-Commerce Project. However, there may be continuing opportunity to participate even after initial activity commences. Selected participants will be required to enter into a consortium CRADA with NIST (for reference, see **ADDRESSES** section above). NIST published a notice in the **Federal Register** on October 19, 2012 (77 FR 64314) inviting U.S. companies to enter into National Cybersecurity Excellence Partnerships (NCEPs) in furtherance of the NCCoE. For this demonstration project, NCEP partners

will not be given priority for participation.

Multifactor Authentication for e-Commerce Project Objective: The goal of this project is to increase the confidence of user identity and reduce the risk of fraud in the online, Card-Not-Present (CNP) space by implementing multifactor authentication for e-commerce transactions along with other security controls. The solution will provide guidance for implementing multifactor authentication mechanisms, risk calculation, web analytics, and potentially identity federation, in retail IT architecture segments that support or interface with e-commerce transactions such as online shopping or loyalty points programs. It will produce an architecture that includes components that will integrate multifactor authentication mechanisms (certificate-based, biometric, or others), risk calculation engines (risk score calculation and decisions), web analytics (pertaining to known user behavior and/or web threat detection), potentially identity federation (which can include authentication and risk information sent from a third-party business partner and Identity Provider), and automated logging within and between each component.

A detailed description of the Multifactor Authentication for e-Commerce Project is available at: https://nccoe.nist.gov/projects/use_cases/multifactor-authentication-ecommerce.

Requirements: Each responding organization's letter of interest should identify which security platform component(s) or capability(ies) it is offering. Letters of interest should not include company proprietary information, and all components and capabilities must be commercially available. Components are listed in the High-Level Architecture section of the Multifactor Authentication for e-Commerce Project Description (for reference, please see the link in the Process section above) and include, but are not limited to:

- Online/e-commerce shopping cart and payment system (in-house or outsourced)
- Multifactor authentication mechanisms (types of which to be determined)
- Risk calculation platform/engine
- Web analytics engine
- Logging of risk calculation and web analytics data
- Data storage for risk calculation and web analytics data
- Identity federation mechanism (optional)

Each responding organization's letter of interest should identify how their products address one or more of the following desired solution characteristics in the High-Level Architecture section of the Multifactor Authentication for e-Commerce Project Description for the retail use case (for reference, please see the link in the Process section above):

- Authentication mechanisms that meet business security and regulatory requirements
 - Automated web analytics including monitoring of user behavior and contextual details
 - Automated logging of web analytics and risk calculation data
 - Automated data storage of web analytics and risk calculation data
 - Ability to establish and enforce risk decisions including performing risk calculations
 - Automated alerting of suspected fraudulent activity
 - Ease of use for the consumer, no substantial increase in friction during the e-commerce transaction
 - Identity federation (optional)
- Responding organizations need to understand and, in their letters of interest, commit to provide:

1. Access for all participants' project teams to component interfaces and the organization's experts necessary to make functional connections among security platform components
2. Support for development and demonstration of the Multifactor Authentication for e-Commerce Project for the retail use case in NCCoE facilities which will be conducted in a manner consistent with Federal requirements (e.g., FIPS 200, FIPS 201, SP 800-53, and SP 800-63)

Additional details about the Multifactor Authentication for e-Commerce Project for the retail sector use case are available at: https://nccoe.nist.gov/projects/use_cases/multifactor-authentication-ecommerce. NIST cannot guarantee that all of the products proposed by respondents will be used in the demonstration. Each prospective participant will be expected to work collaboratively with NIST staff and other project participants under the terms of the consortium CRADA in the development of the Multifactor Authentication for e-Commerce Project for the retail sector capability. Prospective participant's contribution to the collaborative effort will include assistance in establishing the necessary interface functionality, connection and set-up capabilities and procedures, demonstration harnesses, environmental and safety conditions for use, integrated platform user instructions, and

demonstration plans and scripts necessary to demonstrate the desired capabilities. Each participant will train NIST personnel, as necessary, to operate its product in capability demonstrations to the retail community. Following successful demonstrations, NIST will publish a description of the security platform and its performance characteristics sufficient to permit other organizations to develop and deploy security platforms that meet the security objectives of the Multifactor Authentication for e-Commerce Project for the retail sector use case. These descriptions will be public information.

Under the terms of the consortium CRADA, NIST will support development of interfaces among participants' products by providing IT infrastructure, laboratory facilities, office facilities, collaboration facilities, and staff support to component composition, security platform documentation, and demonstration activities.

The dates of the demonstration of the Multifactor Authentication for e-Commerce Project for the retail sector capability will be announced on the NCCoE Web site at least two weeks in advance at <http://nccoe.nist.gov/>. The expected outcome of the demonstration is added security and reduced fraud stemming from an increased use of multifactor authentication for e-commerce transactions across an entire retail sector enterprise. Participating organizations will gain from the knowledge that their products are interoperable with other participants' offerings.

For additional information on the NCCoE governance, business processes, and NCCoE operational structure, visit the NCCoE Web site <http://nccoe.nist.gov/>.

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2016-30435 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-13-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF040

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Ad Hoc Ecosystem Workgroup (EWG) will hold a webinar, which is open to the public.

DATES: The webinar will be held on January 10, 2017, from 1:30 to 4:30 p.m., or when business for the day is completed.

ADDRESSES: To join the webinar visit this link: <http://www.gotomeeting.com/online/webinar/join-webinar>. Enter the Webinar ID: 917-479-603. Enter your name and email address (required). Once you have joined the webinar, choose either your computer's audio or select "Use Telephone." If you do not select "Use Telephone" you will be connected to audio using your computer's microphone and speakers (VoIP). To use your telephone for the audio portion of the meeting dial this TOLL number +1 (914) 614-3221 (not a toll-free number); then enter the Attendee phone audio access code 462-275-391, then enter your audio phone pin (shown after joining the webinar). Participants are encouraged to use their telephone, as this is the best practice to avoid technical issues and excessive feedback. You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2425 for technical assistance. A public listening station will also be provided at the Pacific Council office.

Council address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council Staff Officer; phone: (503) 820-2422; email: kit.dahl@noaa.gov.

SUPPLEMENTARY INFORMATION: The purpose of the webinar is for the EWG to discuss (1) preparation of the Annual State of the California Current Ecosystem Report and (2) future ecosystem initiatives under the Council's Fishery Ecosystem Plan (FEP).

Each March, the National Marine Fisheries Service's Northwest and Southwest Fisheries Science Centers deliver a State of the California Current Ecosystem Report to the Council. The Report assesses current status through a series of indicators covering physical, biological, and socioeconomic components of the ecosystem. The Council has provided advice to the Science Centers on how to make the report more relevant to Council decision-making including comments on the suite of indicators it uses. The webinar will provide an opportunity for the EWG to discuss preparation of the current Report with Science Center

representatives and the contents of future reports.

At its March 2017 meeting, the Council will also consider taking up a new ecosystem-based fishery management initiative. Appendix A to the FEP contains a list of these initiatives, which are intended to address ecosystem gaps in ecosystem knowledge and FMP policies, particularly with respect to the cumulative effects of fisheries management on marine ecosystems and fishing communities. The FEP establishes a schedule by which each March the Council reviews progress to date on any ecosystem initiatives the Council already has underway and determines whether to take up a new initiative. In odd-numbered years the Council may also consider identifying new initiatives that are not already in Appendix A. The EWG will discuss current and potential new initiatives in preparation for the March 2017 Council meeting.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820-2425 at least 10 business days prior to the meeting date.

Dated: December 14, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016-30416 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF082

Marine Mammals; File No. 20527

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Ann Pabst, Ph.D., University of North Carolina Wilmington, Biology and Marine Biology, 601 S. College Road, Wilmington, NC 28403, has applied in due form for a permit to conduct research on marine mammals.

DATES: Written, telefaxed, or email comments must be received on or before January 18, 2017.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 20527 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Shasta McClenahan or Carrie Hubard, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222-226).

The applicant proposes to take marine mammals to: (1) Document the presence of North Atlantic right (*Eubalaena glacialis*) and humpback (*Megaptera novaeangliae*) whales in the mid-Atlantic, and (2) describe the distribution and abundance of cetaceans within specific regions used for U.S.

Navy training or other activities. Research activities may occur year-round in the Atlantic Ocean from Delaware Bay to Cape Canaveral, FL, and will include aerial and vessel surveys to conduct counts, photo-identification, photogrammetry, and behavioral observations. ESA-listed species include up to 40 blue (*Balaenoptera musculus*), 100 fin (*B. physalus*), 200 North Atlantic right, 40 sei (*B. borealis*), and 150 sperm (*Physeter macrocephalus*) whales. Non-listed species include 100 Cuvier's beaked (*Ziphius cavirostris*), 100 false killer (*Pseudorca crassidens*), 100 Gervais' beaked (*Mesoplodon europaeus*), 200 humpback, 50 killer (*Orcinus orca*), 100 melon-headed (*Peponocephala electra*), 100 minke (*B. acutorostrata*), 5,000 pilot (*Globicephala spp.*), 100 pygmy and dwarf sperm (*Kogia spp.*), 100 pygmy killer (*Feresa attenuata*), 100 True's beaked (*M. mirus*), and 100 unidentified beaked whales; 5,000 Atlantic spotted (*Stenella frontalis*), 8,000 bottlenose (*Tursiops truncatus*), 1,000 Clymene (*S. clymene*), 1,000 common (*Delphinus delphis*), 100 Fraser's (*Lagenodelphis hosei*), 100 pantropical spotted (*S. attenuata*), 2,500 Risso's (*Grampus griseus*), 500 rough-toothed (*Steno bredanensis*), 200 spinner (*S. longirostris*), and 1,000 striped (*S. coeruleoalba*) dolphins; and 100 harbor porpoise (*Phocoena phocoena*). The permit would be valid for 5 years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 13, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016-30415 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XE417, 0648-XE061, 0648-XE815, and 0648-XE908

Marine Mammals and Endangered Species; File Nos. 19225, 19257, 19315, 19674, and 20599

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that permits have been issued to the following entities:

Permit No. 19225: James D. Darling, Ph.D., Whale Trust, P.O. Box 384, Tofino, BC V0R2Z0 Canada;

Permit No. 19257: Ann M. Zoidis, Director, Cetos Research Organization, 11 Des Isle Avenue, Bar Harbor, ME 04609;

Permit No. 19315: Center for Coastal Studies, Right Whale Ecology Program, 5 Holway Avenue, P.O. Box 1036, Provincetown, MA 02657 [Responsible Party: Richard Delaney];

Permit No. 19674: Scott Kraus, Ph.D., New England Aquarium, Edgerton Research Lab, Central Wharf, Boston MA 02110; and

Permit No. 20599: NMFS Southwest Fisheries Science Center, Antarctic Ecosystem Research Division, La Jolla, California [Responsible Party: George Watters, Ph.D.].

ADDRESSES: The permits and related documents are available for review upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

FOR FURTHER INFORMATION CONTACT: Rosa González (File Nos. 19225 and 19257), Carrie Hubard (File Nos. 19225 and 19257), Amy Hapeman (File Nos. 19315 and 19674), and Sara Young (File Nos. 19315, 19674, 20599).

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** that requests for a permit had been submitted by the above-named applicants. The requested permits have been issued under the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the

taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Permit No. 19225: The requested permit (81 FR 5990, November 1, 2016) authorizes Dr. Darling to use passive acoustic monitoring, active playbacks, suction cup and dart tagging, biopsy sampling, underwater photography/videography, photo ID and photogrammetry during aerial and vessel surveys to address a variety of questions regarding social organization, behavior, and communication of humpback whales (*Megaptera novaeangliae*). Research may occur off Hawaii (primarily off west Maui), and Alaska. Incidental harassment is authorized for the following non-target species: North Pacific right whales (*Eubalaena japonica*); false killer whales (*Pseudorca crassidens*); Dall's porpoises (*Phocoenoides dalli*); spinner (*Stenella longirostris*), pantropical spotted (*S. attenuata*), and bottlenose dolphins (*Tursiops truncatus*); killer whales (*Orcinus orca*); Hawaiian monk seals (*Neomonachus schauinslandi*); harbor seals (*Phoca vitulina*); and Steller sea lions (*Eumetopias jubatus*). The permit is valid until October 31, 2021.

Permit No. 19257: The requested permit (80 FR 59736, November 1, 2016) authorizes Ms. Zoidis to use passive acoustic monitoring, suction cup tagging, biopsy sampling, underwater photography/videography, and photo ID during vessel surveys in Hawaii and the Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands) to address a variety of questions regarding population size, habitat use, and behavior of baleen and odontocete species. The research would target humpback whales and 25 other species of whales and dolphins. Species may undergo all methodologies (except right whales, which will not be tagged). Incidental harassment for all species is also authorized. Research would take place throughout the year. The permit is valid until October 31, 2021.

Permit No. 19315: The requested permit (81 FR 59192, August 29, 2016) authorizes researchers to conduct vessel and aerial surveys of North Atlantic right whales (*Eubalaena glacialis*) and bowhead whales (*Balaena mysticetus*) opportunistically in Atlantic waters from Maine to New Jersey to gain a better understanding of right whale population status, relationship to habitat conditions, distribution and abundance, movement patterns, and interactions with human activities. Surveys may involve approach for observation, photo-identification, and prey mapping. Up to 16 other species of cetaceans and four species of pinnipeds

may be incidentally harassed during surveys. The request to suction cup tag a subset of right whales was denied. The permit is valid for five years from the date of issuance.

Permit No. 19674: The requested permit (81 FR 59192, August 29, 2016) authorizes Dr. Kraus to conduct vessel and aerial surveys of North Atlantic right whales in U.S. and international waters of the North Atlantic from Florida to Iceland to assess, quantify, and track trends in the demographic characteristics of right whales; and to identify, quantify and monitor the long term trends in anthropogenic impacts on the species. Surveys may involve approach for observation, photo-identification, and biopsy and blow sampling, thermal imaging, passive acoustic recording, collection of sloughed skin and feces, photogrammetry, and/or incidental harassment of right whales. Right whale parts may be received, imported or exported. Humpback whales, harbor porpoises (*Phocoena phocoena*), and Atlantic white-sided dolphins (*Lagenorhynchus acutus*) may be incidentally harassed during vessel surveys. The permit is valid for five years from the date of issuance.

Permit No. 20599: The requested permit (81 FR 66928, September 29, 2016) authorizes researchers to take Antarctic fur seals (*Arctocephalus gazella*), southern elephant seals (*Mirounga leonina*), crabeater seals (*Lobodon carcinophagus*), leopard seals (*Hydrurga leptonyx*), Ross seals (*Ommatophoca rossii*), and Weddell seals (*Leptonychotes weddellii*) for life history studies and census surveys for abundance and distribution of pinnipeds in the South Shetland Islands, Antarctica, as part of a long-term ecosystem monitoring program established in 1986. The applicant also requests permission to import tissue samples collected from any animals captured and from salvaged carcasses of any species of pinniped or cetacean found in the study area. The permit is valid for five years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permit was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are

consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 13, 2016.

Julia Harrison,

*Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.*

[FR Doc. 2016–30414 Filed 12–16–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Programmatic Environmental Assessment

AGENCY: National Ocean Service (NOS), NOAA, Department of Commerce.

ACTION: Notice of intent to prepare a programmatic environmental assessment; request for Comments.

SUMMARY: NOAA is issuing this notice to advise the public that NOS is preparing a programmatic environmental assessment (PEA) in accordance with the National Environmental Policy Act (NEPA) to evaluate the environmental impacts of NOS hydroacoustic surveys, mapping, and other related data gathering activities. NOS offices that conduct hydroacoustic surveys, mapping, and other related data-gathering activities which may be covered under this PEA include: Center for Operational Oceanographic Products and Services, National Centers for Coastal Ocean Science, Office of Coast Survey, Office for Coastal Management, Office of National Marine Sanctuaries, Office of Response and Restoration, Office of National Geodetic Survey, and the U.S. Integrated Ocean Observing System Program Office. The PEA will encompass the environment of all geographic areas where NOS conducts these activities, to include terrestrial areas, but primarily focusing on U.S. waters from the coastline to the limits of the U.S. Exclusive Economic Zone, which extends no more than 200 nautical miles from the territorial sea baseline.

NOAA provides this notice to advise other Federal and State agencies, Territories, Tribal Governments, local governments, private parties, and the public of our intent to prepare a PEA, to provide information on the nature of the analysis, and to invite input.

DATES: Comments must be received by January 18, 2017.

ADDRESSES: Comments may be submitted by mail, email, or FAX. Mail:

DOC/NOAA/NOS, Environmental Compliance Coordinator, SSMC4-Station 13612, 1305 East West Highway, Silver Spring, MD 20910. Email: nosaa.ec@noaa.gov. FAX: 301-713-4269. Comments may also be submitted through the NOS Environmental Compliance Web site: <http://oceanservice.noaa.gov/about/environmental-compliance.html>.

FOR FURTHER INFORMATION CONTACT: Giannina DiMaio, Environmental Compliance Coordinator for NOS, at nosaa.ec@noaa.gov or 240-533-0918.

SUPPLEMENTARY INFORMATION: NEPA requires that NOAA consider all reasonably foreseeable environmental effects of our proposed actions, and to involve and inform the public in our decision making process. The main goal of this scoping process is to help NOS focus the analysis of the PEA on the relevant environmental and socioeconomic issues.

NOS uses hydroacoustic surveys to map the ocean floor to provide reliable nautical charts, benthic habitat condition and distribution maps, fishery distribution maps, current and tide charts, and other products necessary for safe navigation, economic security, environmental sustainability, and sound marine resource decision-making in U.S. ocean and coastal waters. These charts and maps are needed to provide reliable navigation, ecosystem distribution and condition information to the public, private users, and decision makers. Up-to-date navigation charts are used to ensure safety, efficiency of transit, and economic well-being.

NOS will take other environmental compliance steps concurrently with the preparation of this PEA to include: application for a 5-year Letter of Authorization pursuant to Section 101 of the Marine Mammal Protection Act; completion of a section 7 consultation under the Endangered Species Act; consultation on the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act; consultations in compliance with Section 106 of the National Historic Preservation Act; and completion of federal consistency determinations for compliance with the Coastal Zone Management Act. Analysis conducted in support of consultations, including quantitative analysis for estimating acoustic impacts on marine species, will be included in the PEA as appropriate.

NOS has not yet identified action alternatives to be analyzed in the PEA. NOS recommends that programmatic NEPA documents examine at least three

alternatives, including the no-action alternative.

NOS will use input provided by Federal and State agencies, Territories, Tribal Governments, local governments, private parties, and the public during this scoping process in the preparation of the PEA. Publication of this notice initiates the public scoping process to solicit public and agency comment regarding the full spectrum of environmental issues and concerns relating to the scope and content of the PEA including:

- Analyses of the human and marine resources that could be affected;
- the nature and extent of the potential impacts on those resources;
- a reasonable range of alternatives to the proposed action; and
- mitigation and monitoring measures.

Comments and questions concerning this PEA should be directed to the NOS contact at the address provided above.

Authority: 42 U.S.C. 4321-4347; 40 CFR 1500 *et seq.*; NOAA Administrative Order 216-6A.

Dated: December 9, 2016.

W. Russell Callender,

Assistant Administrator for Ocean Services and Coastal Management.

[FR Doc. 2016-30439 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-JE-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0649-XF088

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one and a half day meeting of its Standing, Reef Fish, Coastal Migratory Pelagics (CMP) and Socioeconomics Scientific and Statistical Committees (SSC).

DATES: The meeting will convene on Tuesday, January 10, 2017, from 1 p.m. to 5 p.m. and Wednesday, January 11, 2017, from 8:30 a.m. to 5 p.m., EDT.

ADDRESSES: The meeting will be held at the Mayfair Hotel, located at 3000 Florida Avenue, Coconut Grove, Miami, FL 33133; telephone: (305) 441-0000.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348-1630.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Senior Fishery Biologist, Gulf of Mexico Fishery Management Council; steven.atran@gulfcouncil.org, telephone: (813) 348-1630.

SUPPLEMENTARY INFORMATION:

Tuesday, January 10, 2017; 1 p.m. to 5 p.m. and Wednesday, January 11, 2017; 8:30 a.m. to 5 p.m.

- I. Introductions and Adoption of Agenda
- II. Approval Minutes
 - a. Sept. 20-21, 2016 Standing, Reef Fish, Mackerel and Shrimp meeting summary
 - b. Sept. 20-21, 2016 Standing, Reef Fish, Mackerel and Shrimp verbatim minutes
 - c. Nov. 22, 2016 Standing and Reef Fish webinar summary
- III. Selection of SSC representative at January 30-February 2 Council meeting
- IV. Review of Updated National Standard Guidelines (webinar)
- Mackerel SSC Session
- V. Gulf migratory group king mackerel updated OFL and ABC yield streams for 2017/18 to 2019/20
- Reef Fish SSC Session
- VI. SEDAR 49 Data-limited Species Assessment, Part 1
 - a. Introduction and discussion of management framework (no final results until March)
- VII. Gag Update Assessment
- VIII. Mechanism for Allowing Carryover of Quota Underharvest
 - a. SEFSC analysis of carryover levels
- IX. Analysis of time for stocks to recover from MSST under different life history characteristics
- Socioeconomic SSC Session
- X. Discussion on economic and social implications of catch limits
 - a. Discussion of catch limits with respect to National Standard 5
 - b. Discussion of catch limits with respect to National Standard 8

Other Items

- XI. Dates for future SSC meetings
— Meeting Adjourns —

The meeting will be broadcast via webinar. You may register for SSC Meeting: Standing, Reef Fish, Mackerel and Socioeconomic on January 10-11, 2017 at: <https://attendeegotowebinar.com/register/3383291116212545537>

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is <https://public.gulfcouncil.org:5001/webman/index.cgi>, or go to the Council's Web

site and click on the FTP link in the lower left of the Council Web site (<http://www.gulfcouncil.org>). The username and password are both "gulfguest". Click on the "Library Folder", then scroll down to "SSC meeting-2017-01".

The meeting will be webcast over the Internet. A link to the webcast will be available on the Council's Web site, <http://www.gulfcouncil.org>.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: December 14, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016-30484 Filed 12-16-16; 8:45 am]

BILLING CODE 3510-22-P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC-2006-0011]

Notice of Availability of Regulatory Flexibility Act Section 610 Review of the Standard for the Flammability (Open Flame) of Mattress Sets

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of availability.

SUMMARY: The Consumer Product Safety Commission (CPSC) is announcing the availability of a completed rule review under section 610 of the Regulatory Flexibility Act (RFA) for the Standard for the Flammability (Open Flame) of Mattress Sets (Mattress Standard), 16 CFR part 1633. This regulatory review

concludes that the Mattress Standard should be maintained without change.¹

ADDRESSES: The completed review is available on the CPSC Web site at: <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/Mattresses>. The completed review will also be made available through the Federal eRulemaking Portal at <https://www.regulations.gov>, under Docket No. CPSC-2006-0011, Supporting and Related Materials. Copies may also be obtained from the Consumer Product Safety Commission, Office of the Secretary, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923; email cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: Lisa L. Scott, Fire Protection Engineer, Laboratory Sciences, Consumer Product Safety Commission 5 Research Place, Rockville, MD 20850, Telephone: (301) 987-2064; email: lscott@cpsc.gov.

SUPPLEMENTARY INFORMATION: In 2006, the CPSC issued a Standard for the Flammability (Open Flame) of Mattress Sets under the Flammable Fabrics Act. (71 FR 13472, March 15, 2006). The Mattress Standard set forth test procedures and performance requirements that all mattress sets must meet before being introduced into commerce. These requirements are set forth at 16 CFR part 1633.

On April 3, 2015, the Commission published notice in the **Federal Register** (80 FR 18218) to announce that the CPSC would review the Mattress Standard in accordance with the regulatory review provisions of section 610 of the RFA (5 U.S.C. 610) and sought public comment on the rule review. This document announces the availability of completed regulatory review of the Mattress Standard.

The purpose of a rule review under section 610 of the RFA is to determine whether, consistent with the CPSC's statutory obligations, this standard should be maintained without change, rescinded, or modified to minimize any significant impact of the rule on a substantial number of small entities. Section 610 requires agencies to consider five factors in reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities including:

- (1) The continued need for the rule;

¹ The Commissioners voted 5-0 to approve publication of the notice in the **Federal Register**. Commissioner Joseph P. Mohorovic's Statement Regarding the Commission's Regulatory Flexibility Act Review of the Standard for the Flammability (Open Flame) of Mattress Sets is available at: <https://www.cpsc.gov/About-CPSC/Commissioners/Joseph-Mohorovic/statements>.

(2) The nature of complaints or comments received concerning the rule from the public;

(3) The complexity of the rule;

(4) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(b).

The CPSC received 16 written comments representing the views of mattress manufacturers, component manufacturers, fire safety representatives, third party testing bodies, environmental groups, trade associations, and consumers. Staff's briefing package reviews these comments and provides staff's analysis applying the factors listed in section 610 of the RFA to the Mattress Standard. As explained in the staff's briefing package, the staff concludes that the Mattress Standard should be continued without any changes. However, staff believes that stakeholders may benefit from additional outreach and training.

The staff's briefing package containing the review is available on the CPSC Web site at: <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/Mattresses>, www.regulations.gov, and from the Commission's Office of the Secretary at the location listed in the **ADDRESSES** section of this notice.

Dated: December 14, 2016.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2016-30405 Filed 12-16-16; 8:45 am]

BILLING CODE 6355-01-P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice Is Given as a Reminder of the United Launch Alliance (ULA) Consent Order, Department of Defense (DoD) Compliance Officer and Consent Order Expiration Date

AGENCY: Department of Defense (DoD), Principal DoD Space Advisor.

ACTION: Publicize Consent Order and the DoD Compliance Officer; Inform Public of Consent Order Expiration; and Provide Points of Contact for Information and/or Comment Submittal.

SUMMARY: THIS IS NOT A NOTICE OF SOLICITATION ISSUANCE. The Director, Principal DoD Space Advisor

Staff, as the Compliance Officer under the Federal Trade Commission (FTC) Decision and Order (hereinafter referred to as the "Consent Order"), in the Matter of Lockheed Martin Corporation (LMC), the Boeing Company (Boeing), and United Launch Alliance, L.L.C. (ULA) (hereinafter referred to as the "Respondents"), Docket No. C-4188, dated May 1, 2007, is posting this notice to publicize the Consent Order, notify the Public of the DoD Compliance Officer, notify the Public that the Consent Order expires in 2017, and to provide points of contact for further information or for comment submittal.

DATES: Effective May 1, 2006.

FOR FURTHER INFORMATION CONTACT: For further information and inquiries, or to request a meeting with the DoD Compliance Officer or his Government Compliance Team, interested parties should contact either Mrs. Sarah Beth Cliatt (Compliance Division Chief), Tel: 571-241-2452; or Colonel Marc Berkstresser (Deputy Compliance Division Chief), Tel: 703-693-3634. Please note that Government compliance oversight activities will conclude following Consent Order expiration on May 1, 2017. The Compliance Officer is currently working with his Government team and the Respondents to accomplish an orderly close out of Consent Order compliance activities.

SUPPLEMENTARY INFORMATION:

The Consent Order: The Consent Order requires that with regard to covered Government programs, (1) ULA afford all space vehicle manufacturers non-discriminatory treatment for launch services that ULA may provide, and that (2) LMC and Boeing, as space vehicle manufacturers, consider all qualified launch service providers on a non-discriminatory basis. Covered programs are Government programs which are delivered in orbit and utilize medium-to-heavy launch services. The Consent Order also requires firewalls to prevent information from a space vehicle provider being shared by ULA with its Boeing or LMC parent company. Similarly, Boeing and LMC must have firewalls to ensure that other launch service information is not shared with ULA. The Consent Order also requires that the Department of Defense appoint a Compliance Officer to oversee compliance with the Consent Order by all three Respondents. The Consent Order remains in full effect through 30 April 2017 and expires on 1 May 2017. The complete text of the ULA Consent Order and supplementary information is located on the following FTC Web site: <http://www.ftc.gov/enforcement/cases->

proceedings/0510165/lockheed-martin-corporation-boeing-company-united-launch.

DoD Compliance Officer: The DoD Compliance Officer is the Director, Principal DoD Space Advisor Staff. The duties of this position are conducted by Mr. Winston A. Beauchamp.

Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. 2016-30422 Filed 12-16-16; 8:45 am]

BILLING CODE 5001-10-P

DEPARTMENT OF EDUCATION

[Docket No. ED-2016-ICCD-0085]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Upward Bound and Upward Bound Math Science Annual Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 18, 2017.

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-2016-ICCD-0085. 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. *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 Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E-347, Washington, DC 20202-4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kenneth Waters, 202-453-6273.

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: Upward Bound and Upward Bound Math Science Annual Performance Report.

OMB Control Number: 1840-0831.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 975.

Total Estimated Number of Annual Burden Hours: 16,575.

Abstract: The purpose of the Upward Bound (UB) Program is to generate in program participants the skills and motivation necessary to complete a program of secondary education and to enter and succeed in a program of postsecondary education.

Authority for this program is contained in Title IV, Part A, Subpart 2, Chapter 1, Section 402C of the Higher Education Act of 1965, as amended by the Higher Education Opportunity Act of 2008. Eligible applicants include institutions of higher education, public or private agencies or organizations, including community-based organizations with experience in serving disadvantaged youth, secondary schools, and combinations of institutions, agencies, organizations, and secondary schools.

UB Program participants must be potential first-generation college students, low-income individuals, or individuals who have a high risk for academic failure, and have a need for academic support in order to pursue successfully a program of education beyond high school.

Required program services include: (1) Academic tutoring; (2) advice and assistance in secondary and postsecondary course selection; (3) preparation for college entrance exams and completing the college admission applications; (4) information on federal student financial aid programs including (a) federal Pell grant awards, (b) loan forgiveness, and (c) scholarships; (5) assistance completing financial aid applications; (6) guidance on and assistance in: (a) Secondary school reentry, (b) alternative education programs for secondary school dropouts that lead to the receipt of a regular secondary school diploma, (c) entry into general educational development (GED) programs or, (d) entry into postsecondary education; (7) education or counseling services designed to improve the financial and economic literacy of students or the students' parents, including financial planning for postsecondary education; and (8) projects funded for at least two years under the program must provide instruction in mathematics through pre-calculus; laboratory science; foreign language; composition; and literature.

Dated: December 14, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016-30472 Filed 12-16-16; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Request for Comment: Publication of the Draft Plan for a Defense Waste Repository

AGENCY: Office of Spent Fuel and Waste Disposition, Office of Nuclear Energy, Department of Energy.

ACTION: Notice of availability and request for comment.

SUMMARY: Consistent with the determination by the President in March 2015 and pursuant to its authorities under the Atomic Energy Act, the U.S. Department of Energy (DOE) is proceeding to evaluate the development of a repository for disposal of high-level radioactive waste (HLW) resulting from DOE's atomic energy defense activities. This defense waste repository (DWR)

could be used to dispose of some or all of the spent nuclear fuel (SNF) and HLW resulting from DOE's atomic energy defense activities and/or research and development activities. The DOE intends to use a consent-based process for siting the DWR, and is beginning that process by sharing the Draft Plan for a DWR for public comment.

DATES: The comment period will end March 20, 2017. Comments received after this date will be considered to the extent practicable.

ADDRESSES: The Draft Plan is available at energy.gov/DWR. Interested persons may submit comments by any of the following methods.

Email: Comments may be submitted by email to DWR@hq.doe.gov. Please include "Response to DWR RFC" in subject line.

Mail: Comments may be provided by mail to the following address: U.S. Department of Energy, Office of Nuclear Energy, Response to DWR RFC, 1000 Independence Ave. SW., Washington, DC 20585.

Fax: Responses may be faxed to 202-586-0544. Please include "Response to DWR RFC" on the fax cover page.

Online: Responses may be submitted online at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Evangeline Chase at (202) 586-7965 or DWR@hq.doe.gov. Written inquiries should be mailed to Ms. Evangeline Chase at the Department of Energy, Office of Spent Fuel and Waste Disposition (NE-8), Office of Nuclear Energy, 1000 Independence Ave. SW., Washington, DC 20585.

SUPPLEMENTARY INFORMATION:

Background

Nuclear material is used to power naval vessels and was used to build the U.S. nuclear weapon stockpile during the Cold War. These activities have generated spent nuclear fuel (SNF) and high-level radioactive waste (HLW) that are currently stored at multiple DOE sites.

The United States no longer generates defense HLW from reprocessing of SNF associated with weapons production. The finite volume and lower heat output of the defense HLW compared to commercial SNF simplify the planning required to site and construct a DWR, in contrast to that for a common repository for both defense and commercial nuclear waste under the Nuclear Waste Policy Act (NWPA).

The United States does not have an operating permanent disposal site for SNF and HLW. Isolating this material from the biosphere is necessary to

ensure the long-term safety and security of the public and environment. DOE is responsible for removing defense HLW and SNF that is currently stored at several DOE sites. These environmental clean-up activities require a permanent disposal site for the defense waste.

In March 2015, the President issued a Presidential Memorandum in which he found that "the development of a repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only is required." This finding permits the Department to develop a separate DWR in accordance with its authority under the Atomic Energy Act. A DWR could be used to dispose of some or all of the SNF and HLW resulting from DOE's atomic energy defense activities and/or research and development activities.

The Department has begun early planning to identify various activities that need to be performed to evaluate and design a DWR. Although these plans are preliminary, they begin to describe the different components—including technical, regulatory, risk management, cost and schedule considerations—that need to come together to build a viable program, all within the framework of a consent-based siting process. A DWR could be sited, licensed, and built sooner than a common repository. This could potentially reduce ongoing storage, treatment, and management costs for defense waste currently stored at DOE facilities. Successful development of a DWR could play an important role in a broader nuclear waste strategy by providing important experience in the design, siting, licensing, and development of the facility that could be applied to the development of a future repository for commercial spent fuel.

It is now appropriate to share the Draft Plan and ask the public for its review and feedback. Ultimately, the final Plan would provide meaningful information to any community interested in learning more about what it would take to host such a facility.

Purpose

In this notice, DOE announces the availability of the Draft Plan for a Defense Waste Repository to inform the public and request feedback on the plan. The Draft Plan is available at the following Web site—energy.gov/DWR.

Next Steps

Comments received in response to this Request for Comments will be used to revise the Draft Plan and inform next steps.

Submitting Comments

Instructions: Submit comments via any of the mechanisms set forth in the **ADDRESSES** section. No individual responses to comments will be provided. DOE plans to publish all comments received in their entirety without change or edit, including any personal information provided, on the Office of Nuclear Energy Web site at the close of the public comment period. All submissions from individuals, organizations or businesses will be recorded and included in the public record, published and open to public inspection in their entirety.

Privacy Act: Data collected via the mechanism listed above will not be protected from the public view in any way.

Issued in Washington, DC, on December 6, 2016.

Andrew R. Griffith,

Deputy Assistant Secretary for Spent Fuel and Waste Disposition, Office of Nuclear Energy, Department of Energy.

[FR Doc. 2016-30366 Filed 12-16-16; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings #1**

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17-44-000.

Applicants: JPM Capital Corporation, HA Wind IV LLC.

Description: Application of JPM Capital Corporation and HA Wind IV LLC for Approval Under Section 203 of the Federal Power Act.

Filed Date: 12/12/16.

Accession Number: 20161212-5136.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: EC17-45-000.

Applicants: American Transmission Company LLC.

Description: Application of American Transmission Company LLC for Authority to Acquire Certain Facilities Under Section 203 of the FPA.

Filed Date: 12/12/16.

Accession Number: 20161212-5174.

Comments Due: 5 p.m. ET 1/3/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2881-014; ER10-2641-014; ER10-2663-014; ER10-2882-014; ER10-2883-014; ER10-2884-014; ER10-2885-014; ER10-2886-014; ER13-1101-009;

ER13-1541-008; ER14-787-002; EL15-39-000.

Applicants: Alabama Power Company.

Description: Motion to Supplement July 7, 2016 Technical Conference Reply Comments of Southern Company Services, Inc.

Filed Date: 12/12/16.

Accession Number: 20161212-5066.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-1579-006.

Applicants: 67RK 8me LLC.

Description: Compliance filing: 67RK 8me LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5133.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-1582-007.

Applicants: 65HK 8me LLC.

Description: Compliance filing: 65HK 8me LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5140.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-1914-008.

Applicants: 87RL 8me LLC.

Description: Compliance filing: 87RL 8me LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5135.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-2680-004.

Applicants: Sandstone Solar LLC.

Description: Compliance filing: Sandstone Solar LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5141.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-760-007.

Applicants: Western Antelope Blue Sky Ranch A LLC.

Description: Compliance filing: Western Antelope Blue Sky Ranch A LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5131.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15-762-008.

Applicants: Sierra Solar Greenworks LLC.

Description: Compliance filing: Sierra Solar Greenworks LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5130.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-468-002.

Applicants: FTS Master Tenant 1, LLC.

Description: Compliance filing: FTS Master Tenant 1 LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5132.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-474-003.

Applicants: Central Antelope Dry Ranch C LLC.

Description: Compliance filing: Central Antelope Dry Ranch C LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5149.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-890-003.

Applicants: Summer Solar LLC.

Description: Compliance filing: Summer Solar LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5158.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1255-002.

Applicants: Antelope Big Sky Ranch LLC.

Description: Compliance filing: Antelope Big Sky Ranch LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5166.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1738-002.

Applicants: Beacon Solar 4, LLC.

Description: Compliance filing: Beacon Solar 4, LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5177.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1901-002.

Applicants: Elevation Solar C LLC.

Description: Compliance filing: Elevation Solar C LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5168.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1955-002.

Applicants: Antelope DSR 2, LLC.

Description: Compliance filing: Antelope DSR 2, LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5172.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1956-002.

Applicants: Western Antelope Dry Ranch LLC.

Description: Compliance filing: Western Antelope Dry Ranch LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212-5170.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16-1973-002.

Applicants: Western Antelope Blue Sky Ranch B LLC.

Description: Compliance filing: Western Antelope Blue Sky Ranch B

LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5169.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16–2201–001.

Applicants: Antelope DSR 1, LLC.

Description: Compliance filing;

Antelope DSR 1, LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5173.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16–2224–001.

Applicants: Solverde 1, LLC.

Description: Compliance filing;

Solverde 1, LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5175.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16–2578–001.

Applicants: North Lancaster Ranch LLC.

Description: Compliance filing; North Lancaster Ranch LLC MBR Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5176.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER16–2703–000.

Applicants: Deerfield Wind Energy, LLC.

Description: Third Supplement to September 29, 2016 Deerfield Wind Energy, LLC tariff filing.

Filed Date: 12/9/16.

Accession Number: 20161209–5241.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER17–186–001.

Applicants: Upper Michigan Energy Resources Corporation.

Description: Tariff Amendment: Revised UMERC to Ontonagon Rate Schedule No 5 12.12.16 to be effective 1/1/2017.

Filed Date: 12/12/16.

Accession Number: 20161212–5089.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–186–001.

Applicants: Upper Michigan Energy Resources Corporation.

Description: Tariff Amendment: Revised UMERC to Ontonagon Rate Schedule No 5 12.12.16 to be effective 1/1/2017.

Filed Date: 12/12/16.

Accession Number: 20161212–5089.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–519–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Filing of GIA and amended DSA for the Grapeland EGT Project to be effective 12/12/2016.

Filed Date: 12/9/16.

Accession Number: 20161209–5197.

Comments Due: 5 p.m. ET 12/30/16.

Docket Numbers: ER17–520–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Revisions to Attachment AE Section 8.6.7 Regarding Resources Dispatched to Zero to be effective 3/1/2017.

Filed Date: 12/9/16.

Accession Number: 20161209–5198.

Comments Due: 5 p.m. ET 12/30/16.

Docket Numbers: ER17–521–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Queue Position AB2–058, Original Interconnection Service Agreement No. 4566 to be effective 11/15/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5071.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–522–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–12 SA 2896 METC–WPSC 2nd Rev. GIA (J392) to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5101.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–523–000.

Applicants: Boulder Solar Power, LLC.

Description: § 205(d) Rate Filing: Amendment of Boulder Solar Market-Based Rate Tariff to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5139.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–524–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 2014 Southwestern Power Administration Amendatory Agreement Fifth Extension to be effective 12/1/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5142.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–525–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Amended IFA Citrus Pump Station Project WDT322 SA No. 471 to be effective 12/13/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5171.

Comments Due: 5 p.m. ET 1/3/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings

must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 12, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30397 Filed 12–16–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2016–0718; FRL–9956–47]

Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: As required by the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act in June 2016, EPA is publishing an initial list of ten (10) chemical substances that will be the subject of the Agency's chemical risk evaluations to determine whether the chemical substances present an unreasonable risk of injury to health or the environment. The law requires that EPA initiate risk evaluations on 10 chemical substances drawn from the 2014 update of the TSCA Work Plan for Chemical Assessments and that EPA publish this list within 180 days of enactment (*i.e.*, by December 19, 2016). EPA's designation of the first ten chemical substances constitutes the initiation of the risk evaluation process for each of these chemical substances, pursuant to the requirements of TSCA section 6(b)(4). For each chemical substance, within six months from the date of publication of this notice, EPA will issue a scoping document. EPA has also established dockets for each of these chemical substances to document each risk evaluation and to facilitate receipt of information that will be useful to the Agency's risk evaluation.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Sheila Canavan, Chemical Control Division (Mail Code 7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 566-1978; email address: canavan.sheila@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (defined under TSCA to include import), process, distribute in commerce, use or dispose of any of the ten chemical substances identified in this document for risk evaluation. This action may be of particular interest to entities that are regulated under TSCA (e.g., entities identified under North American Industrial Classification System (NAICS) codes 325 and 324110, among others). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities and corresponding NAICS codes for entities that may be interested in or affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2016-0718, is available at <http://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. 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 OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

II. What action is the Agency taking?

EPA is announcing the first 10 chemical substances that it will evaluate for potential risks to human health and the environment under TSCA section 6(b)(2)(A), as amended by the Frank R. Lautenberg Chemical Safety for the 21st

Century Act (https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/evaluating-risk-existing-chemicals-under-tsca#chemical_names). As amended, the law requires that risk evaluation be initiated on 10 chemical substances drawn from the 2014 update of the TSCA Work Plan for Chemical Assessments (Ref. 1) and that EPA publish this list within 180 days of enactment (i.e., by December 19, 2016). The 10 chemical substances for which EPA is initiating risk evaluations are as follows:

- 1,4-Dioxane;
- 1-Bromopropane;
- Asbestos;
- Carbon Tetrachloride;
- Cyclic Aliphatic Bromide Cluster (HBCD);
- Methylene Chloride;
- N-Methylpyrrolidone (NMP);
- Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-d'e'f']diisoquinoline-1,3,8,10(2H,9H)-tetrone);
- Trichloroethylene (TCE);
- Tetrachloroethylene (also known as perchloroethylene).

III. What is the authority for this action?

On June 22, 2016, the President signed into law the “Frank R. Lautenberg Chemical Safety for the 21st Century Act,” which amended TSCA (15 U.S.C. 2601 *et seq.*). The amendments give EPA improved authority to take actions to protect people and the environment from the effects of dangerous chemical substances. Additional information on the new law is available on EPA’s Web site at: <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act>. One of the key features of the new law is the requirement that EPA now systematically prioritize and assess existing chemical substances and manage identified risks. Through a combination of new authorities, a risk-based safety standard, mandatory deadlines for action, and minimum throughput requirements, TSCA effectively creates a pipeline by which EPA will conduct review and management of existing chemical substances. This new pipeline—from prioritization to risk evaluation to risk management (when warranted)—is intended to drive steady forward progress on evaluating and addressing risks from existing chemical substances. Risk evaluation is a key step in this process.

TSCA section 6(b) specifies the requirements for risk evaluations. Section 6(b)(2)(A) requires EPA to “ensure that risk evaluations are being

conducted on 10 chemical substances drawn from the 2014 update of the TSCA Work Plan for Chemical Assessments and shall publish the list of such chemical substances” not later than 180 days after enactment of the law.

IV. Initiation for Risk Evaluation

A. Statutory Requirements for Risk Evaluations

EPA’s designation in this document of the first 10 chemical substances for risk evaluation constitutes the initiation of the risk evaluation process for each of these chemical substances, pursuant to the requirements of section 6(b)(4) of TSCA. These chemical substances are now in the process of risk evaluation to determine whether they “present an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.”

Within six months from the date of publication of this notice (i.e., June 19, 2017), EPA will issue a scoping document that will include information about the chemical substance, such as the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the Agency expects to consider in the risk evaluation. TSCA generally requires that these chemical risk evaluations be completed within three years of initiation, allowing for a single 6-month extension.

For each risk evaluation that EPA completes (other than industry-requested risk evaluations under TSCA section 6(b)(4)(C)(ii)), TSCA requires that EPA begin another risk evaluation. Additional chemical substances will be designated as high priority for risk evaluation, and have their risks evaluated under section 6(b)(4). By the end of 2019, EPA must have at least 20 chemical risk evaluations ongoing at any given time.

B. How did EPA select the first 10 chemicals?

TSCA requires that EPA choose the first 10 chemical substances from the list of 90 chemical substances on the 2014 update of the TSCA Work Plan for Chemical Assessments. TSCA Work Plan chemicals were selected based on their hazard and potential exposure, as well as other considerations such as persistence and bioaccumulation. In selecting the first 10 chemical

substances, EPA took into account scientific information documented in the 2014 Work Plan, and recommendations from stakeholders and the public. EPA has established a separate docket for each of these chemical substances to document the risk evaluation process and to facilitate receipt of information which may be useful to the Agency's risk evaluations. The following list of the first 10 chemical substances includes their exposure and hazard information from the 2014 Work Plan and their docket ID number:

1,4-Dioxane. *Exposure Information from 2014 Work Plan:* Used in consumer products. Present in groundwater, ambient air and indoor environments. High reported releases to the environment. *Hazard Information from 2014 Work Plan:* Possible human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0723.

1-Bromopropane. *Exposure Information from 2014 Work Plan:* Used in consumer products. Present in drinking water, indoor environments, surface water, ambient air, groundwater, soil. Estimated to have high releases to the environment. *Hazard Information from 2014 Work Plan:* Possible human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0741.

Asbestos. *Exposure Information from 2014 Work Plan:* Used in chlor-alkali production, consumer products, coatings and compounds, plastics, roofing products, and other applications. Also found in certain imported products such as brakes, friction products, gaskets, packing materials and building materials. *Hazard Information from 2014 Work Plan:* Known human carcinogen; Acute and chronic toxicity from inhalation exposures. *Docket ID No.:* EPA-HQ-OPPT-2016-0736.

Carbon Tetrachloride. *Exposure Information from 2014 Work Plan:* Used in commercial/industrial products. Present in biomonitoring, drinking water, indoor environments, surface water, ambient air, groundwater, soil. High reported releases to the environment. *Hazard Information from 2014 Work Plan:* Probable human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0733.

Cyclic Aliphatic Bromide Cluster (HBCD). *Exposure Information from 2014 Work Plan:* Flame retardant in extruded polystyrene foam, textiles, and electrical and electronic appliances. *Hazard Information from 2014 Work Plan:* Acute aquatic toxicity. *Docket ID No.:* EPA-HQ-OPPT-2016-0735.

Methylene Chloride. *Exposure Information from 2014 Work Plan:* Used

in consumer products. Present in drinking water, indoor environments, ambient air, groundwater, and soil. *Hazard Information from 2014 Work Plan:* Probable human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0742.

N-Methylpyrrolidone (NMP). *Exposure Information from 2014 Work Plan:* Used in consumer products. Present in drinking water and indoor environments. High reported releases into the environment. *Hazard Information from 2014 Work Plan:* Reproductive toxicity. *Docket ID No.:* EPA-HQ-OPPT-2016-0743.

Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-de'f]diisoquinoline-1,3,8,10(2H,9H)-tetrone). *Exposure Information from 2014 Work Plan:* Used in consumer products. Estimated to have moderate releases to the environment. *Hazard Information from 2014 Work Plan:* Aquatic toxicity. *Docket ID No.:* EPA-HQ-OPPT-2016-0725.

Trichloroethylene (TCE). *Exposure Information from 2014 Work Plan:* Used in consumer products. Present in drinking water, indoor environments, surface water, ambient air, groundwater, and soil. *Hazard Information from 2014 Work Plan:* Probable human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0737.

Tetrachloroethylene (also known as perchloroethylene). *Exposure Information from 2014 Work Plan:* Used in consumer products and dry cleaning. Present in biomonitoring, drinking water, indoor environments, ambient air, groundwater, soil. High reported releases to the environment. *Hazard Information from 2014 Work Plan:* Probable human carcinogen. *Docket ID No.:* EPA-HQ-OPPT-2016-0732.

III. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. Office of Pollution Prevention and Toxics. <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemical-assessments-2014-update>. October 2014.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 13, 2016.

James J. Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2016-30468 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2016-0715; FRL_9957-01-OW]

Request for Scientific Views: Draft Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) announces the release of the draft of *Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin—2016* for a 60-day public comment. These are the draft recommended concentrations of the toxins microcystins and cylindrospermopsin in recreational water protective of human health while swimming or participating in other activities on the water. Recreational exposure to the microcystins and cylindrospermopsin produced by cyanobacteria has the potential to result in liver and kidney toxicity, respectively. The recommended values found in this draft document do not replace or supersede the 2012 Recreational Water Quality Criteria (RWQC) recommendations for *E. coli* and *Enterococcus*. Rather, once final, they will supplement the 2012 RWQC to provide further public health protection for additional, potentially hazardous conditions found in ambient recreational waters.

Following closure of this 60-day public comment period, EPA will consider the comments, revise the draft document, as appropriate, and then publish a final document that will provide recommendations for States and authorized Tribes to establish water quality standards under the Clean Water Act (CWA). Alternatively, States and authorized Tribes may use these same values as the basis of swimming advisories for public notification purposes.

DATES: Comments must be received on or before February 17, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-

OW-2016-0715, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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. 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 <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: John Ravenscroft, Health and Ecological Criteria Division, Office of Water (Mail Code 4304T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566-1101; email address: ravenscroft.john@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How can I get copies of this document and other related information?

1. *Docket.* EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2016-0715. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center 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 Water Docket is (202) 566-2426.

2. *Electronic Access.* You may access this Federal Register document electronically from the Government Printing Office under the “**Federal Register**” listings FDSys (<http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>).

II. What are cyanotoxins microcystins and cylindrospermopsin and why is EPA concerned about them?

Cyanobacteria, also commonly referred to as blue-green algae, are photosynthetic bacteria that grow in many diverse habitats. Sometimes cyanobacteria can grow to high cell densities and form blooms, known as harmful algal blooms (HABs). These situations can cause green and blue scums to form in surface water. Microcystins and Cylindrospermopsin are toxins that can be produced by a variety of cyanobacteria species and can be released from cyanobacterial cells at any time. During a HAB event, excessive growth of cyanobacteria in surface waters leads to situations in which elevated levels of cyanotoxins are more likely, however, exposure can occur even when there are no visible signs of a bloom.

Elevated levels of cyanotoxins affect not only the health of humans, but domestic animals and wildlife in contact with contaminated waters. At certain concentrations microcystins, and their associated cyanobacteria, can cause headaches, sore throats, vomiting and nausea, stomach pain, dry cough, diarrhea, blistering around the mouth, and pneumonia through recreational exposure. Cylindrospermopsin recreational exposure may cause fever, headache, vomiting, bloody diarrhea, hepatomegaly, and kidney damage with loss of water, electrolytes and protein.

III. Information on the Recreational Ambient Water Quality Criteria (AWQC) for the Cyanotoxins Microcystins and Cylindrospermopsin

EPA’s draft recommended AWQC identify the concentration identify the following concentrations of microcystins and cylindrospermopsin that would be protective of human health given a primary contact recreational exposure scenario: 4 µg/L for microcystins and 8 µg/L for cylindrospermopsin. The recommended draft values supplement EPA’s 2012 recreational AWQC to provide further public health protection for additional, potentially hazardous conditions found in ambient recreational waters.

The draft recommended AWQC are based on the same peer-reviewed science used to develop EPA’s 10-Day Drinking Water Health Advisories for these same cyanotoxins published in 2015. The draft criteria document has gone through an internal work group review and includes information on the state of the science describing the human health effects from exposure to cyanobacteria and their toxins,

discussion of other domestic and international governmental and agency guidelines for recreational waters, and information on incidents involving exposure of domestic pets and other animals to cyanotoxins.

IV. What are section 304(a) water quality criteria?

Section 304(a) water quality criteria are recommendations developed by EPA under authority of section 304(a) of the Clean Water Act based on the latest scientific information on the relationship that the effect that a constituent concentration has on particular aquatic species and/or human health.

Section 304(a)(1) of the Clean Water Act directs the EPA to develop and publish and, from time to time, revise criteria for water quality accurately reflecting the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

Section 304(a) criteria provide guidance to States and authorized Tribes in adopting water quality standards that ultimately provide a basis for controlling discharges of pollutants. The criteria also provide guidance that EPA considers when promulgating federal regulations under section 303(c) when such action is necessary. Under the CWA and its implementing regulations, States and authorized Tribes are to adopt water quality criteria to protect designated uses (*e.g.*, aquatic life, recreational use). EPA’s water quality criteria recommendations are not regulations. Thus, EPA’s recommended criteria do not constitute legally binding requirements. States and authorized Tribes may adopt other scientifically defensible water quality criteria that differ from these recommendations. When adopting new or revised water quality standards, the States and authorized Tribes must adopt criteria that are scientifically defensible and protective of the designated uses of the bodies of water. States have the flexibility to do this by adopting criteria based on (1) EPA’s recommended criteria, (2) EPA’s criteria modified to reflect site-specific conditions, or (3) other scientifically defensible methods.

V. Use of the Values as Swimming Advisories

EPA is also publishing these values for consideration by States and authorized Tribes for use as swimming advisories for notification purposes in recreational waters to protect the public. States and authorized Tribes could consider using the values as swimming advisories in making decisions whether to close, open, warn about concerns in recreational waters in a manner consistent or similar to their current recreational water advisory programs. The values in this 304(a) recommended criteria, even if used as swimming advisories, are not regulations, and thus, do not constitute legally binding requirements.

VI. Solicitation of Scientific Views

EPA is soliciting additional scientific views, data, and information regarding the science and technical approach used in the derivation of the draft *Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin* document. EPA is proposing that these recommended criteria, if adopted by States or authorized Tribes as CWA section 303(c) WQS, be used for CWA section 303(d) assessment and listing purposes where the magnitude is not exceeded for more than 10 percent of days during a recreational season up to one calendar year as an indicator of long-term impairment from multiple short-term blooms. EPA is soliciting public comment on this 10 percent exceedance frequency as well as alternative exceedance frequencies. For swimming advisories, EPA is proposing that these recommended values could be used to trigger public notification whenever values are exceeded for one day. EPA is soliciting public comment on this recommended single day exceedance as well as alternative exceedance frequencies.

Dated: December 9, 2016.

Joel Beauvais,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2016-30464 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2016-0642; FRL 9956-69-OGC]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (“CAA”), notice is hereby given of a proposed settlement agreement to settle a lawsuit filed by American Chemistry Council (“Petitioner”), in the United States Court of Appeals for the D.C. Circuit: *American Chemistry Council v. EPA (Case Number 15-1146)*. On May 18, 2015, Petitioner and Eastman Chemical Company (“Eastman”) filed petitions for review of an EPA rule titled “National Emission Standards for Hazardous Air Pollutants for Major Sources: Off-Site Waste Recovery Operations,” published in the **Federal Register** on March 18, 2015 (the “Final Rule”). The proposed settlement agreement would establish deadlines for EPA to take specified actions.

DATES: Written comments on the proposed settlement agreement must be received by January 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID number EPA-HQ-OGC-2016-0642, online at www.regulations.gov. For comments submitted at www.regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from www.regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (“CBI”) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on

making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Emily Seidman, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564-0906; fax number (202) 564-5603; email address: seidman.emily@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

On May 18, 2015, Petitioner and Eastman filed petitions for review of an EPA rule titled “National Emission Standards for Hazardous Air Pollutants for Major Sources: Off-Site Waste Recovery Operations,” published at 80 FR 14,248 (March 18, 2015) (the “Final Rule”). In addition, Petitioner and Eastman submitted to the EPA a Petition for Reconsideration of the Final Rule of two issues: (1) equipment leak detection provisions for connectors; and (2) monitoring requirements for pressure relief devices (“PRD”) on portable containers. The EPA granted the request for reconsideration of the Final Rule on the issue of PRD monitoring requirements for portable containers but denied the request for reconsideration of the equipment leak detection provisions for connectors. The EPA provided public notice of this denial through a **Federal Register** notice published on May 16, 2016 at 81 FR 30,182. On September 26, 2016, Eastman filed an unopposed motion for voluntary dismissal which the court granted.

The proposed settlement agreement would settle Petitioner’s lawsuit. Under the terms of the proposed settlement agreement, the EPA will reconsider the Final Rule’s provisions relating to PRDs and take an initial action no later than July 20, 2017 and a final action no later than January 18, 2018, as long as Petitioner provides the EPA with the requested data on PRDs identified in Appendix A of the settlement agreement by no later than October 28, 2016, or a later date, as provided for in the settlement agreement. Please review the settlement agreement for additional details, available in the public docket at EPA-HQ-OGC-2016-0642.

For a period of 30 days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement agreement from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed

settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to the agreement should be withdrawn or withheld, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the proposed settlement agreement?

The official public docket for this action under Docket ID No. EPA-HQ-OGC-2016-0642 contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center 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 OEI Docket is (202) 566-1752.

An electronic version of the public docket is available through www.regulations.gov. You may use the www.regulations.gov to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search".

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at www.regulations.gov without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket

materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the www.regulations.gov Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an "anonymous access" system. If you send an email comment directly to the Docket without going through www.regulations.gov, your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 7, 2016.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2016-30058 Filed 12-16-16; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[DA 16-1321]

Order Declares Redes Modernas de la Frontera SA de CV Section 214 Authorization Terminated

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the International Bureau of the Federal Communications Commission (Commission) declares the international section 214 authorization granted to Redes Modernas de la Frontera SA de CV (Redes) terminated given Redes' inability to comply with an express condition for holding the authorization. It also concludes that Redes failed to comply with those requirements of the Communications Act of 1934, as amended (the Act) and the Commission's rules that ensure that the Commission can contact and communicate with the authorization holder and verify Redes is still providing service, which failures have prevented any way of addressing Redes' inability to comply with the condition of its authorization.

FOR FURTHER INFORMATION CONTACT:

Veronica Garcia-Ulloa, Telecommunications and Analysis Division, International Bureau at (202) 418-0481 or Veronica.Garcia-Ulloa@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, DA 16-1321, adopted and released November 30, 2016.

Background

Section 214(a) of the Act prohibits any carrier from constructing, extending, acquiring, or operating any line, and from engaging in transmission through any such line, without first obtaining a certificate of authorization from the Commission. Under section 214(c) of the Act, the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." On July 27, 2007, the International Bureau granted Redes an international section 214 authorization to provide international global or limited global facilities-based authority, and global or limited global resale authority, in accordance with section 63.18(e)(1) and 63.18(e)(2) of the Commission's rules. The International Bureau granted the application on the express condition that Redes abide by the commitments and undertakings

contained in its July 10, 2007 letter of assurance (LOA) to the U.S. Department of Justice (DOJ), U.S. Department of Homeland Security (DHS), and Federal Bureau of Investigation (FBI). The LOA outlines a number of commitments made by Redes to address national security, law enforcement, and public safety concerns.

On April 13, 2016, DOJ with the concurrence of DHS (collectively, the "Executive Branch Agencies") notified the Commission of Redes' non-compliance with the conditions of its authorization and requested that the Commission terminate, declare null and void and no longer in effect, the international section 214 authorization issued to Redes. The Executive Branch Agencies stated that on July 31, 2012, the designated point of contact informed DHS that Redes is no longer in business and open source research conducted by DHS confirms this fact. In addition, the Executive Branch Agencies stated that Redes has not filed any of its international traffic and revenue reports with the Commission since 2007. Based on this, the Executive Branch Agencies conclude that Redes is no longer providing services pursuant to its authorization.

The Commission has made significant efforts to communicate with Redes, but has also been unable to do so. On July 5, 2016, the International Bureau sent Redes a letter to the last addresses of record requesting that Redes respond to the *April 13, 2016 Executive Branch Letter* by August 3, 2016. Redes did not respond. Since that time, the International Bureau has provided Redes with additional opportunities to respond to these allegations. The International Bureau stated that failure to respond would result in termination of Redes' international section 214 authorization for failure to comply with the condition of its authorization. To date, Redes has not responded to any of the International Bureau or the Executive Branch Agencies' multiple requests to resolve this matter.

Discussion

We determine that Redes' international section 214 authorization to provide services issued under File No. ITC-214-20070515-00189 has terminated for inability to comply with an express condition for holding the international section 214 authorization. The International Bureau provided Redes with notice and opportunity to respond to the allegations in the *April 13, 2016 Executive Branch Letter* concerning Redes' non-compliance with the condition of the grant. Redes has not responded to any of our multiple

requests or requests from the Executive Branch Agencies. We find that Redes' failure to respond to our multiple requests demonstrates that it is unable to satisfy the LOA commitments, upon which the Executive Branch Agencies relied in providing their non-objection to the grant of the authorization to Redes, and compliance with which is a condition of the grant of its international section 214 authorization.

Furthermore, after having received an international 214 authorization, a carrier "is responsible for the continuing accuracy of the certifications made in its application" and must promptly correct information no longer accurate, "and in any event, within thirty (30) days." Redes has failed to inform the Commission of any changes in its business status of providing international telecommunications services, as required by the rules. Finally, as part of its authorization, Redes "must file annual international telecommunications traffic and revenue as required by § 43.62." Section 43.62(b) states that "[n]ot later than July 31 of each year, each person or entity that holds an authorization pursuant to section 214 to provide international telecommunications service shall report *whether* it provided international telecommunications services during the preceding calendar year." Our records indicate that Redes failed to file annual international telecommunications traffic and revenue reports indicating whether or not Redes provided services in 2014 and 2015, as required by section 43.62(b) of the Commission's rules. Redes' failure to adhere to the Commission's rules designed to ensure its ability to communicate with the holder of the authorization and to verify the holder is still providing service also warrants termination, wholly apart from Redes' non-compliance with the condition of its international section 214 authorization.

Ordering Clauses

Accordingly, *it is ordered*, pursuant to sections 4(i), 214, and 413 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 214, 413, and sections 1.47(h), 43.62, 63.18, 63.21, 63.22(h), 63.23(e), and 64.1195 of the Commission's rules, 47 CFR 1.47(h), 43.62, 63.18, 63.21, 63.22(h), 63.23(e), 64.1195, that the international section 214 authorization issued under File No. ITC-214-20070515-00189 is *hereby terminated and declared null and void*.

It is further ordered that the request of the U.S. Department of Homeland Security and U.S. Department of Justice, *is hereby granted*, to the extent set forth in this Order.

It is further ordered that a copy of this Order shall be sent by return receipt requested to Redes Modernas de la Frontera SA de CV at its last known addresses. In addition, this Order shall be posted in the Commission's Office of the Secretary.

It is further ordered that a copy of this Order, or a summary thereof, shall be published in the **Federal Register**.

This Order is issued on delegated authority under 47 CFR 0.51, 0.261, and is effective upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 CFR 1.106, or applications for review under section 1.115 of the Commission's rules, 47 CFR 1.115, may be filed within 30 days of the date of the release of this Order.

Federal Communications Commission.

Denise Coca,

Chief, Telecommunications and Analysis Division, International Bureau.

[FR Doc. 2016-30402 Filed 12-16-16; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

[DA 16-1322]

Order Declares IP To Go, LLC Section 214 Authorization Terminated

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the International Bureau of the Federal Communications Commission (Commission) declares the international section 214 authorization granted to IP To Go, LLC (IPTG) terminated given IPTG's inability to comply with an express condition for holding the authorization. It also concludes that IPTG failed to comply with those requirements of the Communications Act of 1934, as amended (the Act) and the Commission's rules that ensure that the Commission can contact and communicate with the authorization holder and verify IPTG is still providing service, which failures have prevented any way of addressing IPTG's inability to comply with the condition of its authorization.

FOR FURTHER INFORMATION CONTACT:

Veronica Garcia-Ulloa, Telecommunications and Analysis Division, International Bureau at (202) 418-0481 or Veronica.Garcia-Ulloa@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, DA 16-1322, adopted and released November 30, 2016. The full text of this

document can be located at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1130/DA-16-1322A1.pdf.

Background

Section 214(a) of the Act prohibits any carrier from constructing, extending, acquiring, or operating any line, and from engaging in transmission through any such line, without first obtaining a certificate of authorization from the Commission. Under section 214(c) of the Act, the Commission “may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.” On December 19, 2011, the International Bureau granted IPTG an international section 214 authorization to provide international global or limited global facilities-based authority, and global or limited global resale authority, in accordance with section 63.18(e)(1) and 63.18(e)(2) of the Commission’s rules. The International Bureau granted the application on the express condition that IPTG abide by the commitments and undertakings contained in its December 5, 2011 letter of assurance (LOA) to the U.S. Department of Justice (DOJ). The LOA outlines a number of commitments made by IPTG to address national security, law enforcement, and public safety concerns.

On April 11, 2016, DOJ notified the Commission of IPTG’s non-compliance with the conditions of its authorization and requested that the Commission terminate, declare null and void and no longer in effect, and/or revoke the international section 214 authorization issued to IPTG. DOJ believes that IPTG “is neither providing services pursuant to authorization file number ITC–214–20090508–00208 nor still in existence.” DOJ stated that it has been unable to contact IPTG using the telephone numbers listed in its application or through open source research since January 2016. Additionally, DOJ indicates that it contacted IPTG via the email addresses provided in IPTG’s application several times since January 2016, with no response. DOJ states that IPTG listed a telephone number on its application as belonging to Alonzo Bevene from the Regulatory Back Office, Inc., but that number belongs to Maldonado Law Group. DOJ stated that in February 2016, DOJ called and Mr. Maldonado answered this number advising DOJ “that the firm is no longer on retainer with IPTG and has no forwarding information for the company.” Finally, DOJ stated that the Florida Department of State Division of Corporations lists IPTG as an active

company as of May 22, 2007 with a mailing address for Hitstay, a travel company, also owned by IPTG business owner, Ricardo Mandini, but no telephone number was found for Hitstay.

The Commission has made significant efforts to communicate with IPTG, but has also been unable to do so. On July 5, 2016, the International Bureau sent IPTG a letter to the last addresses of record requesting that IPTG respond to the *April 11, 2016 Executive Branch Letter* by August 3, 2016. IPTG did not respond. Since that time, the International Bureau has provided IPTG with additional opportunities to respond to these allegations. The International Bureau stated that failure to respond would result in termination of IPTG’s international section 214 authorization for failure to comply with the condition of its authorization. In IPTG’s application, IPTG stated it was incorporated in Florida, and according to the Florida Department of State Division of Corporations, on October 14, 2016, IPTG filed a voluntary dissolution letter and is now listed as “inactive.” To date, IPTG has not responded to any of the International Bureau or DOJ’s multiple requests to resolve this matter.

Discussion

We determine that IPTG’s international section 214 authorization to provide services issued under File No. ITC–214–20090508–00208 has terminated for inability to comply with an express condition for holding the international section 214 authorization. The International Bureau provided IPTG with notice and opportunity to respond to the allegations in the *April 11, 2016 Executive Branch Letter* concerning IPTG’s non-compliance with the condition of the grant. IPTG has not responded to any of our multiple requests or requests from DOJ. We find that IPTG’s failure to respond to our multiple requests demonstrates that it is unable to satisfy the LOA commitments, upon which the Executive Branch Agencies relied in providing their non-objection to the grant of the authorization to IPTG, and compliance with which is a condition of the grant of its international section 214 authorization.

Furthermore, after having received an international section 214 authorization, a carrier “is responsible for the continuing accuracy of the certifications made in its application” and must promptly correct information no longer accurate, “and in any event, within thirty (30) days.” IPTG has failed to inform the Commission of any changes in its business status of providing

international telecommunications services, as required by the rules. Finally, as part of its authorization, IPTG “must file annual international telecommunications traffic and revenue as required by section 43.62.” Section 43.62(b) states that “[n]ot later than July 31 of each year, each person or entity that holds an authorization pursuant to section 214 to provide international telecommunications service shall report *whether* it provided international telecommunications services during the preceding calendar year.” Our records indicate that IPTG failed to file annual international telecommunications traffic and revenue reports indicating whether or not IPTG provided services in 2014 and 2015, as required by section 43.62(b) of the Commission’s rules. IPTG’s failure to adhere to the Commission’s rules designed to ensure its ability to communicate with the holder of the authorization and to verify if the holder is still providing service also warrants termination, wholly apart from IPTG’s non-compliance with the condition of its international section 214 authorization.

Ordering Clauses

Accordingly, *it is ordered*, pursuant to sections 4(i), 214, and 413 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 214, 413, and sections 1.47(h), 43.62, 63.18, 63.21, 63.22(h), 63.23(e), and 64.1195 of the Commission’s rules, 47 CFR 1.47(h), 43.62, 63.18, 63.21, 63.22(h), 63.23(e), 64.1195, that the international 214 authorization issued under File No. ITC–214–20090508–00208 is *hereby terminated and declared null and void*.

It is further ordered that the request of the U.S. Department of Justice, *is hereby granted*, to the extent set forth in this Order.

It is further ordered that a copy of this Order shall be sent registered mail, return receipt requested to IP To Go, LLC at its last known addresses. In addition, this Order shall be posted in the Commission’s Office of the Secretary.

It is further ordered that a copy of this Order, or a summary thereof, shall be published in the **Federal Register**.

This Order is issued on delegated authority under 47 CFR 0.51, 0.261, and is effective upon release. Petitions for reconsideration under section 1.106 of the Commission’s rules, 47 CFR 1.106, or applications for review under section 1.115 of the Commission’s rules, 47 CFR 1.115, may be filed within 30 days of the date of the release of this Order.

Federal Communications Commission.
Denise Coca,
*Chief, Telecommunications and Analysis
 Division, International Bureau.*
 [FR Doc. 2016-30428 Filed 12-16-16; 8:45 am]
BILLING CODE 6712-01-P

**DEPARTMENT OF HEALTH AND
 HUMAN SERVICES**

**Centers for Disease Control and
 Prevention**

[30Day-17-16ATI]

**Agency Forms Undergoing Paperwork
 Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (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 or send an email to *omb@cdc.gov*. Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395-5806. Written comments should be received within 30 days of this notice.

Proposed Project

Development of CDC’s Act Against AIDS Social Marketing Campaigns Targeting Consumers—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In an effort to refocus attention on domestic HIV and AIDS, CDC launched the Act Against AIDS (AAA) initiative in 2009 with the White House and the U.S. Department of Health and Human Services. AAA is a multifaceted national communication initiative that supports reduction of HIV incidence in the U.S. through multiple, concurrent communication and education campaigns for a variety of audiences including, the general public populations most affected by HIV and health care providers. The campaigns target consumers 18-64 years old and include the following audiences: (1) Men who have sex with men (MSM) of all races; (2) Blacks/African Americans; (3) Hispanics/Latinos; (4) Transgender individuals; (5) HIV-positive individuals; and (6) national audience

of all races. All campaigns support the comprehensive HIV prevention efforts of CDC and the National HIV/AIDS Strategy (NHAS).

The goal of this study is to qualitatively test messages and materials that will be used in specific HIV social marketing campaigns under the AAA initiative that target consumers in order to increase HIV testing rates, increase HIV awareness and knowledge, challenge commonly held misperceptions about HIV, and promote HIV prevention and risk reduction. The intended use of the resulting data is for CDC to revise and/or develop timely, relevant, clear, and engaging materials for these social marketing campaigns.

Qualitative methods will be used to collect the data include focus groups, intercept interviews, and in-depth interviews. Qualitative methods provide flexible in-depth exploration of the participants’ perceptions and experience; and the interviews yield descriptions in the participants’ own words. Qualitative methods also allow the interviewer flexibility to pursue relevant and important issues as they arise during the discussion.

The participants will also participate in a brief 15-minute brief survey. Data collected by the brief survey will provide a source of quantitative data supplementing the qualitative data collected during the interviews. The brief survey will be administered to participants before the individual in-depth interview and focus group. The survey will collect basic background information about the participants’ knowledge, attitudes and beliefs about HIV, HIV testing behaviors, risk behaviors and demographics to enable us to more fully describe the participants.

There is no cost to participants other than their time. The total estimated annualized burden hours are 2,063.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Individuals (males and females) aged 18-64.	Study screener	2338	1	2/60
	Exploratory—HIV Testing In-depth Interview Guide	74	1	1
	Exploratory—HIV Prevention In-depth Interview Guide	74	1	1
	Exploratory—HIV Communication and Awareness In-depth Interview Guide.	74	1	1
	Exploratory—HIV Prevention with Positives In-depth Interview Guide.	74	1	1
	Consumer Message Testing In-depth Interview Guide	68	1	1
	Consumer Concept Testing In-depth Interview Guide	68	1	1
	Consumer Materials Testing In-depth Interview Guide	68	1	1
	Exploratory—HIV Testing Focus Group Interview Guide	74	1	2
	Exploratory—HIV Prevention Focus Group Interview Guide	74	1	2

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
	Exploratory—HIV Communication and Awareness Focus Group Interview Guide.	74	1	2
	Exploratory—HIV Prevention with Positives Focus Group Interview Guide.	74	1	2
	Consumer Concept Testing Focus Group Interview Guide ...	68	1	2
	Consumer Message Testing Focus Group Interview Guide ..	68	1	2
	Consumer Materials Testing Focus Group Interview Guide ..	68	1	2
	HIV Testing Survey	250	1	15/60
	HIV Prevention Survey	250	1	15/60
	HIV Communication and Awareness Survey	250	1	15/60
	HIV Prevention with Positives Survey	250	1	15/60
	Intercept Interview Guide	700	1	20/60

Leroy A. Richardson,
*Chief, Information Collection Review Office,
 Office of Scientific Integrity, Office of the
 Associate Director for Science, Office of the
 Director, Centers for Disease Control and
 Prevention.*

[FR Doc. 2016–30408 Filed 12–16–16; 8:45 am]

BILLING CODE 4163–18–P

**DEPARTMENT OF HEALTH AND
 HUMAN SERVICES**

**Centers for Disease Control and
 Prevention**

[30Day–17–16AUE]

**Agency Forms Undergoing Paperwork
 Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (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 or send an email to *omb@cdc.gov*. Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Developing Effective Messages about Excessive Alcohol Consumption: Formative Focus Groups with Adult Drinkers and Abstainers—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Excessive alcohol use, including binge drinking, is responsible for approximately 88,000 deaths in the U.S. annually—including one in 10 deaths among working-age adults ages 20–64. On average, for each death due to alcohol, an individual’s life is cut short by 30 years. Excessive alcohol use can also lead to motor vehicle crashes; intimate partner violence; and risky sexual behaviors, increasing the risk of HIV, other sexually transmitted infections, and unintended pregnancy. Over time, excessive alcohol use can lead to alcohol dependence, liver disease, high blood pressure, heart attack, stroke, and certain kinds of

cancer. Furthermore, in 2010, excessive alcohol use cost the United States government \$249 billion, or \$2.05 per drink.

Binge drinking (defined as four or more drinks on an occasion for women or five or more drinks on an occasion for men) accounts for more than half of the deaths and three-quarters of the economic costs of excessive drinking. More than 38 million U.S. adults binge drink about four times a month, averaging eight drinks per binge. However, most (90%) binge drinkers are not alcohol dependent, presenting an opportunity for prevention through messages that improve voluntary compliance with recommended guidelines. States and communities can prevent binge drinking by supporting evidence-based strategies, such as those recommended by the Community Preventive Services Task Force; however, these strategies are underused. Understanding the type of information and messages that the larger community—those who drink but not excessively or abstain from drinking in addition to those who engage in binge drinking—respond to will be essential in developing the communication strategy for future outreach.

CDC plans to collect information needed to improve understanding of current knowledge, perceptions, and attitudes related to excessive alcohol consumption. Respondents will be 72 adults ages 21–64 years who agree to participate in focus group discussions of about 1.5 hours each. A total of 12 focus groups are planned in three geographically diverse locations with appropriate facilities (four focus groups per location). Each focus group will involve six respondents and will be guided by a professional moderator. Through an initial screening process, CDC will also collect the information needed to assess knowledge,

perceptions, and attitudes across various audience segments: those who engage in binge drinking, those who drink but not excessively, and those who abstain from drinking.

The focus group discussions will be analyzed using qualitative tools and leverage a structured approach to thematic analysis. Findings from this

information collection will guide the CDC Alcohol Program in the development and refinement of targeted messages to effectively communicate the problem of excessive alcohol use, and encourage support for effective prevention strategies. The ultimate goal of the subsequent messaging is a

reduction in binge drinking, which will in turn reduce alcohol-related injuries and deaths among adults.

OMB approval is requested for one year. Participation is voluntary and there are no costs to respondents other than their time. The total estimated annual burden hours are 132.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Adults aged 21–64	Questionnaire/Screeners	288	1	5/60
	Focus Group	72	1	1.5
Total .....	.....	.....	.....	.....

Leroy A. Richardson,
 Chief, Information Collection Review Office,
 Office of Scientific Integrity, Office of the
 Associate Director for Science, Office of the
 Director, Centers for Disease Control and
 Prevention.

[FR Doc. 2016–30400 Filed 12–16–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10171]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS’ intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: the necessity and utility of the proposed information collection for the proper performance of the agency’s functions; the accuracy of the estimated burden; ways to enhance the quality, utility, and

clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by February 17, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to <http://www.regulations.gov>. Follow the instructions for “Comment or Submission” or “More Search Options” to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS’ Web site address at <http://www.cms.hhs.gov/PaperworkReductionActof1995>.

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to Paperwork@cms.hhs.gov.

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection’s supporting statement and associated materials (see **ADDRESSES**).

CMS–10171 Collecting Benefit Coordination Data

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term “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 requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Collecting Benefit Coordination Data; *Use:* This collection of information request coordinates Part D plan prescription drug coverage with other prescription drug coverage. The collected information will assist CMS, Part D

plans and other payers with coordination of prescription drug benefits at the point-of-sale and tracking of the beneficiary's True out-of-pocket (TrOOP) expenditures using the Part D Transaction Facilitator (PDTF). *Form Number:* CMS-10171 (OMB control number: 0938-0978); *Frequency:* Yearly and occasionally; *Affected Public:* Business or other for-profits; *Number of Respondents:* 62,438; *Total Annual Responses:* 891,777,634; *Total Annual Hours:* 5,201,718. (For policy questions regarding this collection contact Shelly Winston at 410-786-3694.)

2.

Dated: December 14, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016-30432 Filed 12-16-16; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2015-E-3157]

Determination of Regulatory Review Period for Purposes of Patent Extension; TRULICITY

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for TRULICITY and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by February 17, 2017. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 19, 2017. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows: June 19, 2017

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):** Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, 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-2015-E-3157 for "Determination of Regulatory Review Period for Purposes of Patent Extension; TRULICITY." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the

information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Division of Dockets Management. 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: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and

an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product TRULICITY (dulaglutide). TRULICITY is indicated as an adjunct to diet and exercise to improve glycemic control in adults with type 2 diabetes mellitus. Subsequent to this approval, the USPTO received a patent term restoration application for TRULICITY (U.S. Patent No. 7,452,966) from Eli Lilly and Company, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 15, 2015, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of TRULICITY represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for TRULICITY is 3,303 days. Of this time, 2,937 days occurred during the testing phase of the regulatory review period, while 366 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* September 4, 2005. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on September 4, 2005.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* September 18, 2013. The applicant claims September 17, 2013, as the date the biologics license application (BLA) for TRULICITY (BLA 125469) was initially submitted. However, FDA records indicate that BLA 125469 was submitted on September 18, 2013.

3. *The date the application was approved:* September 18, 2014. FDA has verified the applicant's claim that BLA 125469 was approved on September 18, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,249 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA-305), Food and Drug Administration,

5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 14, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016-30399 Filed 12-16-16; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA-2012-N-0873; FDA-2008-D-0031; FDA-2013-N-0242; FDA-2013-N-0125; FDA-2013-N-0093; FDA-2016-N-1593; FDA-2015-N-2406; FDA-2013-N-0450; FDA-2011-N-0830]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 11601 Landsdown St., North Bethesda, MD 20852, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the Internet at <http://www.reginfo.gov/public/do/PRAMain>. 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.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control No.	Date approval expires
Bar Code Label Requirements for Human Drug Products and Biological Products	0910-0537	9/30/2019
Clinical Laboratory Improvement Amendments Waiver Applications	0910-0598	9/30/2019
Current Good Manufacturing Practices for Positron Emission Tomography Drugs	0910-0667	9/30/2019
Medical Devices: Use of Certain Symbols in Labeling—Glossary to Support the Use of Symbols in Labeling	0910-0740	9/30/2019
Evaluation of the Program for Enhanced Review Transparency and Communication for New Molecular Entity New Drug Applications and Original Biologics License Applications in Prescription Drug User Fee Act	0910-0746	9/30/2019

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB—Continued

Title of collection	OMB control No.	Date approval expires
Medical Device Accessories	0910–0823	9/30/2019
Market Claims in Direct-to-Consumer Prescription Drug Print Ads	0910–0824	9/30/2019
Abbreviated New Animal Drug Applications	0910–0669	10/31/2019
Abbreviated New Drug Applications and 505(b)(2) Applications	0910–0786	11/30/2019

Dated: December 13, 2016.
Leslie Kux,
Associate Commissioner for Policy.
 [FR Doc. 2016–30351 Filed 12–16–16; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute Of Allergy And Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Peer Review Meeting.

Date: January 9, 2017.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Ann Marie M. Cruz, Ph.D., Scientific Review Officer, Program Management & Operations Branch DEA/SRP RM 3E71, National Institutes of Health, NIAID, 5601 Fishers Lane, Rockville, MD 20852, 301–761–3100, *AnnMarie.Cruz@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 13, 2016.
Natasha M. Copeland,
Program Analyst, Office of Federal Advisory Committee Policy.
 [FR Doc. 2016–30360 Filed 12–16–16; 8:45 am]
BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Notice of Charter Renewal

In accordance with Title 41 of the U.S. Code of Federal Regulations, Section 102–3.65(a), notice is hereby given that the Charter for the National Toxicology Program Board of Scientific Counselors was renewed for an additional two-year period on November 14, 2016.

It is determined that the National Toxicology Program Board of Scientific Counselors is in the public interest in connection with the performance of duties imposed on the National Toxicology Program by law, and that these duties can best be performed through the advice and counsel of this group.

Inquiries may be directed to Jennifer Spaeth, Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail code 4875), Telephone (301) 496–2123, or *spaethj@od.nih.gov*.

Dated: December 12, 2016.

Jennifer Spaeth,
Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–30364 Filed 12–16–16; 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 (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Repository Contract Review.

Date: January 5, 2017.

Time: 10:30 a.m. to 1:45 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *arnardm@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: December 13, 2016.

David Clary,
Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–30363 Filed 12–16–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Dental and Craniofacial Research Special Emphasis Panel; NIDCR T32/T90 Review.

Date: January 11, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Guo He Zhang, MPH, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research National Institutes of Health, 6701 Democracy Boulevard Suite 672, Bethesda, MD 20892
zhanggu@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 13, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016-30362 Filed 12-16-16; 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 Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of an Interagency Autism Coordinating Committee (IACC or Committee) meeting.

The purpose of the IACC meeting is to discuss business, agency updates, and issues related to autism spectrum

disorder (ASD) research and services activities. The Committee will discuss the 2016-2017 update of the IACC Strategic Plan. The meeting will be open to the public and will be accessible by webcast and conference call.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Open Meeting.

Date: January 13, 2017.

Time: 9:00 a.m. to 5:00 p.m. * Eastern Time * Approximate end time.

Agenda: To discuss business, updates, and issues related to ASD research and services activities. The Committee will discuss updates of the IACC Strategic Plan.

Place: National Institute of Mental Health, 6001 Executive Boulevard, NSC, Conference Rooms C and D, Rockville, MD 20850.

Webcast Live: <https://videocast.nih.gov>.

Conference Call Access: Dial: 888-989-9784. Access code: 5757026.

Cost: The meeting is free and open to the public.

Registration: A registration web link will be posted on the IACC Web site (www.iacc.hhs.gov) prior to the meeting. Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis. Onsite registration will also be available.

Deadlines: Notification of intent to present oral comments: Monday, January 2, 2017 by 5:00 p.m. ET. Submission of written/electronic statement for oral comments: Thursday, January 5, 2017 by 5:00 p.m. ET. Submission of written comments: Thursday, January 5, 2017 by 5:00 p.m. ET. For IACC Public Comment guidelines please see: <https://iacc.hhs.gov/meetings/public-comments/guidelines/>.

Access: White Flint Metro Station (Red Line).

Contact Person: Ms. Angelice Mitrasak, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, Room 6182A, Bethesda, MD 20892-9669, Phone: 301-435-9269, Email: IACCPublicInquiries@mail.nih.gov.

Public Comments: Any member of the public interested in presenting oral comments to the Committee must notify the Contact Person listed on this notice by 5:00 p.m. ET on Monday, January 2, 2017, with their request to present oral comments at the meeting, and a written/electronic copy of the oral presentation/statement must be submitted by 5:00 p.m. ET on Thursday, January 5th.

A limited number of slots for oral comment are available, and in order to ensure that as many different individuals are able to present throughout the year as possible, any given individual only will be permitted to present oral comments once per calendar year (2017). Only one representative of an organization will be allowed to present oral comments in any given meeting; other representatives of the same group may provide written comments. If the oral comment session is full, individuals who could not be accommodated are welcome to provide written comments instead. Comments to be read or presented in the meeting must not exceed 250 words or 3 minutes, but a longer version may be submitted in writing for the record. Commenters going beyond the 250 word or 3 minute time limit in the meeting may be asked to conclude immediately in order to allow other comments and presentations to proceed on schedule.

Any interested person may submit written public comments to the IACC prior to the meeting by emailing the comments to IACCPublicInquiries@mail.nih.gov or by submitting comments at the Web link: <https://iacc.hhs.gov/meetings/public-comments/submit/index.jsp> by 5:00 p.m. ET on Thursday, January 5, 2017. The comments should include the name, address, telephone number, and when applicable, the business or professional affiliation of the interested person. NIMH anticipates written public comments received by 5:00 p.m. ET on Thursday, January 5, 2017 will be presented to the Committee prior to the meeting for the Committee's consideration. Any written comments received after the 5:00 p.m. ET, January 5, 2017 deadline through January 12, 2017 will be provided to the Committee either before or after the meeting, depending on the volume of comments received and the time required to process them in accordance with privacy regulations and other applicable Federal policies. All written public comments and oral public comment statements received by the deadlines for both oral and written public comments will be provided to the IACC for their consideration and will become part of the public record. Attachments of copyrighted publications are not permitted, but web links or citations for any copyrighted works cited may be provided.

In the 2009 IACC Strategic Plan, the IACC listed the "Spirit of Collaboration" as one of its core values, stating that, "We will treat others with respect, listen to diverse views with open minds, discuss submitted public comments, and foster discussions where

participants can comfortably offer opposing opinions.” In keeping with this core value, the IACC and the NIMH Office of Autism Research Coordination (OARC) ask that members of the public who provide public comments or participate in meetings of the IACC also seek to treat others with respect and consideration in their communications and actions, even when discussing issues of genuine concern or disagreement.

Remote Access: The meeting will be open to the public through a conference call phone number and webcast live on the Internet. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the webcast or conference call, please send an email to IACCPublicInquiries@mail.nih.gov.

Individuals wishing to participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the Contact Person listed on this notice at least five days prior to the meeting.

Security: Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Also as a part of the security procedures, attendees should be prepared to present a photo ID at the meeting registration desk during the check-in process. Pre-registration is recommended. Seating will be limited to the room capacity and seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered.

Meeting schedule subject to change.

Information about the IACC is available on the Web site: <http://www.iacc.hhs.gov>.

Dated: December 14, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016-30473 Filed 12-16-16; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Immunobiology of Transfusion.

Date: January 10, 2017.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7202, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Melissa E Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7202, Bethesda, MD 20892, 301-435-0297, nagelinmh2@nhlbi.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 13, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016-30359 Filed 12-16-16; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Notice is hereby given of a meeting of the Big Data to Knowledge Multi-Council Working Group.

The teleconference meeting will be open to the public as indicated below. Individuals who plan to attend and need special assistance should notify the contact person listed below in advance of the meeting. No physical meeting location is provided for any interested individuals to listen to committee discussions. Any individual interested in listening to the meeting discussions must call: 1-877-668-4493 and use Passcode: 627 298 875 for access to the meeting.

Name of Working Group: Big Data to Knowledge Multi-Council Working Group.

Date: January 9, 2017.

Open Session: 11:00 a.m.–12:00 p.m. EST.

Agenda: Discussion will review current Big Data to Knowledge (BD2K) activities and newly proposed BD2K initiatives.

Open Session Presentations: ADDS Updates—“State of BD2K”. All-Hands Meeting and Open Data Science Symposium Recap.

Place: Teleconference.

Closed Session: 12:30 p.m.–3:30 p.m. EST.

Agenda: Discussion will focus on review of proposed Funding Plans for BD2K Funding Opportunity Announcements.

Place: Teleconference.

Contact Person: Tonya Scott, Building 1, Room 325, 1 Center Drive, Bethesda, MD 20814-0174, email: tonya.scott@nih.gov, Telephone: 301-402-9817.

Information is also available on the Office of the Associate Director for Data Science's home page: <https://datascience.nih.gov/index> where an agenda and any additional information for the meeting will be posted when available.

Dated: December 12, 2016.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2016-30358 Filed 12-16-16; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute Of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel.

Date: January 12, 2017.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710 B Rockledge Drive Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dennis E. Leszczynski, Ph.D., Scientific Review Administrator
Division of Scientific Review National
Institute of Child Health and Human
Development, NIH, 6710B Bethesda Drive,
Bethesda, MD 20892 (301) 435-6884,
leszczyd@mail.nih.gov.

Name of Committee: National Institute of
Child Health and Human Development Initial
Review Group Function, Integration, and
Rehabilitation Sciences Subcommittee

Date: March 3, 2017.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant
applications.

Place: Embassy Suites at the Chevy Chase
Pavilion, 4300 Military Road, NW.,
Washington, DC 20015.

Contact Person: Joanna Kubler-Kielb,
Ph.D., Scientific Review Officer, Scientific
Review Branch, Eunice Kennedy Shriver,
National Institute of Child Health and
Human Development, 6710B Bethesda Drive,
Bethesda, MD 20892, 301-435-6916,
kielbj@mail.nih.gov.

(Catalogue of Federal Domestic Assistance
Program Nos. 93.864, Population Research;
93.865, Research for Mothers and Children;
93.929, Center for Medical Rehabilitation
Research; 93.209, Contraception and
Infertility Loan Repayment Program, National
Institutes of Health, HHS)

Dated: December 13, 2016.

Michelle Trout,

*Program Analyst, Office of Federal Advisory
Committee Policy.*

[FR Doc. 2016-30361 Filed 12-16-16; 8:45 am]

BILLING CODE 4140-01-P

**DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

**Substance Abuse and Mental Health
Services Administration**

**Agency Information Collection
Activities: Proposed Collection;
Comment Request**

In compliance with Section
3506(c)(2)(A) of the Paperwork

Reduction Act of 1995 concerning
opportunity for public comment on
proposed collections of information, the
Substance Abuse and Mental Health
Services Administration (SAMHSA)
will publish periodic summaries of
proposed projects. To request more
information on the proposed projects or
to obtain a copy of the information
collection plans, call the SAMHSA
Reports Clearance Officer on (240) 276-
1243.

Comments are invited on: (a) Whether
the proposed collections of information
are necessary for the proper
performance of the functions of the
agency, including whether the
information shall have practical utility;
(b) the accuracy of the agency's estimate
of the burden of the proposed collection
of information; (c) ways to enhance the
quality, utility, and clarity of the
information to be collected; and (d)
ways to minimize the burden of the
collection of information on
respondents, including through the use
of automated collection techniques or
other forms of information technology.

**Proposed Project: SAMHSA SOAR
Web-Based Data Form (OMB No. 0930-
0329)—REVISION**

In 2009 the Substance Abuse and
Mental Health Services Administration
(SAMHSA) of the U.S. Department of
Health and Human Services created a
Technical Assistance Center to assist in
the implementation of the SSI/SSDI
Outreach Access and Recovery (SOAR)
effort in all states. The primary objective
of SOAR is to improve the allowance
rate for Social Security Administration
(SSA) disability benefits for people who
are experiencing or at risk of
homelessness, and who have serious
mental illnesses.

During the SOAR training, the
importance of keeping track of SSI/SSDI
applications through the process is

stressed. In response to requests from
states implementing SOAR, the
Technical Assistance Center under
SAMHSA's direction developed a web-
based data form that case managers can
use to track the progress of submitted
applications, including decisions
received from SSA either on initial
application or on appeal. This
password-protected web-based data
form is hosted on the SOAR Web site
(<https://soartrack.prainc.com>). Use of
this form is completely voluntary.

In addition, data from Part I of the
web-based form can be compiled into
reports on decision results and the use
of SOAR core components, such as the
SSA-1696 Appointment of
Representative, which allows SSA to
communicate directly with the case
manager assisting with the application.
These reports will be reviewed by
agency directors, SOAR state-level
leads, and the national SOAR Technical
Assistance Center to quantify the
success of the effort overall and to
identify areas where additional
technical assistance is needed. There are
no proposed changes to Part I of this
form.

The proposed additions to create a
new Part II of this form include
qualitative (open-ended) questions on
annual SOAR accomplishments,
identified challenges and collaborations.
There are 8 new questions that represent
new initiatives, challenges, funding
sources, steering committees and
training. There is also an additional
open-ended question on collaborations
with 8 potentially applicable areas (*e.g.*
Veterans, justice-involved persons,
hospitals) that could require a response.
The addition of Part II is for annual
reporting by state and local leads only.

The estimated response burden is as
follows:

Form name	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Hourly wage cost	Total hour cost (\$)
SOAR Data Form (Part I)	700	3	2,100	.25	525	\$20	\$10,500
Annual Report Ques- tions (Part II)	75	1	75	1	37.50	20	750
TOTAL	775	.....	2,175	.....	562.50	.....	11,250

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 15E-57B, 5600 Fishers Lane, Rockville, MD 20857 OR email her a copy at summer.king@samhsa.hhs.gov. Written comments should be received by February 17, 2017.

Summer King,
Statistician.

[FR Doc. 2016-30431 Filed 12-16-16; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FW-HQ-ES-2016-N213;
FXFR131109WFHS0-FF09F10000-167]

**Proposed Information Collection;
Injurious Wildlife; Importation
Certification for Live Fish and Fish
Eggs**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on March 31, 2017. We 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: To ensure that we are able to consider your comments on this IC, we must receive them by February 17, 2017.

ADDRESSES: Send your comments on the IC to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail); or tina_campbell@fws.gov (email). Please include "1018-0078" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Tina Campbell at tina_campbell@fws.gov (email) or 703-358-2676 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Lacey Act (18 U.S.C. 42) (Act) prohibits the importation of any animal deemed to be and prescribed by regulation to be injurious to:

- Human beings;
- The interests of agriculture, horticulture, and forestry; or
- Wildlife or the wildlife resources of the United States.

The Department of the Interior is charged with enforcement of this Act. The Act and regulations at 50 CFR 16 allow for the importation of animals classified as injurious if specific criteria are met. To effectively carry out responsibilities and protect the aquatic resources of the United States, we must gather information on the animals being imported with regard to their source, destination, and health status. It is also imperative that we ensure the qualifications of those individuals who

provide the fish health data and sign the health certificate upon which we base our decision to allow importation.

We use three forms to collect this information:

(1) FWS Form 3-2273 (Title 50 Certifying Official Form). New applicants and those seeking recertification as a title 50 certifying official provide information so that we can assess their qualifications.

(2) FWS Form 3-2274 (U.S. Title 50 Certification Form). Certifying officials use this form or their own health certificate to affirm the health status of the fish or their reproductive products to be imported.

(3) FWS Form 3-2275 (Title 50 Importation Request Form). We use the information on this form to ensure the safety of the shipment and to track and control importations.

II. Data

OMB Control Number: 1018-0078.

Title: Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs, 50 CFR 16.13.

Service Form Numbers: 3-2273, 3-2274, and 3-2275.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Aquatic animal health professionals seeking to be certified title 50 inspectors; certified title 50 inspectors who have performed health certifications on live salmonids; and any entity wishing to import live salmonids or their reproductive products into the United States.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
FWS Form 3-2273	20	20	1 hour	20
FWS Form 3-2274	25	50	30 minutes	25
FWS Form 3-2275	25	50	15 minutes	13
TOTALS	70	120	.....	58

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- 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 respondents.

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 IC. 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.

Dated: December 14, 2016.

Tina A. Campbell,
Chief, Division of Policy, Performance, and Management Programs, U.S. Fish and Wildlife Service.

[FR Doc. 2016-30460 Filed 12-16-16; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-CRPS-22434; PPWOCRADIO, PCU00RP14.R50000 (177)]

Proposed Information Collection; Archeology Permit Applications and Reports

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on July 31, 2017. We 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: To ensure that we are able to consider your comments on this IC, we must receive them by February 17, 2017.

ADDRESSES: Send your comments on the IC to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Dr., Mail Stop 242, Reston, VA 20192 (mail); or *madonna_baucum@nps.gov* (email). Please include "1024-0037" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Karen Mudar, Ph.D., Archeologist, Washington Support Office Archeology Program, National Park Service, 1849 C Street NW., Washington, DC 20240 (mail); *Karen*

Mudar@nps.gov (email); or (202) 354-2103 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract

Section 4 of the Archeological Resources Protection Act (ARPA) of 1979 (16 U.S.C 470cc), and Section 3 of the Antiquities Act (AA) of 1906 (54 U.S.C. 320302), authorize any individual or institution to apply to Federal land managing agencies to scientifically excavate or remove archeological resources from public or Indian lands. A permit is required for any archeological investigation by non-NPS personnel occurring on parklands, regardless of whether or not these investigations are linked to regulatory compliance. Archeological investigations that require permits include excavation, shovel-testing, coring, pedestrian survey (with and without removal of artifacts), underwater archeology, photogrammetry, and rock art documentation. Individuals, academic and scientific institutions, museums, and businesses that propose to conduct archeological field investigations on parklands must first obtain a permit before the project may begin.

To apply for a permit, applicants submit DI Form 1926 (Application for Permit for Archeological Investigations). In general, an application includes, but is not limited to, the following information:

- Statement of Work.
- Statement of Applicant's Capabilities.
- Statement of Applicant's Past Performance.
- Curriculum vitae for Principal Investigator(s) and Project Director(s).
- Written consent by State or tribal authorities to undertake the activity on State or tribal lands that are managed by the NPS, if required by the State or tribe.

- Curation Authorization.
- Detailed Schedule of All Project Activities.

Persons receiving a permit must submit the following reports:

- Preliminary Reports—Within 6 weeks of completion of the field component of the research project, the permittee must submit a preliminary report that describes the fieldwork, including accomplishments, methods used to accomplish the work, names of individuals that carried out the fieldwork, maps, any GPS data, information about any newly recorded archeological sites, and any professional recommendations. If fieldwork involves only minor work and/or minor findings, a final report may be submitted in place of the preliminary report.
- Annual Reports—If the permit extends for more than 1 year, we require an annual progress report. The report must detail the extent of work accomplished to date, and how much work remains to be carried out.
- Final Reports—Within 6 months of completion of the field component of the research project, the permittee must submit a final report for review by the regional director.

II. Data

OMB Control Number: 1024-0037.
Title: Archeology Permit Applications and Reports—43 CFR 3 and 7.
Form Number(s): DI-1926, "Application for Permit for Archeological Investigations".
Type of Request: Revision to a currently approved collection.
Description of Respondents: Individuals or organizations wishing to excavate or remove archeological resources from public or Indian lands.
Respondent's Obligation: Required to obtain or retain a benefit.
Frequency of Collection: On occasion.

Activity	Annual number of respondents	Number of annual responses	Average time per response (Hours)	Total annual burden hours
Applications for Archeology Permits	773	773	2.5	1,933
Reporting—Archeology Permits	773	773	.5	387
Totals	1,546	904	3.0	2,320

Estimated Annual Nonhour Cost Burden: None.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including

whether or not the information will have practical utility;

- The accuracy of our estimate of the burden for this collection of information;
- 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 respondents.

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 IC. 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.

Dated: December 14, 2016.

Madonna L. Baucum,

*Information Collection Clearance Officer,
National Park Service.*

[FR Doc. 2016-30450 Filed 12-16-16; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[17XM1917XD/MMLL100000/
MD1EV0000.AAX00]

Proposed Information Collection: Beachgoer and Vessel Surveys

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: 60-day notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act, the Bureau of Ocean Energy Management (BOEM) will ask the Office of Management and Budget (OMB) to approve a collection of information to support ocean observation planning and management on public lands and waters. The respondents will be recreationists visiting public and private Gulf Coast beaches, and coastal and offshore vessel (boat) operators in the Gulf of Mexico region. The BOEM invites public comments on this proposed collection. A Federal 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: Please submit comments on the proposed information collection by February 17, 2017.

ADDRESSES: Comments may be submitted by mail, fax, or electronic mail.

Mail: Information Collection Clearance Officer, Anna Atkinson, U.S. Department of the Interior, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, VA 20166.

Fax: to Anna Atkinson at 703-787-1209.

Electronic mail: anna.atkinson@boem.gov.

Please indicate "Attn: 1010-XXXX" regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Dr. Rex Caffey, Louisiana State University, Center for Natural Resource Economics & Policy, Baton Rouge, LA 70803; email: rcaffey@agcenter.lsu.edu; or phone: 225-578-2393.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act, 44 U.S.C. 3501-3521, require that interested members of the public and affected agencies be given an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8 (d) and 1320.12(a)). This notice identifies an information collection that the BOEM plans to submit to OMB for approval. The Paperwork Reduction Act provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

I. Abstract

BOEM manages the exploration and development of oil, natural gas and other minerals and renewable energy alternatives on the nation's Outer Continental Shelf (OCS). Section 1346 of the Outer Continental Shelf Lands Act (OCSLA) mandates the conduct of environmental and socioeconomic studies needed for the assessment and management of environmental impacts on the human, marine, and coastal environments which may be affected by oil and gas, renewable energy, or other mineral development. Section 1345 of OCSLA authorizes the use of cooperative agreements with affected States to meet the requirements of OCSLA, which may include, but not be limited to, the sharing of information, the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to the OCS operations both onshore and offshore.

This data collection effort is necessary in order to monetarily value benefits of coastal and oceanic data collected in the U.S. Gulf of Mexico, as part of the Gulf of Mexico Coastal Ocean Observing System (GCOOS). Information on the economic value of regional ocean observations is critical for sustained public and private support for the GCOOS, especially as the costs of

operation and maintenance for ocean monitoring systems are questioned in Federal, State, and private budgetary processes.

The data collection effort is part of a cooperative agreement between the Environmental Studies Program (ESP) of the BOEM and the Louisiana Coastal Marine Institute (CMI) at Louisiana State University (LSU). The objective of the ESP is to support research in topics that serve the public interest of safe and environmentally sound energy production and meet the goals of the BOEM.

The GCOOS is a regional ocean observing system consisting of Federal, State, and local infrastructure. The system provides a wide array of science-based data to both public and private sector decision makers tasked with the management of human-built infrastructure, centers of population, and environmental and natural resources in the southeastern United States. As a component of the U.S. Integrated Ocean Observing System (IOOS), the overall goal of GCOOS is to provide the science-based biological, chemical, and physical data, along with the appropriate analytic tools, that are needed by society to address important short- and long-term management problems associated with marine industrial operations (marine transportation, oil and gas exploration and production), coastal hazards (offshore obstructions, pollutant spill tracking, conditions for offshore operations), public health and safety (forecasting harmful algal bloom movement, search and rescue), healthy ecosystems, and water quality. The information provided through GCOOS supports the policy mandates and objectives of a number of Federal agencies, including the BOEM, National Marine Fisheries Service, Environmental Protection Agency, and the U.S. Geological Survey.

The information collection will be led by researchers at Louisiana State University and Mississippi State University, who will conduct two surveys to assess the impact of an improved and expanded GCOOS. The surveys will gauge public perceptions of coastal and ocean-related data and information products and how improvements to these could impact future recreation, boating, and weather-related preparation/evacuation choices. This information collection request covers two proposed surveys, which collect necessary data from residents of Texas, Louisiana, Mississippi, Alabama, and Florida. This information is not otherwise available.

We will use the information from these surveys to gauge public perceptions of coastal and oceanic data collected in the U.S. Gulf of Mexico, as part of the GCOOS, and to estimate how improvements and expansions of the GCOOS could affect future recreation, boating, and hurricane preparation/evacuation choices.

A *Beachgoers Survey* will be utilized to gauge preferences for, and valuation of, GCOOS-derived information to inform coastal access via land. A *Vessel Survey* will gauge the associated preferences and values of GCOOS information for informing decision-making for coastal and marine boating.

The data collection for the Beachgoers Survey will be conducted using an internet-based survey, administered to members of the GfK Custom Research Knowledge Panel. No personally identifiable information will be collected. The survey will cover beachgoers, and is divided into three parts. The first part is an introduction wherein the purpose of the survey is discussed, highlighting the cooperating agencies, institutions and organizations, the Paperwork Reduction Act of 1995, and a privacy statement. Respondents will be screened for those who have made a trip to a Gulf beach in the last 12 months. Another question will inquire about one's beach activities, which is used to help categorize beach use.

The second part of the survey introduces the beach conditions monitoring system and Web site currently available for select beaches in Florida, and asks questions about which beach conditions are most important to respondents when visiting or planning a visit to a beach. It then proposes a hypothetical program that would

expand the beach conditions monitoring Web site to a larger set of beaches across all five Gulf Coast states. Following the introduction of the hypothetical program, respondents will be asked whether they would be willing to support the proposed expanded program if it were to cost a randomly-assigned amount of money per household to provide it, using standard contingent-valuation methods. The third section closes with a series of demographic and general awareness questions.

Data collection for the Vessel Survey will be conducted using both postal and Internet surveying, depending on respondent preference. This survey will cover a representative sample of registered vessel owners in the five Gulf Coast states. The first part will introduce the purpose of the survey, highlighting the cooperating agencies, institutions and organizations, the Paperwork Reduction Act of 1995, and a privacy statement. Basic information on the respondent's coastal and marine boating history in the last 12 months will then be requested. These questions will address necessary information related to the primary vessel utilized and associated type and duration of activities (e.g. fishing, sailing, research, etc.).

The second part of the survey gauges respondent use of specific types of ocean monitoring information (current observations and forecasted conditions), and their preference for general categories of GCOOS-based information. A follow-up question proposes a hypothetical program that would expand the GCOOS infrastructure by 40%. Following the introduction of the hypothetical program, respondents will be asked whether they would be willing

to support the proposed expanded program if it were to cost a randomly-assigned amount of money per household to provide it, using standard contingent-valuation methods. The third section of this survey closes with some basic demographics from the participants. No personally identifiable information will be collected.

II. Data

The following information pertains to this request:

Title: GCOOS Beachgoers and Vessel Surveys.

OMB Control Number: This is a new collection; 1010-XXXX.

Description of Respondents: General-population beachgoers and coastal-marine vessel owners/operators in the five Gulf Coast states.

Respondent Obligation: Voluntary.

Frequency of Collection: These would be one-time collections, which would take place over a 1–2 month collection period.

Estimated Annual Responses: 1,100 completed Beachgoers Survey responses, 4,138 non-response and dropout Beachgoers Survey responses; 1,066 completed Vessel Survey responses, 4,014 non-response and dropout Vessel Survey responses; total of 10,318 estimated responses.

Estimated Annual Burden Hours: We estimate the estimated burden of response to be 15 minutes for completed surveys and 3 minutes for non-response/dropout responses, for a total of 950 estimated annual burden hours.

Estimated Annual Non-Hour Costs: There is no non-hour cost burden associated with this collection.

The estimated burdens are itemized in the following table:

Type of response	Number of responses	Time per response (minutes)	Total hours (Col. B × Col. C/60 minutes)
A.	B.	C.	D.
<i>Beachgoer Survey:</i> Complete respondents	1100	15	275
<i>Beachgoer Survey:</i> Non-respondents and drop-outs	4138	3	207
<i>Vessel Survey:</i> Complete respondents	1066	15	267
<i>Vessel Survey:</i> Non-respondents and drop-outs	4014	3	201
Total	10318	.....	950

III. Request for Comments

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4)

ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information.

Agencies must also estimate the non-hour cost burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if

you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup costs or annual cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost

factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (a) Before October 1, 1995; (b) to comply with requirements not associated with the information collection; (c) for reasons other than to provide information or keep records for the Government; or (d) as part of customary and usual business or private practices. We will summarize written responses to this notice and address them in our submission for OMB approval. Please note that the comments submitted 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 IC. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Disclosure Statement: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act, 44 U.S.C. 3501–3521, require that interested members of the public and affected agencies be given an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8 (d) and 1320.12(a)). This notice identifies an information collection that the BOEM plans to submit to OMB for approval. The Paperwork Reduction Act provides that

an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Public Availability of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 9, 2016.
Deanna Meyer-Pietruszka,
Chief, Office of Policy, Regulation, and Analysis.
 [FR Doc. 2016–30353 Filed 12–16–16; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–392]

Bulk Manufacturer of Controlled Substances Application: Research Triangle Institute

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic classes, and

applicants therefore, may file written comments on or objections to the issuance of the proposed registration in accordance with 21 CFR 1301.33(a) on or before February 17, 2017.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DRW, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: The Attorney General has delegated her authority under the Controlled Substances Act to the Administrator of the Drug Enforcement Administration (DEA), 28 CFR 0.100(b). Authority to exercise all necessary functions with respect to the promulgation and implementation of 21 CFR part 1301, incident to the registration of manufacturers, distributors, dispensers, importers, and exporters of controlled substances (other than final orders in connection with suspension, denial, or revocation of registration) has been redelegated to the Assistant Administrator of the DEA Diversion Control Division (“Assistant Administrator”) pursuant to section 7 of 28 CFR part 0, appendix to subpart R.

In accordance with 21 CFR 1301.33(a), this is notice that on March 13, 2015, Research Triangle Institute, Kenneth S. Rehder, Hermann Building, East Institute Drive, P.O. Box 12194, Research Triangle Park, North Carolina 27709–2194 applied to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Controlled substance	Drug code	Schedule
Marihuana	7360	I
Tetrahydrocannabinols	7370	I

The company will manufacture marihuana (7360) and tetrahydrocannabinols (7370) for use by their researchers under the above-listed controlled substances as Active Pharmaceutical Ingredients (API) for clinical trials.

In reference to drug code (7370) the company plans to bulk manufacture a synthetic tetrahydrocannabinol. No other activity for this drug code is authorized for this registration.

Dated: December 3, 2016.

Louis J. Milione,
Assistant Administrator.

[FR Doc. 2016–30368 Filed 12–16–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Death in Custody Reporting Act Collection

AGENCY: Bureau of Justice Assistance, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Justice Assistance will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 17, 2017.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Chris Casto, Bureau of Justice Assistance, 810 Seventh Street NW., Washington, DC 20531 (email: DICRAComments@usdoj.gov; telephone: 202–616–6500).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information

are encouraged. Your comments should address one or more of the following points:

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether the proposed collection will result in the collection of timely, accurate, complete, and reliable information;
- Evaluate whether and, if so, how the quality, utility, and clarity of the information to be collected can be enhanced;
- Evaluate the extent to which the information to be collected should be made publicly available; and
- Evaluate whether the burden of the collection of information on those who are to respond can be minimized and, if so, how, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *The Title of the Form/Collection:* Death in Custody Reporting Act Collection

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* This collection includes the following newly-developed forms to respond to the Death in Custody Reporting Act (the DCRA), which respondents will be asked to complete through an online, web-based portal:

- *Form DCR-1: Quarterly Summary.* This summary form requires States to either (1) identify all reportable deaths that occurred in their jurisdiction during the corresponding quarter and provide basic information about the circumstances of the death, or (2) affirm that no reportable death occurred in the State during the reporting period.

- *Form DCR-1A: Incident Report, Law Enforcement.* This incident report form requires States to provide additional information for each reportable death identified in the Quarterly Summary that occurred during interactions with law enforcement personnel or while in their custody. The required information includes the circumstances surrounding the death and additional characteristics of the decedent.

- *Form DCR-1B: Incident Report, Corrections.* This incident report form

requires States to provide additional information for each reportable death identified in the Quarterly Summary that occurred while the decedent was in the custody of a jail, prison, or similar detention facility. The required information includes the circumstances surrounding the death and additional characteristics of the decedent.

- *Form DCR-2: Open Source Summary.* This summary form requires States to confirm whether the deaths identified through DOJ's open source review are qualifying reportable deaths and were already reported in the Quarterly Summary (Form DCR-1). For reportable deaths that were not included in the Quarterly Summary, the respondent is required to submit the corresponding Incident Report (Form DCR-1A or DCR-1B).

- *State Data Collection Plan.* By the beginning of each fiscal year, each State is required to submit its plan—or an update to an existing plan—on how it will collect the information that the DCRA requires the State to report on a quarterly basis that achieves maximum timeliness, accuracy, and completeness.

The applicable component of the Department of Justice sponsoring this collection is the Office of Justice Programs, Bureau of Justice Assistance.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* In order to comply with the mandate of the DCRA, the Department of Justice, Bureau of Justice Assistance, is proposing a new data collection for State Administering Agencies to collect and submit information regarding the death of any person who is detained, under arrest, or is in the process of being arrested, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, State-run boot camp prison, boot camp prison that is contracted out by the State, any State or local contract facility, or other local or State correctional facility (including any juvenile facility).

For purposes of this collection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. Thus, the affected public that will be asked to respond on a quarterly basis each federal fiscal year include 56 State actors. Indirectly, these States will be requesting information from approximately 19,450 State and local law enforcement agencies (LEAs), 50 State departments of corrections, and 2,800 local adult jail jurisdictions.

DOJ previously published a notice in the **Federal Register** on August 4, 2016, describing a plan to collect DCRA

information in Fiscal Years (FYs) 2016 and 2017. Based on comments received from the public, DOJ has amended its plan which is described more fully below.

Background

The Death in Custody Reporting Act (DCRA) requires states and federal law enforcement agencies to report certain information to the Attorney General regarding the death of any person occurring during interactions with law enforcement officers or while in custody. *See* 42 U.S.C. 13727(a) & (b), 13727a(a) & (b). It further requires the Attorney General and the Department of Justice (Department) to collect the information, establish guidelines on how it should be reported, annually determine whether each state has complied with the reporting requirements, and address any state's noncompliance.

The DCRA, which Congress enacted in December 2014, builds on an earlier law, also called the Death in Custody Reporting Act, enacted in 2000 (*P.L. 106-247*). The 2000 law required States to report "information regarding the death of any person who is in the process of arrest, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, or other local or State correctional facility (including any juvenile facility) . . ." In response, the Department of Justice through the Bureau of Justice Statistics (BJS) of the Office of Justice Programs developed a Deaths in Custody Reporting Program (DCRP), which had two parts. First, BJS collected data on deaths that occurred while the decedent was in the custody of local jails or State prisons. Second, BJS collected information on deaths that occurred during the process of arrest (arrest-related deaths, or ARDs). The DCRP collected information on deaths regardless of the manner of death, including those that resulted from accidents, suicides, natural causes, law enforcement homicides, and other homicides.

Although the 2000 law expired in 2006, BJS continued to collect data on deaths in jails and prisons. The most recent reports based on the prison and jails data collection can be found at <http://www.bjs.gov/index.cfm?ty=tp&tid=19>. BJS continued the ARD program as well, but it was suspended in 2014 due to an assessment which revealed that variations in data collection methodology and coverage among States resulted in an insufficient census of arrest-related deaths. BJS then tested a new methodology. Instead of relying solely on States to affirmatively

submit information on reportable ARDs, BJS piloted a mixed method approach using open sources to identify eligible cases, followed by data requests to law enforcement, medical examiners, and/or coroner offices for incident-specific information about the decedent and circumstances surrounding the event. During the follow-up, BJS also would request information on other ARDs that had not been identified through open sources. The results of the redesigned “open source review” approach, which are available at <http://www.bjs.gov>, showed substantial improvements in data coverage and quality.

In enacting the current DCRA, Congress maintained the reporting structure that places the primary responsibility of reporting DCRA information on States and added new provisions that were not in the 2000 law—namely that the Attorney General was granted authority to establish guidelines and to determine whether States are in compliance with those standards. A noncompliant State is subject, at the discretion of the Attorney General, to a 10% reduction of its Byrne Justice Assistance Grant (Byrne JAG), and the amount of any reduction is to be reallocated to States that are found to be in compliance. Because the new provisions envision the data collected to be used to determine compliance and potentially assess penalties on Byrne JAG grantees, the Department’s plan described below shifts the responsibility of DCRA data collection from BJS, which may collect data only for statistical and research purposes, to the Bureau of Justice Assistance. Thus, BJS in 2018 will suspend the current DCRP data collection efforts in jails and prisons and will not pursue a revised ARD program.

Collection Process

DOJ proposes the following plan to collect DCRA information in fiscal year 2017 and beyond (and also describes below a plan to collect DCRA information for fiscal year 2016). The plan, which constitutes “guidelines established by the Attorney General” pursuant to section 2(a) of the DCRA, combines elements of past approaches shown to increase data quality and coverage of reportable deaths with elements with provisions specifically required by the statute.

For purposes of this notice, the term “reportable death” means any death that the DCRA or the Department’s guidelines require States to report. Generally, these are deaths that occurred during interactions with law enforcement personnel or while the decedent was in their custody or in the

custody, under the supervision, or under the jurisdiction of a State or local law enforcement or correctional agency, such as a jail or prison. Specifically, the DCRA requires States to report information regarding “the death of any person who is detained, under arrest, or is in the process of being arrested, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, State-run boot camp prison, boot camp prison that is contracted out by the State, any State or local contract facility, or other local or State correctional facility (including any juvenile facility).” 42 U.S.C. 13727(a). The Department interprets the Act’s list of circumstances to include any deaths that occurred:

- Due to any use of force by law enforcement personnel (e.g., officer-involved shootings and deaths caused by law enforcement weapons or tactics).
- While the decedent’s freedom to leave was restricted by law enforcement prior to, during, or following an arrest—including during detention for questioning or investigation (e.g., a *Terry* stop); during the process of apprehension (e.g., the pursuit of a criminal suspect, or a standoff with law enforcement); while in the custody of, or shortly after restraint by, law enforcement personnel (even if the decedent was not formally under arrest); or while in transit by law enforcement personnel.
- During an interaction with law enforcement personnel responding to medical or mental health assistance (e.g., in response to suicidal persons).
- While the decedent was confined in a correctional or detention facility, including a prison, jail, boot camp, lockup, or booking center.
- While the decedent was under the jurisdiction or supervision of a law enforcement agency or correctional or detention facility but located elsewhere, such as special jail facilities (e.g., medical/treatment/release centers, halfway houses, or work farms), or in transit.

Please note that the DCRA information that States submit to the Department must originate from official government records, documents, or personnel.

The DCRA requires quarterly reporting. Because these data collection guidelines will not be finalized before the 2nd quarter of FY 2017, quarterly reporting will begin with the 3rd and 4th quarters of FY 2017 and continue quarterly thereafter. Reporting for the 3rd and 4th quarters of FY 2017 will include only reportable deaths occurring during interactions with law enforcement personnel or while in their

custody (i.e., deaths reportable on Form DCR–1A), and not deaths occurring in the jail, prison, or detention settings. Deaths in prisons and jails occurring during 2016 and 2017 will be captured by BJS through its existing data collection program on deaths in prisons and jails. Beginning with FY 2018, quarterly DCRA reporting will include all reportable deaths—deaths occurring during interactions with law enforcement personnel or while in their custody and deaths in jail, prison, or detention settings.

Please note that the Department will not make any compliance determination based on a State’s FY 2017 data reporting. States are expected to begin reporting pursuant to the DCRA during the 3rd and 4th Quarters of FY 2017, but the Department will not find a State to be in noncompliance or reduce a State’s grant funding for noncompliance because of reporting failures during FY 2017. This grace period for FY 2017 is necessary to allow States time to develop and implement their data collection and reporting plans. It will be important for States to report during FY 2017, however, so that they have an opportunity to test their abilities to report the data effectively, to identify and correct any flaws in their data collection and reporting systems before reporting for FY 2018 begins, and to develop the data collection plans that they will use for FY 2018. *The Department will assess states’ compliance with their reporting obligations over FY 2018, and States that fail to comply during FY 2018 will be subject to a reduction of their grant funding, pursuant to the DCRA.*

States will be required to complete the following four steps in order to be in compliance with DCRA requirements:

(1) *Quarterly Summary.* For each quarter in a fiscal year, a State must complete the Quarterly Summary (Form DCR–1) and submit it by the reporting deadline. The Quarterly Summary is a list of all reportable deaths that occurred in the State during the corresponding quarter with basic information about the circumstances of each death. If a State did not have a reportable death during the quarter, the State must so indicate on the Quarterly Summary. The reporting deadline to submit the Quarterly Summary is the last day of the month following the close of the quarter. For each quarter, DOJ will send two reminders prior to the reporting deadline.

Example. The second quarter of a fiscal year is January 1–March 31. The deadline to submit the second quarter Quarterly Summary is April 30. DOJ will send a reminder to States on March 31 and April 15.

(2) *Incident Reports.* For each reportable death identified in the Quarterly Summary, a State must complete and submit by the same reporting deadline an Incident Report (Form DCR-1A or DCR-1B depending on the agency involved or that had custody of the defendant at the time of death), which contains specific information on the circumstances of the death and additional characteristics of the decedent. These include:

- The decedent's name, date of birth, gender, and other demographic information.
- The date, time, and location of the death.
- The law enforcement or correctional agency involved.
- Precipitating events and reason for law enforcement personnel's initial contact with the decedent (e.g., whether the decedent committed or allegedly committed any crimes).
- The decedent's behavior during the incident (e.g., whether the decedent threatened or assaulted anyone; exhibited mental health or substance abuse issues; or possessed or appeared to possess a weapon).
- Law enforcement actions during the incident (e.g., engaged in pursuit or restraint tactics; used force; discharged a firearm, and if so, how many shots were fired; the number of officers responding to the incident).
- Manner of death.

States must answer all questions on the Incident Report before it can submit the form. If information about a death is unavailable due to an ongoing criminal or internal affairs investigation, the State may select the "unavailable, pending investigation" answer, if available. The State then must identify the type of investigation, which agency is conducting the investigation, and when the investigation is expected to be completed. If the State does not have sufficient information to complete one of the questions, then the State may select the "unknown" answer, if available, and then identify when the information is anticipated to be obtained. An "unknown" response is valid only if the State has contacted the law enforcement or correctional agency involved in the death and the information is not known to that agency. For "under investigation" or "unknown" responses, States are expected to provide that information when it becomes available, and DOJ will follow up with States in subsequent reporting periods to update previous entries.

(3) *Open Source Summary.* Within 15 days after each reporting deadline, DOJ will send to each State an Open Source

Summary (Form DCR-2) with a prepopulated list of deaths identified through the open source review for the relevant quarter. States will have until the following quarter's reporting deadline to submit an Incident Report (Form DCR-1A or DCR-1B) for any reportable death identified on the Open Source Summary that was NOT reported by the State on the Quarterly Summary (Form DCR-1). If a death identified in the Open Source Summary is determined by the State to not be reportable under the DCRA, the State must so indicate, also by the following quarter's reporting deadline.

Example. A State submits its second quarter Quarterly Summary (Form DCR-1) and corresponding Incident Reports by the reporting deadline—April 30. By May 15, DOJ will send to the State the Open Source Summary (Form DCR-2) that lists second quarter reportable deaths identified through the open source review. The State will have until the third quarter reporting deadline—July 31—to submit an Incident Report for any deaths on the Open Source Summary for which an Incident Report was not previously submitted.

(4) *State Data Collection Plan.* By the first day of each fiscal year, each State must submit to DOJ its plan for collecting the required information on reportable deaths on a quarterly basis that achieves maximum timeliness, accuracy, and completeness. The State Data Collection Plan should include, at a minimum, a description of how the State will communicate with relevant law enforcement and correctional agencies within its jurisdiction, receive accurate and complete information on reportable deaths, and conduct appropriate follow up to ensure reliability of the information transmitted. Each State must also identify a point of contact responsible for submitting the information to DOJ. On an annual basis, the State must review its plan and update it as necessary. States will not be required to submit its Data Collection Plans for FY 2017, but will be required to submit one for FY 2018 and update it thereafter. Information on State Data Collection Plans will aid DOJ in assisting States that are seeking to improve their collection plans and help DOJ evaluate the reliability of all data collected. DOJ will make each State Data Collection Plan available to the public but will not assess the merits of the plan for compliance purposes.

Compliance Determination

Beginning with FY 2018, DOJ will determine on an annual basis whether States have complied with the DCRA by completing the four requirements listed

above. A State found to be not in compliance with all of the DCRA reporting requirements will be subject to a penalty of 10% of its Byrne JAG award, consistent with the statutory language of the DCRA. This penalty, if applied, would reduce the State's Byrne JAG award for the following fiscal year. The penalty will be applied to the portion of the Byrne JAG award that is allocated to and controlled by the State, and not to amounts allocated to localities. The noncompliant State's penalty amount will be reallocated in accordance with Byrne JAG formula calculations to States that have been found to be in compliance for the corresponding fiscal year.

A noncompliant State, however, will have the opportunity, in lieu of the imposition of a 10% penalty, to elect to redirect a portion of its Byrne JAG award to use within the State to assess and improve its DCRA collection. The amount a State can voluntarily redirect internally under this "pre-penalty" option is as follows: for the first two noncompliance determinations, 5% of the State portion of its Byrne JAG award; for any subsequent noncompliance determinations, 10%. There is no limit to the number of times a State may choose the "pre-penalty" option.

Example. State X fails to submit two Quarterly Summaries in fiscal year 2019 and is thus found to be not in compliance. Instead of being penalized for noncompliance, State X may choose the pre-penalty option and use 5% of its fiscal year 2020 Byrne JAG award allocated to the State to improve its DCRA collection efforts. If State X does not choose the pre-penalty option, the State portion of its fiscal year 2020 Byrne JAG award is reduced by 10% and reallocated to States that were found to be in compliance for fiscal year 2019.

Should a State encounter an extraordinary circumstance preventing it from completing any of the DCRA requirements (e.g., a natural disaster that compromises a State's data collection and reporting infrastructure), the State may submit a letter to DOJ signed by its Governor certifying the reason for noncompliance and requesting specific relief. In considering such requests, DOJ will be guided by analyzing, among other things, the severity of the described extenuating circumstances, past history, if any, of the State's compliance with DCRA requirements, and the State's description of how it plans to modify its processes to address the extenuating circumstance.

Collection of Data From FY 2016 and the First Two Quarters of FY 2017

To collect data from FY 2016 and the 1st and 2nd Quarters of FY 2017, DOJ will send an Open Source Summary to States, which will contain all reportable deaths identified through the open source review as occurring during that timeframe and that did not occur in or under the jurisdiction of jails, prisons, or other correctional facilities. DOJ will send the Open Source Summary by May 31, 2017. DOJ will request States to submit Incident Reports for each of the identified deaths by November 30, 2017. Reportable deaths that occurred in jails, prisons, or other correctional facilities during 2016 and 2017 will be captured through BJS' existing jails and prisons collections. *DOJ will not be making any compliance determinations or assessing penalties on States based on States' reporting of FY 2016 or FY 2017 data.*

Publicly Available Information

To advance DCRA's aims of transparency and evidence-based policy development, DOJ will release certain information to the public each fiscal year, including the State plans, the number of deaths reported for each agency and facility, and data on the circumstances surrounding those deaths. The information released would otherwise be subject to public disclosure under the Freedom of Information Act. The release will be consistent with Department policies and any applicable federal laws, including federal privacy laws, and will not contain personally identifiable information.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* For purposes of this burden calculation, it is estimated that for each fiscal year there will be a total of 1900 reportable deaths by 1,060 LEAs, 1,053 reportable deaths by 600 jails, and 3,483 reportable deaths by prisons.

For FY 2016, the total projected respondent burden is 2,124.00 hours. For States to review and complete the Open Source Summary (DCR-2) at 4.00 hours per Summary and to complete the corresponding Incident Reports (DCR-1A) at 0.25 hours per Report, the total estimated burden is 475.00 hours. For LEAs, the estimated burden to assist States in completing Incident Reports is 0.75 hours per Report for a total of 1,425.00 hours.

For FY 2017, the total projected respondent burden is 14,172 hours. States will need an estimated 4.00 hours to complete each Quarterly Summary for a total of 2,240.00 hours, 0.25 hours

to complete each corresponding Incident Reports (DCR-1A) for a total of 475.00 hours, and 4.00 hours for the Open Source Summaries (DCR-2) for a total of 224.00 hours. Additionally, States must develop the State Data Collection Plan in FY2017 to meet the October 1, 2017, deadline. The estimated burden is 160.00 hours for a total of 8,960.00 hours. For LEAs in FY 2017, the estimated burden to assist States in completing the Quarterly Summaries is 0.40 hours per Report for a total of 848.00 hours, and a total of 1,425.00 hours, at 0.75 hours for each corresponding Incident Report.

For FY2018, the total projected respondent burden is 14,428.49 hours. The increase over FY 2017 is due to requiring reportable deaths from jails and prisons in addition to arrest-related deaths but is offset by the need for each State to devote approximately significantly less time—approximately 8.00 hours, for a total of 448.00 hours—to update instead of develop its State Data Collection Plan. Additionally, based on the same per report estimates described for FY 2017, the projected aggregate burden for States is 4,480.00 hours to complete the Quarterly Summaries (DCR-1), 1,713.49 hours to complete the corresponding Incident Reports (DCR-1A and DCR-1B), and 224.00 hours to complete the Open Source Summaries (DCR-2).

For LEAs in FY 2018, the estimated burden to assist States in completing the Quarterly Summaries is a total of 1,696.00 hours, while the total to assist States in completing Incident Reports remains 1,425.00 hours. The estimated burden for jails is a total of 960.00 hours to assist States in completing the Quarterly Summaries and 789.75 hours in completing Incident Reports. Finally, the estimated burden for prisons to assist States in completing the Quarterly Summaries is a total of 80.00 hours, and a total of 2,612.25 hours to assist States in completing Incident Reports.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: December 13, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016-30396 Filed 12-16-16; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Intent To Renew the Advisory Committee on Apprenticeship (ACA) Charter

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Secretary of Labor has determined that the renewal of the Advisory Committee on Apprenticeship is necessary and in the public interest. The Department of Labor intends to renew the ACA Charter with revisions. The revisions are not intended to change the purpose or the Committee's original intent. The revisions are a routine updating of the Charter to ensure closer alignment with the Department's current apprenticeship expansion goals.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer, Mr. Daniel Villao, Deputy Administrator for National Office Policy, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room C-5321, Washington, DC 20210, Telephone: (202) 693-2796 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Registered Apprenticeship is a unique public private partnership that is highly dependent on the engagement and involvement of its stakeholders and partners for its ongoing operational effectiveness. Apart from the ACA, there is no single organization or group with the broad representation of labor, employers, and the public available to consider the complexities and relationship of apprenticeship activities to other training efforts or to provide advice on such matters to the Secretary. It is particularly important to have such considerations at this time in light of the current national interest in apprenticeship and the Department of Labor's goal to double the number of apprentices across the country, in the next five years by expanding into a variety of non-traditional industries. The ACA's insight and recommendations on the best ways to grow apprenticeship to meet the emerging skill needs of employers is critical. For these reasons, the Secretary of Labor has determined that the renewal of a national advisory committee on apprenticeship is necessary and in the public interest. The ACA Charter is being renewed to

provide advice and recommendations to the Secretary on the following: (1) The development and implementation of policies, legislation and regulations affecting the National Registered Apprenticeship system; (2) strategies that can expand the use of the Registered Apprenticeship model in non-traditional industries such as, but not limited to, Hospitality, Financial Services, Transportation/Logistics, Healthcare, Energy, Advanced Manufacturing, and Information Technology and Communications; (3) ways to more effectively partner with the public workforce system, workforce intermediaries, International apprenticeship partners, and educational institutions and communities to leverage Registered Apprenticeship as a valued post-secondary credential; including policies related to the Registered Apprenticeship College Consortium; (4) priorities and strategic investments to help in the development of career pathways that can generate access for everyone and sustained employment for new and incumbent workers, youth, Veterans, women, minorities and other under-utilized and disadvantaged populations; and (5) efforts to improve performance, quality and oversight, and utilization of the National Registered Apprenticeship system. The current ACA Charter will expire on January 14, 2017. The ACA's Charter is required to be renewed every two years. Since the Charter was last renewed in January 2015, it has been revised in four sections to ensure alignment with departmental priorities. The following four sections have been updated (1) Objectives and Scope of Activities; (2) Designated Federal Officer; and (3) Representation under the Membership and Designation; and (4) Recordkeeping.

Summary of the Changes

1. Objectives and Scope of Activities: The objectives and scope section of the ACA Charter outlines the areas of focus where the ACA will provide advice and recommendations. ETA is expanding and engaging with non-traditional apprenticeship partners, such as workforce intermediaries, and international partners. ETA also seeks to have ongoing engagement and feedback from the ACA on the impact of funding investments being made under the ApprenticeshipUSA initiative. The current ACA Charter states that the ACA will advise on ways to more effectively partner with the public workforce system, educational institutions and communities to leverage Registered Apprenticeship as a valued post-secondary credential. The proposed

ACA Charter is being updated to reflect ETA's efforts to expand its partnerships to include workforce intermediaries, and interested partners from the international apprenticeship community. The proposed Charter is further updated to include the need for the ACA provide advice and recommendations on the impact of priorities and strategic investments being made under ApprenticeshipUSA.

2. Designated Federal Officer: The Designated Federal Officer (DFO) section of the Charter is being updated to reflect leadership changes within ETA and subsequent shift of the DFO responsibilities from the Administrator of the Office of Apprenticeship to the Deputy Administrator for National Office Policy from the Office of Apprenticeship.

3. Representation: The Representation section of the Charter is being updated to better align the ACA membership with the ACA's focus on Registered Apprenticeship. NAGLO does not focus solely on Registered Apprenticeship matters. The Representation section of the Charter is being further updated to streamline the number of ex-officio members from Federal agencies represented on the ACA. The current Charter reflects ex-officio membership for five Federal agencies: The U.S. Departments of (1) Commerce, (2) Education, (3) Energy, (4) Health and Human Services, and (5) Labor. A major part of ETA's apprenticeship expansion focuses on expanding Registered Apprenticeship as a premiere workforce development strategy among businesses, workforce development entities, post-secondary institutions, Career and Technical Education and other educational institutions. The proposed Charter is being updated to streamline the number of Federal agencies represented on the ACA to the Departments of Commerce, Education, and Labor. ETA will continue to engage with other Federal agencies as appropriate.

4. Recordkeeping: The Recordkeeping section of the Charter is being updated to reflect changes to the General Records Schedule for advisory committees. The current Charter states that the records of the ACA shall be handled in accordance with the General Records Schedule 26, item 2 and the approved records disposition schedule for the Employment and Training Administration. The proposed Charter is being updated to reflect changes in the General Records Schedule for advisory committees; records of the ACA will be handled in accordance with General Records Schedule 6.2, Federal Advisory Committee Records, and the approved

records disposition schedule for the Employment and Training Administration.

Signed at Washington, DC.

Portia Wu,

Assistant Secretary for the Employment and Training Administration.

[FR Doc. 2016-30486 Filed 12-16-16; 8:45 am]

BILLING CODE 4510-FR-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Welding, Cutting, and Brazing Standard

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Welding, Cutting, and Brazing Standard" to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 18, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-1218-008 (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn:

Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Welding, Cutting, and Brazing Standard information collection. More specifically, regulations 29 CFR 1910.255(e) requires that a periodic inspection of resistance welding equipment be made by qualified maintenance personnel and a certification record generated and maintained. The certification shall include the date of the inspection, the signature of the person who performed the inspection and the serial number, or other identifier, for the equipment inspected. The maintenance inspection ensures that welding equipment is in safe operating condition, while the maintenance record provides evidence that employers performed the required inspections. Occupational Safety and Health Act sections 2(b)(3) and 8(c) authorize this information collection. See 29 U.S.C. 651(b)(3), 657(c).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218-0207.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on February 28, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice

published in the **Federal Register** on September 29, 2016 (81 FR 67003).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218-0207. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- 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.

Agency: DOL-OSHA.

Title of Collection: Welding, Cutting, and Brazing Standard.

OMB Control Number: 1218-0207.

Affected Public: Private Sector—business or other for profits.

Total Estimated Number of Respondents: 20,471.

Total Estimated Number of Responses: 81,884.

Total Estimated Annual Time Burden: 5,732 hours.

Total Estimated Annual Other Costs Burden: \$0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: December 12, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016-30451 Filed 12-16-16; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Federal Contract Compliance Programs (OFCCP) sponsored information collection request (ICR) titled, "Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 18, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201610-1250-001 (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OFCCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW.,

Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the OFCCP Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended (VEVRAA) information collection. More specifically, this ICR covers the VEVRAA recordkeeping and third-party disclosure requirements codified in regulations 29 CFR 300.42 and 41 CFR 60-300. VEVRAA section 2012 authorizes this information collection. See 38 U.S.C. 4212(d).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1250-0004.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on January 31, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 26, 2016 (81 FR 58964).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1250-0004. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- 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.

Agency: DOL-OFCCP.

Title of Collection: Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended.

OMB Control Number: 1250-0004.

Affected Public: Individuals or Households; Private Sector—businesses and other for-profits, farms, and not-for-profit institutions.

Total Estimated Number of Respondents: 41,814,991.

Total Estimated Number of Responses: 41,814,991.

Total Estimated Annual Time Burden: 5,427,933 hours.

Total Estimated Annual Other Costs Burden: \$196,214,431.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: December 12, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016-30453 Filed 12-16-16; 8:45 am]

BILLING CODE 4510-CM-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Federal Contract Compliance Programs

(OFCCP) sponsored information collection request (ICR) titled, "Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 18, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201610-1250-002 (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OFCCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the OFCCP Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503 information collection. More specifically, this ICR covers the section 503 recordkeeping and third-party disclosure requirements codified in regulations 41 CFR 60-710. Rehabilitation Act section 503 and Executive Order 11758, *Delegating*

Authority of the President Under the Rehabilitation Act of 1973, section 2 authorize this information collection. See 29 U.S.C. 793 and E.O. 11758 section 2.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1250-0002.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on January 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 26, 2016.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1250-0005. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- 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.

Agency: DOL-OFCCP.

Title of Collection: Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503.

OMB Control Number: 1250-0005.

Affected Public: Individuals or Households; Private Sector—businesses and other for-profits, farms, and not-for-profit institutions.

Total Estimated Number of Respondents: 41,814,991.

Total Estimated Number of Responses: 41,814,991.

Total Estimated Annual Time Burden: 4,392,369 hours.

Total Estimated Annual Other Costs Burden: \$150,282,664.

Dated: December 13, 2016.

Authority: 44 U.S.C. 3507(a)(1)(D).

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016-30454 Filed 12-16-16; 8:45 am]

BILLING CODE 4510-CM-P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collections Application of the Employee Polygraph Protection Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is soliciting comments concerning a proposed extension to the information collection request (ICR) titled, "Application of the Employee Polygraph Protection Act." This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before February 17, 2017.

ADDRESSES: You may submit comments identified by Control Number 1235-0005, by either one of the following methods: *Email:* WHDPRAComments@dol.gov; *Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT:

Robert Waterman, Compliance Specialist, 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 notice may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693-0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. *Background:* The Wage and Hour Division (WHD) of the Department of Labor (DOL) administers the Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. 2001 *et seq.* The EPPA prohibits most private employers from using any lie detector tests either for pre-employment screening or during the course of employment. The Act contains an exemption applicable to Federal, State and local government employers. The EPPA also contains several limited exemptions authorizing polygraph tests under certain conditions, including testing: (1) By the Federal Government of experts, consultants, or employees of Federal contractors engaged in national security intelligence or counterintelligence

functions; (2) of employees the employer reasonably suspects of involvement in a workplace incident resulting in economic loss or injury to the employer's business; (3) of some prospective employees of private armored cars, security alarm and security guard firms; and (4) of some current and prospective employees of certain firms authorized to manufacture, distribute, or dispense controlled substances. The WHD may assess civil money penalties of up to \$19,787 against employers who violate any EPPA provision. This amount increases annually due to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. On November 2, 2015, President Obama signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to advance the effectiveness of civil money penalties and to strengthen their deterrent effect. Outdated penalties are a problem because civil penalties are less effective when they do not keep pace with the cost of living. The new law directs agencies across the federal government to adjust their penalties for inflation each year in January.

II. *Review Focus*: The Department of Labor is particularly interested in comments which:

- 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;
- Enhance the quality, utility, and clarity of the information to be collected;
- 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;
- 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.

III. *Current Actions*: The Department of Labor seeks an approval for the extension of this information collection in order to ensure effective administration of the Employee Polygraph Protection Act.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Application of the Employee Polygraph Protection Act.

OMB Number: 1235-0005.

Affected Public: Business or other for-profit, Not-for-profit institutions, Farms, State, Local, or Tribal Government.

Total Respondents: 593,400.

Total Annual Responses: 593,400.

Estimated Total Burden Hours: 68,739.

Estimated Time per Response: 30–45 minutes.

Frequency: On occasion.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operation/maintenance): \$0.

Dated: December 12, 2016.

Melissa Smith,

Director, Division of Regulations, Legislation and Interpretation.

[FR Doc. 2016-30452 Filed 12-16-16; 8:45 am]

BILLING CODE 4510-27-P

NATIONAL MEDIATION BOARD

Notice of Proposed Information Collection Requests

AGENCY: National Mediation Board.

SUMMARY: The Assistant Chief of Staff, Administration invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments within 30 days from the date of this publication.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Assistant Chief of Staff, Administration publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, e.g. new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments

concerning the proposed extension of the Application for Mediation Services and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 13, 2016.

Samantha Jones,

Assistant Chief of Staff, Administration, National Mediation Board.

Application for Mediation Services

Type of Review: Extension.

Title: Application for Mediation Services, OMB Number: 3140-0002.

Frequency: On occasion.

Affected Public: Carrier and Union Officials, and employees of railroads and airlines.

Reporting and Recordkeeping Hour Burden:

Responses: 50 annually.

Burden Hours: 12.50.

Abstract: Section 5, First of the Railway Labor Act, 45 U.S.C., 155, First, provides that both, or either, of the parties to the labor-management dispute may invoke the mediation services of the National Mediation Board. Congress has determined that it is in the nation's best interest to provide for governmental mediation as the primary dispute resolution mechanism to resolve labor-management disputes in the railroad and airline industries. The Railway Labor Act is silent as to how the invocation of mediation is to be accomplished and the Board has not promulgated regulations requiring any specific vehicle. Nonetheless, 29 CFR1203.1 provides that applications for mediation services be made on printed forms which may be secured from the National Mediation Board. This section of the regulations provides that applications should be submitted in duplicate, show the exact nature of the dispute, the number of employees involved, name of the carrier and name of the labor organization, date of agreement between the parties, date and copy of notice served by the invoking party to the other and date of final conference between the parties. The application should be signed by the highest officer of the carrier who has been designated to handle disputes under the Railway Labor Act or by the chief executive of the labor

organization, whichever party files the application.

The extension of this form is necessary considering the information provided by the parties is used by the Board to structure a mediation process that will be productive to the parties and result in a settlement without resort to strike or lockout. The Board has been very successful in resolving labor disputes in the railroad and airline industries. Historically, some 97 percent of all NMB mediation cases have been successfully resolved without interruptions to public service. Since 1980, only slightly more than 1 percent of cases have involved a disruption of service. This success ratio would possibly be reduced if the Board was unable to collect the brief information that it does in the application for mediation services.

Requests for copies of the proposed information collection request may be accessed from www.nmb.gov or should be addressed to Denise Murdock, NMB, 1301 K Street NW., Suite 250 E, Washington, DC 20005 or addressed to the email address murdock@nmb.gov or faxed to 202-692-5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Samantha Jones at 202-692-5010 or via internet address jones@nmb.gov. Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 2016-30384 Filed 12-16-16; 8:45 am]

BILLING CODE 7550-01-P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501 *et seq.*). This is the second notice for public comment; the first was published in the **Federal Register** at 81 FR 49689, and one comment was received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of

this second notice. The full submission may be found at: <http://www.reginfo.gov/public/do/PRAMain>.

Comments: Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the NSF, including whether the information will have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 7th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230 or send email to splimpto@nsf.gov.

DATES: Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission may be obtained by calling 703-292-7556. NSF 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.

SUPPLEMENTARY INFORMATION

Comments: As required by 5 CFR 1320.8(d), comments on the information collection activities as part of this study were solicited through publication of a 60-Day Notice in the **Federal Register** on July 28, 2016, at 81 FR 49689. We received one comment, to which we here respond.

Commenter: The comment requested NSF consider the use of administrative records, specifically the National Student Clearinghouse, to obtain information on education background in lieu of asking this information from respondents on the National Survey of College Graduates (NSCG).

Response: NSF informed the commenter that, at the request of NSF, the Census Bureau's Center for

Administrative Records Research and Application is conducting research to compare administrative records data with the NSCG respondent-provided data. This research will inform survey content discussions for future NSCG cycles and will provide insight on the necessity of certain NSCG questionnaire items including the education background items.

After consideration of this comment, we are moving forward with our submission to OMB.

Title of Collection: 2015 National Survey of College Graduates.

OMB Approval Number: 3145-0141.

Type of Request: Intent to seek approval to renew an information collection for three years.

Abstract: The National Survey of College Graduates (NSCG) has been conducted biennially since the 1970s. The 2017 NSCG sample will be selected from the 2015 American Community Survey (ACS) and the 2015 NSCG. By selecting sample from these two sources, the 2017 NSCG will provide coverage of the college graduate population residing in the United States. The purpose of this longitudinal survey is to collect data that will be used to provide national estimates on the science and engineering workforce and changes in their employment, education, and demographic characteristics.

The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to “. . . provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government.” The NSCG is designed to comply with these mandates by providing information on the supply and utilization of the nation's scientists and engineers.

The U.S. Census Bureau, as in the past, will conduct the NSCG for NSF. The survey data collection will begin in March 2017 using web and mail questionnaires. Nonrespondents to the web or mail questionnaire will be followed up by computer-assisted telephone interviewing. The individual's response to the survey is voluntary. The survey will be conducted in conformance with Census Bureau statistical quality standards and, as such, the NSCG data will be afforded protection under the applicable Census Bureau confidentiality statutes.

Use of the Information: NSF uses the information from the NSCG to prepare congressionally mandated reports such as *Women, Minorities and Persons with*

Disabilities in Science and Engineering and Science and Engineering Indicators. A public release file of collected data, designed to protect respondent confidentiality, will be made available to researchers on the Internet.

Expected Respondents: A statistical sample of approximately 123,500 persons will be contacted in 2017. This 123,500 sample is a 5,500 case increase over the sample size listed in the first notice for public comment in the **Federal Register** at 81 FR 49689. The larger sample size is needed to account for the increased size of the college-educated population as well as lower response rates in recent years. NSF estimates the 2017 NSCG response rate to be 70 to 80 percent.

Estimate of Burden: The amount of time to complete the questionnaire may vary depending on an individual's circumstances; however, on average it will take approximately 30 minutes to complete the survey. NSF estimates that the total annual burden will be no more than 49,400 hours (=123,500 respondents × 80% response × 30 minutes) during the 2017 survey cycle.

Dated: December 9, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016-30044 Filed 12-16-16; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Notice of Intent to Seek Approval to Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than three years.

DATES: Written comments on this notice must be received by February 17, 2017 to be assured of consideration.

Comments received after that date will be considered to the extent practicable.

FOR ADDITIONAL INFORMATION OR COMMENTS: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal

Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Comments: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104-13), we are providing opportunity for public comment on this action. 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 shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Title of Collection: Grantee Reporting Requirements for National User Facilities managed by the NSF Division of Materials Research.

OMB Number: 3145-0234.

Expiration Date of Approval: March 31, 2017.

Type of Request: Intent to seek approval to renew an information collection.

Overview of this Information Collection: The NSF Division of Materials Research (DMR) supports a number of National User Facilities that provide specialized capabilities and instrumentation to the scientific community on a competitive proposal basis. In addition to the user program, these facilities support in-house research, development of new instrumentation or techniques, education, and knowledge transfer.

The facilities integrate research and education for students and post-docs involved in experiments, and support extensive K-12 outreach to foster an interest in Science Technology Engineering and Mathematics (STEM) and STEM careers. Facilities capitalize on diversity through participation in center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

National User Facilities will be required to submit annual reports on

progress and plans, which will be used as a basis for performance review and determining the level of continued funding. User facilities will be required to develop a set of management and performance indicators for submission annually to NSF via the Research Performance Project Reporting (RPPR) module in *Research.gov*. These indicators are both quantitative and descriptive and may include, for example, lists of successful proposal and users, the characteristics of facility personnel and students; sources of financial support and in-kind support; expenditures by operational component; research activities; education activities; knowledge transfer activities; patents, licenses; publications; degrees granted to students supported through the facility or users of the facility; descriptions of significant advances and other outcomes of this investment. Such reporting requirements are included in the cooperative agreement which is binding between the academic institution and the NSF.

Each facility's annual report will address the following categories of activities: (1) Research, (2) education and training, (3) knowledge transfer, (4) partnerships, (5) diversity, (6) management, and (7) budget issues.

For each of the categories the report will describe overall objectives and metrics for the reporting period, challenges or problems the facility has encountered in making progress towards goals, anticipated problems in the following year, and specific outputs and outcomes.

Facilities are required to file a final report through the RPPR. Final reports contain similar information and metrics as annual reports, but are retrospective and focus on the period that was not addressed in previous annual reports.

Use of the Information: NSF will use the information to continue funding of the DMR National User Facilities, and to evaluate the progress of the program.

Estimate of Burden: 200 hours per facility for three National User Facilities for a total of 600 hours.

Respondents: Non-profit institutions.

Estimated Number of Responses per Report: One from each of the DMR user facilities.

Dated: December 14, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016-30434 Filed 12-16-16; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION**Notice of Intent to Seek Approval To Establish an Information Collection**

AGENCY: National Science Foundation.
ACTION: Notice and Request for Comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than three years.

DATES: Written comments on this notice must be received by February 17, 2017 to be assured of consideration.

Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT:

Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Title of Collection: Grantee Reporting Requirements for National User Facilities managed by the NSF Division of Materials Research.

OMB Number: 3145-0234.

Expiration Date of Approval: March 31, 2017.

Type of Request: Intent to seek approval to renew an information collection.

Overview of this Information Collection:

The NSF Division of Materials Research (DMR) supports a number of National User Facilities that provide specialized capabilities and instrumentation to the scientific community on a competitive proposal basis. In addition to the user program, these facilities support in-house research, development of new instrumentation or techniques, education, and knowledge transfer.

The facilities integrate research and education for students and post-docs involved in experiments, and support extensive K-12 outreach to foster an interest in Science Technology Engineering and Mathematics (STEM) and STEM careers. Facilities capitalize on diversity through participation in center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

National User Facilities will be required to submit annual reports on progress and plans, which will be used as a basis for performance review and determining the level of continued funding. User facilities will be required to develop a set of management and performance indicators for submission annually to NSF via the Research Performance Project Reporting (RPPR) module in Research.gov. These indicators are both quantitative and descriptive and may include, for example, lists of successful proposal and users, the characteristics of facility personnel and students; sources of financial support and in-kind support; expenditures by operational component; research activities; education activities; knowledge transfer activities; patents, licenses; publications; degrees granted to students supported through the facility or users of the facility; descriptions of significant advances and other outcomes of this investment. Such reporting requirements are included in the cooperative agreement which is binding between the academic institution and the NSF.

Each facility's annual report will address the following categories of activities: (1) Research, (2) education and training, (3) knowledge transfer, (4) partnerships, (5) diversity, (6) management, and (7) budget issues.

For each of the categories the report will describe overall objectives and metrics for the reporting period, challenges or problems the facility has encountered in making progress towards goals, anticipated problems in the

following year, and specific outputs and outcomes.

Facilities are required to file a final report through the RPPR. Final reports contain similar information and metrics as annual reports, but are retrospective and focus on the period that was not addressed in previous annual reports.

Use of the Information: NSF will use the information to continue funding of the DMR National User Facilities, and to evaluate the progress of the program.

Estimate of Burden: 200 hours per facility for three National User Facilities for a total of 600 hours.

Respondents: Non-profit institutions.

Estimated Number of Responses per Report: One (1) from each of the DMR user facilities.

Dated: December 14, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016-30448 Filed 12-16-16; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION**Notice of Intent To Seek Approval to Establish an Information Collection System**

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection.

DATES: Written comments on this notice must be received by February 17, 2017, to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT: Ms. Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

SUPPLEMENTARY INFORMATION:

Comments: Pursuant to the Paperwork Reduction Act, Pub. L. 104-13 (44 U.S.C. 3501 *et seq.*), comments are

invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Foundation, including whether the information will have practical utility; (b) the accuracy of the Foundation's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Title of Collection: Grantee Reporting Requirements for the Emerging Frontiers in Research and Innovation program

OMB Number: 3145-0233.

Expiration Date of Approval: March 31, 2017.

Type of Request: Intent to seek approval to renew an information collection system.

Abstract:

Proposed Project:

The Emerging Frontiers in Research and Innovation (EFRI) program recommends, prioritizes, and funds interdisciplinary initiatives at the emerging frontier of engineering research and education. These investments represent transformative opportunities, potentially leading to: new research areas for NSF, ENG, and other agencies; new industries or capabilities that result in a leadership position for the country; and/or significant progress on a recognized national need or grand challenge.

Established in 2007, EFRI supports cutting-edge research that is difficult to fund through other NSF programs, such as single-investigator grants or large research centers. EFRI seeks high-risk opportunities with the potential for a large payoff where researchers are encouraged to stretch beyond their ongoing activities. Based on input from workshops, advisory committees, technical meetings, professional societies, research proposals, and suggestions from the research community the EFRI program identifies those emerging opportunities and manages a formal process for funding their research. The emerging ideas tackled by EFRI are "frontier" because they not only push the understood limits of engineering but actually overlap multiple fields. The EFRI funding process inspires investigators with different expertise to work together on one emerging concept.

EFRI awards require multi-disciplinary teams of at least one Principal Investigator and two Co-Principal Investigators. The anticipated

duration of all awards is 4-years. The anticipated funding level for each project team may receive support of up to a total of \$2,000,000 spread over four years, pending the availability of funds. In that sense EFRI awards are above the average single-investigator award amounts.

EFRI-funded projects could include research opportunities and mentoring for educators, scholars, and university students, as well as outreach programs that help stir the imagination of K-12 students, often with a focus on groups underrepresented in science and engineering.

We are seeking to collect additional information from the grantees about the outcomes of their research that goes above and beyond the standard reporting requirements used by the NSF and spans over a period of 5 years after the award. This data collection effort will enable program officers to longitudinally monitor outputs and outcomes given the unique goals and purpose of the program. This is very important to enable appropriate and accurate evidence-based management of the program and to determine whether or not the specific goals of the program are being met.

Grantees will be required to submit this information on an annual basis to support performance review and the management of EFRI grants by EFRI officers. EFRI grantees will be required to submit these indicators to NSF via a data collection Web site that will be embedded in NSF's IT infrastructure. These indicators are both quantitative and descriptive and may include, for example, the characteristics of project personnel and students; sources of complementary cash and in-kind support to the EFRI project; characteristics of industrial and/or other sector participation; research activities; education activities; knowledge transfer activities; patents, licenses; publications; descriptions of significant advances and other outcomes of the EFRI effort. Such reporting requirements will be included in the cooperative agreement which is binding between the academic institution and the NSF.

Each submission will address the following major categories of activities: (1) Knowledge transfer across disciplines, (2) innovation of ideas in areas of greater opportunity, (3) potential for translational research, (4) project results advance the frontier/creation of new fields of study, (5) innovative research methods or discoveries are introduced to the classroom, and (6) fostering participation of underrepresented groups in science. For each of the

categories, the report will enumerate specific outputs and outcomes.

Use of the Information: The data collected will be used for NSF internal reports, historical data, and performance review by peer site visit teams, program level studies and evaluations, and for securing future funding for continued EFRI program maintenance and growth.

Estimate of Burden: Approximately 10 hours per grant for approximately 80 grants per year for a total of 800 hours per year.

Respondents: Principal Investigators who lead the EFRI grants.

Estimated Number of Responses per Report: One report collected for each of the approximately 80 grantees every year.

Dated: December 14, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016-30447 Filed 12-16-16; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register** at 81 FR 49689, and one comment was received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: <http://www.reginfo.gov/public/do/PRAMain>.

Comments: Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the NSF, including whether the information will have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 7th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230 or send email to splimpto@nsf.gov.

DATES: Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission may be obtained by calling 703-292-7556. NSF 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.

SUPPLEMENTARY INFORMATION:

Comments: As required by 5 CFR 1320.8(d), comments on the information collection activities as part of this study were solicited through publication of a 60-Day Notice in the **Federal Register** on July 28, 2016, at 81 FR 49689. We received one comment, to which we here respond.

Commenter: The comment requested NSF consider the use of administrative records, specifically the National Student Clearinghouse, to obtain information on education background in lieu of asking this information from respondents on the National Survey of College Graduates (NSCG).

Response: NSF informed the commenter that, at the request of NSF, the Census Bureau's Center for Administrative Records Research and Application is conducting research to compare administrative records data with the NSCG respondent-provided data. This research will inform survey content discussions for future NSCG cycles and will provide insight on the necessity of certain NSCG questionnaire items including the education background items.

After consideration of this comment, we are moving forward with our submission to OMB.

Title of Collection: 2015 National Survey of College Graduates.

OMB Approval Number: 3145-0141.

Type of Request: Intent to seek approval to renew an information collection for three years.

Abstract: The National Survey of College Graduates (NSCG) has been conducted biennially since the 1970s. The 2017 NSCG sample will be selected from the 2015 American Community Survey (ACS) and the 2015 NSCG. By selecting sample from these two sources, the 2017 NSCG will provide coverage of the college graduate population residing in the United States. The purpose of this longitudinal survey is to collect data that will be used to provide national estimates on the science and engineering workforce and changes in their employment, education, and demographic characteristics.

The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to “. . . provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government.” The NSCG is designed to comply with these mandates by providing information on the supply and utilization of the nation's scientists and engineers.

The U.S. Census Bureau, as in the past, will conduct the NSCG for NSF. The survey data collection will begin in March 2017 using web and mail questionnaires. Nonrespondents to the web or mail questionnaire will be followed up by computer-assisted telephone interviewing. The individual's response to the survey is voluntary. The survey will be conducted in conformance with Census Bureau statistical quality standards and, as such, the NSCG data will be afforded protection under the applicable Census Bureau confidentiality statutes.

Use of the Information: NSF uses the information from the NSCG to prepare congressionally mandated reports such as *Women, Minorities and Persons with Disabilities in Science and Engineering* and *Science and Engineering Indicators*. A public release file of collected data, designed to protect respondent confidentiality, will be made available to researchers on the Internet.

Expected Respondents: A statistical sample of approximately 123,500 persons will be contacted in 2017. This 123,500 sample is a 5,500 case increase over the sample size listed in the first notice for public comment in the **Federal Register** at 81 FR 49689. The larger sample size is needed to account for the increased size of the college-educated population as well as lower response rates in recent years. NSF estimates the 2017 NSCG response rate to be 70 to 80 percent.

Estimate of Burden: The amount of time to complete the questionnaire may vary depending on an individual's circumstances; however, on average it will take approximately 30 minutes to complete the survey. NSF estimates that the total annual burden will be no more than 49,400 hours (=123,500 respondents × 80% response × 30 minutes) during the 2017 survey cycle.

Dated: December 9, 2016.

Suzanne H. Plimpton,
Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016-30395 Filed 12-16-16; 8:45 am]

BILLING CODE 7555-01-P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2014-85; CP2017-70; MC2017-45 and CP2017-71; MC2017-46 and CP2017-72; MC2017-47 and CP2017-73; MC2017-48 and CP2017-74]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 21, 2016 (Comment due date applies to Docket No. CP2014-85; Docket No. CP2017-70; Docket Nos. MC2017-45 and CP2017-71; Docket Nos. MC2017-46 and CP2017-72); and December 22, 2016 (Comment due date applies to Docket Nos. MC2017-47 and CP2017-73; Docket Nos. MC2017-48 and CP2017-74).

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related

to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s)*.: CP2014–85; *Filing Title*: Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Priority Mail Contract 95; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 CFR 3015.5; *Public Representative*: Jennaca D. Upperman; *Comments Due*: December 21, 2016.

2. *Docket No(s)*.: CP2017–70; *Filing Title*: Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 7 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 CFR 3015.5; *Public Representative*: Max

E. Schnidman; *Comments Due*: December 21, 2016.

3. *Docket No(s)*.: MC2017–45 and CP2017–71; *Filing Title*: Request of the United States Postal Service to Add Priority Mail Contract 270 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative*: Gregory Stanton; *Comments Due*: December 21, 2016.

4. *Docket No(s)*.: MC2017–46 and CP2017–72; *Filing Title*: Request of the United States Postal Service to Add Priority Mail Contract 271 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative*: Gregory Stanton; *Comments Due*: December 21, 2016.

5. *Docket No(s)*.: MC2017–47 and CP2017–73; *Filing Title*: Request of the United States Postal Service to Add Priority Mail Contract 272 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative*: Christopher C. Mohr; *Comments Due*: December 22, 2016.

6. *Docket No(s)*.: MC2017–48 and CP2017–74; *Filing Title*: Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 41 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date*: December 13, 2016; *Filing Authority*: 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative*: Christopher C. Mohr; *Comments Due*: December 22, 2016.

This notice will be published in the Federal Register.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–30417 Filed 12–16–16; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736.

Extension:

Rule 103, SEC File No. 270–410, OMB Control No. 3235–0466.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) is soliciting comments on the existing collection of information provided for in Rule 103 of Regulation M (17 CFR 242.103), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 103—Nasdaq Passive Market Making—permits passive market-making in Nasdaq securities during a distribution. A distribution participant that seeks use of this exception would be required to disclose to third parties its intention to engage in passive market making.

There are approximately 309 respondents per year that require an aggregate total of 309 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 1 hour to complete. Thus, the total compliance burden per year is 309 burden hours. The total estimated internal labor cost of compliance for the respondents is approximately \$20,085.00 per year, resulting in an estimated internal labor cost of compliance per response of approximately \$65.00 (*i.e.*, \$20,085.00/309 responses).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in

writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30372 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79535; File No. SR-FICC-2016-008]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the MBSD Schedule of Charges Dealer Account Group

December 13, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 2, 2016, Fixed Income Clearing Corporation (“FICC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of an amendment to the Mortgage-Backed Securities Division (“MBSD”) Clearing Rules (the “MBSD Rules”) to include an additional fee in the “Schedule of Charges Dealer Account Group,” as described in greater detail below.³ The proposed fee would be implemented as of January 1, 2017.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Capitalized terms used herein and not otherwise defined shall have the meaning assigned to such terms in the MBSD Rules, available at <http://www.dtcc.com/legal/rules-and-procedures>.

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FICC is proposing to amend the MBSD “Schedule of Charges Dealer Account Group” to include an additional fee. The proposed rule change would allow FICC to pass through any daylight overdraft (“DOD”) fees that MBSD incurs from The Bank of New York Mellon (“BNY”) in connection with the settlement of Clearing Members’ securities obligations. FICC would pass through these BNY DOD fees to Clearing Members who settle their securities obligations at BNY.⁴

In October 2016, FICC began to incur the cost of the BNY DOD fees. FICC is proposing to amend the MBSD “Schedule of Charges Dealer Account Group” to allow FICC to pass through the BNY DOD fees to Clearing Members who settle their securities obligations at BNY.⁵ Specifically, each Clearing Member who settles securities obligations at BNY would be charged a pass-through fee, calculated as a percentage of the total of all such costs incurred by MBSD. This percentage would be calculated on a monthly basis as follows:

(Total dollar value of Pool Deliver Obligations and Pool Receive Obligations of such Clearing Member at BNY)

(Total dollar value of Pool Deliver Obligations and Pool Receive Obligations in all Dealer Accounts at BNY)

⁴ This proposed rule change would be consistent with the fee schedule in FICC’s Government Securities Division Rulebook, available at <http://www.dtcc.com/legal/rules-and-procedures>.

⁵ The proposed fee would not be applicable to Brokers because Brokers do not have securities settlement obligations.

2. Statutory Basis

Section 17A(b)(3)(D) of the Securities Exchange Act of 1934, as amended (“Act”) requires, in part, that the rules of the clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants.⁶ The proposed rule change would allow FICC to recover the costs of providing securities settlement services to Clearing Members by passing the BNY DOD fees incurred by MBSD to Clearing Members who settle their securities obligations at BNY. FICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FICC, in particular Section 17A(b)(3)(D), because the proposed fee would be allocated among all Clearing Members who settle their securities obligations at BNY, calculated as a percentage of the total of such costs incurred by MBSD in connection with the services that FICC provide provides for such Clearing Members.⁷

(B) Clearing Agency’s Statement on Burden on Competition

FICC believes that the proposed rule change could have an impact on competition because the proposed rule change would impose an additional fee on Clearing Members who settle their securities obligations at BNY. FICC believes, however, that any burden on competition that would be created by the proposed rule change would be necessary and appropriate in furtherance of the Act. Specifically, the proposed rule change is necessary to allow FICC to recover the cost of providing services to Clearing Members by passing through the BNY DOD fees to Clearing Members who settle their securities obligations at BNY. The proposed rule change is appropriate because, as stated, it would only apply to Clearing Members who settle their securities obligations at BNY, which is the third party that is charging the fees being incurred by MBSD to provide FICC’s services.

(C) Clearing Agency’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments related to the proposed rule change have not been solicited or received. FICC will notify the Commission of any written comments received by FICC.

⁶ 15 U.S.C. 78q-1(b)(3)(D).

⁷ *Id.*

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)⁸ of the Act and paragraph (f) of Rule 19b-4⁹ 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.

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-FICC-2016-008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.
- All submissions should refer to File Number SR-FICC-2016-008. 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 Web site (<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 Web site 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 FICC and on DTCC's Web site (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FICC-2016-008 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016-30388 Filed 12-16-16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79534; File No. SR-BatsBYX-2016-37]

Self-Regulatory Organizations; Bats BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 11.27(b) Regarding the Data Collection Requirements of the Regulation NMS Plan To Implement a Tick Size Pilot Program

December 13, 2016.

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 November 30, 2016, Bats BYX Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Exchange Rule 11.27(b) regarding the data collection requirements of the Regulation NMS Plan to Implement a Tick Size Pilot Program ("Plan").

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, the Exchange, and several other self-regulatory organizations (the "Participants") filed with the Commission, pursuant to Section 11A of the Act⁵ and Rule 608 of Regulation NMS thereunder,⁶ the Plan to Implement a Tick Size Pilot Program.⁷ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁸ The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁹ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹⁰ On November 6, 2015, the SEC exempted the Participants from implementing the

⁵ 15 U.S.C. 78k-1.

⁶ 17 CFR 242.608.

⁷ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁸ See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁹ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order").

¹⁰ See Approval Order at 27533 and 27545.

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f).

Pilot until October 3, 2016.¹¹ Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.¹²

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

The Exchange adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.¹³ Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Exchange Rule 11.27(b)(2) provides, among other things, that the Exchange shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2)(A) of Rule 11.27, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.27(b)(3)(C), provides, among other things, that the Exchange shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 11.27, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.27(b)(5) provides, among other things, shall collect and transmit to the Commission data

described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics, but does not currently include a provision requiring the Exchange to publish such data to its Web site.¹⁴ Interpretation and Policy .08 to Exchange Rule 11.27(b) provides, among other things, that the requirement that Exchange or Designated Examining Authority ("DEA") make certain data publicly available on their Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.¹⁵

The Exchange is proposing amendments to Rule 11.27(b)(2) (regarding Appendix B.I and B.II data) and Rule 11.27(b)(3)(C) (regarding Appendix B.IV data), to provide that data required to be made available on Exchange's or DEA's Web site be published within 120 calendar days following month end. The Exchange also proposes to add a provision to Rule 11.27(b)(5) to state that the Exchange shall make data collected under Appendix B.III publicly available on the Exchange Web site within 120 calendar days following month end at no charge. In addition, the proposed amendments to Interpretation and Policy .08 to Exchange Rule 11.27(b) would provide that, notwithstanding the provisions of paragraphs (b)(2), (b)(3)(C), and (b)(5), the Exchange and DEA shall make data for the Pre-Pilot period publicly available on their Web site pursuant to Appendix B and C to the Plan by February 28, 2017.¹⁶ The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day

operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁸ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC. The Exchange believes that the instant proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal does not alter the information required to be submitted to the SEC.

¹⁴ Section VII.A. 4 of the Plan.

¹⁵ The Exchange understands that some Market Makers may utilize a DEA that is not a Participant to the Plan and that their DEA would not be subject to the Plan's data collection requirements. Exchange rules require members that are Market Makers whose DEA is not a Participant to the Plan to transmit transaction data for Market Maker participation and profitability calculations to FINRA. See paragraphs (3)(B) and (4)(B) of Exchange Rule 11.27(b).

¹⁶ With respect to data for the Pilot Period, the requirement that the Exchange and DEA make data publicly available on their Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Exchange's or DEA's Web site by February 28, 2017, which is 120 days following the end of October 2016.

¹¹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

¹² See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Exchange, dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Exchange, to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹³ See, e.g., Securities Exchange Act Release Nos. 77418 (March 22, 2016), 81 FR 17213 (March 28, 2016); and 78795 (September 9, 2016), 81 FR 63508 (September 15, 2016). See also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

(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.¹⁹

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)²⁰ of the Act and Rule 19b-4(f)(6) thereunder.²¹

A proposed rule change filed under Rule 19b-4(f)(6)²² normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement proposed changes that are intended to address confidentiality concerns. The Commission notes that

some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative as of November 30, 2016.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁵ 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BatsBYX-2016-37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File No. SR-BatsBYX-2016-37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File No. SR-BatsBYX-2016-37 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2016-30387 Filed 12-16-16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79540; File No. SR-CBOE-2016-082]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to Rules Regarding the Responsibility for Ensuring Compliance With Open Outcry Priority and Allocation Requirements and Trade-Through Prohibitions

December 13, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2016, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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

The Exchange seeks to amend Exchange rules regarding

¹⁹ See Letter from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii)

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C).

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

responsibilities for ensuring compliance with open outcry priority and allocation requirements and Trade-Through prohibitions. The text of the proposed rule change is provided below.

(additions are *italicized*; deletions are [bracketed])

* * * * *

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Rule 6.45A.—Priority and Allocation of Equity Option Trades on the CBOE Hybrid System

* * * * *

. . . Interpretations and Policies:
.01–.04 No change.

.05 *For an open outcry transaction between a Floor Broker and Market-Maker it is the responsibility of the initiator of the transaction to ensure that the transaction is executed in accordance with the priority and allocation provisions set forth in Rule 6.45A(b) and does not cause a Trade-Through (unless otherwise excepted) under Rule 6.81. For an open outcry transaction between a Floor Broker and another Floor Broker or between a Market-Maker and another Market-Maker, both parties to the transaction are responsible for ensuring the transaction is executed in accordance with the aforementioned Rules.*

Rule 6.45B—Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System

* * * * *

. . . Interpretations and Policies:
.01–.05 No Change.

.06 *For an open outcry transaction between a Floor Broker and Market-Maker it is the responsibility of the initiator of the transaction to ensure that the transaction is executed in accordance with the priority and allocation provisions set forth in Rule 6.45B(b) and does not cause a Trade-Through (unless otherwise excepted) under Rule 6.81. For an open outcry transaction between a Floor Broker and another Floor Broker or between a Market-Maker and another Market-Maker, both parties to the transaction are responsible for ensuring the transaction is executed in accordance with the aforementioned Rules.*

* * * * *

Rule 6.73. Responsibilities of Floor Brokers

* * * * *

. . . Interpretations and Policies:
.01–.06 No change.

.07 *For an open outcry transaction between a Floor Broker and Market-*

Maker it is the responsibility of the initiator of the transaction to ensure that the transaction is executed in accordance with the priority and allocation provisions set forth in Rules 6.45A(b) and 6.45B(b) and does not cause a Trade-Through (unless otherwise excepted) under Rule 6.81. For an open outcry transaction between a Floor Broker and another Floor Broker or between a Market-Maker and another Market-Maker, both parties to the transaction are responsible for ensuring the transaction is executed in accordance with the aforementioned Rules.

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend CBOE Rules 6.45A, 6.45B, and 6.73 to identify the party to a transaction that is responsible for ensuring that a transaction is executed in accordance with the priority and allocation requirements as set forth in Rules 6.45A(b) and 6.45B(b)³ and does not cause a "Trade-Through" (unless otherwise excepted) under Rule 6.81.⁴

³ Rules 6.45A(b) and 6.45B(b) set forth the Exchange's rules related to the allocation of orders represented in open outcry. Specifically, Rules 6.45A(b) and 6.45B(b) provide, among other things, that where two or more bids (offers) for the same option contract represent the highest (lowest) price, public customer orders in the electronic book shall have first priority.

⁴ A "Trade-Through" is a transaction in an options series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer. CBOE Rule 6.81 provides that

The Exchange does not seek to absolve TPHs of the responsibility to ensure transactions are executed in accordance with the priority and allocation provisions or the Trade-Through prohibition provisions. Rather, the Exchange seeks to specify that the party or parties responsible for ensuring transactions are executed in accordance with the priority and allocation provisions and Trade-Through prohibitions is the initiator of the transaction when a Floor Broker is trading with a Market-Maker, both parties when a Floor Broker trades with a Floor Broker, and both parties when the transaction is between Market-Makers.⁵

Currently, if a transaction executed on the trading floor is executed at a Trade-Through price or was executed in violation of book priority, the Trade-Through or book priority violations are enforced against both parties to the transaction. With respect to transactions between Floor Brokers and transactions between Market-Makers, both parties will continue to be held responsible for the above violations. With respect to transactions between a Floor Broker and a Market-Maker, the Exchange believes the party that should be held responsible is the party that initiated the transaction on the trading floor. Generally speaking, Floor Brokers are the parties that initiate transactions on the trading floor by representing orders and executing the orders against bids and offers of other in-crowd market participants, including Market-Makers. For example, a typical open outcry transaction consists of a Floor Broker representing an order and requesting a quote from Market-Makers in the trading crowd. Market-Makers respond to the representation by indicating they are willing to buy (bid) the particular options series at X price and sell (offer) at Y price, which are based on the Market-Makers' theoretical values for the particular options. If the quoted market meets the requirements of the order as specified by the Floor Broker's client the Floor Broker executes the order against the best quoted bid or offer price(s). The Floor Broker, as initiator, controls the order and the execution price of the order; thus, it follows that

unless an exception applies, Trading Permit Holders ("TPHs") shall not effect Trade-Throughs.

⁵ In the case of a Floor Broker initiating a transaction with multiple counterparties, any Floor Broker counterparty would be held responsible in the same manner as a Floor Broker trading with one other Floor Broker. Similarly, in the case of a Market-Maker initiation [sic] a transaction with multiple counterparties, any Market-Maker counterparty would be held responsible in the same manner as a Market-maker initiation [sic] a transaction with one other counterparty.

the Floor Broker in this example should be responsible for ensuring priority and allocation consistent with the applicable rules and that Trade-Through requirements are satisfied.

Floor Brokers are also in a good position to prevent Trade-Throughs and book priority violations because Floor Brokers may utilize the Public Automatic Routing System (“PAR”) to execute orders, which is not available to Market-Makers. PAR provides all of the necessary market data to avoid Trade-Throughs and book priority violations (e.g., PAR includes data related to electronic public customer books, CBOE best bid and offer (“BBO”), and national best bid and offer (“NBBO”), etc.). In addition, PAR calculates and displays a net price for complex orders held by a Floor Broker. Most importantly, however, PAR offers alerts that warn Floor Brokers that a proposed execution price for a given order may violate priority or result in a potential Trade-Through. These alerts occur via pop-up windows within PAR.

When Floor Brokers trade with Market-Makers the Market-Makers are not in as good of a position to prevent Trade-Throughs and book priority violations. Although Market-Makers have access to market data via screens on the trading floor and/or their own electronic devices, they do not have access to the specific terms and conditions of a Floor Broker’s order on an electronic basis and must evaluate the CBOE BBO and the NBBO without the aid of PAR. Instead, a request for quote for a given order is verbally communicated by a Floor Broker to the trading crowd and the verbal information is taken into consideration by Market-Makers (and other in-crowd market participants) when providing a responsive quote. Furthermore, Market-Makers evaluate a Floor Broker’s request for a quote against the Market-Maker’s theoretical values for the given options series. This process becomes even more complicated when there are multiple options series that must be evaluated for a complex order. Ultimately, the Exchange believes it is reasonable for a Market-Maker to rely on a Floor Broker to ensure that an open outcry transaction is executed in accordance with the priority and allocation provisions and Trade-Through prohibition provisions when the Floor Broker is initiating the transaction. If a Market-Maker initiates a transaction with a Floor Broker the Market-Maker will be responsible for ensuring that the transaction is executed in accordance with the priority and allocation provisions and Trade-Through prohibition provisions.

The Exchange proposes to add Interpretation and Policy .05 to Rule 6.45A, .06 to Rule 6.45B, and .07 to Rule 6.73. As previously noted, the proposal does not amend who is responsible when an open outcry transaction is between Floor Brokers or between Market-Makers. As is the case today, for open outcry transactions between Floor Brokers or open outcry transactions between Market-Makers, both parties are responsible for ensuring that a transaction is executed in accordance with the priority and allocation rules and the Trade-Through prevention rules. For these scenarios the proposal simply sets forth the existing standard, which, again, calls for both parties being responsible for ensuring that a transaction is executed in accordance with the priority and allocation rules and the Trade-Through prohibition rules.

The Exchange notes that this rule change, consistent with the Options Intermarket Linkage Plan, is reasonably designed to prevent Trade-Throughs⁶ as well as book priority violations because the proposal places the responsibility for ensuring transactions are executed in accordance with the rules on the specific party or parties in a good position to ensure compliance. The Exchange also notes that this rule may help limit the number of priority and Trade-Through violations because the proposal identifies a particular party or parties to each transaction (as opposed to all parties) as being responsible for ensuring compliance with the rules. Furthermore, in all cases the responsibility will fall on all parties to the transaction (*i.e.*, when Floor Broker trades with another Floor Broker or when a Market-Maker trades with another Market-Maker) or the initiator of the transaction.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁷ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁸ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation

and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed rule change is appropriate because the vast majority of the time Floor Brokers are the initiators of open outcry transactions on the trading floor, and they are able to use PAR to assist them with ensuring that transactions are executed in accordance with priority and allocation rules and Trade-Through prohibition rules, which makes this proposal reasonably designed to ensure compliance with Exchange Rules. As a result, the Exchange believes this change will remove potential impediments to a free and open market and a national market system. The Exchange also believes this rule change may help limit the number of priority and Trade-Through violations, which generally helps to protect investors and the public interest, because the proposal more appropriately identifies the specific party or parties responsible for ensuring compliance with these rules (*i.e.*, the initiator in the case of Floor Brokers trading with Market-Makers and both parties when Market-Makers trade with Market-Makers and both parties when Floor Brokers trade with Floor Brokers). Furthermore, in all cases the responsibility will fall on all parties to the transaction (*i.e.*, when Floor Broker trades with another Floor Broker or when a Market-Maker trades with another Market-Maker) or the initiator of the transaction.

B. Self-Regulatory Organization’s Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. CBOE does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change will apply equally to all market participants that initiate

⁶ See generally Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (Order approving Options Intermarket Linkage Plan).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ *Id.*

transactions on the floor of the Exchange. Furthermore, any perceived burden on Floor Brokers or Market-Makers is misplaced because Floor Brokers and Market-makers are no worse off from this proposal as both parties are currently held responsible for book priority and trade-through violations. The Exchange does not believe that the proposed change will impose any burden on intermarket competition because it only applies to trading on CBOE.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. By order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CBOE-2016-082 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.
- All submissions should refer to File Number SR-CBOE-2016-082. 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 Web site (<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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2016-082 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016-30393 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Regulation S-AM, SEC File No. 270-548, OMB Control No. 3235-0609.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Regulation S-AM (17 CFR part 248, subpart B), under the Fair Credit

Reporting Act (15 U.S.C. 1681 *et seq.*) ("FCRA"), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), and the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*).

Regulation S-AM implements the requirements of Section 624 of the FCRA (15 U.S.C. 1681s-3) with respect to investment advisers and transfer agents registered with the Commission, as well as brokers, dealers and investment companies (collectively, "Covered Persons"). Section 624 and Regulation S-AM limit a Covered Person's use of certain consumer financial information received from an affiliate to solicit a consumer for marketing purposes, unless the consumer has been given notice and a reasonable opportunity and a reasonable and simple method to opt out of such solicitations. Regulation S-AM potentially applies to all of the approximately 32,061 Covered Persons registered with the Commission, although only approximately 17,954 of them have one or more corporate affiliates, and the regulation requires only approximately 3,206 to provide consumers with an affiliate marketing notice and an opt-out opportunity.

The Commission staff estimates that there are approximately 17,954 Covered Persons having one or more affiliates, and that they each spend an average of 0.20 hours per year to review affiliate marketing practices, for, collectively, an estimated annual time burden of 3,591 hours at an annual internal staff cost of approximately \$1,798,991. The staff also estimates that approximately 3,206 Covered Persons provide notice and opt-out opportunities to consumers, and that they each spend an average of 7.6 hours per year creating notices, providing notices and opt-out opportunities, monitoring the opt-out notice process, making and updating records of opt-out elections, and addressing consumer questions and concerns about opt-out notices, for, collectively, an estimated annual time burden of 24,366 hours at an annual internal staff cost of approximately \$4,489,806. Thus, the staff estimates that the collection of information requires a total of approximately 17,954 respondents to incur an estimated annual time burden of a total of 27,957 hours at a total annual internal cost of compliance of approximately \$6,288,897.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

¹⁰ 17 CFR 200.30-3(a)(12).

The public may view background documentation for this information collection at the following Web site: www.reginfo.gov. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Shagufta_Ahmed@omb.eop.gov; and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30378 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Rule 102, SEC File No. 270-409, OMB Control No. 3235-0467.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) is soliciting comments on the existing collection of information provided for in Rule 102 of Regulation M (17 CFR 242.102), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 102—Activities by Issuers and Selling Security Holders During a Distribution—prohibits distribution participants, issuers, and selling security holders from purchasing activities at specified times during a distribution of securities. Persons otherwise covered by these rules may seek to use several applicable exceptions such as exclusion for actively traded reference securities and the maintenance of policies regarding

information barriers between their affiliates.

There are approximately 998 respondents per year that require an aggregate total of 1,898 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes on average approximately 1.902 hours to complete. Thus, the total compliance burden per year is 1,898 burden hours. The total internal compliance cost for all respondents is approximately \$123,370.00, resulting in an internal cost of compliance per response of approximately \$124.00 (*i.e.*, \$123,370.00/998 responses).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30371 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79537; File No. SR-BatsEDGX-2016-70]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 11.22(b) Regarding the Data Collection Requirements of the Regulation NMS Plan To Implement a Tick Size Pilot Program

December 13, 2016.

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 November 30, 2016, Bats EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Exchange Rule 11.22(b) regarding the data collection requirements of the Regulation NMS Plan to Implement a Tick Size Pilot Program (“Plan”).

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, the Exchange, and several other self-regulatory organizations (the "Participants") filed with the Commission, pursuant to Section 11A of the Act⁵ and Rule 608 of Regulation NMS thereunder,⁶ the Plan to Implement a Tick Size Pilot Program.⁷ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁸ The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁹ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹⁰ On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.¹¹ Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.¹²

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its

member organizations, as applicable, with the provisions of the Plan.

The Exchange adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.¹³ Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Exchange Rule 11.22(b)(2) provides, among other things, that the Exchange shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2)(A) of Rule 11.22, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.22(b)(3)(C), provides, among other things, that the Exchange shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 11.22, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.22(b)(5) provides, among other things, shall collect and transmit to the Commission data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics, but does not currently include a provision requiring the Exchange to publish such data to its Web site.¹⁴ Interpretation and Policy .08 to Exchange Rule 11.22(b) provides, among other things, that the requirement that Exchange or Designated Examining Authority ("DEA") make certain data publicly available on their Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.¹⁵

The Exchange is proposing amendments to Rule 11.22(b)(2) (regarding Appendix B.I and B.II data) and Rule 11.22(b)(3)(C) (regarding

Appendix B.IV data), to provide that data required to be made available on Exchange's or DEA's Web site be published within 120 calendar days following month end. The Exchange also proposes to add a provision to Rule 11.22(b)(5) to state that the Exchange shall make data collected under Appendix B.III publicly available on the Exchange Web site within 120 calendar days following month end at no charge. In addition, the proposed amendments to Interpretation and Policy .08 to Exchange Rule 11.22(b) would provide that, notwithstanding the provisions of paragraphs (b)(2), (b)(3)(C), and (b)(5), the Exchange and DEA shall make data for the Pre-Pilot period publicly available on their Web site pursuant to Appendix B and C to the Plan by February 28, 2017.¹⁶ The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁸ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC. The

¹⁶ With respect to data for the Pilot Period, the requirement that the Exchange and DEA make data publicly available on their Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Exchange's or DEA's Web site by February 28, 2017, which is 120 days following the end of October 2016.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

⁵ 15 U.S.C. 78k-1.

⁶ 17 CFR 242.608.

⁷ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁸ See Securities Exchange Act Release No. 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁹ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order").

¹⁰ See Approval Order at 27533 and 27545.

¹¹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

¹² See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Exchange, dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Exchange, to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹³ See, e.g., Securities Exchange Act Release Nos. 77416 (March 22, 2016), 81 FR 17225 (March 28, 2016); and 78798 (September 9, 2016), 81 FR 63532 (September 15, 2016). See also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

¹⁴ Section VII.A. 4 of the Plan.

¹⁵ The Exchange understands that some Market Makers may utilize a DEA that is not a Participant to the Plan and that their DEA would not be subject to the Plan's data collection requirements. Exchange rules require members that are Market Makers whose DEA is not a Participant to the Plan to transmit transaction data for Market Maker participation and profitability calculations to FINRA. See paragraphs (3)(B) and (4)(B) of Exchange Rule 11.22(b).

Exchange believes that the instant proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal does not alter the information required to be submitted to the SEC.

(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.¹⁹

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) ²⁰ of the Act and Rule 19b-4(f)(6) thereunder.²¹

A proposed rule change filed under Rule 19b-4(f)(6) ²² normally does not become operative prior to 30 days after

the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative as of November 30, 2016.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁵ 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 proposal is consistent with the Act. Comments may

be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BatsEDGX-2016-70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-BatsEDGX-2016-70. 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 Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BatsEDGX-2016-70 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016-30390 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

²⁶ 17 CFR 200.30-3(a)(12).

¹⁹ See Letter from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii).

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79541; File No. SR-ISEGemini-2016-23]

Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change To Amend ISE Gemini Rule 723 and To Make Pilot Program Permanent

December 13, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 12, 2016, ISE Gemini, LLC (the “Exchange” or “ISE Gemini”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE Gemini Rule 723, concerning its Price Improvement Mechanism (“PIM”). Certain aspects of PIM are currently operating on a pilot basis (“Pilot”), which is set to expire on January 18, 2017.³ The Pilot concerns (i) the termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders eligible for PIM. ISE Gemini seeks to make the Pilot permanent, and also proposes to change the requirements for providing price improvement for Agency Orders of less than 50 option contracts.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to make permanent certain pilots within Rule 723, relating to PIM. Paragraph .03 of the Supplementary Material to Rule 723 provides that there is no minimum size requirement for orders to be eligible for PIM. Paragraph .05 concerns the termination of the exposure period by unrelated orders. In addition, ISE Gemini proposes to modify the requirements for PIM auctions involving less than 50 contracts where the National Best Bid and Offer (“NBBO”) is only \$0.01 wide.

Background

The Exchange adopted PIM as part of its application to be registered as a national securities exchange under its previous name of Topaz Exchange, LLC (“Topaz”).⁴ In approving PIM, the Commission noted that it was largely based on a similar functionality offered by the International Securities Exchange, LLC (“ISE”).⁵ The PIM is a process that allows Electronic Access Members (“EAM”) to provide price improvement opportunities for a transaction wherein the Member seeks to execute an agency order as principal or execute an agency order against a solicited order (a “Crossing Transaction”). A Crossing Transaction is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the

“Counter-Side Order”). The Counter-Side Order may represent interest for the Member’s own account, or interest the Member has solicited from one or more other parties, or a combination of both.

Rule 723 sets forth the criteria pursuant to which the PIM is initiated. Specifically, a Crossing Transaction must be entered only at a price that is equal to or better than the national best bid or offer (“NBBO”) and better than the limit order or quote on the Exchange order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

Rule 723 also sets forth requirements relating to the exposure of orders in PIM and the termination of the exposure period. Upon entry of a Crossing Transaction into the Price Improvement Mechanism, a broadcast message that includes the series, price and size of the Agency Order, and whether it is to buy or sell, will be sent to all Members. This broadcast message will not be included in the ISE disseminated best bid or offer and will not be disseminated through OPRA. Members will be given 500 milliseconds to indicate the size and price at which they want to participate in the execution of the Agency Order (“Improvement Orders”). Improvement Orders may be entered by all Members for their own account or for the account of a Public Customer in one-cent increments at the same price as the Crossing Transaction or at an improved price for the Agency Order, and for any size up to the size of the Agency Order. During the exposure period, Improvement Orders may not be canceled, but may be modified to (1) increase the size at the same price, or (2) improve the price of the Improvement Order for any size up to the size of the Agency Order. During the exposure period, responses (including the Counter Side Order, Improvement Orders, and any changes to either) submitted by Members shall not be visible to other auction participants. The exposure period will automatically terminate (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange.

Rule 723 also describes how orders will be executed at the end of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 78343 (July 15, 2016), 81 FR 47483 (July 21, 2016) (SR-ISEGemini-2016-07).

⁴ See Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (File No. 10-209) (“Exchange Approval Order”). The Exchange subsequently changed its name to ISE Gemini. See Securities Exchange Act Release No. 71586 (February 20, 2014), 79 FR 10861 (February 26, 2014) (SR-Topaz-2014-06). In addition to the Exchange Approval Order and the filings cited above, the following proposed rule changes have been submitted in connection with PIM. See Securities Exchange Act Release Nos. 79253 (November 7, 2016), 81 FR 79540 (ISEGemini-2016-13); 78343 (July 15, 2016), 81 FR 47483 (July 21, 2016) (SR-ISE Gemini-2016-07); 75481 (July 17, 2015), 80 FR 43826 (July 23, 2015) (SR-ISE Gemini-2015-13); 73317 (October 8, 2014), 79 FR 61911 (October 15, 2014) (SR-ISEGemini-2014-26); 72553 (July 8, 2014), 79 FR 40813 (July 8, 2014) (SR-ISE Gemini-2014-19); 72466 (June 25, 2014), 79 FR 37378 (July 1, 2014) (SR-ISE Gemini-2014-17); 70636 (October 9, 2013), 78 FR 62838 (October 22, 2013) (SR-Topaz-2013-05).

⁵ See Exchange Approval Order, *supra* note 4.

exposure period. Specifically, at the end of the exposure period, the Agency Order will be executed in full at the best prices available, taking into consideration orders and quotes in the Exchange market, Improvement Orders, and the Counter-Side Order. The Agency Order will receive executions at multiple price levels if there is insufficient size to execute the entire order at the best price. At a given price, Priority Customer interest is executed in full before Professional Orders and any other interest of Members (*i.e.*, proprietary interest from Electronic Access Members and Exchange market makers).

After Priority Customer interest at a given price, Professional Orders and Members' interest will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the Members' interest.

In the case where the Counter-Side Order is at the same price as Members' interest (after Priority Customer interest at a given price), the Counter-Side order will be allocated the greater of one (1) contract or forty percent (40%) of the initial size of the Agency Order before other Member interest is executed. Upon entry of Counter-Side orders, Members can elect to automatically match the price and size of orders, quotes and responses received during the exposure period up to a specified limit price or without specifying a limit price. In this case, the Counter-Side order will be allocated its full size at each price point, or at each price point within its limit price if a limit is specified, until a price point is reached where the balance of the order can be fully executed. At such price point, the Counter-Side order shall be allocated the greater of one contract or forty percent (40%) of the original size of the Agency Order, but only after Priority Customer Orders at such price point are executed in full. Thereafter, all other orders, Responses, and quotes at the price point will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the order, Response or quote. An election to automatically match better prices cannot be cancelled or altered during the exposure period.

When a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so

that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the \$.01 increment that favors the Agency Order.

The Pilot

As described above, two components of PIM are currently operating on a pilot basis: (i) The termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders entered into PIM. The pilot has been extended until January 18, 2017.⁶

As described in greater detail below, during the pilot period the Exchange has been required to submit, and has been submitting, certain data periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism. The Exchange has also analyzed the impact of certain aspects of the Pilot; for example, situation in which PIM is terminated prematurely by an unrelated order.

The Exchange now seeks to have the Pilot approved on a permanent basis. In addition, the Exchange proposes to modify the scope of PIM so that, with respect to PIM orders for less than 50 option contracts, members will be required to receive price improvement of at least one minimum price improvement increment over the NBBO if the NBBO is only \$.01 wide. For orders of 50 contracts or more, or if the difference in the NBBO is greater than \$.01, the requirements for price improvement remain the same.

Price Improvement for Orders Under 50 Contracts

Currently, the PIM may be initiated if all of the following conditions are met. A Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the Exchange order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

ISE Gemini proposes to amend Rule 723(b) to require Electronic Access Members to provide at least \$.01 price improvement for an Agency Order if

that order is for less than 50 contracts and if the difference between the NBBO is \$.01. For the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than April 15, 2017, ISE Gemini will adopt a member conduct standard to implement this requirement.⁷ Under this provision, ISE Gemini is proposing to amend the Auction Eligibility Requirements to require that, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$.01, an Electronic Access Member shall not enter a Crossing Transaction unless such Crossing Transaction is entered at a price that is one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, and better than any limit order on the limit order book on the same side of the market as the Agency Order. This requirement will apply regardless of whether the Agency Order is for the account of a public customer, or where the Agency Order is for the account of a broker dealer or any other person or entity that is not a Public Customer. Failure to provide such price improvement will subject Members to the fines set forth in Rule 1614(d)(4) of the International Securities Exchange, LLC ("ISE").⁸

The Exchange will conduct electronic surveillance of PIM to ensure that members comply with the proposed

⁷ The Exchange notes that its indirect parent company, U.S. Exchange Holdings, Inc. has been acquired by Nasdaq, Inc. See Securities Exchange Act Release No. 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR-ISEGemini-2016-05). Pursuant to this acquisition, ISE Gemini platforms are migrating to Nasdaq platforms, including the platform that operates PIM. ISE Gemini intends to retain the proposed member conduct standard requiring price improvement for options orders of under 50 contracts where the difference between the NBBO is \$.01 until the ISE Gemini platforms and the corresponding symbols are migrated to the platforms operated by Nasdaq, Inc.

⁸ In a separate proposed rule change, ISE is proposing to adopt similar price improvement requirements for orders of less than 50 contracts for its PIM. As part of that rule change, ISE is proposing to amend ISE Rule 1614 (Imposition of Fines for Minor Rule Violations) to add Rule 1614(d)(4), which will provide that, beginning January 19, 2017, any Member who enters an order into PIM for less than 50 contracts, while the National Best Bid or Offer spread is \$.01, must provide price improvement of at least one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, which increment may not be smaller than \$.01. Failure to provide such price improvement will result in members being subject to the following fines: \$500 for the second offense, \$1,000 for the third offense, and \$2,500 for the fourth offense. Subsequent offenses will subject the member to formal disciplinary action. ISE will review violations on a monthly cycle to assess these violations.

⁶ See note 3 above.

price improvement requirements for option orders of less than 50 contracts. Specifically, using an electronic surveillance system that produces alerts of potentially unlawful PIM orders, the Exchange will perform a frequent review of member firm activity to identify instances of apparent violations. Upon discovery of an apparent violation, the Exchange will attempt to contact the appropriate member firm to communicate the specifics of the apparent violation with the intent to assist the member firm in preventing submission of subsequent problematic orders. The Exchange will review the alerts monthly and determine the applicability of the MRVP and appropriate penalty. The Exchange is not limited to the application of the MRVP, and may at its discretion, choose to escalate a matter for processing through the Exchange's disciplinary program.

The Exchange is also proposing a systems-based mechanism to implement this price improvement requirement, which shall be effective following the migration of a symbol to INET, the platform operated by Nasdaq, Inc. that will also operate the PIM. Under this provision, if the Agency Order is for less than 50 option contracts, and if the difference between the National Best Bid and National Best Offer ("NBBO") is \$0.01, the Crossing Transaction must be entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than the limit order or quote on the ISE order book on the same side of the Agency Order.

The Exchange believes that these changes to PIM may provide additional opportunities for Agency Orders of under 50 option contracts to receive price improvement over the NBBO where the difference in the NBBO is \$0.01 and therefore encourage the increased submission of orders of under 50 option contracts. The Exchange notes that the statistics for the current pilot, which include, among other things, price improvement for orders of less than 50 option contracts under the current auction eligibility requirements, show relatively small amounts of price improvement for such orders. ISE Gemini believes that the proposed requirements will therefore increase the price improvement that orders of under 50 option contracts may receive in PIM.

The Exchange will retain the current requirements for auction eligibility where the Agency Order is for 50 option contracts or more, or if the difference between the NBBO is greater than \$0.01. Accordingly, the Exchange is amending

the Auction Eligibility Requirements to state that, if the PIM Order is for 50 option contracts or more or if the difference between the NBBO is greater than \$0.01, the Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the Exchange order book on the same side as the Agency Order.

No Minimum Size Requirement

Supplemental Material .03 to Rule 723 provides that, as part of the current Pilot, there will be no minimum size requirement for orders to be eligible for the Auction.⁹ As with the ISE PIM, the Exchange proposed the no-minimum size requirement for the PIM because it believed that this would provide small customer orders with the opportunity to participate in the PIM and to receive corresponding price improvement. In initially approving the ISE PIM, the Commission noted that the no minimum size requirement provided an opportunity for more market participants to participate in the auction.¹⁰ The Commission also stated that it would evaluate PIM during the Pilot Period to determine whether it would be beneficial to customers and to the options market as a whole to approve any proposal requesting permanent approval to permit orders of fewer than 50 contracts to be submitted to the PIM.¹¹

As noted above, throughout the Pilot, the Exchange has been required to submit certain data periodically to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism.

The Exchange believes that the data gathered since the approval of the Pilot establishes that there is liquidity and competition both within PIM and outside of PIM, and that there are

⁹ The provision relating to the no minimum size requirement also requires the Exchange to submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange outside of the PIM. Any raw data which is submitted to the Commission will be provided on a confidential basis.

¹⁰ See Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR-ISE-2003-06) ("ISE PIM Approval Order").

¹¹ *Id.*

opportunities for significant price improvement within PIM.¹²

In the period between January and June 2016, the PIM executed a total of 297,239 contracts, which represented 0.62% of total ISE Gemini contract volume and 0.01% of industry volume. The percent of ISE Gemini volume traded in PIM ranged from 0.47% in May 2016 to 0.69% in February 2016.

The Exchange compiled price improvement data in orders from January through June 2016 that divides the data into the following groups: (1) Orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE Gemini was at the NBBO; (2) orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE Gemini was not at the NBBO; (3) orders of over 50 contracts where the Agency Order was on behalf of a non-customer and ISE Gemini was at the NBBO; (4) orders of over 50 contracts where the Agency Order was on behalf of a non-customer and ISE Gemini was not at the NBBO; (5) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE Gemini was at the NBBO; (6) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE Gemini was not at the NBBO; (7) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE Gemini was at the NBBO; and (8) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE Gemini was not at the NBBO.

For January 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE Gemini was at the NBBO, the most contracts traded (4,192) occurred when the spread was between \$0.05 and \$0.10.¹³ Of these, the greatest number of contracts (1,400) received \$0.03 price improvement. There was an average number of three participants when the spread was between \$0.05 and \$0.10. In

¹² Specifically, the Exchange gathered and reported nine separate data fields relating to PIM orders of fewer than 50 contracts, including (1) the number of orders of fewer than 50 contracts entered into the PIM; (2) the percentage of all orders of fewer than 50 contracts sent to the Exchange that are entered into the PIM; (3) the spread in the option, at the time an order of fewer than 50 contracts is submitted to the PIM; and (4) of PIM trades, the percentage done at the NBBO plus \$0.01, plus \$0.02, plus \$0.03, etc. See Exhibit B to Topaz Exchange Application, Securities Exchange Act Release No. 69012 (March 1, 2013), 78 FR 14847 (March 7, 2013) (File No. 10-209).

¹³ This discussion of January 2016 data is intended to be illustrative of data that was gathered between January 2016 and July 2016. The complete underlying data for January 2016 through June 2016 for these eight categories is attached as Exhibit 3.

comparison, 6 contracts that traded at this spread received no price improvement. When the spread was \$0.01 for this same category, a total of 499 contracts traded; 349 contracts received no price improvement, and 150 received \$0.01 price improvement. There was an average number of four participants when the spread was \$0.01.

In comparison, in January 2016, where the order was on behalf of a Public Customer, and the order was for greater than 50 contracts, and ISE Gemini was at the NBBO, the most contracts traded (1,495) occurred where the spread was \$0.02. Of those contracts, the greatest number of contracts (979) received \$0.01 price improvement, and 456 contracts received no price improvement. There was an average number of 4 participants where the spread was \$0.02.

In January 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE Gemini was not at the NBBO, the most contracts traded (1,403) occurred when the spread was between \$0.05 and \$0.10. Of this category, the greatest number of contracts (570) received \$0.01 price improvement. In comparison, when the spread was \$0.01 in this same category, a total of 80 contracts traded, and all received price improvement.

In comparison, in January 2016, where the order was on behalf of a Public Customer, and order was for greater than 50 contracts, and ISE Gemini was not at the NBBO, the most contracts traded (4,846) occurred where the spread was \$0.05–\$0.10. Of those contracts, the greatest number of contracts (1,234) received \$0.01 price improvement, and 1,008 contracts received no price improvement. There was an average number of 4 participants where the spread was \$0.05–\$0.10.

ISE Gemini believes that the data gathered during the Pilot period indicates that there is meaningful competition in PIM auctions for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that there are opportunities for significant price improvement for orders executed through PIM. The Exchange therefore believes that it is appropriate to approve the no-minimum size requirement on a permanent basis.

Early Conclusion of the PIM Auction

Supplemental Material .05 to Rule 723 provides that Rule 723(c)(5) and Rule 723(d)(4), which relate to the termination of the exposure period by unrelated orders shall be part of the current Pilot. Rule 723(c)(5) provides

that the exposure period will automatically terminate (i) at the end of the 500 millisecond period,¹⁴ (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. Rule 723(d)(4) provides that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the \$0.01 increment that favors the Agency Order.¹⁵

As with the no minimum size requirement, the Exchange has gathered data on these three conditions to assess the effect of early PIM Auction conclusions on the Pilot.¹⁶

¹⁴ As initially approved, this provision of Rule 723(c)(5) provided that the exposure period would automatically terminate at the end of a one second period. See Exhibit B to ISE Topaz Form 1 (10–209). This exposure period was subsequently reduced to the current 500 milliseconds, and the Exchange is further proposing to modify the exposure period to a time period of no less than 100 milliseconds and no more than one second. See Securities Exchange Act Release No. 79353 (November 18, 2016), 81 FR 85280 (November 25, 2016) (SR–ISEGemini–2016–14).

¹⁵ When the Pilot was initially approved, Rule 723(d)(5) was approved on a pilot basis, which was subsequently re-numbered as current Rule 723(d)(4). See Securities Exchange Act Release No. 72553 (July 8, 2014), 79 FR 40813 (July 8, 2014) (SR–ISEGemini–2014–19).

¹⁶ The Exchange agreed to gather and submit the following data on this part of the Pilot: (1) The number of times that a market or marketable limit order in the same series on the same side of the market as the Agency Order prematurely ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (2) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (3) the number of times that a market or marketable limit order in the same series on the opposite side of the market as the Agency Order prematurely ended the PIM auction and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (4) the percentage of

For the period from January 2016 through June 2016, there were a total of 65 early terminated auctions. The number of orders in early terminated PIM auctions constituted 0.08% of total PIM orders. There were a total of 325 contracts that traded through early terminated auctions. The number of contracts in early terminated PIM auctions represented 0.11% of total PIM contracts. Of the early terminated auctions, 50.77% of those auctions received price improvement, and 52% of contracts that traded in an early-terminated auction received price improvement. The total amount of price improvement for PIM auctions that terminated early was \$7.96.

Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency, or will otherwise significantly affect the functioning of the PIM. The Exchange also notes that, of the early terminated auctions, 50.77% of those auctions received price improvement, and 52% of contracts that traded in an early-terminated auction received price improvement. The total amount of price improvement per contract for PIM

PIM early terminations due to the receipt of a market or marketable limit order in the same series on the opposite side of the market that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (5) the number of times that a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange prematurely ended the PIM auction and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (6) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; and (7) The average amount of price improvement provided to the Agency Order when the PIM auction is not terminated early (*i.e.*, runs the full three seconds). See Exhibit B to Topaz Exchange Application, Securities Exchange Act Release No. 69012 (March 1, 2013), 78 FR 14847 (March 7, 2013) (File No. 10–209).

auctions that terminated early was \$7.96. The Exchange therefore believes it is appropriate to approve this aspect of the Pilot on a permanent basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁷ in general and with Section 6(b)(5) of the Act,¹⁸ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act¹⁹ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Specifically, the Exchange believes that PIM, including the rules to which the Pilot applies, results in increased liquidity available at improved prices, with competitive final pricing out of the complete control of the Electronic Access Member that initiated the auction. The Exchange believes that PIM promotes and fosters competition and affords the opportunity for price improvement to more options contracts. The Exchange believes that the changes to the PIM requiring price improvement of at least one minimum price improvement increment over the NBBO for Agency Orders of less than 50 option contracts where the difference in the NBBO is \$0.01 will provide further price improvement for those orders, and thereby encourage additional submission of those orders into PIM. The Exchange believes that the proposal, which subjects members to the Minor Rule Violation Plan for failing to provide the required price improvement, coupled with the Exchange's surveillance efforts, are designed to facilitate members' compliance with the proposed requirement.

The Exchange believes that approving the Pilot on a permanent basis is also consistent with the Act. With respect to the no minimum size requirement, the Exchange believes that the data gathered during the Pilot period indicates that there is meaningful competition in the PIM for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that there are opportunities for significant price improvement for orders executed through PIM, including for small customer orders.

With respect to the early termination of the PIM, the Exchange believes that it is appropriate to terminate an auction (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. The Exchange also believes that it is consistent with the Act to require that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency, or will otherwise disrupt the functioning of the PIM. The Exchange also notes that a significant percentage of PIM auctions that terminated early executed at a price that was better than the NBBO at the time the auction began, and that a significant percentage of contracts in auctions that terminated early received price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal will apply to all Exchange members, and participation in the PIM process is completely voluntary. Based on the data collected by the Exchange during the Pilot, the Exchange believes that there is meaningful competition in the PIM for all size orders, there are opportunities for significant price improvement for orders executed through PIM, and that

there is an active and liquid market functioning on the Exchange outside of the PIM. The Exchange believes that requiring increased price improvement for Agency Orders may encourage competition by attracting additional orders to participate in the PIM. The Exchange believes that approving the Pilot on a permanent basis will not significantly impact competition, as the Exchange is proposing no other change to the Pilot beyond implementing it on a permanent basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ISEGemini-2016-23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-ISEGemini-2016-23. 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 Web site (<http://www.sec.gov/>

¹⁷ 15 U.S.C. 78f.

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78f(b)(8).

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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISEGemini-2016-23 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Eduardo A. Aleman,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79538; File No. SR-CHX-2016-21]

Self Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the Web Site Data Publication Requirements and Clarify Certain Data Reporting Obligations Related to the Regulation NMS Plan To Implement a Tick Size Pilot Program

December 13, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on November 29, 2016, the Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have

been prepared by the 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

CHX proposes to amend Article 20, Rule 13(b) of the Rules of the Exchange ("CHX Rules") to modify the Web site data publication requirements and clarify the Exchange's data reporting obligations relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program.

The text of this proposed rule change is available on the Exchange's Web site at (www.chx.com) and in 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 CHX included statements concerning the purpose of and basis for the proposed rule changes 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 CHX 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 Changes

1. Purpose

On August 25, 2014, the Exchange, and several other self-regulatory organizations (the "Plan Participants"³) filed with the Commission, pursuant to Section 11A of the Act⁴ and Rule 608 of Regulation NMS thereunder,⁵ the Plan to Implement a Tick Size Pilot Program (the "Plan").⁶ The Plan Participants filed the Plan to comply with an order issued by the Commission

³ A "Participant" is a "member" of the Exchange for purposes of the Act. See CHX Article 1, Rule 1(s). For clarity, the Exchange proposes to utilize the term "CHX Participant" when referring to members of the Exchange and the term "Plan Participant" when referring to Participants of the Plan.

⁴ 15 U.S.C. 78k-1.

⁵ 17 CFR 242.608.

⁶ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

on June 24, 2014.⁷ The Plan⁸ was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁹ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹⁰ On November 6, 2015, the SEC exempted the Plan Participants from implementing the pilot until October 3, 2016.¹¹ As set forth in Appendices B and C to the Plan, data that is reported pursuant to the appendices shall be provided for dates starting six months prior to the Pilot Period through six months after the end of the Pilot Period. Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the Commission exempted the Plan Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Plan Participants to implement the pilot on a phased-in basis, as described in the Plan Participants' exemptive request.¹²

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stocks of small-capitalization companies. Each Plan Participant is required to comply, and to enforce compliance by its members, as applicable, with the provisions of the Plan.

On March 28, 2016, the Exchange filed with the Commission a proposed rule change to adopt Article 20, Rule 13(b), which was immediately effective upon filing, to implement the data collection requirements of the Plan, including requirements relating to Web site data publication.¹³ Specifically, current Article 20, Rule 13(b)(2)(A)(v) provides that the Exchange shall make Appendix B.I and B.II data of certain

⁷ See Securities Exchange Act Release No. 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁸ Unless otherwise specified, capitalized terms used in this rule filing are based on the defined terms of the Plan.

⁹ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order").

¹⁰ See Approval Order at 27533 and 27545.

¹¹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015) (File No. 4-657).

¹² See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹³ See Securities Exchange Act Release No. 77469 (March 29, 2016), 81 FR 19275 (April 4, 2016) (SR-CHX-2016-03).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

CHX Participants that operate Trading Centers¹⁴ collected pursuant to current Article 20, Rule 13(b)(2)(A) publicly available on the Exchange Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Also, current Article 20, Rule 13(b)(B)(ii) provides that the Exchange shall make Appendix B.I and B.II data of the Exchange operated Trading Center collected pursuant to current Article 20, Rule 13(b)(2)(B)(i) publicly available on the Exchange Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. In addition, current Article 20, Rule 13(b)(3)(C) provides that the Exchange shall make Appendix B.IV data collected pursuant to current Article 20, Rule 13(b)(3)(A) and (B) publicly available on the Exchange Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data.

The Exchange is now proposing amendments to Article 20, Rule 13(b)(2)(A)(v) (regarding Appendix B.I and B.II data for Trading Centers operated by CHX Participants), Article 20, Rule 13(b)(2)(B)(ii) (regarding Appendix B.I and B.II data for the Exchange operated Trading Center) and Article 20, Rule 13(b)(3)(C) (regarding Appendix B.IV data) to provide that data required to be made available on the Exchange Web site be published within 120 calendar days following the month end. The Exchange also proposes to adopt new language under Article 20, Rule 13(b)(5) (regarding Appendix B.III data) that provides that the Exchange shall make its Appendix B.III data publicly available on the CHX Web site within 120 calendar days following month end at no charge and shall not identify the Trading Center that generated the data.

Moreover, the Exchange is proposing to adopt Article 20, Rule 13(b)(4)(C) (regarding Appendix C data) to clarify that the Exchange, as a Designated Examining Authority (“DEA”), shall collect the data required by Item I of Appendix C to the Plan and current paragraph (b)(4)(A) for those CHX Participants that are Market Makers for which the Exchange is the DEA, and on a monthly basis transmit such data, categorized by the Control Group and each Test Group, to the SEC in a pipe

¹⁴ The Plan incorporates the definition of a “Trading Center” from Rule 600(b)(78) of Regulation NMS. Regulation NMS defines a “Trading Center” as “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, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.” See 17 CFR 242.600(b).

delimited format. Also, in light of the recently proposed amendment to the Financial Industry Regulatory Authority (“FINRA”) Rule 6191(b)(4)(B),¹⁵ which provides, among other things, that FINRA shall aggregate and publish (i) Market Maker profitability statistics for Market Makers for which FINRA is the DEA; (ii) Market Maker profitability statistics collected from other Plan Participants that are DEAs; and (iii) Market Maker profitability statistics for Market Maker profitability statistics [sic] for Market Makers whose DEA is not a Plan Participant, the Exchange is proposing to adopt additional language that provides the Exchange, as DEA, shall also make the data collected pursuant to current paragraph (b)(4)(A) available to FINRA for aggregation and publication, categorized by the Control Group and each Test Group, on the FINRA Web site pursuant to FINRA Rules.

Furthermore, the Exchange is proposing amendments to paragraph .08 of the Interpretations and Policies under Article 20, Rule 13(b) to conform its provisions to the above proposed changes. Specifically, amended paragraph .08 would provide that with respect to data for the Pilot Period, the Exchange shall make the data collected pursuant to current paragraph (b)(4)(A) available to FINRA for aggregation and publication on the FINRA Web site pursuant to FINRA Rules and the Exchange will publish the data collected pursuant to current paragraphs (2) and (3) on the Exchange Web site, which shall commence at the beginning of the Pilot Period. Also, notwithstanding the provisions of amended paragraphs (b)(2)(A)(v), (b)(2)(B)(ii) and (b)(3)(C), the Exchange shall make data for the Pre-Pilot Period publicly available on the Exchange’s Web site pursuant to Appendix B to the Plan by February 28, 2017.

The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.¹⁶ In

¹⁵ See SR-FINRA-2016-042, filed November 15, 2016.

¹⁶ The Exchange understands that some Market Makers may utilize a DEA that is not a Plan Participant and that their Designated Examining Authority (“DEA”) would not be subject to the Plan’s data collection requirements. Prior to this proposal, the Plan Participants implemented rules that required members that were Market Makers whose DEA is not a Plan Participant to transmit transaction data for Market Maker profitability calculations to FINRA. See e.g., Securities Exchange Act Release No. 77469 (March 29, 2016), 81 FR 19275 (April 4, 2016) (SR-CHX-2016-03).

addition, the purpose of adopting language that the Exchange will transmit Appendix C data to the SEC for the Market Making activity of a CHX Participant for which the Exchange is the DEA is to clarify the Exchange’s data reporting obligations pursuant to the Plan. Moreover, the purpose of explicitly stating that the Exchange will publish the relevant Appendix B data on its Web site and that FINRA will publish the relevant Appendix C data on its Web site is to conform CHX Rules to the Web site publication procedures recently proposed by FINRA.¹⁷

The Exchange notes that the proposed rule change is similar to SR-FINRA-2016-042 in all material respects, except that the Exchange does not propose to adopt provisions regarding the calculation and public dissemination of Appendix C data as FINRA will be conducting that function on behalf of all Plan Participants. Also, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of the filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁹ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Plan Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC. The Exchange believes that the instant proposal is consistent with the Act in that it is designed to (1) address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the

¹⁷ See *supra* note 15.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

public availability of such information, (2) clarify the Exchange's data reporting obligations pursuant to the Plan and (3) conform CHX Rules to the Web site publication procedures recently proposed by FINRA.²⁰

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Plan Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to (1) address confidentiality concerns that may adversely impact competition by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information, (2) clarify the Exchange's data reporting obligations pursuant to the Plan and (3) conform CHX Rules with the Web site publication procedures recently proposed by FINRA.²¹ The Exchange notes that the proposed change will not affect the data reporting requirements for CHX Participants. The proposal also does not alter the information required to be submitted to the SEC.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act²² and Rule 19b-4(f)(6)²³ thereunder.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission

may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to (1) delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information; and (2) allow for FINRA to aggregate and publish Market Maker profitability data for all Participant DEAs. The Exchange notes that the proposed change will not affect the data reporting requirements for members for which CHX is the DEA. The proposal also does not alter the information required to be submitted to the Commission.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement these proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative on November 30, 2016.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁵ If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²⁶ of the Act to determine whether the proposed rule change should be approved or disapproved.

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C).

²⁶ 15 U.S.C. 78s(b)(2)(B).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-CHX-2016-21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Robert W. Errett, Deputy Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-CHX-2016-21. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site 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 CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-CHX-2016-21 and should be submitted on or before January 9, 2017.

²⁷ 17 CFR 200.30-3(a)(12).

²⁰ See *supra* note 15.

²¹ See *supra* note 15.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016-30391 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available

From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Rule 104, SEC File No. 270-411, OMB Control No. 3235-0465.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) is soliciting comments on the existing collection of information provided for in Rule 104 of Regulation M (17 CFR 242.104), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 104—Stabilizing and Other Activities in Connection with an Offering—permits stabilizing by a distribution participant during a distribution so long as the distribution participant discloses information to the market and investors. This rule requires disclosure in offering materials of the potential stabilizing transactions and that the distribution participant inform the market when a stabilizing bid is made. It also requires the distribution participants (*i.e.*, the syndicate manager) to maintain information regarding syndicate covering transactions and penalty bids and disclose such information to the Self-Regulatory Organization (SRO).

There are approximately 848 respondents per year that require an aggregate total of 170 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 0.20 hours (12 minutes) to complete. Thus, the total compliance burden per year is 170 hours. The total estimated internal labor cost of compliance for the respondents is approximately \$11,050.00 per year, resulting in an estimated cost of compliance for each respondent per response of

approximately \$13.03 (*i.e.*, \$11,050/848 responses).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30373 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available

From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Form 10-K, SEC File No. 270-48, OMB Control No. 3235-0063.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 10-K (17 CFR 249.310) is filed by issuers of securities to satisfy their annual reporting obligations under to Section 13 or 15(d) of the Exchange Act

(“Exchange Act”) (15 U.S.C. 78m or 78o(d)). The information provided by Form 10-K is intended to ensure the adequacy of information available to investors and securities markets about an issuer. Form 10-K takes approximately 2003.7884 hours per response to prepare and is filed by approximately 8,137 respondents. We estimate that 75% of the approximately 2003.7884 hours per response (1,502.8413 hours) is prepared by the company for an annual reporting burden of 12,228,620 hours (1,502.8413 hours per response × 8,137 responses).

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.

The public may view the background documentation for this information collection at the following Web site, www.reginfo.gov. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Shagufta_Ahmed@omb.eop.gov; and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30376 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79539; File No. SR-ISEMercury-2016-25]

Self-Regulatory Organizations; ISE Mercury LLC; Notice of Filing of Proposed Rule Change to Amend ISE Mercury Rule 723 and To Make Pilot Program Permanent

December 13, 2016

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 12, 2016, ISE Mercury, LLC (the “Exchange” or “ISE Mercury”) filed with the Securities and Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE Mercury Rule 723, concerning its Price Improvement Mechanism (“PIM”). Certain aspects of PIM are currently operating on a pilot basis (“Pilot”), which is set to expire on January 18, 2017.³ The Pilot concerns (i) the termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders eligible for PIM. ISE Mercury seeks to make the Pilot permanent, and also proposes to change the requirements for providing price improvement for Agency Orders of less than 50 option contracts.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to make permanent certain pilots within Rule 723, relating to PIM. Paragraph .03 of the Supplementary Material to Rule 723 provides that there is no minimum size requirement for orders to be eligible for PIM. Paragraph .05 concerns the termination of the exposure period by unrelated orders. In

addition, ISE Mercury proposes to modify the requirements for PIM auctions involving less than 50 contracts where the National Best Bid and Offer (“NBBO”) is only \$0.01 wide.

Background

The Exchange adopted PIM as part of its application to be registered as a national securities exchange.⁴ In approving PIM, the Commission noted that it was largely based on a similar functionality offered by the International Securities Exchange, LLC (“ISE”).⁵ The PIM is a process that allows Electronic Access Members (“EAM”) to provide price improvement opportunities for a transaction wherein the Member seeks to execute an agency order as principal or execute an agency order against a solicited order (a “Crossing Transaction”). A Crossing Transaction is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the “Counter-Side Order”). The Counter-Side Order may represent interest for the Member’s own account, or interest the Member has solicited from one or more other parties, or a combination of both.

Rule 723 sets forth the criteria pursuant to which the PIM is initiated. Specifically, a Crossing Transaction must be entered only at a price that is equal to or better than the national best bid or offer (“NBBO”) and better than the limit order or quote on the Exchange order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

Rule 723 also sets forth requirements relating to the exposure of orders in PIM and the termination of the exposure period. Upon entry of a Crossing Transaction into the Price Improvement Mechanism, a broadcast message that includes the series, price and size of the Agency Order, and whether it is to buy or sell, will be sent to all Members. This broadcast message will not be included in the ISE Mercury disseminated best bid or offer and will not be disseminated through OPRA. Members will be given 500 milliseconds to indicate the size and price at which they want to participate in the execution of the Agency Order (“Improvement Orders”). Improvement Orders may be

entered by all Members for their own account or for the account of a Public Customer in one-cent increments at the same price as the Crossing Transaction or at an improved price for the Agency Order, and for any size up to the size of the Agency Order. During the exposure period, Improvement Orders may not be canceled, but may be modified to (1) increase the size at the same price, or (2) improve the price of the Improvement Order for any size up to the size of the Agency Order. During the exposure period, responses (including the Counter Side Order, Improvement Orders, and any changes to either) submitted by Members shall not be visible to other auction participants. The exposure period will automatically terminate (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange.

Rule 723 also describes how orders will be executed at the end of the exposure period. Specifically, at the end of the exposure period, the Agency Order will be executed in full at the best prices available, taking into consideration orders and quotes in the Exchange market, Improvement Orders, and the Counter-Side Order. The Agency Order will receive executions at multiple price levels if there is insufficient size to execute the entire order at the best price. At a given price, Priority Customer interest is executed in full before Professional Orders and any other interest of Members (*i.e.*, proprietary interest from Electronic Access Members and Exchange market makers).

After Priority Customer interest at a given price, Professional Orders and Members’ interest will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the Members’ interest.

In the case where the Counter-Side Order is at the same price as Members’ interest (after Priority Customer interest at a given price), the Counter-Side order will be allocated the greater of one (1) contract or forty percent (40%) of the initial size of the Agency Order before other Member interest is executed. Upon entry of Counter-Side orders, Members can elect to automatically match the price and size of orders, quotes and responses received during the exposure period up to a specified

³ See Securities Exchange Act Release No. 78342 (July 15, 2016), 81 FR 47481 (July 21, 2016) (SR-ISEMercury-2016-13).

⁴ See Securities Exchange Act Release No. 76998 (January 29, 2016), 81 FR 6066 (February 4, 2016) (File No. 10-221) (“Exchange Approval Order”).

⁵ See Exchange Approval Order, *supra* note 4.

limit price or without specifying a limit price. In this case, the Counter-Side order will be allocated its full size at each price point, or at each price point within its limit price if a limit is specified, until a price point is reached where the balance of the order can be fully executed. At such price point, the Counter-Side order shall be allocated the greater of one contract or forty percent (40%) of the original size of the Agency Order, but only after Priority Customer Orders at such price point are executed in full. Thereafter, all other orders, Responses, and quotes at the price point will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the order, Response or quote. An election to automatically match better prices cannot be cancelled or altered during the exposure period.

When a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the \$0.01 increment that favors the Agency Order.

The Pilot

As described above, two components of PIM are currently operating on a pilot basis: (i) The termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders entered into PIM. The pilot has been extended until January 18, 2017.⁶

As described in greater detail below, during the pilot period the Exchange has been required to submit, and has been submitting, certain data periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism. The Exchange has also analyzed the impact of certain aspects of the Pilot; for example, situation in which PIM is terminated prematurely by an unrelated order.

The Exchange now seeks to have the Pilot approved on a permanent basis. In addition, the Exchange proposes to

modify the scope of PIM so that, with respect to PIM orders for less than 50 option contracts, members will be required to receive price improvement of at least one minimum price improvement increment over the NBBO if the NBBO is only \$0.01 wide. For orders of 50 contracts or more, or if the difference in the NBBO is greater than \$0.01, the requirements for price improvement remain the same.

Price Improvement for Orders Under 50 Contracts

Currently, the PIM may be initiated if all of the following conditions are met. A Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the Exchange order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

ISE Mercury proposes to amend Rule 723(b) to require Electronic Access Members to provide at least \$0.01 price improvement for an Agency Order if that order is for less than 50 contracts and if the difference between the NBBO is \$0.01. For the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than September 15, 2017, ISE Mercury will adopt a member conduct standard to implement this requirement.⁷ Under this provision, the Exchange is proposing to amend the Auction Eligibility Requirements to require that, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, an Electronic Access Member shall not enter a Crossing Transaction unless such Crossing Transaction is entered at a price that is one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than any limit order on the limit order book on the same side of the market as the Agency Order. This

⁷ The Exchange notes that its indirect parent company, U.S. Exchange Holdings, Inc. has been acquired by Nasdaq, Inc. See Securities Exchange Act Release No. 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR-ISEMercury-2016-10). Pursuant to this acquisition, ISE Mercury platforms are migrating to Nasdaq platforms, including the platform that operates PIM. ISE Mercury intends to retain the proposed member conduct standard requiring price improvement for options orders of under 50 contracts where the difference between the NBBO is \$0.01 until the ISE Mercury platforms and the corresponding symbols are migrated to the platforms operated by Nasdaq, Inc.

requirement will apply regardless of whether the Agency Order is for the account of a public customer, or where the Agency Order is for the account of a broker dealer or any other person or entity that is not a Public Customer. Failure to provide such price improvement will subject Members to the fines set forth in Rule 1614(d)(4) of the International Securities Exchange, LLC ("ISE").⁸

The Exchange will conduct electronic surveillance of PIM to ensure that members comply with the proposed price improvement requirements for option orders of less than 50 contracts. Specifically, using an electronic surveillance system that produces alerts of potentially unlawful PIM orders, the Exchange will perform a frequent review of member firm activity to identify instances of apparent violations. Upon discovery of an apparent violation, the Exchange will attempt to contact the appropriate member firm to communicate the specifics of the apparent violation with the intent to assist the member firm in preventing submission of subsequent problematic orders. The Exchange will review the alerts monthly and determine the applicability of the MRVP and appropriate penalty. The Exchange is not limited to the application of the MRVP, and may at its discretion, choose to escalate a matter for processing through the Exchange's disciplinary program.

The Exchange is also proposing a systems-based mechanism to implement this price improvement requirement, which shall be effective following the migration of a symbol to INET, the platform operated by Nasdaq, Inc. that will also operate the PIM. Under this provision, if the Agency Order is for less than 50 option contracts, and if the difference between the National Best Bid and National Best Offer ("NBBO") is \$0.01, the Crossing Transaction must

⁸ In a separate proposed rule change, ISE is proposing to adopt similar price improvement requirements for orders of less than 50 contracts for its PIM. As part of that rule change, ISE is proposing to amend ISE Rule 1614 (Imposition of Fines for Minor Rule Violations) to add Rule 1614(d)(4), which will provide that, beginning January 19, 2017, any Member who enters an order into PIM for less than 50 contracts, while the National Best Bid or Offer spread is \$0.01, must provide price improvement of at least one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, which increment may not be smaller than \$0.01. Failure to provide such price improvement will result in members being subject to the following fines: \$500 for the second offense, \$1,000 for the third offense, and \$2,500 for the fourth offense. Subsequent offenses will subject the member to formal disciplinary action. ISE will review violations on a monthly cycle to assess these violations.

⁶ See note 3 above.

be entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than the limit order or quote on the ISE order book on the same side of the Agency Order.

The Exchange believes that these changes to PIM may provide additional opportunities for Agency Orders of under 50 option contracts to receive price improvement over the NBBO where the difference in the NBBO is \$0.01 and therefore encourage the increased submission of orders of under 50 option contracts. The Exchange notes that the statistics for the current pilot, which include, among other things, price improvement for orders of less than 50 option contracts under the current auction eligibility requirements, show relatively small amounts of price improvement for such orders. ISE Mercury believes that the proposed requirements will therefore increase the price improvement that orders of under 50 option contracts may receive in PIM.

The Exchange will retain the current requirements for auction eligibility where the Agency Order is for 50 option contracts or more, or if the difference between the NBBO is greater than \$0.01. Accordingly, the Exchange is amending the Auction Eligibility Requirements to state that, if the PIM Order is for 50 option contracts or more or if the difference between the NBBO is greater than \$0.01, the Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the ISE Mercury order book on the same side as the Agency Order.

No Minimum Size Requirement

Supplemental Material .03 to Rule 723 provides that, as part of the current Pilot, there will be no minimum size requirement for orders to be eligible for the Auction.⁹ As with the ISE PIM, the Exchange proposed the no-minimum size requirement for the PIM because it believed that this would provide small customer orders with the opportunity to participate in the PIM and to receive corresponding price improvement. In initially approving the ISE PIM, the Commission noted that the no minimum

⁹The provision relating to the no minimum size requirement also requires the Exchange to submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange outside of the PIM. Any raw data which is submitted to the Commission will be provided on a confidential basis.

size requirement provided an opportunity for more market participants to participate in the auction.¹⁰ The Commission also stated that it would evaluate PIM during the Pilot Period to determine whether it would be beneficial to customers and to the options market as a whole to approve any proposal requesting permanent approval to permit orders of fewer than 50 contracts to be submitted to the PIM.¹¹

As noted above, throughout the Pilot, the Exchange has been required to submit certain data periodically to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism.

The Exchange believes that the data gathered since the approval of the Pilot establishes that there is liquidity and competition both within PIM and outside of PIM, and that there are opportunities for significant price improvement within PIM.¹²

In the period between February and June 2016, the PIM executed a total of 613,353 contracts, which represented 26.36% of total ISE Mercury contract volume and 0.04% of industry volume. The percent of ISE Mercury volume traded in PIM ranged from 0% in February 2016 to 37.88% in June 2016.

The Exchange compiled price improvement data in orders from February through June 2016 that divides the data into the following groups: (1) Orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE Mercury was at the NBBO; (2) orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE Mercury was not at the NBBO; (3) orders of over 50 contracts where the Agency Order was on behalf of a non-customer and ISE Mercury was at the NBBO; (4) orders of over 50 contracts where the

¹⁰ See Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR-ISE-2003-06) (“ISE PIM Approval Order”).

¹¹ *Id.*

¹² Specifically, the Exchange gathered and reported nine separate data fields relating to PIM orders of fewer than 50 contracts, including (1) the number of orders of fewer than 50 contracts entered into the PIM; (2) the percentage of all orders of fewer than 50 contracts sent to the Exchange that are entered into the PIM; (3) the spread in the option, at the time an order of fewer than 50 contracts is submitted to the PIM; and (4) of PIM trades, the percentage done at the NBBO plus \$0.01, plus \$0.02, plus \$0.03, etc. See Exhibit B to ISE Mercury Exchange Application (File No. 10-209).

Agency Order was on behalf of a non-customer and ISE Mercury was not at the NBBO; (5) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE Mercury was at the NBBO; (6) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE Mercury was not at the NBBO; (7) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE Mercury was at the NBBO; and (8) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE Mercury was not at the NBBO.

For March 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE Mercury was at the NBBO, the most contracts traded (2,525) occurred when the spread was \$0.03, with an average number of two participants.¹³ All of these contracts received \$0.01 price improvement. When the spread was \$0.01 for this same category, a total of 734 contracts traded, with none of those contracts receiving price improvement. There was an average number of 3 participants when the spread was \$0.01.

In comparison, where the order was on behalf of a Public Customer, the order was for greater than 50 contracts, and ISE Mercury was at the NBBO, the most contracts traded (934) occurred when the spread was \$0.10 to \$0.20, with an average number of 3 participants. The greatest number of these contracts (429) received \$0.05–\$0.10 price improvement.

In March 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE Mercury was not at the NBBO, the most contracts traded (3,772) occurred when the spread \$0.01. Of this category, the greatest number of contracts (3,722) received no price improvement, and 50 contracts received \$0.01 price improvement. There was an average number of 2 participants when the spread was \$0.01.

In comparison, in March 2016, where the order was on behalf of a Public Customer, the order was for greater than 50 contracts, and ISE Mercury was not at the NBBO, the most contracts traded (1,431) occurred when the spread was \$0.02. Of these contracts, the greatest number of contracts (758) received no price improvement. There was an

¹³ This discussion of March 2016 data is intended to be illustrative of data that was gathered between February 2016 and July 2016. The complete underlying data for February 2016 through June 2016 for these eight categories is attached as Exhibit 3.

average number of 2 participants when the spread was \$0.02.

ISE Mercury believes that the data gathered during the Pilot period indicates that there is meaningful competition in PIM auctions for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that there are opportunities for significant price improvement for orders executed through PIM. The Exchange therefore believes that it is appropriate to approve the no-minimum size requirement on a permanent basis.

Early Conclusion of the PIM Auction

Supplemental Material .05 to Rule 723 provides that Rule 723(c)(5) and Rule 723(d)(4), which relate to the termination of the exposure period by unrelated orders shall be part of the current Pilot. Rule 723(c)(5) provides that the exposure period will automatically terminate (i) at the end of the 500 millisecond period,¹⁴ (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. Rule 723(d)(4) provides that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the \$.01 increment that favors the Agency Order.

As with the no minimum size requirement, the Exchange has gathered data on these three conditions to assess the effect of early PIM conclusions on the Pilot.¹⁵

¹⁴ The Exchange notes that it is proposing to modify the exposure period to a time period of no less than 100 milliseconds and no more than one second. See Securities Exchange Act Release No. 79354 (November 18, 2016), 81 FR 85295 (November 25, 2016) (SR-ISEMercury-2016-21).

¹⁵ The Exchange agreed to gather and submit the following data on this part of the Pilot: (1) The number of times that a market or marketable limit order in the same series on the same side of the market as the Agency Order prematurely ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (2) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market that occurred within a 1/2 second of the start of the PIM auction; the percentage that occurred within one

For the period from January 2016 through June 2016, there were a total of 77 early terminated auctions. The number of orders in early terminated PIM auctions constituted 0.35% of total PIM orders. There were a total of 1,581 contracts that traded through early terminated auctions. The number of contracts in early terminated PIM auctions represented 0.26% of total PIM contracts. Of the early terminated auctions, 46.75% of those auctions received price improvement, and 31.37% of contracts that traded in an early-terminated auction received price improvement. Of the PIM auctions that terminated early and received price improvement from February 2016 through June 2016, the total amount of price improvement received was \$16.53.

second of the start of the PIM auction; the percentage that occurred within one and 1/2 second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and 1/2 seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (3) the number of times that a market or marketable limit order in the same series on the opposite side of the market as the Agency Order prematurely ended the PIM auction, and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (4) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the opposite side of the market that occurred within a 1/2 second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and 1/2 second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and 1/2 seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (5) the number of times that a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange prematurely ended the PIM auction and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (6) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange that occurred within a 1/2 second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and 1/2 second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and 1/2 seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; and (7) the average amount of price improvement provided to the Agency Order when the PIM auction is not terminated early. See Exhibit B to ISE Mercury Exchange Application (File No. 10-209).

Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency, or will otherwise significantly affect the functioning of the PIM. Of the early terminated auctions, 46.75% of those auctions received price improvement, and 31.37% of contracts that traded in an early-terminated auction received price improvement. The total amount of price improvement for PIM auctions that terminated early was \$16.53. The Exchange therefore believes it is appropriate to approve this aspect of the Pilot on a permanent basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁶ in general and with Section 6(b)(5) of the Act,¹⁷ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act¹⁸ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Specifically, the Exchange believes that PIM, including the rules to which the Pilot applies, results in increased liquidity available at improved prices, with competitive final pricing out of the complete control of the Electronic Access Member that initiated the auction. The Exchange believes that PIM promotes and fosters competition and affords the opportunity for price improvement to more options contracts. The Exchange believes that the changes to the PIM requiring price improvement of at least one minimum price improvement increment over the NBBO for Agency Orders of less than 50 option contracts where the difference in the NBBO is \$0.01 will provide further

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78f(b)(8).

price improvement for those orders, and thereby encourage additional submission of those orders into PIM. The Exchange believes that the proposal, which subjects members to the Minor Rule Violation Plan for failing to provide the required price improvement, coupled with the Exchange's surveillance efforts, are designed to facilitate members' compliance with the proposed requirement.

The Exchange believes that approving the Pilot on a permanent basis is also consistent with the Act. With respect to the no minimum size requirement, the Exchange believes that the data gathered during the Pilot period indicates that there is meaningful competition in the PIM for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that there are opportunities for significant price improvement for orders executed through PIM, including for small customer orders.

With respect to the early termination of the PIM, the Exchange believes that it is appropriate to terminate an auction (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. The Exchange also believes that it is consistent with the Act to require that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency, or will otherwise disrupt the functioning of the PIM. The Exchange also notes that a significant percentage of PIM auctions that terminated early executed at a price that was better than the NBBO at the time the auction began, and that a significant percentage of contracts in auctions that terminated early received price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal will apply to all Exchange members, and participation in the PIM process is completely voluntary. Based on the data collected by the Exchange during the Pilot, the Exchange believes that there is meaningful competition in the PIM for all size orders, there are opportunities for significant price improvement for orders executed through PIM, and that there is an active and liquid market functioning on the Exchange outside of the PIM. The Exchange believes that requiring increased price improvement for Agency Orders may encourage competition by attracting additional orders to participate in the PIM. The Exchange believes that approving the Pilot on a permanent basis will not significantly impact competition, as the Exchange is proposing no other change to the Pilot beyond implementing it on a permanent basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ISEMercury 2016-25 on the subject line.

Paper comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISEMercury-2016-25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISEMercury 2016-25 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2016-30392 Filed 12-16-16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

¹⁹ 17 CFR 200.30-3(a)(12).

Rule 17a-13, SEC File No. 270-27, OMB Control No. 3235-0035.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information provided for in Rule 17a-13 (17 CFR 240.17a-13) under the Securities Exchange Act of 1934 (15 U.S.C. 78 *et seq.*) ("Exchange Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 17a-13(b) (17 CFR 240.17a-13(b)) generally requires that at least once each calendar quarter, all registered brokers-dealers physically examine and count all securities held and account for all other securities not in their possession, but subject to the broker-dealer's control or direction. Any discrepancies between the broker-dealer's securities count and the firm's records must be noted and, within seven days, the unaccounted for difference must be recorded in the firm's records. Rule 17a-13(c) (17 CFR 240.17a-13(c)) provides that under specified conditions, the count, examination, and verification of the broker-dealer's entire list of securities may be conducted on a cyclical basis rather than on a certain date. Although Rule 17a-13 does not require broker-dealers to file a report with the Commission, discrepancies between a broker-dealer's records and the securities counts may be required to be reported, for example, as a loss on Form X-17a-5 (17 CFR 248.617), which must be filed with the Commission under Exchange Act Rule 17a-5 (17 CFR 240.17a-5). Rule 17a-13 exempts broker-dealers that limit their business to the sale and redemption of securities of registered investment companies and interests or participation in an insurance company separate account and those who solicit accounts for federally insured savings and loan associations, provided that such persons promptly transmit all funds and securities and hold no customer funds and securities. Rule 17a-13 also does not apply to certain broker-dealers required to register only because they effect transactions in securities futures products.

The information obtained from Rule 17a-13 is used as an inventory control device to monitor a broker-dealer's ability to account for all securities held in transfer, in transit, pledged, loaned, borrowed, deposited, or otherwise subject to the firm's control or direction. Discrepancies between the securities

counts and the broker-dealer's records alert the Commission and applicable self-regulatory organizations ("SROs") to those firms experiencing back-office operational issues.

Currently, there are approximately 4,067 broker-dealers registered with the Commission. However, given the variability in their businesses, it is difficult to quantify how many hours per year each broker-dealer spends complying with Rule 17a-13. As noted, Rule 17a-13 requires a respondent to account for all securities in its possession or subject to its control or direction. Many respondents hold few, if any, securities; while others hold large quantities. Therefore, the time burden of complying with Rule 17a-13 will depend on respondent-specific factors, including a broker-dealer's size, number of customers, and proprietary trading activity. The staff estimates that the average time spent per respondent is 100 hours per year on an ongoing basis to maintain the records required under Rule 17a-13. This estimate takes into account the fact that more than half of the 4,067 respondents—according to financial reports filed with the Commission—may spend little or no time complying with the rule, given that they do not do a public securities business or do not hold inventories of securities. For these reasons, the staff estimates that the total compliance burden per year is 406,700 hours (4,067 respondents × 100 hours/respondent).

The records required to be made by Rule 17a-13 are available only to Commission examination staff, state securities authorities, and applicable SROs. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522, 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.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: December 6, 2016.

Brent J. Fields,
Secretary.

[FR Doc. 2016-30375 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Rules 15Ba1-1 through 15Ba1-8, SEC File No. 270-619, OMB Control No. 3235-0681.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information provided for in Rules 15Ba1-1 to 15Ba1-8 (17 CFR 240.15Ba1-1 to 17 CFR 240.15Ba1-8)—Registration of Municipal Advisors, under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the "Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

On September 20, 2013 (*see* 78 FR 67468, November 12, 2013), the Commission adopted Rules 15Ba1-1 through 15Ba1-8 and Rule 15Bc4-1 under the Act to establish the rules by which a municipal advisor must obtain, maintain, and terminate its registration with the Commission. In addition, the rules interpret the definition of the term "municipal advisor," interpret the statutory exclusions from that definition, and provide certain additional regulatory exemptions. The rules became effective on January 13,

2014; however, on January 13, 2014, the Commission temporarily stayed such rules until July 1, 2014 (*see* 79 FR 2777, January 16, 2014). Section 15B(a)(1) of the Act makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the Commission. The rules, among other things (i) require municipal advisors to file certain forms (*i.e.*, Form MA, Form MA-A, Form MA/A, Form MA-I, Form MA-I/A, Form MA-NR, and Form MA-W) with the Commission to, as appropriate, obtain, maintain, or terminate their registration with the Commission and maintain certain books and records in accordance with the Act, and (ii) set forth how certain entities may meet the requirements of the statutory exclusions or regulatory exemptions from the definition of "municipal advisor."

Form MA

The Commission estimates that approximately 75 respondents will submit new Form MA applications annually in each of the next three years. The Commission further estimates that each submission will take approximately 3.5 hours. Thus, the total annual burden borne by respondents for submitting an initial Form MA application will be approximately 263 hours.¹ The Commission estimates that respondents submitting new Form MA applications would, on average, consult with outside counsel for one hour, at a rate of \$400/hour. Thus, the Commission estimates that the average total annual cost that may be incurred by all respondents filing new Form MA applications will be \$30,000.² In addition to filing initial Form MA applications, the rules require municipal advisors to amend Form MA once annually (Form MA-A) and after the occurrence of any material event (Form MA/A). The requirement to amend Form MA applies to all registered municipal advisors. There are currently approximately 668 municipal advisors registered with the Commission and, as noted above, the Commission anticipates receiving 225 new Form MA submissions over the next three years. Therefore, the Commission expects that the rules' requirement to amend Form MA will apply to approximately 743 municipal

advisors in year one, approximately 818 municipal advisors in year two, and approximately 893 municipal advisors in year three. The Commission estimates that completing an annual amendment would take a municipal advisor approximately 1.5 hours and completing a material event amendment would take 0.5 hours. The Commission further estimates that each municipal advisor will submit two amendments per year (one Form MA-A and one Form MA/A). Thus, the Commission estimates that the average annual burden borne by respondents for amending Form MA during the three-year period will be approximately 1,636 hours.³

Form MA-I

The Commission estimates that it will receive approximately 950 new Form MA-I submissions annually. The Commission further estimates that each Form MA-I submission will take approximately three hours to complete. Thus, the total annual burden borne by respondents submitting Form MA-I will be approximately 2,850 hours.⁴ The Commission also estimates that a Form MA-I respondent will submit 1.7 updating amendments per year (Form MA-I/A), and that each such amendment will take approximately 0.5 hours to complete. There are currently approximately 5,685 Form MA-IIs on file with the Commission and, as noted above, the Commission expects to receive 2,850 Form MA-I submissions over the next three years. Therefore, the Commission expects the rules' requirement to amend Form MA-I to apply to approximately 6,635 Form MA-IIs in year one, approximately 7,585 Form MA-IIs in year two, and approximately 8,535 Form MA-IIs in year three. Thus, the Commission estimates that the average annual burden borne by respondents submitting Form MA-I amendments during the three-year period will be approximately 6,447 hours.⁵

Form MA-W

The Commission estimates that it will receive 40 new Form MA-W submissions annually. The Commission further estimates that each Form MA-W submission will take approximately 0.5 hours to complete. Thus, the total annual burden borne by respondents submitting Form MA-W will be approximately 20 hours.⁶

³ 818 respondents × 2 hours.

⁴ 950 submissions × 3 hours.

⁵ 7,585 Form MA-I/As × (1.7 amendments × 0.5 hours).

⁶ 40 respondents × 0.5 hours.

Form MA-NR

The Commission estimates that three municipal advisors will have a non-resident general partner, non-resident managing agent, or non-resident associated person and such advisors will submit a total of approximately nine Form MA-NRs annually. The Commission further estimates that each Form MA-NR submission will take approximately 1.5 hours to complete. Thus, the total annual burden borne by respondents submitting Form MA-NR will be approximately 13.5 hours.⁷ In addition, each respondent that submits a Form MA-NR must also provide an opinion of counsel. The Commission estimates that such an opinion of counsel would take three hours to complete, at a rate of \$400/hour. Thus, the Commission estimates that the total annual burden borne by respondents providing an opinion of counsel will be approximately nine hours.⁸ The estimated average total cost that may be incurred by all respondents providing an opinion of counsel will be \$3,600.⁹

Consent to Service of Process

The Commission estimates that 75 new municipal advisors will have to develop a template document to use in obtaining written consents to service of process from their associated persons annually. The Commission further estimates that each template document will take approximately one hour to draft. Thus, the Commission estimates that the total annual burden borne by respondents developing a template document will be approximately 75 hours.¹⁰ In addition, the Commission estimates that municipal advisors will need to obtain 950 new consents to service of process from associated persons annually. The Commission further estimates that, after the written consents are drafted, it will take municipal advisors approximately 0.10 hours to obtain each consent. Thus, the Commission estimates that the total annual burden borne by respondents obtaining consents to service of process will be 170 hours.¹¹

Books and Records To Be Maintained by Municipal Advisors

The Commission estimates 743, 818, and 893 municipal advisors will be subject to the books and records rules during each of the next three years, respectively. The Commission further

⁷ 3 respondents × (3 Form MA-NR submissions × 1.5 hours).

⁸ 3 respondents × 3 hours.

⁹ 3 respondents × (3.0 hours × \$400/hour).

¹⁰ 75 respondents × 1 hour.

¹¹ 75 hours + (950 × 0.1 hours).

¹ 75 respondents × 3.5 hours.

² 75 respondents × (\$400/hour × 1 hour).

estimates that the average annual burden for a municipal advisor to comply with the books and records requirement is approximately 182 hours. Thus, the Commission estimates that the average annual burden borne by respondents to comply with the books and records requirements during the three-year period will be approximately 148,876 hours.¹²

Independent Registered Municipal Advisor Exemption

The Commission estimates that approximately 150 persons will seek to rely on the independent registered municipal advisor exemption annually. The Commission further estimates that the one-time burden of developing a written template disclosure document will be approximately one hour. Thus, the Commission estimates that the total one-time burden borne by respondents developing a template disclosure document will be approximately 150 hours.¹³ The Commission also recognizes that respondents will be subject to a recurring burden each time they seek to rely on the exemption. The Commission estimates that respondents may seek the exemption on approximately 7,400 transactions annually. The Commission further estimates that the burden of obtaining the written representations needed from the municipal entity or obligated person client will be approximately 0.25 hours. Thus, the Commission estimates that the total annual burden borne by respondents seeking to rely on the independent registered municipal advisor exemption will be approximately 1,850 hours.¹⁴

Definition of Municipal Escrow Investments Exemption

The Commission estimates that approximately 700 respondents will seek to rely on the municipal escrow investments exemption. The Commission further estimates that the one-time burden of creating a template document to use in obtaining the written representations necessary to rely on the exemption will be approximately one hour. Thus, the Commission estimates that the total one-time burden borne by respondents developing a template document will be approximately 700 hours.¹⁵ The Commission also recognizes that respondents will be subject to a recurring burden each time they seek to rely on the exemption. The Commission

estimates the respondents will seek to rely on the exemption with approximately 8,620 municipal entity clients. The Commission further estimates that the burden of obtaining the required written representations from the respondent's client will be approximately 0.25 hours. Thus, the Commission estimates that the total annual burden borne by respondents seeking to rely on the municipal escrow investments exemption will be approximately 2,155 hours.¹⁶

Definition of Proceeds of Municipal Securities Exemption

The Commission estimates that approximately 880 respondents will seek to rely on the proceeds of municipal securities exemption. The Commission further estimates that the one-time burden of creating a template document to use in obtaining the written representations necessary to rely on the exemption will be approximately one hour. Thus, the Commission estimates that the total one-time burden borne by respondents developing a template document will be approximately 880 hours.¹⁷ The Commission also recognizes that respondents will be subject to a recurring burden each time they seek to rely on the exemption. The Commission estimates that respondents will seek to rely on the exemption in connection with services provided to approximately 25,420 clients. The Commission further estimates that the burden of obtaining the required written consents from the respondent's client will be approximately 0.25 hours. Thus, the Commission estimates that the total annual burden borne by respondents seeking to rely on proceeds of municipal securities exemption will be approximately 6,355 hours.¹⁸

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in

writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number. Please direct your written comments to: Pamela C. Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: December 6, 2016.

Brent J. Fields,
Secretary.

[FR Doc. 2016-30374 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79533; File No. SR-BatsBZX-2016-82]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Exchange Rule 11.27(b) Regarding the Data Collection Requirements of the Regulation NMS Plan to Implement a Tick Size Pilot Program

December 13, 2016

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 November 30, 2016, Bats BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Exchange Rule 11.27(b) regarding the data collection requirements of the Regulation NMS

¹² 818 respondents × 182 hours.

¹³ 150 respondents × 1 hour.

¹⁴ 7,400 transactions × 0.25 hours.

¹⁵ 700 respondents × 1 hour.

¹⁶ 8,620 clients × 0.25 hours.

¹⁷ 880 respondents × 1 hour.

¹⁸ 25,420 clients × 0.25 hours.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

Plan to Implement a Tick Size Pilot Program (“Plan”).

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

(A) Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, the Exchange, and several other self-regulatory organizations (the “Participants”) filed with the Commission, pursuant to Section 11A of the Act⁵ and Rule 608 of Regulation NMS thereunder,⁶ the Plan to Implement a Tick Size Pilot Program.⁷ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁸ The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁹ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹⁰ On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.¹¹ Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted

the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants’ exemptive request.¹²

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

The Exchange adopted rule amendments to implement the requirements of the Plan, including relating to the Plan’s data collection requirements and requirements relating to Web site data publication.¹³ Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Exchange Rule 11.27(b)(2) provides, among other things, that the Exchange shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2)(A) of Rule 11.27, publicly available on the Exchange’s Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.27(b)(3)(C), provides, among other things, that the Exchange shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 11.27, publicly available on the Exchange’s Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.27(b)(5) provides, among other things, shall collect and transmit to the Commission data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics, but does not currently include a provision requiring the Exchange to publish such data to its

Web site.¹⁴ Interpretation and Policy .08 to Exchange Rule 11.27(b) provides, among other things, that the requirement that Exchange or Designated Examining Authority (“DEA”) make certain data publicly available on their Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.¹⁵

The Exchange is proposing amendments to Rule 11.27(b)(2) (regarding Appendix B.I and B.II data) and Rule 11.27(b)(3)(C) (regarding Appendix B.IV data), to provide that data required to be made available on Exchange’s or DEA’s Web site be published within 120 calendar days following month end. The Exchange also proposes to add a provision to Rule 11.27(b)(5) to state that the Exchange shall make data collected under Appendix B.III publicly available on the Exchange Web site within 120 calendar days following month end at no charge. In addition, the proposed amendments to Interpretation and Policy .08 to Exchange Rule 11.27(b) would provide that, notwithstanding the provisions of paragraphs (b)(2), (b)(3)(C), and (b)(5), the Exchange and DEA shall make data for the Pre-Pilot period publicly available on their Web site pursuant to Appendix B and C to the Plan by February 28, 2017.¹⁶ The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

¹⁴ Section VII.A. 4 of the Plan.

¹⁵ The Exchange understands that some Market Makers may utilize a DEA that is not a Participant to the Plan and that their DEA would not be subject to the Plan’s data collection requirements. Exchange rules require members that are Market Makers whose DEA is not a Participant to the Plan to transmit transaction data for Market Maker participation and profitability calculations to FINRA. See paragraphs (3)(B) and (4)(B) of Exchange Rule 11.27(b).

¹⁶ With respect to data for the Pilot Period, the requirement that the Exchange and DEA make data publicly available on their Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Exchange’s or DEA’s Web site by February 28, 2017, which is 120 days following the end of October 2016.

⁵ 15 U.S.C. 78k–1.

⁶ 17 CFR 242.608.

⁷ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁸ See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁹ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).

¹⁰ See Approval Order at 27533 and 27545.

¹¹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

¹² See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Exchange, dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Exchange, to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹³ See, e.g., Securities Exchange Act Release Nos. 77105 (February 10, 2016), 81 FR 8112 (February 17, 2016); 77310 (March 7, 2016), 81 FR 13012 (March 11, 2016); and 78795 (September 9, 2016), 81 FR 63508 (September 15, 2016). See also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁸ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC. The Exchange believes that the instant proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal does not alter the information required to be submitted to the SEC.

(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.¹⁹

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)²⁰ of the Act and Rule 19b-4(f)(6) thereunder.²¹

A proposed rule change filed under Rule 19b-4(f)(6)²² normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement proposed changes that are intended to address confidentiality concerns. The Commission notes that

¹⁹ See Letter from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii)

some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative as of November 30, 2016.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁵ 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BatsBZX-2016-82 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.
- All submissions should refer to File No. SR-BatsBZX-2016-82. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C).

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BatsBZX-2016-82 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2016-30386 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79536; File No. SR-BatsEDGA-2016-30]

Self-Regulatory Organizations; Bats EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 11.21(b) Regarding the Data Collection Requirements of the Regulation NMS Plan To Implement a Tick Size Pilot Program

December 13, 2016.

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 November 30, 2016, Bats EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend Exchange Rule 11.21(b) regarding the data collection requirements of the Regulation NMS Plan to Implement a Tick Size Pilot Program ("Plan").

The text of the proposed rule change is available at the Exchange's Web site at www.batstrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, the Exchange, and several other self-regulatory organizations (the "Participants") filed with the Commission, pursuant to Section 11A of the Act⁵ and Rule 608 of Regulation NMS thereunder,⁶ the Plan to Implement a Tick Size Pilot Program.⁷ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁸ The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁹ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹⁰ On

⁵ 15 U.S.C. 78k-1.

⁶ 17 CFR 242.608.

⁷ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁸ See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁹ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order").

¹⁰ See Approval Order at 27533 and 27545.

November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.¹¹ Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.¹²

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

The Exchange adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.¹³ Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Exchange Rule 11.21(b)(2) provides, among other things, that the Exchange shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2)(A) of Rule 11.21, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.21(b)(3)(C), provides, among other things, that the Exchange shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 11.21, publicly available on the Exchange's Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Exchange Rule 11.21(b)(5) provides,

¹¹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

¹² See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Exchange, dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Exchange, to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹³ See, e.g., Securities Exchange Act Release Nos. 77417 (March 22, 2016), 81 FR 17219 (March 28, 2016); and 78799 (September 9, 2016), 81 FR 63549 (September 15, 2016). See also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

among other things, shall collect and transmit to the Commission data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics, but does not currently include a provision requiring the Exchange to publish such data to its Web site.¹⁴ Interpretation and Policy .08 to Exchange Rule 11.21(b) provides, among other things, that the requirement that Exchange or Designated Examining Authority (“DEA”) make certain data publicly available on their Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.¹⁵

The Exchange is proposing amendments to Rule 11.21(b)(2) (regarding Appendix B.I and B.II data) and Rule 11.21(b)(3)(C) (regarding Appendix B.IV data), to provide that data required to be made available on Exchange’s or DEA’s Web site be published within 120 calendar days following month end. The Exchange also proposes to add a provision to Rule 11.21(b)(5) to state that the Exchange shall make data collected under Appendix B.III publicly available on the Exchange Web site within 120 calendar days following month end at no charge. In addition, the proposed amendments to Interpretation and Policy .08 to Exchange Rule 11.21(b) would provide that, notwithstanding the provisions of paragraphs (b)(2), (b)(3)(C), and (b)(5), the Exchange and DEA shall make data for the Pre-Pilot period publicly available on their Web site pursuant to Appendix B and C to the Plan by February 28, 2017.¹⁶ The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission

waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁸ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC. The Exchange believes that the instant proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal does not alter the information required to be submitted to the SEC.

(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.¹⁹

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)²⁰ of the Act and Rule 19b-4(f)(6) thereunder.²¹

A proposed rule change filed under Rule 19b-4(f)(6)²² normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement proposed changes that are intended to address confidentiality concerns. The Commission notes that

¹⁹ See Letter from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii).

¹⁴ Section VII.A. 4 of the Plan.

¹⁵ The Exchange understands that some Market Makers may utilize a DEA that is not a Participant to the Plan and that their DEA would not be subject to the Plan’s data collection requirements. Exchange rules require members that are Market Makers whose DEA is not a Participant to the Plan to transmit transaction data for Market Maker participation and profitability calculations to FINRA. See paragraphs (3)(B) and (4)(B) of Exchange Rule 11.21(b).

¹⁶ With respect to data for the Pilot Period, the requirement that the Exchange and DEA make data publicly available on their Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Exchange’s or DEA’s Web site by February 28, 2017, which is 120 days following the end of October 2016.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative as of November 30, 2016.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²⁵ 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BatsEDGA-2016-30 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.
- All submissions should refer to File No. SR-BatsEDGA-2016-30. 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 Web site (<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

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C).

available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BatsEDGA-2016-30 and should be submitted on or before January 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016-30389 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

Extension:

Regulation C, SEC File No. 270-68, OMB Control No. 3235-0074.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Regulation C (17 CFR 230.400 through 230.498) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) provides standard instructions for persons filing registration statements under the Securities Act. The information collected is intended to ensure the adequacy of information available to investors. The information provided is mandatory. Regulation C is assigned one burden hour for administrative convenience because it does not directly impose information collection requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

²⁶ 17 CFR 200.30-3(a)(12).

unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, www.reginfo.gov. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Shagufta.Ahmed@omb.eop.gov; and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 6, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016-30377 Filed 12-16-16; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, under Section 309 of the Act and Section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small business Investment Company License No. 01/71-0383 issued to Marketing 1 to 1 Ventures, LP., said license is hereby declared null and void.

United States Small Business Administration.

Dated: December 7, 2016.

Mark L. Walsh,

Associate Administrator for Investment.

[FR Doc. 2016-30369 Filed 12-16-16; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of 30 day Reporting Requirements Submitted for OMB Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act, agencies are required to submit proposed reporting

and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before January 18, 2017. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

ADDRESSES: Address all comments concerning this notice to: *Agency Clearance Officer*, Curtis Rich, Small Business Administration, 409 3rd Street SW., 5th Floor, Washington, DC 20416; and *OMB Reviewer*, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Curtis Rich, Agency Clearance Officer, (202) 205-7030 curtis.rich@sba.gov.

SUPPLEMENTARY INFORMATION:

Copies: Request for clearance (OMB 83-1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

Abstract: SBA Forms 2181, 2182 and 2183 provide SBA with the necessary information to make informed and proper decisions regarding the approval or denial of an applicant for a small business investment company (SBIC) license. SBA uses this information to assess an applicant's ability to successfully operate an SBIC within the scope of the Small Business Investment Act, as amended.

Title: SBIC License Application.

Frequency: On Occasion.

SBA Form Numbers: 2181, 2182, 2183.

Description of Respondents: Small Business Owners and Farmers.

Responses: 400.

Annual Burden: 7,370.

Authority: 44 U.S.C. Chapter 35.

Curtis Rich,

Management Analyst.

[FR Doc. 2016-30370 Filed 12-16-16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind a Notice of Intent for an Environmental Impact Statement: Dane County, Wisconsin

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice to Rescind a Notice of Intent for an Environmental Impact Statement.

SUMMARY: The FHWA is issuing this notice to advise the public that FHWA and Wisconsin Department of Transportation (WisDOT) will no longer prepare a Tier 1 EIS for the US 51 corridor in Dane County, Wisconsin generally between Interstate 39/90 east of the City of Stoughton and US 12/18 (Madison South Beltline Highway) because funding to complete improvements to be considered would not be available in the foreseeable future.

FOR FURTHER INFORMATION CONTACT:

Anna Varney, Major Projects Engineer, Federal Highway Administration, 525 Junction Road, Suite 8000, Madison, Wisconsin, 53717-2157, Telephone: (608) 829-7514. You may also contact Steve Krebs, Director, Bureau of Technical Services, Wisconsin Department of Transportation, P.O. Box 7965, Madison, Wisconsin 53707-7965, Telephone: (608) 246-7930.

SUPPLEMENTARY INFORMATION: A Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) was published in 77 FR 5087, Feb. 1, 2012 for proposed transportation improvements in the United States Highway (US) 51 corridor in Dane County, Wisconsin generally between Interstate 39/90 east of the City of Stoughton and US 12/18 (Madison South Beltline Highway). A revised NOI was published in 80 FR 19111, Apr. 9, 2015 to advise that the environmental review process was being changed to a tiered process in which a Tier 1 EIS would be prepared to evaluate potential corridors for a future project-specific alignment.

A needs assessment was conducted for the project corridor in 2004 followed by initiation of the environmental review process for an EIS. The EIS review process examined factors contributing to the need for improvements within the U.S. 51 study corridor (long-term planning and corridor preservation, safety, roadway deficiencies, bike and pedestrian accommodations, and travel demand and capacity). Based on statewide transportation priorities, it was determined a commitment to improvements that address all of the need factors could not be made and the environmental review process was converted from a standard EIS to a Tier 1 EIS. FHWA, in cooperation with WisDOT, planned to prepare a Tier 1 EIS for proposed improvements to address safety, operational and capacity

concerns on approximately 18 miles of U.S. 51 between Interstate 39/90, east of the City of Stoughton, to U.S. 12/18 (Madison South Beltline Highway).

The federal fiscal constraint requirement applied to WisDOT environmental studies requires that funding be identified for the next major project action to advance the project within a reasonable timeframe. Based on statewide priorities, it was determined that the U.S. 51 corridor alternatives proposed in the DEIS would not receive funding for the next major action to advance the project. It is anticipated 30+ years might elapse before improvements recommended in a Tier 1 EIS might align with funding. As such, the preparation of the EIS for the U.S. 51 corridor in Dane County, Wisconsin generally between Interstate 39/90 east of the City of Stoughton and U.S. 12/18 (Madison South Beltline Highway) will not be completed. Any future transportation improvements along the U.S. 51 corridor will progress under a separate environmental review process in accordance with all applicable laws and regulations.

Issued on: December 8, 2016.

Anna Varney,

Major Projects Engineer, Federal Highway Administration, Madison, Wisconsin.

[FR Doc. 2016-30379 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2016-0112]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with part 235 of Title 49 Code of Federal Regulations and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated November 16, 2016, Union Pacific Railroad (UP) petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA-2016-0112.

Applicant: Union Pacific Railroad, Mr. Kevin D. Hicks, AVP Engineering—Design, 1400 Douglas Street, MS 0910, Omaha, NE 68179.

UP seeks approval of the modification of the coded track circuits on the siding, between control point (CP) 0233 at Milepost (MP) 233.4 and CP 0235, MP 235.0, on the San Antonio Service Unit, Austin Subdivision, in the cities of Schertz and New Braunfels, TX. The

Red Over Yellow and Red Over Flashing Yellow signal aspects will be removed at each CP with the Red Over Flashing Red aspects remaining.

The reason given for the proposed modification is to accommodate an increased volume of switching operations, which will take place in the siding with the construction of a new rock facility adjacent to Corbyn Yard.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U. S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 2, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the

commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Safety, Chief Safety Officer.

[FR Doc. 2016-30446 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2016-0108]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated November 2, 2016, Union Pacific Railroad Company (UP) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236. FRA assigned the petition Docket Number FRA-2016-0108. UP seeks a waiver from compliance with cab signal system requirements found in 49 CFR 236.566—*Locomotive of each train operating in train stop, train control, or cab signal territory; equipped.*

Specifically, UP seeks relief to operate Positive Train Control (PTC) equipped controlling locomotives with the automatic cab signals (ACS) cut-out.

The relief would be within a PTC revenue service demonstration (RSD) area on UP's Portland Subdivision, on which a PTC system is installed and operative; the PTC system is successfully initialized; and a locomotive engineer trained and qualified in the operation of PTC is present for the operation of the train with the ACS cut-out.

Locations of requested relief on the Portland Subdivision are:

1. Between Milepost (MP) 81.6 and MP 15.6 for westward moves.
2. Between MP 15.6 and MP 81.6 for eastward moves.
3. Between MP 0.6 and MP 15.6 on the Graham Line.

The PTC system to be utilized is UP's implementation of the Interoperable Electronic Train Management System (I-ETMS).

If the PTC system fails and/or is cut-out enroute as a result of same, the train

crew will cut-in the ACS onboard system, perform a departure test, and, if successful, continue the trip through the project limits under ACS operation. If the ACS onboard system cut-in and/or departure test are not completed successfully, the train will continue to operate under the provisions of 49 CFR 236.567, restrictions imposed when device fails and/or is cut out en route.

UP notes that the ACS and PTC systems are not integrated on the locomotive and their concurrent use would potentially be confusing and distracting to the train crew, due to differences in the content of their displays, audible and visual alerts provided, and required acknowledgement protocols.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 18, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the

name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of [regulations.gov](http://www.regulations.gov).

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016-30444 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2016-0111]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated November 14, 2016, The Belt Railway Company of Chicago (BRC) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236. FRA assigned the petition docket number FRA-2016-0111.

BRC seeks relief from certain requirements of part 236; specifically sections 236.377 Approach Locking, 236.378 Time Locking, 236.379 Route Locking, 236.380 Indication Locking, and 236.381 Traffic Locking, on vital microprocessor-based systems. BRC proposes to verify and test signal locking systems controlled by microprocessor-based equipment by use of alternative procedures every 4 years after initial baseline testing or program change as follows:

- Verifying the Cyclic Redundancy Check (CRC)/Check Sum/Universal Control Number (UNC) of the existing location's specific application logic to the previously tested version.
- Testing the appropriate interconnection to the associated signaling hardware equipment outside of the processor (switch indication, track indication, searchlight signal indication, approach locking (if external)) to verify correct and intended

inputs to and outputs from the processor are maintained.

- Analyze and compare the results of the 4-year alternative testing with the results of the baseline testing performed at the location and submit the results to the FRA.

Many of BRC's Interlockings, control points, and other locations are controlled by solid-state, vital microprocessor-based systems. These systems use programmed logic equations in lieu of relays or other mechanical components for control of both vital and non-vital functions. The logic does not change once a microprocessor-based system has been tested and locking tests are documented on installation.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site:* <http://www.regulations.gov> Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, US Department of Transportation, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 2, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the

name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of [regulations.gov](http://www.regulations.gov).

Issued in Washington, DC

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016-30445 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2007-28049]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 of the Code of Federal Regulations (CFR), this provides the public notice that by a document dated November 29, 2016, Union Pacific Railroad Company (UP) has petitioned the Federal Railroad Administration (FRA) for extension of a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 229, Railroad Locomotive Safety Standards. Specifically, UP seeks extension of the provision, which allows locomotives with increased pilot height (allowed in yard service under 49 CFR 229.123(b)) to operate in the lead position over approximately one mile of track between Englewood and Settegast yards in Houston, TX. This petition has been assigned Docket Number FRA-2007-28049. In the petition for extension, UP states that it has been operating under the conditions set out in the original approval for this waiver for a period of 9 years with no adverse impact on the safety of operations.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- **Web site:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- **Fax:** 202-493-2251.
- **Mail:** Docket Operations Facility, US Department of Transportation, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.
- **Hand Delivery:** 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 2, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of www.regulations.gov.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016-30443 Filed 12-16-16; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2016-0091]

Proposed Information Collection Submitted to the Office of Management and Budget; Request for Comments

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on September 20, 2016 (81 FR 65709).

DATES: Comments must be submitted on or before January 18, 2017.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: NHTSA Desk Officer, 725 17th Street NW., Washington, DC 20503.

Comments are invited on the following:

- i. Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- ii. The accuracy of the Department's estimate of the burden of the proposed information collection;
- iii. Ways to enhance the quality, utility and clarity of the information to be collected; and
- iv. Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Ms. Yvonne Clarke, NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590; Telephone (202) 366-1845; Facsimile: (202) 366-2106; email address: Yvonne.e.clarke@dot.gov.

For access to the docket to read background documents, go to <http://www.regulations.gov> or the street address listed above. Follow the online instructions for accessing the dockets.

SUPPLEMENTARY INFORMATION:

Title: Vehicle Performance Guidance.
OMB Control Number: Not assigned.
Type of Request: New Information Collection.

Abstract: On September 20, 2016, the Department of Transportation published

its *Federal Automated Vehicles Policy*. Recognizing the potential that highly automated vehicles (HAVs) have to enhance safety and mobility, the *Federal Automated Vehicles Policy* sets out an approach to enable the safe deployment of L2 and HAV systems. An HAV system is defined as one that corresponds to Conditional (Level 3), High (Level 4), and Full (Level 5) Automation, as defined in SAE J3016. HAV systems rely on the automation system (not on a human driver) to monitor the driving environment for at least certain aspects of the driving task. An L2 system, also described in SAE J3016, is different because the human driver is never relieved of the responsibility to monitor the driving environment.

The speed with which increasingly complex L2 and HAV systems are evolving challenges DOT and NHTSA to take approaches that ensure these technologies are safely introduced, provide safety benefits today, and achieve their full safety potential in the future. Consistent with its statutory purpose to reduce traffic accidents and deaths and injuries resulting from traffic accidents, NHTSA seeks to collect from, and recommend the recordkeeping and disclosure of information by vehicle manufacturers and other entities as described in *Federal Automated Vehicles Policy*. Specifically, NHTSA's recommendations in the policy section titled "Vehicle Performance Guidance for Automated Vehicles" (hereafter referred to as "Guidance") are the subject of this voluntary information collection request. This Guidance outlines recommended best practices, many of which should be commonplace in the industry, for the safe pre-deployment design, development, and testing of HAV and L2 systems prior to commercial sale or operation on public roads. Further, the Guidance identifies key areas to be addressed by manufacturers and other entities prior to testing or deploying HAV or L2 systems on public roadways.

To assist NHTSA and the public in evaluating how safety is being addressed by manufacturers and other entities developing and testing HAV and L2 systems, NHTSA is recommending the following documentation, recordkeeping, and disclosures that aid in that mission. The burden estimates contained in this notice are based on the Agency's present understanding of the HAV and L2 systems market. NHTSA seeks comment on the burden estimates in this notice in whole or in part.

Currently NHTSA expects up to approximately 45 OEMs and other entities producing level 3 through 5

vehicles or features will choose to voluntarily comply with the guidance set forth in the Federal Automated Vehicle Policy. The agency also expects that up to 45 manufacturers and other entities who are currently supplying level 2 functionality to voluntarily comply with the guidance. The estimated cost for complying with this regulation is \$100 per hour. Therefore, the total annual cost is estimated to be \$13,605,000 (time burden of 136,050 hours × \$100 cost per hour).

Affected Public: Business or other for profit.

Estimated Number of Respondents: 90.

Estimated Number of Responses: 90.

Annual Estimated Total Annual Burden Hours: 136,050 hrs.

Frequency of Collection: Annual.

On September 20, 2016, NHTSA published a notice announcing the proposed collection of information pursuant to 44 U.S.C. 3501 *et seq.* and providing a 60-day comment period (81 FR 65709). . The Agency received 11 comments on this notice from the general public, five of these commenters provided general comments on the Federal Automated Vehicles Policy (the Policy). The remaining commenters (Daimler Trucks North America, the Alliance of Automobile Manufacturers, Inc., Association of Global Automakers, Inc., Motor and Equipment Manufacturers Association (MEMA), Truck and Engine Manufacturers Association (EMA), and the Insurance Institute for Highway Safety (IIHS)) had comments that were responsive to the 60-Day notice. The Agency also received a number of substantive comments pertaining to the ICR as part of the overall general comments on the Policy (Docket # NHTSA–2016–0090). In general these comments were reflected in the specific comments received on the 60-Day Notice.

These comments can be grouped into the following categories:

1. Comments regarding the burden of voluntarily responding to the 15 point Safety Assessment
2. Comments regarding the burden hours imposed by the guidance (*e.g.* documentation related to the 15 point Safety Assessment) contained in the Federal Automated Vehicles Policy
3. Comments regarding the scope of the Safety Assessment Letter

4. Comments regarding submitting Safety Assessment Letters for test vehicles
5. Comments regarding submitting Safety Assessment Letters for vehicles meeting SAE International (SAE) Level 2 automation

It is important to note that the Federal Automated Vehicles Policy was effective on September 23, 2016, and is intended to be updated on an annual basis. Therefore the burden hours outlined in the 60-Day notice and this subsequent 30 Day notice are reflective of that version of the policy. Comments which suggested changes to the scope of the Safety Assessment Letter, removal of test vehicles and SAE Level 2 vehicles from the Policy, and similar comments are addressed in the supporting document. Additionally, the agency has provided and will continue to provide clarifications to the policy on its Web site.

The remaining comments regarding the burden of voluntarily submitting a Safety Assessment Letter and the burden of following the guidance contained inside the Policy can be summed up as “NHTSA has underestimated the burden of following its policy.” However, none of the commenters offered substantive information regarding the specific details of the Agency’s underestimation of the burden in following the Policy’s Guidance. In light of these comments, NHTSA has reevaluated its analysis of the burden hours and looked to voluntary industry standards such as the International Organization for Standardization’s (ISO) 26262—Road vehicles—Functional safety, SAE J3061—Cybersecurity Guidebook for Cyber-Physical Vehicle Systems, and NHTSA’s own experience with safety defect investigations as it relates to record keeping by companies. Based on this analysis and the Agency’s observation that the Policy is not suggesting new documentation procedures, we have not made any adjustments to the burden hours . . .

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.95.

Nathaniel Beuse,

Associate Administrator for Vehicle Safety Research, National Highway Traffic Safety Administration.

[FR Doc. 2016–30479 Filed 12–16–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Order 13224

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 1 individual and 2 entities whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.”

DATES: OFAC’s actions described in this notice were effective on December 13, 2016.

FOR FURTHER INFORMATION CONTACT:

Associate Director for Global Targeting, tel.: 202–622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, Assistant Director for Licensing, tel.: 202–622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202–622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC’s Web site (www.treas.gov/ofac).

Notice of OFAC Actions

On December 13, 2016, OFAC blocked the property and interests in property of the following 1 individual and 2 entities pursuant to E.O. 13224, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism”:

Individual

1. JUBAYR AL-RAWI, Fawaz Muhammad (a.k.a. AL-ARWEE, Hajji Fouaz; a.k.a. AL-RAWI, Hajj Fawaz; a.k.a. JABIR AL-RAWI, Fawaz Muhamed; a.k.a. JABUR AL-RAWI, Fawwaz; a.k.a. JUBAYR AL-RAWI, Fawwaz Muhammad), Syria; DOB 1974; POB Abu Kamal, Syria; Gender Male (individual) [SDGT] (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).

Entities

1. HANIFA MONEY EXCHANGE OFFICE (Arabic: شركة حنيفة للصرافة) (a.k.a. HANIFA EXCHANGE; a.k.a. HANIFAH CURRENCY EXCHANGE; a.k.a. HANIFAH EXCHANGE COMPANY; a.k.a. HANIFEH EXCHANGE; a.k.a. HUNAIFA OFFICE), Abu Kamal, Syria; Abu Kamal Branch only [SDGT] (Linked To: JUBAYR AL-RAWI, Fawaz Muhammad; Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).
2. SELSELAT AL THAHAB (a.k.a. AL SILSILAH AL DHAHABA; a.k.a. GOLDEN CHAIN (Arabic: سلسله الذهب); a.k.a. SELSELAT AL THAHAB FOR MONEY EXCHANGE; a.k.a. SILSALAT AL DHAB; a.k.a. SILSILAH MONEY EXCHANGE COMPANY; a.k.a. SILSILAT MONEY EXCHANGE COMPANY; a.k.a. SILSILET AL THAHAB), Al- Kadhumi Complex, al Harthia, Baghdad, Iraq; al Abbas Street, Karbala, Iraq [SDGT] (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).

Dated: December 13, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016-30380 Filed 12-16-16; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request; Office of the Procurement Executive

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, Office of the Procurement

Executive, is soliciting comments concerning information collection No. 1505-0107—Regulation Agency Protests that is scheduled to expire February 28, 2017.

DATES: Written comments must be received on or before February 17, 2017 to be assured of consideration.

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

Email: Thomas.olinn@treasury.gov.

The subject line should contain the OMB number and title for which you are commenting. *Mail:* Thomas O'Linn, Office of the Procurement Executive, Department of the Treasury, 1722 I Street NW., Mezzanine, Washington, DC 20006. All responses to this notice will be included in the request for OMB's

approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or request a copy of the information collection should be directed to Thomas O'Linn (202) 622-2092.

SUPPLEMENTARY INFORMATION:

OMB Number: 1505-0107.

Type of Review: Extension without change of a currently approved collection.

Title: Regulation Agency Protests.

Abstract: This notice provides a request to continue including the designated OMB Control Number on information requested from contractors. The information is requested from contractors so that the Government will be able to evaluate protests effectively

and provide prompt resolution of issues to dispute when contractors file agency level protests.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Number of Respondents: 9.

Estimated Number of Responses per Respondent: 1.

Estimated Hours per Response: 2.

Estimated Total Annual Burden Hours: 18.

Request For Comments: The Department of the Treasury invites the general public and other Federal agencies to comment on an extension of an existing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology, and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Bob Faber,

Acting Treasury PRA Clearance Officer.

[FR Doc. 2016–30403 Filed 12–16–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 14, 2016.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before January 18, 2017 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimates, or any other aspect of the information collections, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at OIRA_Submission@OMB.EOP.gov and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8142, Washington, DC 20220, or email at PRA@treasury.gov.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained by emailing PRA@treasury.gov, calling (202) 622–0934, or viewing the entire information collection request at www.reginfo.gov.

Internal Revenue Service (IRS)

OMB Control Number: 1545–1038.

Type of Review: Extension without change of a currently approved collection.

Title: Annual Certification of a Qualified Residential Rental Project.

Form: 8703

Abstract: Operators of qualified residential projects will use this form to certify annually that their projects meet the requirements of IRC section 142(d). Operators are required to file this certification under section 142(d)(7). Operators must indicate on the form the specific “set-aside” test the bond issuer elected under 26 U.S.C. Section 142(d) for the project period. They must also indicate the percentage of low-income units in the residential rental project.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 76,620.

OMB Control Number: 1545–1592.

Type of Review: Extension without change of a currently approved collection.

Title: Exception from the information reporting requirements in § 6045(e).

Abstract: This revenue procedure supersedes Rev. Proc. 98–20, 98–1 C.B. 549, and provides the written assurances that are acceptable to the Service for exempting a real estate reporting person from information reporting requirements for the sale of a principal residence under section 6045(e)5 of the Internal Revenue Code.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 420,500.

OMB Control Number: 1545–1684.

Type of Review: Extension without change of a currently approved collection.

Title: Pre-Filing Agreements Program.

Abstract: This revenue procedure permits a taxpayer under the jurisdiction of the Large Business and International Division (LB&I) to request that the Service examine specific issues relating to tax returns before those returns are filed. This revenue procedure modifies and supersedes Rev. Proc. 2009–14, 2009–3 I.R.B. 324. This revenue procedure provides the framework within which a taxpayer and the Service may work together in a cooperative environment to resolve, after examination, issues accepted into the program.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 13,134.

OMB Control Number: 1545–1708.

Type of Review: Extension without change of a currently approved collection.

Title: Handbook for Authorized IRS e-file Providers.

Abstract: Publication 1345 provides important information for Authorized IRS e-file Providers of Individual Income Tax Returns, including information regarding return submission, record keeping requirements, payment options, and refunds.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 6,023,762.

OMB Control Number: 1545–1734.

Type of Review: Extension without change of a currently approved collection.

Title: Terminal Operator Report.

Form: 720–TO

Abstract: Representatives of the motor fuel industry, state governments, and the Federal government are working to ensure compliance with excise taxes on motor fuels. This joint effort has resulted in a system to track the movement of all products to and from terminals. Form 720–TO is an information return that will be used by terminal operators to report their monthly receipts and disbursements of products.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 2,347,020.

OMB Control Number: 1545–1875.

Type of Review: Extension without change of a currently approved collection.

Title: Guidance on how a state elects a health program for HCTC.

Abstract: Revenue Procedure 2004–12 informs states how to elect a health program to be qualified health insurance

for purposes of the health coverage tax credit (HCTC) under section 35 of the Internal Revenue Code. The collection of information is voluntary. However, if a state does not make an election, eligible residents of the state may be impeded in their efforts to claim the HCTC.

Affected Public: State, Local, and Tribal Governments.

Estimated Total Annual Burden Hours: 26.

OMB Control Number: 1545–2079.

Type of Review: Extension without change of a currently approved collection.

Title: Disclosure by taxable party to the tax-exempt entity.

Abstract: This document contains final regulations that provide guidance under section 4965 of the Internal Revenue Code (Code), relating to excise taxes with respect to prohibited tax shelter transactions to which tax-exempt entities are parties, and sections 6033(a)(2) and 6011(g) of the Code, relating to certain disclosure obligations with respect to such transactions.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 98,500.

Bob Faber,

Acting Treasury PRA Clearance Officer.

[FR Doc. 2016–30404 Filed 12–16–16; 8:45 am]

BILLING CODE 4830–01–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of

proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than February 20, 2017. Written reply comments, which may only respond to issues raised in the original comment period, should be received by the Commission on March 10, 2017. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment period, may not be considered.

(2) Public Hearing.—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its Web site at www.ussc.gov.

ADDRESSES: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public Comment@ussc.gov*. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502–4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or

commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The proposed amendments and issues for comment in this notice are as follows:

(1) A multi-part proposed amendment to Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence), including (A) setting forth options for a new Chapter Four guideline, at § 4C1.1 (First Offenders), and amending § 5C1.1 (Imposition of a Term of Imprisonment) to provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table, and related issues for comment; and (B) revisions to Chapter Five to (i) amend the Sentencing Table in Chapter Five, Part A to expand Zone B by consolidating Zones B and C, (ii) amend the Commentary to § 5F1.2 (Home Detention) to revise language requiring electronic monitoring, and (iii) related issues for comment.

(2) a multi-part proposed amendment relating to the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, including (A) amending the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider in determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, and related issues for comment; and (B) amending the Commentary to § 1B1.1 (Application Instructions) to provide a definition of “court protection order,” and related issues for comment;

(3) a proposed amendment to § 4A1.2 (Definitions and Instructions for Computing Criminal History) to revise how juvenile sentences are considered for purposes of calculating criminal

history points, and to the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for cases in which a defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults;” and related issues for comment;

(4) a multi-part proposed amendment to Chapter Four, Part A (Criminal History), including (A) amending § 4A1.2 (Definitions and Instructions for Computing Criminal History) to revise how revocations of probation, parole, supervised release, special parole, or mandatory release are considered for purposes of calculating criminal history points, and related issues for comment; and (B) amending the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for cases in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score, and a related issue for comment;

(5) a multi-part proposed amendment to respond to the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015), including (A) revisions to Appendix A (Statutory Index), and a related issue for comment; and (B) amending § 2B1.1 (Theft, Property Destruction, and Fraud) to address new increased penalties for certain persons who commit fraud offenses under certain Social Security programs, and related issues for comment;

(6) a proposed amendment to the Commentary to § 3E1.1 (Acceptance of Responsibility) to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline, and a related issue for comment;

(7) a multi-part proposed amendment to the *Guidelines Manual* to respond to recently enacted legislation and miscellaneous guideline issues, including (A) amending § 2B5.3 (Criminal Infringement of Copyright or Trademark) to respond to changes made by the Transnational Drug Trafficking Act of 2015, Public Law 114–154 (May 16, 2016); (B) amending § 2A3.5 (Failure to Register as a Sex Offender), § 2A3.6 (Aggravated Offenses Relating to

Registration as a Sex Offender), and Appendix A (Statutory Index) to respond to changes made by the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Public Law 114–119 (Feb. 8, 2016); (C) revisions to Appendix A (Statutory Index) to respond to a new offense established by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Public Law 114–182 (June 22, 2016); and (D) a technical amendment to § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor);

(8) a proposed amendment to make technical changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term “marihuana equivalency” used in the Drug Equivalency Tables when determining penalties for controlled substances;

(9) a proposed amendment to make various technical changes to the *Guidelines Manual*, including (A) an explanatory note in Chapter One, Part A, Subpart 1(4)(b)(Departures) and clarifying changes to the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud); (B) technical changes to § 4A1.2 (Definitions and Instructions for Computing Criminal History) and to the Commentary of other guidelines to correct title references to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); and (C) clerical changes to § 2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), § 5D1.3 (Conditions of Supervised Release), Appendix A (Statutory Index), and to the Commentary of other guidelines;

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the

court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission’s Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. 994(p).

Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission’s Web site at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.3, 4.4.

Patti B. Saris,
Chair.

1. First Offenders/Alternatives to Incarceration

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

(A) First Offenders

Part A of the proposed amendment is primarily informed by the Commission’s multi-year study of recidivism, which included an examination of circumstances that correlate with increased or reduced recidivism. See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). It is also informed by the Commission’s continued study of approaches to encourage the use of alternatives to incarceration. *Id.*

Under the *Guidelines Manual*, offenders with minimal or no criminal history are classified into Criminal History Category I. “First offenders,” offenders with no criminal history, are

addressed in the guidelines only by reference to Criminal History Category I. However, Criminal History Category I includes not only “first” offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point. Accordingly, the following offenders are classified in the same category: (1) First time offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in § 4A1.2(d) and (e); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their “staleness” (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions or infractions); and (4) offenders with a prior conviction that received only one criminal history point.

Part A sets forth a new Chapter Four guideline, at § 4C1.1 (First Offenders), that would provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (compared to otherwise similar offenders in Criminal History Category I). Recidivism data analyzed by the Commission indicate that “first offenders” generally pose the lowest risk of recidivism. See, e.g., U.S. Sent. Comm’n, “Recidivism Among Federal Offenders: A Comprehensive Overview,” at 18 (2016), available at <http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview>. In addition, 28 U.S.C. 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. The new Chapter Four Guideline, in conjunction with the revision to § 5C1.1 (Imposition of a Term of Imprisonment) described below, would further implement the congressional directive at section 994(j).

The new Chapter Four guideline would apply if [(1) the defendant did not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind. Part A of the proposed amendment sets forth two options for providing such an adjustment.

Option 1 provides a decrease of [1] level from the offense level determined under Chapters Two and Three.

Option 2 provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a

decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

Part A also amends § 5C1.1 (Imposition of a Term of Imprisonment) to add a new subsection (g) that provides that if (1) the defendant is determined to be a first offender under § 4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options.

Finally, Part A of the proposed amendment also provides issues for comment.

(B) Consolidation of Zones B and C in the Sentencing Table

Part B of the proposed amendment is a result of the Commission’s continued study of approaches to encourage the use of alternatives to incarceration. See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

The *Guidelines Manual* defines and allocates sentencing options in Chapter Five (Determining the Sentence). This chapter sets forth “zones” in the Sentencing Table based on the minimum months of imprisonment in each cell. The Sentencing Table sorts all sentencing ranges into four zones, labeled A through D. Each zone allows for different sentencing options, as follows:

Zone A.—All sentence ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. A sentencing court has the discretion to impose a sentence that is a fine-only, probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A allows for probation without any conditions of confinement.

Zone B.—Sentence ranges in Zone B are from one to 15 months of imprisonment. Zone B allows for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement. Zone B allows for non-prison sentences, which technically result in sentencing ranges larger than

six months, because the minimum term of imprisonment is one month and the maximum terms begin at seven months. To avoid sentencing ranges exceeding six months, the guidelines require that probationary sentences in Zone B include conditions of confinement. Zone B also allows for a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (i.e., a “split sentence”) or a term of imprisonment only.

Zone C.—Sentences in Zone C range from 10 to 18 months of imprisonment. Zone C allows for split sentences, which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.—The final zone, Zone D, allows for imprisonment only, ranging from 15 months to life.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and allow for the sentencing options described above. Although the proposed amendment would in fact delete Zone C by its consolidation with Zone B, Zone D would not be redesignated. Finally, Part B makes conforming changes to §§ 5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Part B also amends the Commentary to § 5F1.2 (Home Detention) to remove the language instructing that (1) electronic monitoring “ordinarily should be used in connection with” home detention; (2) alternative means of surveillance may be used “so long as they are effective as electronic monitoring;” and (3) “surveillance necessary for effective use of home detention ordinarily requires” electronic monitoring.

Issues for comment are also provided.

(A) First Offenders

Proposed Amendment

Chapter Four is amended by inserting at the end the following new Part C:

Part C—First Offender

§ 4C1.1. *First Offender*

(a) A defendant is a first offender if [(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind.

[Option 1:

(b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by [1] level.]

[Option 2:

(b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level as follows:

- (1) if the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or
- (2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.]

Commentary*Application Note:*

1. *Cases Involving Mandatory Minimum Penalties.*—If the case involves a statutorily required minimum sentence of at least five years and the defendant meets the criteria set forth in subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level determined under this section shall be not less than level 17. *See* § 5C1.2(b).”

Section 5C1.1 is amended by inserting at the end the following new subsection (g):

“(g) In cases in which (1) the defendant is determined to be a first offender under § 4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.”

The Commentary to § 5C1.1 captioned “Application Notes” is amended by inserting at the end the following new Note 10:

“10. *Application of Subsection (g).*—
(A) *Sentence of Probation Prohibited.*—The court may not impose a sentence of probation pursuant to this provision if prohibited by statute or where a term of imprisonment is required under this guideline. *See* § 5B1.1 (Imposition of a Term of Probation).

(B) *Definition of ‘Crime of Violence.’*—For purposes of subsection (g), ‘crime of violence’ has the meaning given that term in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

(C) *Sentence of Imprisonment for First Offenders.*—A sentence of

imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense].”

Issues for Comment

1. The Commission seeks comment on “first offenders,” defined in the proposed amendment as defendants with no prior convictions of any kind. Should the Commission broaden the scope of the term “first offender” to include other defendants who did not receive criminal history points and, if so, how? For example, should the term “first offender” include defendants who have prior convictions that are not used in computing criminal history points under Chapter Four (e.g., sentences resulting from foreign or tribal court convictions, misdemeanors and petty offenses listed in § 4A1.2(c))? Should the Commission instead limit the scope of the term? If so, how? Should the Commission provide additional or different guidance for determining whether a defendant is, or is not, a first offender?

2. Part A of the proposed amendment sets forth a new Chapter Four guideline that would apply if [(1) the defendant did not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind. One of the options set forth for this new guideline, Option 1, would provide that if the defendant is determined to be a first offender (as defined in the new guideline) a decrease of [1] level from the offense level determined under Chapters Two and Three would apply. Should the Commission limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels? For example, should the Commission provide that if the offense level determined under Chapters Two and Three is less than level [16], the offense level shall be decreased by [1] level? What other limitations or requirements, if any, should the Commission provide for such an adjustment?

3. Part A of the proposed amendment would amend § 5C1.1 (Imposition of a Term of Imprisonment) to provide that if the defendant is determined to be a first offender under the new § 4C1.1 (First Offender), [the defendant’s instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense],

and the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options. Should the Commission further limit the application of such a rebuttable “presumption” and exclude certain categories of non-violent offenses? If so, what offenses should be excluded from the presumption of a non-incarceration sentence? For example, should the Commission exclude public corruption, tax, and other white-collar offenses?

4. If the Commission were to promulgate Part A of the proposed amendment, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

*(B) Consolidation of Zones B and C in the Sentencing Table***Proposed Amendment**

Chapter Five, Part A is amended in the Sentencing Table by striking “Zone C”; by redesignating Zone B to contain all guideline ranges having a minimum of at least one month but not more than twelve months; and by inserting below “Zone B” the following: “[Zone C Deleted]”.

The Commentary to Chapter Five, Part A (Sentencing Table) is amended by inserting at the end the following:

“*Background:* The Sentencing Table previously provided four “zones,” labeled A through D, based on the minimum months of imprisonment in each cell. The Commission expanded Zone B by consolidating former Zones B and C. Zone B in the Sentencing Table now contains all guideline ranges having a minimum term of imprisonment of at least one but not more than twelve months. Although Zone C was deleted by its consolidation with Zone B, the Commission decided not to redesignate Zone D as Zone C, to avoid unnecessary confusion that may result from different meanings of “Zone C” and “Zone D” through different editions of the *Guidelines Manual*.”

The Commentary to § 5B1.1 captioned “Application Notes” is amended in Note 1(B), in the heading, by striking “nine months” and inserting “twelve months”; and in Note 2 by striking “Zone C or D” and inserting “Zone D”, and by striking “ten months” and inserting “fifteen months”.

Section 5C1.1 is amended—
in subsection (c) by striking “subsection (e)” both places such term appears and inserting “subsection (d)”;
by striking subsection (d) as follows:

“(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or
 (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.”; and by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

The Commentary to § 5C1.1 captioned “Application Notes” is amended—in Note 3 by striking “nine months” and inserting “twelve months”; by striking Note 4 as follows:

“4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.”;

by striking Note 6 as follows:

“6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* § 5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.”;

by redesignating Notes 5, 7, 8, and 9 as Notes 4, 5, 6, and 7, respectively;

in Note 4 (as so redesignated) by striking “Subsection (e)” and inserting “Subsection (d)”;

in Note 5 (as so redesignated) by striking “subsections (c) and (d)” and inserting “subsection (c)”;

and in Note 7 (as so redesignated) by striking “Subsection (f)” and inserting “Subsection (e)”, and by striking “subsection (e)” and inserting “subsection (d)”.

The Commentary to § 5F1.2 captioned “Application Notes” is amended in Note 1 [by striking “Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention” and inserting “Electronic monitoring is an appropriate means of surveillance for home detention”; and] by striking “may be used so long as they are as effective as electronic monitoring” and inserting “may be used if appropriate”.

The Commentary to § 5F1.2 captioned “Background” is amended by striking “The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring” and inserting “The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “the court should be confident that an alternative form of surveillance will be equally effective” and inserting “the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant’s case”.

Issues for Comment

1. The Commission requests comment on whether the zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (*e.g.*, to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?

2. The proposed amendment would consolidate Zones B and C to create an expanded Zone B. Such an adjustment would provide probation with conditions of confinement as a sentencing option for current Zone C

defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B defendants. If so, what guidance should the Commission provide?

2. Tribal Issues

Synopsis of Proposed Amendment: In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of the findings and recommendations contained in the May 2016 Report issued by the Commission’s Tribal Issues Advisory Group, and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). See also Report of the Tribal Issues Advisory Group (May 16, 2016), at <http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>. The Commission is publishing this proposed amendment to inform the Commission’s consideration of the issues related to this policy priority.

In 2015, the Commission established the Tribal Issues Advisory Group (TIAG) as an ad hoc advisory group to the Commission. Among other things, the Commission tasked the TIAG with studying the following issues—

(A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;

(B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;

(C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;

(D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;

(E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and

(F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers

appropriate. See Tribal Issues Advisory Group Charter § 1(b)(3).

The Commission also directed the TIAG to present a final report with its findings and recommendations, including any recommendations that the TIAG considered appropriate on potential amendments to the guidelines and policy statements. See *id.* § 6(a). On May 16, 2016, the TIAG presented to the Commission its final report. Among the recommendations suggested in the Report, the TIAG recommends revisions to the *Guidelines Manual* relating to “the use of tribal court convictions in the computation of criminal history scores” and “how the federal sentencing guidelines should account for protection orders issued by tribal courts.”

The Commission is publishing this proposed amendment to inform the Commission’s consideration of these issues. The proposed amendment contains two parts. The Commission is considering whether to promulgate one or both of these parts, as they are not necessarily mutually exclusive.

(A) Tribal Court Convictions

Pursuant to Chapter Four, Part A (Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). See USSG § 4A1.2(i). The policy statement at § 4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history. Among the grounds for departure, the policy statement includes “[p]rior sentences not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).” USSG § 4A1.3(a)(2)(A).

As noted in the TIAG’s report, in recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA), Pub. L. 111–211, to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Pub. L. 113–4, was enacted to expand the criminal jurisdiction of tribes to prosecute, sentence, and convict Indians and non-Indians who assault Indian spouses or dating partners or violate a protection

order in Indian Country. It also established new assault offenses and enhanced existing assault offenses. Both Acts increased criminal jurisdiction for tribal courts, but also required more robust court procedures and provided more procedural protections for defendants.

The TIAG notes in its report that “[w]hile some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources, and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon.” TIAG Report, at 10–11. Members of the TIAG describe their experience with tribal courts as “widely varied,” expressing among their findings certain concerns about funding, perceptions of judicial bias or political influence, due process protections, and access to tribal court records. *Id.* at 11–12.

The TIAG report highlights that “[t]ribal courts occupy a unique and valuable place in the criminal justice system,” while also recognizing that “[t]ribal courts range in style”. *Id.* at 13. According to the TIAG, the differences in style and the concerns expressed above “make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.” *Id.* at 11. It also asserts that “taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian defendants in federal courts.” *Id.* at 12. Thus, the TIAG concludes that tribal convictions should not be counted for purposes of determining criminal history points pursuant to Chapter Four, Part A, and that “the current use of USSG § 4A1.3 to depart upward in individual cases continues to allow the best formulation of ‘sufficient but not greater than necessary’ sentences for defendants, while not increasing sentencing disparities or introducing due process concerns.” *Id.* Nevertheless, the TIAG recommends that the Commission amend § 4A1.3 to provide guidance and a more structured analytical framework for courts to consider when determining whether a departure is appropriate based on a defendant’s record of tribal court convictions. The guidance recommended by the TIAG “collectively . . . reflect[s] important considerations for courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances,

and the goal of accurately assessing the severity of any individual defendant's criminal history." *Id.* at 13.

The proposed amendment would amend the Commentary to § 4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate.

Issues for comment are also provided.

(B) Court Protection Orders

Under the *Guidelines Manual*, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. See USSG §§ 2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence). The Commission has heard concerns that the term "court protection order" has not been defined in the guidelines and should be clarified.

The TIAG notes in its report the importance of defining "court protection orders" in the guidelines, because—

[a] clear definition of that term will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. TIAG Report, at 14.

The TIAG recommends that the Commission adopt a definition of "court protection order" that incorporates the statutory provisions at 18 U.S.C. 2265 and 2266. Section 2266(5) provides that the term "protection order" includes:

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. 2266(5).

Section 2265(b) provides that

A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 U.S.C. 2265(b).

The proposed amendment would amend the Commentary to § 1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. 2266(5), with a provision that it must be consistent with 18 U.S.C. 2265(b).

Issues for comment are also provided.

(A) Tribal Court Convictions

Proposed Amendment

Section 4A1.3(a)(2) is amended by striking "subsection (a)" and inserting "subsection (a)(1)"; and by striking "tribal offenses" and inserting "tribal convictions".

The Commentary to § 4A1.3 captioned "Application Notes" is amended in Note 2 by inserting at the end the following new paragraph (C):

“(C) *Upward Departures Based on Tribal Court Convictions.*—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in § 4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (March 7, 2013).

(iii) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(iv) The conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that

convictions from its courts should be counted for purposes of computing criminal history pursuant to the *Guidelines Manual*.]”.

Issues for Comment

1. The proposed amendment would provide a list of relevant factors that courts may consider, in addition to the factors set forth in § 4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted. The Commission seeks comment on whether the factors provided in the proposed amendment are appropriate. Should any factors be deleted or changed? Should the Commission provide additional or different guidance? If so, what guidance should the Commission provide?

In particular, the Commission seeks comment on how these factors should interact with each other and with the factors already contained in § 4A1.3(a). Should the Commission provide greater emphasis on one or more factors set forth in the proposed amendment? For example, how much weight should be given to factors that address due process concerns (subdivisions (i) and (ii)) in relation to the other factors provided in the proposed amendment, such as those factors relevant to preventing unwarranted double counting (subdivisions (iii) and (iv))? Should the Commission provide that in order to consider whether an upward departure based on a tribal court conviction is appropriate, and before taking into account any other factor, the court must first determine as a threshold factor that the defendant received due process protections consistent with those provided to criminal defendants under the United States Constitution?

Finally, the proposed amendment brackets the possibility of including as a factor that courts may consider in deciding whether to depart based on a tribal court conviction if, “at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the *Guidelines Manual*.” The Commission invites broad comment on this factor and its interaction with the other factors set forth in the proposed amendment. Is this factor relevant to the court's determination of whether to depart? What are the advantages and disadvantages of including such a factor? How much weight should be given to this factor in relation to the other factors provided in the proposed amendment? What criteria should be used in determining when a tribal government has “formally expressed a

desire” that convictions from its courts should count? How would tribal governments notify and make available such statements?

2. Pursuant to subsection (i) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). As stated above, the policy statement at § 4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history.

The Commission invites comment on whether the Commission should consider changing how the guidelines account for sentences resulting from tribal court convictions for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending § 4A1.2(i) and, if so, how? For example, should the guidelines treat sentences resulting from tribal court convictions like other sentences imposed for federal, state, and local offenses that may be used to compute criminal history points? Should the Commission treat sentences resulting from tribal court convictions more akin to military sentences and provide a distinction between certain types of tribal courts? Is there a different approach the Commission should follow in addressing the use of tribal court convictions in the computation of criminal history scores?

(B) Court Protection Orders

Proposed Amendment

The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

“(D) ‘court protection order’ means ‘protection order’ as defined by 18 U.S.C. 2266(5) and consistent with 18 U.S.C. 2265(b).”.

Issues for Comment

1. The proposed amendment would include in the Commentary to § 1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. 2266(5), that is consistent with 18 U.S.C. 2265(b). Is this definition appropriate? If not, what definition, if any, should the Commission provide?

2. The Commission has heard concerns about cases in which the offense involved the violation of a court protection order. As stated above, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines (see §§ 2A2.2, 2A6.1, and 2A6.2). However, other guidelines in which the offense might involve a violation of a court protection order do not provide for such an enhancement.

The Commission seeks comment on whether the *Guidelines Manual* should provide higher penalties for cases involving the violation of a court protection order. How, if at all, should the Commission amend the guidelines to provide appropriate penalties in such cases?

For example, should the Commission address this factor throughout the guidelines by establishing a Chapter Three adjustment if the offense involved the violation of a court protection order? If so, how should this provision interact with other provisions in the *Guidelines Manual* that may involve the violation of an order, such as § 2B1.1(b)(9)(C) (“If the offense involved . . . (C) a violation of any prior specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines . . . increase by 2 levels.”), § 2J1.1 (Contempt), and § 3C1.1 (Obstructing or Impeding the Administration of Justice)?

Alternatively, should the Commission identify and amend particular offense guidelines in Chapter Two to include the violation of a court protection order as a specific offense characteristic? If so, which guidelines should be amended to include such a new specific offense characteristic? For example, should the Commission include such a new specific offense characteristic in the guidelines related to offenses against the person, sexual offenses, and offenses that create a risk of injury? Should the Commission include such a new specific offense characteristic in offenses that caused a financial harm, such as identity theft?

3. Youthful Offenders

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s study of the treatment of youthful offenders under the *Guidelines Manual*. See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 5280004 (Aug. 24, 2016). This policy priority stemmed from recommendations about the treatment of youthful offenders contained in the May 2016 Report issued by the Commission’s Tribal Issues Advisory Group. See Report of

the Tribal Issues Advisory Group (May 16, 2016), at <http://www.uscc.gov/research/research-publications/report-tribal-issues-advisory-group>.

Pursuant to Chapter Four, Part A (Criminal History), sentences for offenses committed prior to age eighteen are considered in the calculation of the defendant’s criminal history score. The guidelines distinguish between an “adult sentence” in which the defendant committed the offense before age eighteen and was convicted as an adult, and a “juvenile sentence” resulting from a juvenile adjudication.

Under § 4A1.2 (Definitions and Instructions for Computing Criminal History), if the defendant was convicted as an adult for an offense committed before age eighteen and received a sentence exceeding one year and one month, the sentence is counted so long as it was imposed, or resulted in the defendant being incarcerated, within fifteen years of the defendant’s commencement of the instant offense. See USSG § 4A1.2(d), (e). All other sentences for offenses committed prior to age eighteen are counted only if the sentence was imposed, or resulted in the defendant being incarcerated, within five years of the defendant’s commencement of the instant offense. See USSG § 4A1.2(d). The Commentary to § 4A1.2 provides that, to avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” the rules set forth in § 4A1.2(d) apply to all offenses committed prior to age eighteen.

Juvenile adjudications are addressed in two other places in the guidelines. First, § 4A1.2(c)(2) provides a list of certain offenses that are “never counted” for purposes of the criminal history score, including “juvenile status offenses and truancy.” Second, § 4A1.2(f) provides that adult diversionary dispositions resulting from a finding or guilt, or a nolo contendere, are counted even if a conviction is not formally entered. However, the same provision further provides that “diversion from juvenile court is not counted.”

The proposed amendment amends § 4A1.2(d) to exclude juvenile sentences from being considered in the calculation of the defendant’s criminal history score. The proposed amendment also amends the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which a downward departure from the defendant’s criminal history may be warranted. Specifically, the proposed amendment provides that

a downward departure may be warranted if the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.”

Issues for comment are provided.

Proposed Amendment

The Commentary to § 4A1.1 captioned “Application Notes” is amended in Note 2 by striking “An adult or juvenile sentence” and inserting “An adult sentence”; and in Note 3 by striking “An adult or juvenile sentence” and inserting “An adult sentence”.

Section 4A1.2 is amended—

[in subsection (c)(2) by striking “Juvenile status offenses and truancy”]; in subsection (d) by striking “or juvenile” both places such term appears in paragraph (2), and by inserting at the end the following new paragraph (3):

“(3) Sentences resulting from juvenile adjudications are not counted.”;

[and in subsection (f) by striking: “, except that diversion from juvenile court is not counted”].

The Commentary to § 4A1.2 captioned “Application Notes” is amended in Note 7 by striking the following:

“Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a ‘juvenile,’ this provision applies to all offenses committed prior to age eighteen.”,

and inserting the following:

“Section 4A1.2(d) applies only when the defendant was convicted as an adult for an offense committed prior to age eighteen. This provision also sets forth the time period within which such prior adult sentences are counted.”.

The Commentary to § 4A1.3 captioned “Application Notes” is amended in Note 3 by striking the following:

” *Downward Departures.*—A downward departure from the

defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.”,

and inserting the following:

” *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as ‘adults.’

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.”.

Issues for Comment

1. The Commission seeks comment on whether the Commission should consider changing how the guidelines account for juvenile sentences for purposes of determining the defendant’s criminal history pursuant to Chapter Four, Part A (Criminal History). Should the Commission amend the guidelines to provide that sentences resulting from juvenile adjudications shall not be counted in the criminal history score? Alternatively, should the Commission amend the guidelines to count juvenile sentences only if the offense involved violence or was an otherwise serious offense? Should the Commission provide instead that sentences for offenses committed prior to age eighteen are not to be counted in the criminal

history score, regardless of whether the sentence was classified as a “juvenile” or “adult” sentence?

2. If the Commission were to promulgate the proposed amendment, should the Commission provide that juvenile sentences may be considered for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))? If so, should the Commission limit the consideration of such departures to certain offenses? For example, should the Commission provide that an upward departure under § 4A1.3 may be warranted if the juvenile sentence was imposed for an offense involving violence or that was an otherwise serious offense?

3. The proposed amendment would provide that a departure may be warranted in cases in which the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.” Should the Commission provide that a downward departure may be warranted for such cases? How would courts determine that the defendant would have received a juvenile adjudication if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults”? Should the Commission provide specific examples or guidance for determining whether a downward departure is warranted in such cases? If so, what guidance or examples should the Commission provide? Should the Commission use a different approach to address these cases and, if so, what should that approach be? Are there other circumstances that the Commission should identify as an appropriate basis for a downward departure?

4. Criminal History Issues

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s work in examining Chapter Four, Part A (Criminal History) “to (A) study the treatment of revocation sentences under § 4A1.2(k), and (B) consider a possible amendment of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a

conviction counted under the *Guidelines Manual*.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

(A) Treatment of Revocation Sentences Under § 4A1.2(k)

Pursuant to Chapter Four, Part A (Criminal History), revocations of probation, parole, supervised release, special parole, or mandatory release are counted for purposes of calculating criminal history points. Section 4A1.2(k) provides that a sentence of imprisonment given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence for purposes of computing criminal history points under § 4A1.1(a), (b), or (c). The Commentary to § 4A1.2 provides that where a revocation applies to multiple sentences, and such sentences are counted separately under § 4A1.2(a)(2), the term of imprisonment imposed upon revocation is added to the sentence that will result in the greatest increase in criminal history points. See USSG § 4A1.2, comment. (n.11).

Section 4A1.2(k)(2) further provides that aggregating the revocation sentence to the original sentence of imprisonment may affect the time period under which certain sentences are counted under Chapter Four. See USSG § 4A1.2(d)(2) and (e). The resulting total of adding both sentences could affect the applicable time period by increasing the length of a defendant’s term of imprisonment or by changing the defendant’s date of release from imprisonment.

Part A of the proposed amendment would amend § 4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points. It would also state that such revocation sentences may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Issues for comment are also provided.

(B) Departure Based on Substantial Difference Between Time-Served and Sentence Imposed

Section 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) provides for upward and downward departures where the defendant’s criminal history category substantially understates or substantially overstates the seriousness of the defendant’s criminal history or the likelihood of recidivism. The

Commentary to § 4A1.3 provides guidance in determining when a downward departure from the defendant’s criminal history may be warranted.

Part B of the proposed amendment would amend the Commentary to § 4A1.3 to provide that a downward departure from the defendant’s criminal history may warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

An issue for comment is also provided.

(A) Treatment of Revocation Sentences Under § 4A1.2(k)

Proposed Amendment

The Commentary to § 4A1.1 captioned “Application Notes” is amended in Note 1 by striking “Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see § 4A1.2(k).”; and in Note 2 by striking “Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see § 4A1.2(k).”.

Section 4A1.2(k) is amended by striking paragraphs (1) and (2) as follows:

“(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see § 4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (see § 4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see § 4A1.2(d)(2)(B) and (e)(2)).”, and inserting the following:

“Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered

under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).”.

The Commentary to § 4A1.2 captioned “Application Notes” is amended by striking Note 11 as follows:

“11. *Revocations to be Considered.*—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under § 4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. *Example:* A defendant was serving two probationary sentences, each counted separately under § 4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a ‘straight’ probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under § 4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under § 4A1.1(c) (for the other probationary sentence).”; and by redesignating Note 12 as Note 11.

Issues for Comment

1. The Commission invites comment on whether the Commission should consider changing how the guidelines currently account for revocations of

probation, parole, supervised release, special parole, or mandatory release for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending § 4A1.2(k) and, if so, how? For example, should revocation sentences not be counted in determining the criminal history score, as provided in the proposed amendment? Should the Commission provide instead a different approach for counting revocation sentences, such as counting the original sentence and the revocation sentences as separate sentences instead of aggregating them? If the Commission were to provide a different approach for counting revocation sentences, what should that different approach be?

2. The proposed amendment would amend § 4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). The policy statement at § 4A1.3 provides upward departures for cases in which reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history.

The Commission seeks comment on whether revocation sentences, if not counted for purposes of calculating criminal history points, may be considered for a departure under § 4A1.3. Should the Commission provide specific guidance for determining whether an upward departure based on a revocation sentence may be warranted? If so, what specific guidance should the Commission provide?

3. The Commission recently promulgated an amendment to the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States) that, among other things, revised the specific offense characteristics to account for prior convictions primarily through a sentence-imposed approach rather than through a type of offense approach (*i.e.*, "categorical approach"). See USSG App. C, amendment 802 (effective November 1, 2016). The amendment retained in the Commentary to § 2L1.2 a definition of "sentence imposed" that includes as part of the length of the sentence "any term of imprisonment given upon revocation of probation, parole, or supervised release." USSG § 2L1.2, comment. (n.2).

If the Commission were to promulgate the proposed amendment changing how the guidelines account for revocation sentences for purposes of determining criminal history points, should the Commission revise the definition of "sentence imposed" at § 2L1.2 and, if so, how? How, if at all, should the Commission revise the "sentence imposed" definition to address any term of imprisonment given upon a revocation sentence? Should the Commission provide that revocation sentences should not be considered in determining the length of the "sentence imposed" for purposes of applying the enhancements at § 2L1.2?

(B) Departure Based on Substantial Difference Between Time-Served and Sentence Imposed

Proposed Amendment

The Commentary to § 4A1.3 captioned "Application Notes" is amended in Note 3 by striking the following:

" *Downward Departures.*—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism."

and inserting the following:

" *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a

first offender with the lowest risk of recidivism."

Issue for Comment

1. Part B of the proposed amendment would amend the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a downward departure from the defendant's criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. Should the Commission exclude the consideration of such a downward departure in cases in which the time actually served by the defendant was substantially less than the length of the sentence imposed due to reasons unrelated to the facts and circumstances of the defendant's case, *e.g.*, in order to minimize overcrowding or due to state budget concerns?

5. Bipartisan Budget Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. 408, 1011, and 1383a, respectively).

(A) Conspiracy To Commit Social Security Fraud

The Bipartisan Budget Act of 2015 added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. 408, 1011, and 1383a). For each of the three statutes, the new subdivision provides that whoever "conspires to commit any offense described in any of [the] paragraphs" enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

The three amended statutes are currently referenced in Appendix A (Statutory Index) to § 2B1.1 (Theft, Property Destruction, and Fraud). The

proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are referenced not only to § 2B1.1 but also to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

An issue for comment is provided.

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

The Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. The Act included a provision in all three statutes identifying such persons as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

A person who meets this requirement and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend § 2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds Commentary specifying whether an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying.

Issues for comment are also provided.

(A) Conspiracy to Commit Social Security Fraud

Proposed Amendment

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 408 by inserting “, 2X1.1” at the end; in the line referenced to 42 U.S.C. 1011 by inserting “, 2X1.1” at the end; and in the line referenced to 42 U.S.C. 1383a(a) by inserting “, 2X1.1” at the end.

Issue for Comment

1. Part A of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. 408, 1011, and 1383a to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses? Should the Commission reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment?

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

Proposed Amendment

Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively, and by inserting the following new paragraph (13):

“(13) If the defendant was convicted under 42 U.S.C. 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by [4][2] levels. If the resulting offense level is less than [14][12], increase to level [14][12].”

The Commentary to § 2B1.1 captioned “Application Notes” is amended by redesignating Notes 11 through 20 as Notes 12 through 21, respectively, and by inserting the following new Note 11:

“11. *Interaction of Subsection (b)(13) and § 3B1.3.*—[If subsection (b)(13) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).][Application of subsection (b)(13) does not preclude a defendant from consideration for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).]”

Issues for Comment

1. The Bipartisan Budget Act of 2015 amended sections 408, 1011, and 1383a of Title 42 to include a provision in all three statutes increasing the statutory maximum term of imprisonment from five years to ten years for certain persons who commit fraud offenses under subsection (a) of the three statutes. The Act identifies such persons as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or

causes the submission of, medical or other evidence in connection with any such determination

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases in which the offense of conviction is 42 U.S.C. 408, § 1011, or § 1383a, and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. 408(a), § 1011(a), or § 1383a(a). Are these cases adequately addressed by existing provisions in the guidelines, such as the adjustment in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If so, as an alternative to the proposed amendment, should the Commission amend § 2B1.1 only to provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under § 3B1.3 ordinarily would apply? If not, how should the Commission amend the guidelines to address these cases?

2. The proposed amendment would amend § 2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. 408(a), § 1011(a), or § 1383a(a). However, there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment, is convicted under a general fraud statute (e.g., 18 U.S.C. 1341) for an offense involving conduct described in 42 U.S.C. 408(a), § 1011(a), or § 1383a(a).

The Commission seeks comment on whether the Commission should instead amend § 2B1.1 to provide a general specific offense characteristic for such cases. For example, should the Commission provide an enhancement for cases in which the offense involved conduct described in 42 U.S.C. 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination”? If so, how many levels would be appropriate for such an enhancement? How should

such an enhancement interact with the existing enhancements at § 2B1.1 and the Chapter Three adjustment at § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)?

6. Acceptance of Responsibility

Synopsis of Proposed Amendment: In August 2016, the Commission indicated that one of its priorities would be the consideration of miscellaneous guideline application issues, “including possible consideration of whether a defendant’s denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of § 3E1.1.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

Section 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility. Application Note 1(A) of § 3E1.1 provides as one of the appropriate considerations in determining whether a defendant “clearly demonstrate[d] acceptance of responsibility” the following:

truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

In addition, Application Note 3 provides further guidance on evidence that might demonstrate acceptance of responsibility, as follows:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

The Commission has heard concerns that the Commentary to § 3E1.1 (particularly the provisions cited above)

encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report’s assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility.

The proposed amendment amends the Commentary to § 3E1.1 to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, it would amend Application Note 1(A) to delete the sentence that states “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The proposed amendment would instead provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under § 3E1.1(a).

An issue for comment is also provided.

Proposed Amendment

The Commentary to § 3E1.1 captioned “Application Notes” is amended in Note 1(A) by striking “However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility” and inserting the following: “In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)”.

Issue for Comment

1. The Commission seeks comment on whether the Commission should amend the Commentary to § 3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant’s challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of § 3E1.1? If so, what changes should the Commission make to § 3E1.1?

For example, the proposed amendment would provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under § 3E1.1(a). What additional guidance, if any, should the Commission provide on what constitutes “a non-frivolous challenge to

relevant conduct”? Should such challenges include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to include other sentencing considerations, such as departures or variances? Should the Commission instead remove from § 3E1.1 all references to relevant conduct for which the defendant is accountable under § 1B1.3, and reference only the elements of the offense of conviction?

7. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not necessarily mutually exclusive. They are as follows—

Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending § 2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending § 2A3.5 (Failure to Register as a Sex Offender), § 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index).

Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016), by amending Appendix A (Statutory Index).

Part D amends § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

(A) Transnational Drug Trafficking Act of 2015

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154

(May 16, 2016). The primary purpose of the Act is to enable the Department of Justice to target extraterritorial drug trafficking activity. Among other things, the Act clarified the *mens rea* requirement for offenses related to trafficking in counterfeit drugs, without changing the statutory penalties associated with such offenses. The Act amended 18 U.S.C. 2230 (Trafficking in Counterfeit Goods or Services), which prohibits trafficking in a range of goods and services, including counterfeit drugs. The amended statute is currently referenced in Appendix A (Statutory Index) of the *Guidelines Manual* to § 2B5.3 (Criminal Infringement of Copyright or Trademark).

In particular, the Act made changes relating to counterfeit drugs. First, the Act amended the penalty provision at section 2320, replacing the term “counterfeit drug” with the phrase “drug that uses a counterfeit mark on or in connection with the drug.” Second, the Act revised section 2320(f)(6) to define only the term “drug” instead of “counterfeit drug.” The amended provision defines “drug” as “a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).” The Act did not amend the definition of “counterfeit mark” contained in section 2230(f)(1), which provides that—

the term “counterfeit mark” means—

(A) a spurious mark—

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36

Part A of the proposed amendment amends § 2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” The proposed amendment would also amend the Commentary to § 2B5.3 to delete the “counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. 2320(f).

Proposed Amendment

Section 2B5.3(b)(5) is amended by striking “counterfeit drug” and inserting “drug that uses a counterfeit mark on or in connection with the drug”.

The Commentary to § 2B5.3 captioned “Application Notes” is amended in Note 1 by striking the third undesignated paragraph as follows:

“‘Counterfeit drug’ has the meaning given that term in 18 U.S.C. 2320(f)(6).”, and by inserting after the paragraph that begins “‘Counterfeit military good or service’ has the meaning” the following new paragraph:

“‘Drug’ and ‘counterfeit mark’ have the meaning given those terms in 18 U.S.C. 2320(f).”.

(B) International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act (“International Megan’s Law”), Pub. L. 114–119 (Feb. 8, 2016). The Act added a new notification requirement to 42 U.S.C. 16914 (Information required in [sex offender] registration). Section 16914 states that sex offenders who are required to register under the Sex Offender Registration and Notification Act (SORNA) must provide certain information for inclusion in the sex offender registry. Those provisions include the offender’s name, Social Security number, address of all residences, name and address where the offender is an employee, the name and address where the offender is a student, license plate number and description of any vehicle. The International Megan’s Law added as an additional requirement that the sex offender must provide “information relating to intended travel

of the sex offender outside of the United States, including any anticipated dates and places of departure, arrival or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.”

The International Megan’s Law also added a new criminal offense at 18 U.S.C. 2250(b) (Failure to register). The new subsection (b) provides that whoever is required to register under SORNA who knowingly fails to provide the above described information required by SORNA relating to intended travel in foreign commerce and who engages or attempts to engage in the intended travel, is subject to a 10 year statutory maximum penalty. Section 2250 offenses are referenced in Appendix A (Statutory Index) to § 2A3.5 (Failure to Register as a Sex Offender).

Part B of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. 2250(b) are referenced to § 2A3.5. The proposed amendment also brackets the possibility of adding a new application note to the Commentary to § 2A3.5 providing that for purposes of § 2A3.5(b), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. 2250(a) or (b).

Finally, Part B makes clerical changes to § 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C. § 2250(c) by the International Megan’s Law.

Proposed Amendment

The Commentary to § 2A3.5 captioned “Statutory Provisions” is amended by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”.

[The Commentary to § 2A3.5 captioned “Application Notes” is amended by redesignating Note 2 as Note 3, and by inserting the following new Note 2:

“2. *Application of Subsection (b)(1).*— For purposes of subsection (b)(1), a defendant shall be deemed to be in a ‘failure to register status’ during the period in which the defendant engaged in conduct described in 18 U.S.C. 2250(a) or (b).”.]

Section 2A3.6(a) is amended by striking “§ 2250(c)” and inserting “§ 2250(d)”.

The Commentary to § 2A3.6 captioned “Statutory Provisions” is amended by striking “2250(c)” and inserting “2250(d)”.

The Commentary to § 2A3.6 captioned “Statutory provisions is amended—” in Note 1 by striking “Section 2250(c)” and inserting “Section 2250(d)”, and by inserting after “18 U.S.C. 2250(a)” the following: “or (b)”; in Note 3 by striking “§ 2250(c)” and inserting “§ 2250(d)”; and in Note 4 by striking “§ 2250(c)” and inserting “§ 2250(d)”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2250(a) by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”; and in the line referenced to 18 U.S.C. 2250(c) by striking “§ 2250(c)” and inserting “§ 2250(d)”.

(C) Frank R. Lautenberg Chemical Safety for the 21st Century Act

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016). The Act, among other things, amended section 16 of the Toxic Substances Control Act (15 U.S.C. 2615) to add a new subsection that provides that any person who knowingly and willfully violates certain provisions of the Toxic Substances Control Act and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury shall be subject to a fine up to \$250,000, imprisonment of up to 15 years, or both.

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. 2615(b)(2) is referenced to § 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. 2615(b)(1).

Proposed Amendment

Appendix A (Statutory Index) is amended—
in the line referenced to 15 U.S.C. 2615 by striking “§ 2615” and inserting “§ 2615(b)(1)”;
and by inserting before the line referenced to 15 U.S.C. 6821 the following new line reference:
“15 U.S.C. 2615(b)(2) 2Q1.1”.

D) Use of a Computer Enhancement in § 2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment

clarifies how the use of a computer enhancement at § 2G1.3(b)(3) interacts with its corresponding commentary at Application Note 4. Section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) of § 2G1.3 provides a 2-level enhancement if—

the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

Application Note 4 to § 2G1.3 sets forth guidance on this enhancement providing as follows:

Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

An application issue has arisen as to whether Application Note 4, by failing to distinguish between the two prongs of subsection (b)(3), prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor.

Most courts to have addressed this issue have concluded that Application Note 4 is inconsistent with the language of § 2G1.3(b)(3), and have permitted the application of the enhancement for use of a computer in third party solicitation cases. *See, e.g.,* United States v. Cramer, 777 F.3d 597, 606 (2d Cir. 2015) (“We conclude that Application Note 4 is plainly inconsistent with subsection (b)(3)(B). . . . The plain language of subsection (b)(3)(B) is clear, and there is no indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4.”); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015) (“[The defendant] points out that Application Note 4 states that ‘Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a

minor or with a person who exercises custody, care, or supervisory control of the minor.’. . . . But the note is wrong. The guideline section provides a 2-level enhancement whenever the defendant uses a computer to ‘entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor. . . . When an application note clashes with the guideline, the guideline prevails.”); United States v. Hill, 783 F.3d 842, 846 (11th Cir. 2015) (“Because the application note is inconsistent with the plain language of U.S.S.G. § 2G1.3(b)(3)(B), the plain language of the guideline controls.”); United States v. Pringler, 765 F.3d 455 (5th Cir. 2014) (“[W]e hold that the commentary in application note 4 is ‘inconsistent with’ Guideline § 2G1.3(b)(3)(B), and we therefore follow the plain language of the Guideline alone.”).

Part D of the proposed amendment would amend the Commentary to § 2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Proposed Amendment

The Commentary to § 2G1.3 captioned “Application Notes” is amended in Note 4 by striking “(b)(3)” each place such term appears and inserting “(b)(3)(A)”.

8. Marihuana Equivalency

Synopsis of Proposed Amendment This proposed amendment makes technical changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term “marihuana equivalency” which is used in the Drug Equivalency Tables when determining penalties for controlled substances.

The Commentary to § 2D1.1 sets forth a series of Drug Equivalency Tables. These tables provide a value termed “marihuana equivalency” for certain controlled substances that is used to determine the offense level for cases in which the controlled substance involved in the offense is not specifically listed in the Drug Quantity Tables, or where there is more than one controlled substance involved in the offense (whether or not listed in the Drug Quantity Table). *See* § 2D1.1, comment. (n.8). The tables are separated by drug type and schedule.

In a case involving a controlled substance that is not specifically referenced in the Drug Quantity Table,

the base offense level is determined by using the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its marihuana equivalency, then finding the offense level in the Drug Quantity Table that corresponds to that quantity of marihuana. In a case involving more than one controlled substance, each of the drugs is converted into its marihuana equivalency, the converted quantities are added, and the aggregate quantity is used to find the offense level in the Drug Quantity Table.

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. In particular, they suggested that the Commission should replace “marihuana equivalency” with another term.

The proposed amendment amends § 2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables for determining penalties for controlled substances. It replaces that term throughout the guideline with the term “converted drug weight.” It also changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The proposed amendment is not intended as a substantive change in policy.

Finally, the proposed amendment makes certain clerical and conforming changes to reflect the changes to the Drug Equivalency Tables.

Proposed Amendment

Section 2D1.1(c)(1) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • 90,000 KG or more of Converted Drug Weight.”.

Section 2D1.1(c)(2) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(3) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(4) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(5) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(6) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 700 KG but less than 1,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(7) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 400 KG but less than 700 KG of Converted Drug Weight.”.

Section 2D1.1(c)(8) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 100 KG but less than 400 KG of Converted Drug Weight.”.

Section 2D1.1(c)(9) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 80 KG but less than 100 KG of Converted Drug Weight.”.

Section 2D1.1(c)(10) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 60 KG but less than 80 KG of Converted Drug Weight.”.

Section 2D1.1(c)(11) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 40 KG but less than 60 KG of Converted Drug Weight.”.

Section 2D1.1(c)(12) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 20 KG but less than 40 KG of Converted Drug Weight.”.

Section 2D1.1(c)(13) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

” • At least 10 KG but less than 20 KG of Converted Drug Weight.”.

Section 2D1.1(c)(14) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

” • At least 5 KG but less than 10 KG of Converted Drug Weight.”.

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

” • At least 2.5 KG but less than 5 KG of Converted Drug Weight.”.

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

” • At least 1 KG but less than 2.5 KG of Converted Drug Weight.”.

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

” • Less than 1 KG of Converted Drug Weight.”.

The annotation to § 2D1.1(c) captioned “Notes to Drug Quantity Table” is amended by inserting at the end the following new Note (J):

“(J) The term ‘Converted Drug Weight,’ for purposes of this guideline, refers to a nominal reference designation that is to be used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended—in Note 6 by striking “marihuana equivalency” and inserting “converted drug weight” and by inserting after “the most closely related controlled substance referenced in this guideline.” the following: “See Application Note 8.”; in the heading of Note 8 by striking “Equivalency” and inserting “Conversion”;

in Note 8(A) by striking “Drug Equivalency Tables” both places such term appears and inserting “Drug Conversion Tables”; by striking “to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana” and inserting “to find the converted drug weight of the controlled substance involved in the offense”; by striking “Find the equivalent quantity of marihuana” and inserting “Find the corresponding converted drug weight”; by striking “Use the offense level that corresponds to the equivalent quantity of marihuana”

and inserting "Use the offense level that corresponds to the converted drug weight determined above"; by striking "an equivalent quantity of 5 kilograms of marihuana" and inserting "5 kilogram of converted drug weight"; and by striking "the equivalent quantity of marihuana would be 500 kilograms" and inserting "the converted drug weight would be 500 kilograms";

in Note 8(B) by striking "Drug Equivalency Tables" each place such term appears and inserting "Drug Conversion Tables"; by striking "convert each of the drugs to its marihuana equivalent" and inserting "convert each of the drugs to its converted drug weight"; by striking "For certain types of controlled substances, the marihuana equivalencies" and inserting "For certain types of controlled substances, the converted drug weights assigned"; by striking "e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana" and inserting "e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight"; by striking "determine the marihuana equivalency for each schedule separately" and inserting "determine the converted drug weight for each schedule separately"; and by striking "Then add the marihuana equivalencies to determine the combined marihuana equivalency" and inserting "Then add the converted drug weights to determine the combined converted drug weight";

in Note 8(C)(i) by striking "of marihuana" each place such term appears and inserting "of converted drug weight"; and by striking "The total is therefore equivalent to 95 kilograms" and inserting "The total therefore converts to 95 kilograms";

in Note 8(C)(ii) by striking the following:

"The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.",

and inserting the following:

"The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The amount of marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts

to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.";

in Note 8(C)(iii) by striking "is equivalent" both places such term appears and inserting "converts"; by striking "of marihuana" each place such term appears and inserting "of converted drug weight"; and by striking "The total is therefore equivalent" and inserting "The total therefore converts";

in Note 8(C)(iv) by striking "marihuana equivalency" each place such term appears and inserting "converted drug weight"; by striking "76 kilograms of marihuana" and inserting "76 kilograms"; by striking "79.99 kilograms of marihuana" both places such term appears and inserting "79.99 kilograms of converted drug weight"; by striking "equivalent weight" each place such term appears and inserting "converted weight"; by striking "9.99 kilograms of marihuana" and inserting "9.99 kilograms"; and by striking "2.49 kilograms of marihuana" and inserting "2.49 kilograms";

and in Note 8(D)—

in the heading, by striking "Equivalency" and inserting "Conversion";

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

"Schedule I or II Opiates**",

and inserting the following new heading:

"Schedule I or II Opiates* Converted Drug Weight";

and by striking "of marihuana" each place such term appears; under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

"Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*",

and inserting the following new heading:

"Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)* Converted Drug Weight";

and by striking "of marihuana" each place such term appears; under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

"LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*",

and inserting the following new heading:

"LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)* Converted Drug Weight";

and by striking "of marihuana" each place such term appears; under the heading relating to Schedule I Marihuana, by striking the heading as follows:

"Schedule I Marihuana",

and inserting the following new heading:

"Schedule I Marihuana Converted Drug Weight";

and by striking "of marihuana" each place such term appears; under the heading relating to Flunitrazepam, by striking the heading as follows:

"Flunitrazepam***",

and inserting the following new heading:

"Flunitrazepam** Converted Drug Weight";

and by striking "of marihuana"; under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking the heading as follows:

"Schedule I or II Depressants (except gamma-hydroxybutyric acid)",

and inserting the following new heading:

"Schedule I or II Depressants (except gamma-hydroxybutyric acid) Converted Drug Weight";

and by striking "of marihuana"; under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

"Gamma-hydroxybutyric Acid",

and inserting the following new heading:

"Gamma-hydroxybutyric Acid Converted Drug Weight";

and by striking "of marihuana"; under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

"Schedule III Substances (except ketamine)***",

and inserting the following new heading:

"Schedule III Substances (except ketamine)*** Converted Drug Weight";

by striking "1gm of marihuana" and inserting "1 gm"; by striking

“equivalent weight” and inserting “converted weight”; and by striking “79.99 kilograms of marihuana” and inserting “79.99 kilograms of converted drug weight”;

under the heading relating to Ketamine, by striking the heading as follows:

“Ketamine”,

and inserting the following new heading:

“Ketamine *Converted Drug Weight*”;

and by striking “of marihuana”; under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

“Schedule IV Substances (except flunitrazepam)*****”,

and inserting the following new heading:

“Schedule IV Substances (except flunitrazepam)*****
Converted Drug Weight”;

by striking “0.0625 gm of marihuana” and inserting “0.0625 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms of converted drug weight”;

under the heading relating to Schedule V Substances, by striking the heading as follows:

“Schedule V Substances*****”,

and inserting the following new heading:

“Schedule V Substances*****
Converted Drug Weight”;

by striking “0.00625 gm of marihuana” and inserting “0.00625 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms of converted drug weight”; under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****”,

and inserting the following new heading:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****
Converted Drug Weight”;

and by striking “of marihuana” each place such term appears; under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or

ketamine), by striking the heading as follows:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)”, and inserting the following new heading:

“Date Rape Drugs *Converted Drug Weight*”;
(except flunitrazepam, GHB, or ketamine)

and by striking “marihuana” each place such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking “To facilitate conversions to drug equivalencies” and inserting “To facilitate conversions to converted drug weights”.

9. Technical Amendment

Synopsis of Amendment: This proposed amendment makes various technical changes to the *Guidelines Manual*.

Part A of the proposed amendment makes certain clarifying changes to two guidelines. First, the proposed amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that § 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2(A) to § 2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if § 2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Part B of the proposed amendment makes technical changes in §§ 2Q1.3 (Misconduct of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to—

(1) the Commentary to § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)) to correct a typographical error by inserting a missing word in Application Note 4;

(2) subsection (d)(6) to § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to

correct a typographical error in the line referencing Pseudoephedrine;

(3) subsection (e)(2) to § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to correct a punctuation mark under the heading relating to List I Chemicals;

(4) the Commentary to § 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions” to add a missing section symbol and a reference to Appendix A (Statutory Index);

(5) the Commentary to § 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions” to add a missing reference to 42 U.S.C. 7413(c)(5) and a reference to Appendix A (Statutory Index);

(6) the Commentary to § 2Q1.2 (Misconduct of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. 7413(c)(1)–(4);

(7) the Commentary to § 2Q1.3 (Misconduct of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. 7413(c)(1)–(4);

(8) subsection (a)(4) to § 5D1.3 (Conditions of Supervised Release) to change an inaccurate reference to “probation” to “supervised release”; and

(9) the lines referencing “18 U.S.C. 371” and “18 U.S.C. 1591” in Appendix A (Statutory Index) to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

Proposed Amendment:

(A) Clarifying Changes

Chapter One, Part A is amended in Subpart 1(4)(b) (Departures) by inserting an asterisk after “§ 5K2.19 (Post-Sentencing Rehabilitative Efforts)”, and by inserting at the end [of the first paragraph] the following:

“*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)”;

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking “Supplement to Appendix C” and inserting “USSG App. C”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in

Note 2(A)(i) by striking “as determined under the provisions of § 1B1.2 (Applicable Guidelines) for the offense of conviction” and inserting the following: “specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of § 1B1.2 (Applicable Guidelines)”.

(B) Title References to § 4A1.3

The Commentary to § 2Q1.3 captioned “Application Notes” is amended in Note 8 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to § 2R1.1 captioned “Application Notes” is amended in Note 7 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

Section 4A1.2 is amended in subsections (h) through (j) by striking “Adequacy of Criminal History Category” each place such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to § 4A1.2 captioned “Application Notes” is amended in Notes 6 and 8 by striking “Adequacy of Criminal History Category” both places such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to § 4B1.4 captioned “Background” is amended by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

(C) Clerical Changes

The Commentary to § 1B1.13 captioned “Application Notes” is amended in Note 4 by striking “factors set forth 18 U.S.C. 3553(a)” and inserting “factors set forth in 18 U.S.C. 3553(a)”.

Section 2D1.11 is amended in subsection (d)(6) by striking “Pseudoephedrine” and inserting “Pseudoephedrine”;

and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

The Commentary to § 2M2.1 captioned “Statutory Provisions” is amended by striking “§ 2153” and inserting “§§ 2153”, and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to § 2Q1.1 captioned “Statutory Provisions” is amended by striking “42 U.S.C. 6928(e)” and inserting “42 U.S.C. 6928(e), 7413(c)(5)”, and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to § 2Q1.2 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to § 2Q1.3 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

Section 5D1.3(a)(4) is amended by striking “release on probation” and inserting “release on supervised release”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 371 by rearranging the guidelines to place them in proper order, and in the line referencing 18 U.S.C. 1591 by rearranging the guidelines to place them in proper order.

[FR Doc. 2016–30493 Filed 12–16–16; 8:45 am]

BILLING CODE 2210–40–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Request for public comment.

SUMMARY: In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH–018 and AM–2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See 81 FR 58004 (Aug. 24, 2016). As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the United States Sentencing Commission is publishing this issue for comment to inform the Commission’s consideration of the issues related to this policy priority. The issue for comment is set forth in the Supplementary Information portion of this notice.

DATES: Public comment regarding the issue for comment set forth in this notice should be received by the Commission not later than March 10, 2017.

ADDRESSES: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public Comment@ussc.gov*. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502–4500, *pubaffairs@ussc.gov*.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH–018 and AM–2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See 81 FR 58004 (Aug. 24, 2016). The Commission intends that this study will be conducted over a two-year period and will solicit input, several times during this period, from experts and other members of the public. The Commission further intends that in the amendment cycle ending May 1, 2018, it may, if appropriate, publish a proposed amendment as a result of the study.

MDMA, Synthetic Cathinones, and Synthetic Cannabinoids.—As part of the study related to this policy priority, the Commission intends to examine offenses involving the following controlled substances:

- *Synthetic Cathinones*
- MDPV (Methylenedioxypropylvalerone)
- Methylone (3,4-Methylenedioxy-N-Methylcathinone)
- Mephedrone (4-Methylmethcathinone (4–MMC))
- *Synthetic Cannabinoids*
- JWH-018 (1-Pentyl-1-3-1-(1-Naphthoyl)Indole)
- AM-2201 (1-(5-Fluoropentyl)-3-(1-Naphthoyl)Indole)
- *MDMA/Ecstasy (3,4-Methylenedioxy-Methamphetamine)*

The synthetic cathinones and synthetic cannabinoids listed above are Schedule I controlled substances that are not currently referenced at § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

MDPV, methylone, and mephedrone, are synthetic cathinones. According to the National Institute on Drug Abuse, synthetic cathinones, also known as “bath salts,” are man-made substances related to cathinone, a stimulant found in the khat plant. See National Institute on Drug Abuse, DrugFacts: Synthetic Cathinones (“Bath Salts”) (Revised January 2016) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts>.

JWH-018 and AM-2201 are synthetic cannabinoids, sometimes referred to as “Spice” or “K2.” These substances are also man-made and, in liquid form, can be sprayed on shredded plant material so they can be smoked. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids>.

MDMA is a synthetic drug that alters the user’s mood and perception of surrounding objects and conditions. MDMA, also known as “ecstasy” or “molly,” is both a stimulant and hallucinogen, and is typically taken in tablet or capsule form. See National Institute of Drug Abuse, DrugFacts: MDMA (Ecstasy/Molly) (Revised October 2016) available at <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-molly>.

Guidelines Penalty Structure.—When a drug trafficking offense involves a controlled substance not specifically referenced in the guidelines, the Commentary to § 2D1.1 instructs the court to “determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in [§ 2D1.1].” See USSG § 2D1.1, comment. (n.6). The guidelines establish a three-step process for making this determination. See USSG § 2D1.1, comment. (n.6, 8).

First, courts must determine the most closely related controlled substance by considering the following factors to the extent practicable:

(A) Whether the controlled substance not referenced in § 2D1.1 has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in § 2D1.1 has a stimulant, depressant, or hallucinogenic

effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in § 2D1.1 is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

Once the most closely related controlled substance is determined, the next step is to refer to the marijuana equivalency from the Drug Equivalency Tables at Application Note 8(D) for the most closely related controlled substance to convert the quantity of controlled substance in the offense into its equivalent quantity of marijuana. The final step is to find the equivalent quantity of marijuana in the Drug Quantity Table at § 2D1.1(c) and use the corresponding offense level as the base offense level of the controlled substance involved in the offense.

For example, in cases involving methylone, Commission data indicates that in fiscal year 2015, the courts always identified MDMA as its most closely related controlled substance. The marijuana equivalency of MDMA is 1 gm MDMA = 500 gm marijuana. Pursuant to the Drug Equivalency Tables, when sentencing methylone offenders, this is the equivalency to be used. Thus, if an offender is accountable for 50 grams of methylone, the base offense level at § 2D1.1 would be determined by multiplying the 50 grams by 500 grams of marijuana. The resulting equivalency of 25,000 grams of marijuana provides for a base offense level 16.

In recent years, the Commission has received comment from the public suggesting that questions regarding “the most closely related controlled substance” require courts to hold extensive hearings. In addition, the Commission has heard that courts have identified different controlled substances as the “most closely related controlled substance” to the synthetic cathinones and synthetic cannabinoids included in the Commission’s study and, in some cases, adjusted the marijuana equivalency to account for perceived differences between the “most closely related controlled substance” and the controlled substance involved in the offense. Both outcomes may result in sentencing disparities among similarly situated defendants. To possibly alleviate these issues, one possible outcome of the Commission’s study may be to establish marijuana

equivalencies for each of the synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201). The Commission decided to include MDMA in its study because courts have identified MDMA as the most closely related controlled substance referenced in § 2D1.1 to methylone.

Issue for Comment.—In determining the marijuana equivalencies for specific controlled substances, the Commission has considered, among other things, the chemical structure, the pharmacological effects, the legislative and scheduling history, potential for addiction and abuse, the pattern of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The Commission invites general comment on any or all of these factors as they relate to the Commission’s study of synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201).

The Commission further seeks broad comment on offenses involving synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201), and the offenders involved in such offenses. What is the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses? How these offenses and offenders compare with other drug offenses and drug offenders? How are these substances manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities?

Which of the controlled substances currently referenced in § 2D1.1 should be identified as the “most closely related controlled substance” to any of the synthetic cathinones and synthetic cannabinoids included in the Commission’s study? To what extent does the synthetic cathinone or synthetic cannabinoid differ from its “most closely related controlled substance”?

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.4.

Patti B. Saris,

Chair.

[FR Doc. 2016–30490 Filed 12–16–16; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS**Rehabilitation Research and Development Service Scientific Merit Review Board; Notice of Meetings**

The Department of Veterans Affairs (VA) gives notice under the Federal

Advisory Committee Act, 5 U.S.C. App. 2 that the subcommittees of the Rehabilitation Research and Development Service Scientific Merit Review Board will meet from 8:00 a.m. to 5:00 p.m. on the dates indicated below:

Subcommittee	Date(s)	Location
Psychological Health & Social Reintegration	February 28, 2017	VHA National Conference Center.
Rehabilitation Engineering & Prosthetics/Orthotics	February 28, 2017	VHA National Conference Center.
Sensory Systems/Communication Disorders	February 28, 2017	VHA National Conference Center.
Spinal Cord Injury	February 28, 2017	VHA National Conference Center.
Regenerative Medicine	March 1, 2017	VHA National Conference Center.
Career Development Award Program	March 1–2, 2017	VHA National Conference Center.
Musculoskeletal/Orthopedic	March 1–2, 2017	VHA National Conference Center.
Aging & Neurodegenerative Disease	March 2, 2017	VHA National Conference Center.
Brain Injury: TBI & Stroke	March 2–3, 2017	VHA National Conference Center.
VA–ORD Historically Black College and University Research Scientist Training Program.	March 3, 2017	*VA Central Office.

The addresses of the meeting sites are: (*Teleconference). VA Central Office, 1100 First Street NE., Washington, DC 20002. VHA National Conference Center, 2011 Crystal Drive, Arlington, VA 22202.

The purpose of the Board is to review rehabilitation research and development applications and advise the Director, Rehabilitation Research and Development Service, and the Chief Research and Development Officer on the scientific and technical merit, the mission relevance, and the protection of human and animal subjects.

The subcommittee meetings will be open to the public for approximately one-half hour at the start of each meeting to cover administrative matters and to discuss the general status of the program. Members of the public who wish to attend the open portion of the

teleconference sessions may dial (800) 767–1750, participant code 35847. The remaining portion of each subcommittee meeting will be closed to the public for the discussion, examination, reference to, and oral review of the research applications and critiques. During the closed portion of each subcommittee meeting, discussion and recommendations will include qualifications of the personnel conducting the studies (the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would likely compromise significantly the implementation of proposed agency action regarding such research projects). As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the meeting

is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

No oral or written comments will be accepted from the public for either portion of the meetings. Those who plan to attend the open portion of a subcommittee meeting should contact Ms. Tiffany Asqueri, Designated Federal Officer, Rehabilitation Research and Development Service, at Department of Veterans Affairs (10P9R), 810 Vermont Avenue NW., Washington, DC, 20420, or by email at tiffany.asqueri@va.gov at least 5 days before the meeting. For further information, please call Mrs. Asqueri at (202) 443–5757.

Dated: December 13, 2016.

LaTonya L. Small,

Advisory Committee Management Officer.

[FR Doc. 2016–30367 Filed 12–16–16; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Labor

Employment and Training Administration

29 CFR Parts 29 and 30

Apprenticeship Programs; Equal Employment Opportunity; Final Rule

DEPARTMENT OF LABOR**Employment and Training Administration****29 CFR Parts 29 and 30**

RIN 1205-AB59

Apprenticeship Programs; Equal Employment Opportunity**AGENCY:** Employment and Training Administration, Labor.**ACTION:** Final rule.

SUMMARY: The U.S. Department of Labor (DOL or Department) is issuing this rule to modernize the equal employment opportunity regulations that implement the National Apprenticeship Act of 1937. The existing regulations prohibit discrimination in registered apprenticeship on the basis of race, color, religion, national origin, and sex, and require that sponsors of registered apprenticeship programs take affirmative action to provide equal opportunity in such programs. This rule updates equal opportunity standards in part 30 to include age (40 or older), genetic information, sexual orientation, and disability among the list of protected bases upon which a sponsor must not discriminate; improves and clarifies the affirmative action provisions for sponsors by detailing with specificity the actions a sponsor must take to satisfy its affirmative action obligations, including affirmative action for individuals with disabilities; revises regulations to reflect changes made in October 2008 to Labor Standards for Registration of Apprenticeship Programs, the companion regulations governing the conduct of registered apprenticeship programs; and improves the overall readability of part 30 through restructuring and clarification of the text. Wherever possible, this final rule has attempted to streamline and simplify sponsors' obligations, while maintaining broad and effective equal employment opportunity protections for apprentices and those seeking entry into apprenticeship programs. The policies and procedures of this rule promote equality of opportunity in apprenticeship programs registered with the Department and in apprenticeship programs registered with federally recognized state apprenticeship agencies.

DATES: *Effective date:* These regulations are effective January 18, 2017.

Compliance date: Several sections in the final regulation pertaining to equal employment and affirmative action violations specify extended periods

beyond the effective date for sponsors to come into compliance with the rule. They are listed below, and described in more detail in the Section-by-Section Analysis and regulatory text. Unless otherwise indicated, sponsors must comply with the provisions of this regulation on the effective date:

- 180 days after effective date: Obligations under § 30.3
- 2 years after effective date (or 2 years after registration, for sponsors registered after the effective date): Obligations under §§ 30.4(e), 30.5(b), 30.7(d)(2), 30.9, and 30.11
- At first compliance review after effective date: §§ 30.5(c), 30.6

FOR FURTHER INFORMATION CONTACT: John Ladd, Administrator, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-5641, Washington, DC 20210, oa.administrator@dol.gov, (202) 693-2796 (this is not a toll-free number). Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**Statement of Legal Authority and Background Information**

The National Apprenticeship Act of 1937 authorizes the Department to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices.¹ The responsibility for formulating and promoting these labor standards within the Department lies with the Employment and Training Administration's (ETA) Office of Apprenticeship (OA). As part of its duties, OA registers apprenticeship programs that meet certain minimum labor standards. These standards, set forth at 29 CFR parts 29 and 30, are intended to provide for more uniform training of apprentices and to promote equal opportunity in apprenticeship.

The regulations at 29 CFR part 29 implement the National Apprenticeship Act by setting forth labor standards that safeguard the welfare of apprentices, including: Prescribing policies and procedures concerning the registration, cancellation, and deregistration of apprenticeship programs; the recognition of State Apprenticeship Agencies (SAA) as Registration Agencies; and matters relating thereto. On October 29, 2008, the Department published an amended part 29 to

provide a framework that supports an enhanced, modernized apprenticeship system.²

Part 30 implements the National Apprenticeship Act by requiring registered apprenticeship program sponsors to provide equal opportunity for participation in their registered apprenticeship programs, and by protecting apprentices and applicants for apprenticeship from discrimination on certain protected bases. In addition, part 30 also requires that sponsors of registered apprenticeship programs take affirmative action to provide equal employment opportunity in such programs.

The Department first published part 30 on December 18, 1963, by order of the President that the Secretary of Labor, in implementing the National Apprenticeship Act and Executive Order 10925, require that the admission of young workers to apprenticeship programs be on a completely nondiscriminatory basis.³ At that time, the regulations prohibited discrimination based on race, color, religion, and national origin. Nondiscrimination on the basis of sex was added in 1971, as was the requirement for sponsors with five or more apprentices to develop and implement a written affirmative action plan (written AAP) for minorities.⁴ In 1978, the Department amended these regulations to require inclusion of female apprentices in written AAPs.⁵ This rule represents the first changes to these regulations since 1978.

Apprenticeship is an earn-and-learn strategy combining on-the-job training with related technical (classroom) instruction, blending the practical and theoretical aspects of training for highly-skilled occupations. Apprenticeship programs are sponsored voluntarily by a wide range of organizations, including individual employers, employer associations, joint labor-management organizations, and other workforce intermediaries. As of the close of Fiscal Year 2015, there were about 21,000 program sponsors representing about 200,000 employers that offer registered apprenticeship training to more than 455,000 apprentices.⁶

Registered apprenticeship is a voluntary national system under which the vast majority of program sponsors enter into agreements with their

² 73 FR 64402. These regulations can be accessed on OA's Web site at: <http://www.doleta.gov/oa/pdf/FinalRule29CFRPart29.pdf>.

³ 28 FR 13775.

⁴ 36 FR 6810, Apr. 8, 1971.

⁵ 43 FR 20760, May 12, 1978.

⁶ Fiscal Year (FY) 2015 national results available at http://doleta.gov/oa/data_statistics.cfm

Registration Agencies without direct funding. Potential apprenticeship sponsors deciding whether or not to register their programs weigh the net benefits derived from meeting state and national standards for registration.

There are numerous benefits to registering an apprenticeship program with the Department or an SAA. For the business sponsor, registration provides a structure and framework for developing skilled workers critical to a company's success, and connection to industry, education, and government resources for on-going management of the program and adaptation of new technologies and practices. For example, registered apprenticeships are automatically eligible to be listed as Eligible Training Providers within the workforce development system, the only such training model to have such treatment. Also, Federal government grants for apprenticeships are available to registered programs only. There are also economic incentives for apprenticeship employers in terms of the wage rates that apply to apprentices for work on projects covered by the Davis-Bacon Act and related Acts. For apprentices, registered apprenticeship comes with education and training without the high costs of a 4-year college education, and a nationally-recognized credential upon completion. American communities benefit from enhanced systems to develop skilled workers in high paying occupations through collaborative partnerships of education, industry, and government, working together and supporting quality training programs.

OA oversees the National Apprenticeship System. OA serves as the Registration Agency, and its staff members are directly responsible for, registered apprenticeship activities in 25 States. It also provides technical assistance and oversight to 25 SAAs in the other 25 States, in the District of Columbia, the Virgin Islands, and Guam. In these "SAA States," the SAA has requested and received recognition from the Secretary of Labor to serve as the entity authorized to register and oversee State and local apprenticeship programs for Federal purposes. Therefore, in SAA States, the SAA, in accordance with Federal regulations, serves as the Registration Agency and has responsibility for registering apprenticeship activities for Federal purposes.

Apprenticeship programs appear in traditional industries, such as construction (which has historically trained the majority of apprentices) and manufacturing, as well as in new and emerging industries, such as health care, information and communications

technology, transportation and logistics, and energy, which are projected to add substantial numbers of new jobs to the economy.

Apprenticeship has become increasingly attractive to workforce policy-makers in the U.S., and more in focus after witnessing the expansive growth in apprenticeship in some of our closest allies, such as the United Kingdom, Canada, and Australia. U.S. policy-makers have studied these countries as well as several other European countries, such as Germany, Switzerland, and Austria, where apprenticeships have been ingrained in the culture for centuries and train large percentages of their workforce. The United States Departments of Labor, Commerce, and Education have signed Joint Declarations of Intent to cooperate on workforce training with both Germany⁷ and Switzerland;⁸ apprenticeship systems and strategies are featured in both of these Joint Declarations.

In light of favorable policy research and the increased business demand for high-quality workforce skills and competencies, the Department substantially increased its investments in Registered Apprenticeship in recent years.⁹ The Department's new initiative, ApprenticeshipUSA, seeks to advance apprenticeship and build a strong pipeline of skilled workers, critical for companies to grow their business and compete in the global economy. The ApprenticeshipUSA initiative is stepping up efforts to expand apprenticeship into high-growth industries and to support a uniquely American apprenticeship system. The Department is lifting the image and quality of Registered Apprenticeship throughout the nation, and broadening its scope of training and development activities into an array of diverse industries and occupations.

Through ApprenticeshipUSA, the Department has taken steps to focus on

⁷ Joint Declaration of Intent between the U.S. and the Federal Republic of Germany signed June 5, 2015 [https://www.dol.gov/ilab/diplomacy/Signed%20US-Germany%20JDoI%20\(English\).pdf](https://www.dol.gov/ilab/diplomacy/Signed%20US-Germany%20JDoI%20(English).pdf).

⁸ Joint Declaration of Intent between the U.S. and the Swiss Confederation signed July 7-9, 2015 <https://www.dol.gov/ilab/diplomacy/Switzerland-JDoI.pdf>.

⁹ The Department awarded \$175 million in American Apprenticeship Grants in September 2015. See <https://www.dol.gov/opa/media/press/eta/ETA20151762.htm>. Congress also issued a supplemental appropriation of \$90 million to OA in Fiscal Year 2016, which OA is using for new investments through ApprenticeshipUSA to expand apprenticeship in the United States. See <https://www.whitehouse.gov/the-press-office/2016/04/21/fact-sheet-investing-90-million-through-apprenticeshipusa-expanded-proven> (last accessed June 22, 2016).

sector-based and industry engagement in expansion efforts, such as promoting business engagement in the Leaders of Excellence in Apprenticeship Development, Education, and Research (LEADERS) and the Sectors of Excellence in Apprenticeship (SEAs) initiatives, designed to expand the number of employers training apprentices, to increase program quality, and to build pipelines of diverse populations into apprenticeship.

As apprenticeship expands in the U.S., the Department remains committed to long-standing principles of equal employment opportunity to ensure that this expansion draws from and benefits the entire American workforce, providing more Americans a path to good jobs and careers with living wages that apprenticeships offer, in line with the Administration's commitment to double and diversify apprenticeship. The Department is also committed to using these new initiatives and available resources, in conjunction with business, industry, and community partners, to collaborate and build new pipelines into apprenticeship programs, with diversity as a cornerstone of growth in our expansion efforts.

Increasing diversity in apprenticeship will further the goals and demonstrate support of the President's Administration's My Brother's Keeper¹⁰ (MBK) Task Force, a coordinated Federal effort to address persistent opportunity gaps faced by boys and young men of color and ensure that all young people can reach their full potential. This rule also builds upon programs such as the Women in Apprenticeship and Nontraditional Occupations (WANTO)¹¹ initiative, which provides technical assistance to improve outreach, recruitment, hiring, training, employment, and retention of women, including women of color and women with disabilities. The Department has additionally provided support for diversity in apprenticeship through the 2015 American Apprenticeship Initiative grant that supported programs with a focus upon including underrepresented populations, including women, people of color, and individuals with disabilities.

Building a sustained effort to ensure that the benefits apprenticeship programs provide are broadly available to all is a key goal of these revised regulations. The history, demographic

¹⁰ My Brother's Keeper initiative was announced by President Barack Obama on February 27, 2014, <https://www.whitehouse.gov/my-brothers-keeper> (last accessed May 11, 2016).

¹¹ The WANTO Act of 1992, Public Law 102-530, 29 U.S.C. 2501 *et seq.*

patterns, and documented experiences in apprenticeships of members of certain underrepresented groups demonstrate the continuing obstacles to the full participation of these groups in registered apprenticeship programs.

In evaluating the need for this rule, OA analyzed participant demographics in apprenticeship programs in construction and non-construction industries and the demographics of the national labor force. OA reviewed apprenticeship data from OA’s Registered Apprenticeship Partners Information Data System (RAPIDS)¹² and analyzed national labor force data from the Current Population Survey (CPS). Using the data from these sources to compare the demographic characteristics of the national workforce to the demographics of individuals enrolled in apprenticeships makes clear that notable disparities exist in apprenticeship participation and completion.

¹² RAPIDS includes individual, apprentice-level data from the 25 states in which OA is the Registration Agency and from the nine SAA states that have chosen to participate. However, unless otherwise stated, the tables and discussions of RAPIDS data are limited to the apprentice data managed by OA staff. The analysis excludes apprentice data maintained by State Apprenticeship Agencies, including those that participate in the RAPIDS database, since the majority of the SAA states provide limited aggregated information which does not lend itself to detailed statistical analysis of demographic characteristics. Given the unique structure of the Registered Apprenticeship system, OA believes that data managed by OA staff is an acceptable proxy for the nation as a whole, because this individual record dataset contains 62 percent of the total active apprentices nationwide (excluding active military members—USMAP). It should be noted that the United Services Military Apprenticeship Program (USMAP) serves approximately 21 percent of all U.S. apprentices.

The comparisons made here between the demographics of the apprenticeship workforce and the demographics of the national labor force are made because using national-level data allows for the use of certain data breakdowns—such as looking at racial shares of the workforce of a particular level of educational attainment—that would not be possible to do using readily available public state-level data. The 25 states from which the RAPIDS data are drawn are, however, broadly demographically representative of the United States as a whole, and using aggregated data from only these 25 states would not have substantially impacted these comparisons. Looking at all participants in the labor force in calendar year 2015 over age 16, the shares that are women (46.8 percent) and Black or African American (12.3 percent) in the national labor force are not significantly different than the shares that are women and Black or African American in these 25 states (46.2 percent and 11.8 percent respectively), while the share of these states’ labor forces that is Hispanic (19.7 percent) is actually somewhat higher than the share of the national labor force that is Hispanic (16.6 percent). Consequently, had aggregated state-level data from these 25 states been used instead of the national-level data, the disparities illustrated below would have likely looked largely identical or even slightly more substantial in the case of Hispanic workers.

As described in more detail below, these data and other available analyses indicate that certain groups continue to face substantial barriers to entry into and, for some groups, completion of registered apprenticeships. These barriers result in the following:

- Lower than expected enrollment rates in registered apprenticeships among women and specific minority groups;
- To the extent that women and minorities participate in registered apprenticeships, concentration of these groups in apprenticeships for lower-paying occupations; and
- Significantly lower apprenticeship completion rates among specific minority groups and lower construction apprenticeship completion rates among minority groups and women.

It should also be noted that OA lacks data on the apprenticeship experiences of individuals with disabilities, which complicates efforts both to measure the challenges faced by this group and to address the disparities in access and participation that are likely to exist given the disparities faced by these individuals in the labor force more broadly.

Women in Registered Apprenticeships

In general, women’s enrollment in registered apprenticeship programs is significantly lower than would be expected based on labor market data. This disparity exists in comparison to the number of men in registered apprenticeships and also in comparison to the number of women in the wider civilian labor force. As shown in Table 1, in FY2015 the national labor force was 53.2 percent male and 46.8 percent female, and even when looking only at the labor force lacking a college degree—those workers most likely to participate in apprenticeship programs—the labor force was still 43.0 percent female.¹³

¹³ All figures derived from CPS data. Those participants in the labor force lacking a college degree consist of those with no high school diploma, those that completed high school but did not attend college, and those that attended some college but did not receive an associate’s degree or bachelor’s degree. Note that the Bureau of Labor Statistics only publishes educational attainment labor force statistics for individuals age 25 and over. Consequently, while the overall labor force shares presented in the Table 1 are for all individuals age 16 and above, the shares of labor force participants lacking a college degree are for individuals age 25 and above. While this means that the comparison between the latter set of figures and the apprenticeship workforce is not perfect given that many apprentices are below age 25, it nevertheless provides valuable insight into how the composition of the apprenticeship workforce compares to a group of workers of which they already are, or are likely to, become a part.

TABLE 1—MALE AND FEMALE SHARES OF NATIONAL LABOR FORCE IN FY2015

	Share of labor force (%)	Share of labor force with no college degree (%)
Men	53.2	57.0
Women	46.8	43.0

Source: Current Population Survey.

Yet, as Table 2 illustrates, in the last decade, on average, women comprised only 7.1 percent of all new enrollments in registered apprenticeships, whereas men accounted for 92.9 percent. Additionally, while the share of newly enrolled apprentices that are women has fluctuated up and down by small margins over this period, overall no noticeable progress has been made, and the share of newly enrolled apprentices in FY2015 that were women is identical to the share in FY2006 that were women.

TABLE 2—NEW ENROLLMENTS IN REGISTERED APPRENTICESHIP BY SEX AND FISCAL YEAR, ALL INDUSTRIES

Fiscal year	Female (%)	Male (%)
2006	7.1	92.9
2007	6.1	93.9
2008	6.7	93.3
2009	7.8	92.2
2010	8.3	91.7
2011	6.7	93.3
2012	7.5	92.5
2013	6.7	93.3
2014	6.7	93.3
2015	7.1	92.9
10 Year Average	7.1	92.9
CPS Share of Labor Force (FY2015)	46.8	53.2

Source: Query of RAPIDS database—May 2016.

Additionally, when looking at the 50 occupations with the largest number of apprenticeships, it becomes clear that women who are participating in the largest apprenticeship programs are disproportionately ending up in lower-paying occupations.¹⁴ As shown in Table 3 below, while women account for 9.6 percent of the enrollments in apprenticeship programs in the lowest paying apprenticeable occupations, they make up only 2.2 percent of enrollments in apprenticeship programs in the highest paying apprenticeable occupations. Also illustrative of this fact

¹⁴ Note that these 50 occupations accounted for 82.6 percent of all apprentices in the RAPIDS database as of September 2015.

is that while the 16 occupations comprising the lowest-paid tier of these 50 occupations account for only just over one-fifth of total apprenticeship enrollments, they account for nearly half of female enrollments.¹⁵

TABLE 3—REPRESENTATION OF WOMEN IN REGISTERED APPRENTICESHIP IN TOP 50 (MOST POPULOUS) APPRENTICEABLE OCCUPATIONS IN FY2015

Category	Example job titles in the tier	Mean hourly wage	Women's share of enrollments (%)
Highest Paid Occupations Tier (17 occupations)	Electrician, Pipe Fitter, Plumber, Telecommunications Technician.	\$28.04	2.2
Intermediate Paid Occupations Tier (17 occupations)	Firefighter, Carpenter, Sheet Metal Worker, Glazier, Floor Layer.	22.70	4.3
Lowest Paid Occupations Tier (16 occupations)	Truck Driver, Roofer, Painter, Housekeeper, Cook, Child Care Development Specialist.	17.16	9.6

Source: Query of RAPIDS database—May 2016; Bureau of Labor Statistics May 2015 National Occupational Employment and Wage Estimates.

When analyzing the distribution of female apprentices on an industry basis, more pronounced disparities become apparent. As seen in Table 4 below, of the 20 major industries in which apprenticeship programs exist, women's share of apprenticeship enrollments is only greater than or equal to their share of the national labor force in three industries and greater than their share of

the national labor force without a college degree in four industries (Healthcare and Social Assistance, Retail Trade, Finance and Insurance, and Warehousing). Among the top five industries by total apprenticeship enrollments (the first five industries shown in the Table 4), women's share of enrollments is no more than 11.6 percent. While there are many reasons

that these apprenticeship enrollment rates do not equal the share of the labor force that is women or the share of the labor force without a college degree that is women, the magnitudes of the disparities present clearly indicate the presence of significant inequities in access and participation.

TABLE 4—NEW ENROLLMENTS IN REGISTERED APPRENTICESHIP BY SEX AND INDUSTRY IN FY2015

Industry	Total enrollments	Female share (%)
Construction ¹⁶	165,291	2.8
Public Administration	19,579	11.6
Manufacturing	17,154	8.0
Utilities	8,389	1.7
Transportation	4,951	5.9
Health Care and Social Assistance	2,274	71.2
Retail Trade	1,782	72.0
Education	1,755	17.1
Other Services, except Public Administration	1,658	15.6
Wholesale Trade	1,529	9.2
Administrative and Support and Waste Management and Remediation Services	959	18.6
Accommodation and Food Services	701	36.2
Agriculture, Forestry, Fishing and Hunting	701	8.0
Information	673	12.5
Professional, Scientific, and Technical Services	270	20.0
Mining, Quarrying, and Oil and Gas Extraction	225	3.1
Finance and Insurance	146	46.6
Arts, Entertainment, and Recreation	43	37.2
Real Estate and Rental and Leasing	43	7.0
Warehousing	41	58.5

Source: Query of RAPIDS database—May 2016.

Disparities between male and female enrollment rates are particularly dramatic in the construction industry, where over 70 percent of apprentices were enrolled in FY2015.¹⁷ That year, only 2.8 percent of enrollments were women, the second lowest female

enrollment rate among all industries, trailing only the Utilities industry (1.7 percent). While historical and ongoing discrimination are not the sole explanations for this, the magnitude of the disparities seen in the data, along with several studies of the construction

industry and the anecdotal experience of the women working in the industry who submitted comments to the proposed rule, suggest that

¹⁵ Analysis of RAPIDS data from May 2016 query of RAPIDS database and BLS 2015 National Occupational Employment and Wage Estimates.

¹⁶ Joint apprenticeship training committees (JATCs) have been removed from the Education industry category and included in the Construction industry category.

¹⁷ Joint apprenticeship training committees (JATCs) have been removed from the Education industry category and included in the Construction industry category.

discrimination remains a significant factor.¹⁸

In the proposed rule, the Department stated that the construction trades have traditionally used informal networks and referrals and word of mouth to recruit for open apprenticeships. While we recognize, in response to comments submitted, that significant progress has been made in wider recruitment for apprenticeships and in opening these networks, historical barriers linger. Personal introductions and recommendations (as well as nepotism in the past) continue to be significant factors in selection for construction apprenticeships and work, and many potential female apprentices are not even be aware of the apprenticeship and job opportunities available.¹⁹ The

problem of underrepresentation then perpetuates itself; because women have historically been underrepresented in construction apprenticeships and jobs, many of them may not have access to the interpersonal relationships and informal networks necessary to receive information concerning these opportunities and be selected for them.²⁰ Barriers remain even after women gain entry into these programs. Several women submitted comments recounting discrimination they faced during registered apprenticeship programs, such as being assigned more arduous tasks than male counterparts or otherwise being required to work harder than male counterparts to receive equivalent recognition, being given less skilled and meaningful tasks than male

counterparts, being given fewer hours than male counterparts, and seeing men with less skill promoted ahead of them. Several female commenters described incidents of sexual harassment and retaliation that they experienced during their apprenticeships or while working in the trades.

In addition to low enrollment rates, women complete apprenticeships in the construction industry at lower rates than men. As shown in Table 5 below, while across all industries women complete apprenticeships at a higher rate (50.9 percent) than do men (42.0 percent), within the construction industry women completed apprenticeships at a rate of only 36.5 percent compared to 40.6 percent for men.

TABLE 5—APPRENTICESHIP COMPLETION RATES IN FY2015 BY SEX

FY2015 completion rates ²¹				
	Completions (all industries)	Completion rate (all industries)	Completions (construction)	Completion rate (construction) (%)
Male	23,763	42.0	11,685	40.6
Female	2,248	50.9	271	36.5

Source: Query of RAPIDS database—June 2016.

These disparities can be addressed, however, and evidence illustrates that women do participate and succeed in apprenticeship programs at higher levels when provided equal opportunity and support. The state of Oregon, for example, has been proactively working to increase diversity in its highway construction workforce since 2009 by providing potential highway construction workers with a variety of supports to help them complete relevant apprenticeships. The state’s Highway Construction Workforce Development Program (WDP) provides pre-apprenticeship programs, support services including childcare and transportation subsidies, and mentoring

and retention services to help apprentices gain the training and credentials they need, with a particular emphasis on serving female and minority candidates.²² A 2014 poll of apprentices by WDP found that 80 percent of female active apprentices reported that WDP supports allowed them to take a job they would not otherwise have been able to take, and completion rates for female apprentices who received financial services from the WDP were significantly higher than those who did not receive any services (60.9 percent versus 31.5 percent).²³ Between 2005 and 2013, the share of all heavy highway construction apprentices in Oregon that were female apprentices

or apprentices of color increased from 16.5 percent to 26.9 percent, with the program likely playing a significant role in more recent years.²⁴

Examples such as that seen in Oregon demonstrate that progress can be made in improving women’s participation and success in apprenticeship programs when doing so is made a priority. Making sure that women are aware of the apprenticeship opportunities available to them, that they receive equal opportunities to participate in those apprenticeship programs, and that they receive the same quality of training and mentorship in those programs are all critical to closing the significant utilization gaps we see today.

¹⁸ See, e.g., Permanent Commission on the Status of Women, “Pre-Apprenticeship Construction Training Manual for Women.” Hartford, CT, (2007); Byrd, B., “Women in Carpentry Apprenticeship: A Case Study,” 24 *Labor Studies Journal*, at 8 (Fall 1999); Ericksen, J., and Palladino Schultheiss D., “Women Pursuing Careers in Trades and Construction,” 36 *Journal of Career Development* at 69–70 (September 2009); Moir, S., Thomson, M., and Kelleher, C., “Unfinished Business: Building Equality for Women in the Construction Trades.” *Labor Resource Center Publications*. Paper 5 at 10–12 (2011); and “Women in the Construction Workplace: Providing Equitable Safety and Health Protection,” Health and Safety of Women in Construction (HASWIC) Workgroup, Advisory Committee on Construction Safety and Health (ACSSH), submitted to Occupational Safety and Health Administration (OSHA), Department of Labor (June 1999).

¹⁹ See, e.g., Bilginsoy, C., “The Hazards of Training: Attrition and Retention in Construction Industry Apprenticeship Programs,” 57 *Industrial & Labor Relations Review*, at 54–67 (Oct. 2003); Byrd, B., “Women in Carpentry Apprenticeship: A Case Study,” 24 *Labor Studies Journal*, at 8–10 (Fall 1999); National Women’s Law Center, “Women in Construction Still Breaking Ground,” (2014), available at http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf.

²⁰ Bilginsoy, C., “The Hazards of Training: Attrition and Retention in Construction Industry Apprenticeship Programs,” 57 *Industrial & Labor Relations Review*, at 54–67, at 65 (Oct. 2003).

Additionally, the author of a study on women in carpentry apprenticeships suggests that apprenticeship programs in construction need to make a concerted effort to recruit females if they want to increase the number of female applicants. Byrd, B., “Women in Carpentry Apprenticeship: A

Case Study,” 24 *Labor Studies Journal*, at 10 (Fall 1999).

²¹ Completion rate means the percentage of an apprenticeship cohort who receives a certificate of apprenticeship completion within 1 year of the expected completion date. For more information see Bulletin FY 2011–07—Program Performance—Calculation of Registered Apprenticeship Program Completion Rates (http://doleta.gov/OA/bul10/Bulletin_2011-07_Completion_Rates.pdf).

²² S. Burd-Sharps, K. Lewis, and M. Kelly, “Building a More Diverse Skilled Workforce in the Highway Trades: Are Oregon’s Current Efforts Working?” available at <http://www.pdx.edu/sociology/sites/www.pdx.edu.sociology/files/Building%20a%20More%20Diverse%20Skilled%20Workforce%20in%20the%20Highway%20Trades%20FINAL%20REPORT.pdf>.

²³ *Id.*

²⁴ *Id.*

Minorities in Apprenticeship

The participation of racial and/or ethnic minorities in apprenticeships has been uneven and varies by group. In FY2015, the “Black or African American” demographic group²⁵ comprised 12.3 percent of the national labor force and 14.1 percent of the labor force without a college degree (see Table 6), but made up 10.0 percent of all apprenticeship enrollments. While those gaps are clearly substantially smaller than those seen among women, focusing only on this broad measure can mask significant underrepresentation of Black or African Americans in particular industries.

TABLE 6—RACIAL AND ETHNIC COMPOSITION OF LABOR FORCE IN FY2015

	Share of labor force (%)	Share of labor force with no college degree (9%)
White	78.8	78.5
Black or African American	12.3	14.1
Other Race	9.0	7.4
Hispanic or Latino ²⁶	16.6	22.7

Source: Current Population Survey.

For example, as can be seen in Table 7, while Black or African Americans were well-represented in apprenticeships in industries such as

Public Administration, Health Care and Social Assistance, and Other Services in FY2015, they comprised only 8.8 percent of apprentice enrollments in Construction, the industry with by far the largest number of apprentices. Black or African Americans also comprised under 10 percent of enrollments in seven other industries, including Utilities; Agriculture, Forestry, Fishing, and Hunting; and Professional, Scientific, and Technical Services among others. These disparities illustrate the uneven manner in which Black and African Americans participate in apprenticeships across industries and also speak to the importance of disaggregating such enrollment data so as to gain a more accurate picture of where and to what extent different groups are being underrepresented.

TABLE 7—NEW ENROLLMENTS IN REGISTERED APPRENTICESHIP BY RACE AND INDUSTRY IN FY2015

Industry	Total enrollments	White share (%)	Black or African American share (%)	Other race share (%)	Unreported race share (%)
Construction ²⁷	165,291	62.4	8.8	7.2	21.5
Public Administration	19,579	62.0	24.4	3.5	10.1
Manufacturing	17,154	68.6	10.4	6.0	15.0
Utilities	8,389	74.5	6.8	4.0	14.6
Transportation	4,951	49.5	11.1	5.2	34.2
Health Care and Social Assistance	2,274	53.2	31.9	3.2	11.7
Retail Trade	1,782	26.3	14.3	3.3	56.2
Education	1,755	49.3	13.2	9.8	27.7
Other Services, except Public Administration	1,658	55.6	29.5	2.8	12.1
Wholesale Trade	1,529	66.8	13.3	2.0	17.8
Administrative and Support and Waste Management and Remediation Services	959	31.0	22.3	8.2	38.5
Accommodation and Food Services	701	68.2	13.0	8.3	10.6
Agriculture, Forestry, Fishing and Hunting	701	67.8	3.0	5.8	23.4
Information	673	56.8	16.2	18.1	8.9
Professional, Scientific, and Technical Services	270	55.6	5.9	21.1	17.4
Mining, Quarrying, and Oil and Gas Extraction	225	37.8	8.4	32.0	21.8
Finance and Insurance	146	67.1	24.7	4.1	4.1
Arts, Entertainment, and Recreation	43	48.8	9.3	14.0	27.9
Real Estate and Rental and Leasing	43	86.0	2.3	2.3	9.3
Warehousing	41	4.9	4.9	0.0	90.2

Source: Query of RAPIDS database—May 2016.

Studies examining apprenticeship data at the occupation level have also presented compelling evidence that Blacks or African Americans are underrepresented in certain

apprenticeable occupations. In an analysis of 2005–2007 ACS data broken down to the occupational level in the construction, extraction, and maintenance sector, researchers found

that Black or African-American men experienced underrepresentation in 81 percent of the 67 precisely-defined occupations that comprise this sector.²⁸

²⁵ We refer herein to “Black or African American” because that is the racial categorization used by the Bureau of Labor Statistics in CPS data, and is in turn used within the definition of “race” in the part 30 regulations. See Bureau of Labor Statistics Glossary, available at <http://www.bls.gov/bls/glossary.htm#R> (last accessed June 24, 2016); 29 CFR 30.2.

²⁶ Note that percentages in this table will not add up to 100 percent due to rounding and because there is overlap between the Hispanic or Latino

ethnic group and the racial groups presented in the table.

²⁷ Joint apprenticeship training committees (JATCs) have been removed from the Education industry category and included in the Construction industry category.

²⁸ The authors also found that across occupations in all sectors examined, Black or African-American men were underrepresented in 49 percent of occupations. To determine whether underrepresentation existed in a particular occupation, the authors compared the share

workers in the occupation that were Black or African American to the share of workers in the occupation that one would have expected to be Black or African American given the proportion of Black or African-American workers that have the education level associated with that occupation. See Hamilton, D, Algernon A., and William D., Jr., “Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wages of Black Men.” Economic Policy Institute, Washington, DC (Feb. 2011).

Examining the distribution of Hispanic apprentices illustrates a similar pattern of uneven participation of workers across industries and points to the existence of significant underrepresentation of Hispanics in a number of industries. In FY2015, Hispanics comprised 20.2 percent of apprenticeship enrollments, which was higher than their share of the national

labor force (16.6 percent) but below their share of the labor force without a college degree (22.7 percent). Looking specifically at industry employment, it can be seen in Table 8 that while Hispanics were relatively well represented in industries such as Education and Wholesale Trade, of the top seven industries by apprenticeship enrollment, Hispanics accounted for

less than 10 percent of enrollees in all but one (Construction). In total, Hispanics accounted for a share of enrollments that was below their share of the national labor force in 13 industries, and accounted for a share of enrollments that was below their share of the labor force without a college degree in 15 industries.

TABLE 8—NEW ENROLLMENTS IN REGISTERED APPRENTICESHIP BY ETHNICITY AND INDUSTRY IN FY2015

Industry	Total enrollments	Hispanic share (%)	Non-Hispanic share (%)	Unreported ethnicity share (%)
Construction ²⁹	165,291	21.2	55.7	23.1
Public Administration	19,579	7.2	46.8	46.0
Manufacturing	17,154	5.6	62.1	32.3
Utilities	8,389	7.2	61.7	31.1
Transportation	4,951	6.4	37.2	56.3
Health Care and Social Assistance	2,274	9.9	58.9	31.1
Retail Trade	1,782	4.7	14.9	80.4
Education	1,755	30.9	47.0	22.1
Other Services, except Public Administration	1,658	10.5	38.9	50.6
Wholesale Trade	1,529	24.0	61.7	14.3
Administrative and Support and Waste Management and Remediation Services	959	8.4	36.6	55.0
Accommodation and Food Services	701	8.1	47.9	43.9
Agriculture, Forestry, Fishing and Hunting	701	23.7	33.7	42.7
Information	673	22.1	44.7	33.1
Professional, Scientific, and Technical Services	270	7.4	55.6	37.0
Mining, Quarrying, and Oil and Gas Extraction	225	24.0	50.2	25.8
Finance and Insurance	146	2.1	87.7	10.3
Arts, Entertainment, and Recreation	43	23.3	58.1	18.6
Real Estate and Rental and Leasing	43	0.0	55.8	44.2
Warehousing	41	7.3	2.4	90.2

Source: Query of RAPIDS database—May 2016.

Further, minority groups tend to be more concentrated in apprenticeships for lower-paying occupations than are apprentices as a whole. RAPIDS data for the 50 occupations with the largest numbers of apprentices show that both Black or African-American enrollees and Hispanic enrollees in apprenticeship programs make up higher shares of apprentices in low-

wage occupations than of apprentices in high-wage occupations. As seen below in Table 9, while Black or African Americans comprise 17.3 percent of enrollees in the lowest-paid occupation tier, they account for only 7.8 percent of enrollees in the highest-paid tier, and while Hispanics comprise 22.4 percent of enrollees in the lowest-paid occupation tier, they account for only

15.6 percent of enrollees in the highest-paid tier. Further illustrating this point is that while enrollments in the bottom wage tier account for 21.2 percent of total apprenticeship enrollments among these 50 occupations, they account for 35.8 percent of Black or African American enrollments and 25.3 percent of Hispanic enrollments.

TABLE 9—REPRESENTATION BY RACE IN 50 MOST POPULOUS APPRENTICEABLE OCCUPATIONS FY2015 [RAPIDS data]

Category	Example job titles in the tier	Mean hourly wage	Black or African American share of enrollments (%)	Hispanic share of enrollments (%)
Highest Paid Occupations Tier (17 Occupations).	Electrician, Pipe Fitter, Plumber, Telecommunications Technician.	\$28.04	7.8	15.6
Intermediate Paid Occupations Tier (17 Occupations).	Firefighter, Carpenter, Sheet Metal Worker, Glazier, Floor Layer.	22.70	9.5	22.1

²⁹ Joint apprenticeship training committees (JATCs) have been removed from the Education

industry category and included in the Construction industry category.

TABLE 9—REPRESENTATION BY RACE IN 50 MOST POPULOUS APPRENTICEABLE OCCUPATIONS FY2015—Continued
[RAPIDS data]

Category	Example job titles in the tier	Mean hourly wage	Black or African American share of enrollments (%)	Hispanic share of enrollments (%)
Lowest Paid Occupations Tier (16 Occupations).	Truck Driver, Roofer, Painter, Housekeeper, Cook, Child Care Development Specialist.	17.16	17.3	22.4

Source: Query of RAPIDS database—May 2016; Bureau of Labor Statistics May 2015 National Occupational Employment and Wage Estimates.

Finally, RAPIDS data also reveal that there are challenges for minority groups in completion rates as well. For example, the FY2015 completion rate for Black or African American apprentices in all industries was only 39.3 percent, and in the construction

industry it was only 30.6 percent (see Table 10). White apprentices, by comparison, had an all-industry completion rate of 47.3 percent, and a construction-industry completion rate of 44.6 percent. Similar patterns are seen among Hispanic apprentices, who had

an all-industry completion rate of 31.7 percent and a construction-industry completion rate of 34.0 percent in FY2015, compared to a 46.5 percent all-industry completion rate and a 43.2 construction-industry percent completion rate among Non-Hispanics.

TABLE 10—APPRENTICESHIP COMPLETION RATES IN FY2015 BY RACE AND ETHNICITY

	FY2015 completion rates ³⁰			
	Completions (all industries)	Completion rate (all industries) (%)	Completions (construction)	Completion rate (construction) (%)
White	17,853	47.3	9,168	44.6
Black or African American	3,000	39.3	816	30.6
Non-Hispanic	15,690	46.5	7,951	43.2
Hispanic	3,709	31.7	1,568	34.0

Source: Query of RAPIDS database—June 2016.

That such disparities and patterns of uneven participation exist is not surprising given the challenges often faced by many minorities and ethnic groups as they look to find work in the industries and occupations where apprenticeships are most common. These workers can be confronted by workplace cultures that are overtly or subtly hostile to workers of their race or ethnic background, and they often lack access to the types of interpersonal relationships and professional networks that would help them find jobs and receive the mentorship and training they need to complete their apprenticeships. One study of apprentices in the highway trades in Oregon published in 2015 documents all of these challenges.³¹ In surveying apprentices in the highway trades, it found that 21 percent of men of color and 30 percent of women of color reported feeling disadvantaged on the

job due to their race or ethnicity. Speaking to the issues surrounding minorities' access to critically important informal networks, the survey also found that while only 13 percent of white men stated that problems with journeyworkers were a challenge during their apprenticeship, 21 percent of men of color and 35 percent of women of color reported such problems. Indeed, while 79 percent of white men reported receiving mentoring on the job, only 60 percent of men of color and 38 percent of women of color reported the same.

All of these challenges and disparities can make it very difficult for minority workers to break in to trades in which they have not been traditionally well represented, but they can be successfully addressed by robust affirmative action efforts if these efforts are tailored to address the specific circumstances of the disparity.

Individuals With Disabilities in Apprenticeship

While the Department does not currently have data on the representation of persons with disabilities in apprenticeship programs, the underemployment of individuals with disabilities in the labor force more broadly is well documented. According to data from BLS, 30.5 percent of working-age individuals with disabilities were in the labor force in 2015, compared with 76.1 percent of working-age individuals with no disability.³² The unemployment rate for working-age individuals with disabilities was 11.7 percent in 2015, compared with a 5.2 percent unemployment rate for working-age individuals without a disability. Furthermore, wages for individuals with disabilities on average lag behind the rest of the workforce. The mean weekly earnings of employed full-time wage

³⁰ Completion rate means the percentage of an apprenticeship cohort who receives a certificate of apprenticeship completion within 1 year of the expected completion date. For more information see Bulletin FY 2011–07—Program Performance—Calculation of Registered Apprenticeship Program Completion Rates, available at http://doleta.gov/OA/bul10/Bulletin_2011-07_Completion_Rates.pdf.

³¹ M. Kelly et al., “When Working Hard is Not Enough for Female and Racial/Ethnic Minority Apprentices in the Highway Trades,” 30 *Sociology Forum* no. 2 (June 2015).

³² Source: Current Population Survey data. ‘Working age’ refers to individuals between the ages of 16 and 64. As the Department’s Section 503 Final

Rule noted, this acute disparity in the workforce participation and unemployment rates of working age individuals with disabilities persists, despite the many technological advances that now make it possible for a broad array of jobs to be successfully performed by individuals with severe disabilities.

and salary workers with a disability in 2015 were \$962 (with a median of \$737) compared to \$1,157 (median \$811) for those without a disability.³³ While 28.5 percent of individuals, ages 18 to 64, with a disability were in poverty in 2014, the data show that 12.3 percent of individuals without a disability were in poverty.³⁴

Affirmative efforts to seek out individuals with disabilities and ensure they have fair access to apprenticeship programs and the “ticket to the middle class” that apprenticeship programs provide has the potential to powerfully impact these profound inequalities.

Overview of the Apprenticeship Equal Employment Opportunity Notice of Proposed Rulemaking and Public Comments

Leading up to the publication of the Notice of Proposed Rulemaking (NPRM), OA received valuable input from a broad array of interested individuals, including SAAs; the National Association of State and Territorial Apprenticeship Directors (NASTAD); advocacy organizations; registered apprenticeship program sponsors such as employers, employer associations, and labor-management organizations; journeyworkers; former apprentices; and registered apprentices. This input addressed features of the existing rules that work well, those that could be improved, and additional requirements that might help to effectuate the overall goal of ensuring equal opportunity for all individuals who are participating in or seeking to participate in the National Registered Apprenticeship System. Recurring themes in these town halls, webinars, and listening sessions included the need for increased outreach efforts to attract women and minorities; focus on equal training and retention of apprentices; stricter enforcement of the Equal Employment Opportunity (EEO) obligations; recognition of the voluntary nature of apprenticeship programs; clarification of complaint procedures; and progressive actions by Registration Agencies to achieve sponsor compliance with the regulations.

In developing the proposed rule, the Department also consulted with its Advisory Committee on Apprenticeship (ACA). Chartered under the Federal Advisory Committee Act, the ACA provides advice and recommendations to the Secretary of Labor on a wide

range of matters related to apprenticeship. The ACA is comprised of approximately 30 members drawn equally from employers, labor organizations, and the public.

OA’s NPRM was published in the **Federal Register** on November 6, 2015.³⁵ The NPRM sought public comment on a number of proposals designed to improve the regulations implementing EEO in apprenticeship. The NPRM was published for a 60-day public comment period. After receiving several requests to extend the public comment period, OA extended the public comment period an additional 15 days to January 20, 2016.³⁶

The NPRM contained four general categories of proposed revisions to the part 30 regulations: (1) Changes required to make part 30 consistent with the Labor Standards for Registration of Apprenticeship Programs set forth in part 29; (2) adding additional protected bases to those already delineated in part 30, and further clarifying the scope of some of the existing bases; (3) changes to enhance and clarify the affirmative steps sponsors must take to ensure equal employment opportunity, including the contents of affirmative action programs (AAPs), and how these obligations would be reviewed and enforced by Registration Agencies; and (4) changes to improve the overall readability of part 30. Wherever possible, this Final Rule has attempted to streamline and simplify sponsors’ obligations, while maintaining broad and effective EEO protections for apprentices and those seeking entry into apprenticeship programs.

The first set of changes proposed to align the EEO regulations at part 30 with its companion regulations at part 29, and are necessary to ensure a cohesive, comprehensive regulatory framework for the National Registered Apprenticeship System. To that end, the Department proposed to revise or add several definitions and incorporate the procedures set forth in part 29 for deregistration of apprenticeship programs, derecognition of SAAs, and hearings. The use of a more uniform set of procedures streamlines management of the National Apprenticeship System. Also proposed were a few minor, conforming changes in 29 CFR part 29, the companion rule to part 30.

The second category of changes proposed to expand the protected bases upon which discrimination is unlawful and align the existing protected bases with current jurisprudence given the developments in EEO law since the

regulations were last revised in 1978. Categories added to update the rule included age, disability, sexual orientation, genetic information; the proposal also took the position that sex discrimination included discrimination on the basis of pregnancy and gender identity.

The third category of changes in the proposal was designed to improve the effectiveness of program sponsors’ required affirmative action efforts and of Registration Agencies’ efforts to enforce and support compliance with this rule. Among these proposed changes were the following:

- Listing specific steps all sponsors must undertake to ensure equal employment opportunity, including: Dissemination of EEO policy; outreach and recruitment obligations in an effort to increase diversity in applications for apprenticeship; taking steps to keep the workplace free from harassment, intimidation, and retaliation; and assigning an individual at the sponsor to oversee EEO efforts (proposed § 30.3);

- Specifying in clearer detail the components of a written AAP for those sponsors required to maintain one, allowing new sponsors more time to establish initial AAPs, and requiring an internal, annual review of all written AAP contents (with the possibility to extend the review to every two years if their review demonstrated compliance with all AAP elements) (proposed § 30.4);

- As part of an AAP, simplifying the process by which sponsors analyze whether the apprenticeship program is underutilizing women or minorities, and accordingly whether they need to set utilization goals (proposed §§ 30.5–30.6);

- Expanding the AAP to include affirmative action obligations on the basis of disability, including a 7% utilization goal for individuals with disabilities in apprenticeship programs and a self-identification mechanism allowing sponsors to quantitatively measure their progress against that goal (proposed §§ 30.7, 30.11);

- Clarifying the existing outreach and recruitment AAP obligation, which required engaging in a “significant number” of ten possible activities, by specifying four required, common-sense activities (proposed § 30.8);

- Requiring an annual review of personnel practices to ensure the program is operating free from discrimination (proposed § 30.9);

- Providing sponsors greater flexibility in how they may select apprentices for their programs, provided that such selection mechanisms are free from discrimination and comport with the Uniform Guidelines for Employee Selection Procedures that already governed selection in the existing regulations (proposed § 30.10); and

- Clarifying procedures for apprentices to file complaints of discrimination and the types of enforcement actions Registration Agencies may take in the event of violations (proposed §§ 30.12–30.15).

While progress has been made in some segments of the workforce since the

³³ BLS unpublished table A–45.

³⁴ *Income and Poverty in the United States: 2014*, Current Population Reports, issued September 2015, <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf> (last accessed June 3, 2016).

³⁵ 80 FR 68908.

³⁶ 80 FR 80307, Dec. 24, 2015.

promulgation of the existing part 30, these enhancements and improvements were proposed to address the ongoing widespread underutilization of historically disadvantaged worker groups in apprenticeship. The Department has a compelling interest in ensuring that its approval of a sponsor's apprenticeship program does not serve to support, endorse, or further promote discrimination.

The fourth category of changes was proposed to improve the overall readability of part 30 through a reorganization of the part 30 requirements, basic editing, providing clarifying language where needed, and adhering to plain language guidelines. This includes replacing the word "shall" with "must" or "will" as appropriate to the context. The proposed rule added a new section setting forth the effective date for this rule and for programs currently registered to come into compliance with the revised regulations.

OA received 245 comments on the NPRM. Commenters represented diverse perspectives including: 107 individuals; 45 advocacy and public interest groups; 27 Joint Apprenticeship Training Committees (state/local); 13 state government agencies; 11 industry association/business interests; 10 national unions; 9 state and local unions; and 5 private employers.

The commenters raised a broad range of issues. Most commenters supported the broader intent of increasing diversity and equal opportunity to bolster inclusion efforts, and many commenters strongly supported the expanded protections proposed in the NPRM. Other commenters raised various concerns with the cost and burden associated with the proposed rule, and questioned whether various proposals were feasible for sponsors to undertake and/or comply with. Among the primary issues raised by these commenters were:

- Whether the obligations under the new rule conflicted with the obligations of certain sponsors under Employee Retirement Income Security Act (ERISA) to act as a fiduciary for the training plans;
- The application of certain non-discrimination, affirmative action, and recordkeeping obligations to certain group sponsors, whom commenters believed would not have the ability to control personnel actions made and records kept by participating employers (proposed §§ 30.3–30.12);
- The definition of sex discrimination, which many commenters believed should specifically include discrimination on the basis of pregnancy, gender identity, and sexual orientation;

- The exemption from AAP obligations for those sponsors with fewer than 5 apprentices (proposed § 30.4), which was carried over from the existing rule. These comments were split between those who wanted the exemption eliminated altogether versus those who wanted the exemption expanded to include sponsors with larger apprenticeship programs;

- Questions of burden related to the frequency and extent of various elements of the AAP (proposed §§ 30.4–30.9);

- The burden of requiring sponsors to complete utilization analyses for race and sex (proposed §§ 30.5–30.6), given that, while required under the existing rule, many sponsors do not have experience undertaking this analysis and have in practice relied upon Registration Agencies to do so on their behalf. Related, a number of commenters cited a lack of clarity on various facets associated with utilization goals (§§ 30.5–30.6), such as defining a relevant recruitment area;

- The feasibility of the new 7% disability goal and attendant self-identification requirements (proposed § 30.7 and 30.11), with some commenters arguing for a lower goal and some a higher goal, as well as whether pre-offer self-identification inquiries comport with State and Federal laws; and

- The new enforcement measure that would allow Registration Agencies to suspend sponsors (proposed § 30.15), which some commenters believed lacked due process considerations and could be used punitively for political reasons by certain SAAs.

The active engagement from stakeholders to provide their ideas about and comments on the proposed rule resulted in a Final Rule that streamlines and simplifies the obligations of sponsors to the extent possible while maintaining broad equal employment opportunity protections for apprentices.

Overview of the Final Rule

This Final Rule responds to and incorporates the public input received during the open comment period and ACA consultation, as well as OA's analysis regarding barriers to entry, underutilization, and discrimination in apprenticeship and nontraditional occupations for underrepresented groups and best practices to address these challenges. The Final Rule includes the same basic structure and many of the same proposals that were announced in the NPRM. However, to focus the Final Rule more closely on key issues, incorporate public comment, and to reduce the burden to the extent possible while maintaining the efficacy of nondiscrimination and affirmative action efforts, the Final Rule also revises or eliminates some of the NPRM's proposals. A summary of the significant changes from the NPRM are as follows:

- Generally providing more time for sponsors—both those currently registered and those who may register programs in the future—to comply with the new non-discrimination and affirmative action obligations;

- Adjusting the workforce analysis so that it is conducted at the occupation level, and the utilization analysis at the major occupation category level, using a common source of data easily accessible to sponsors;

- Clarifying that Registration Agencies will significantly assist sponsors in conducting utilization analyses;

- Clarifying that failure to meet utilization goals will not, in and of itself, result in the assessment of any enforcement actions or sanctions. In so doing, the Final Rule clarifies the goals are not quotas, which in fact are legally impermissible, and that goals do not displace in any way merit selection principles; indeed, the rule specifically prohibits selections made on the basis of a protected category;

- Revising the proposed program suspension alternative in the enforcement action to address due process concerns raised by commenters; and

- Allowing SAAs more time to submit their State EEO plan to come into compliance with these regulations.

These and other changes to the Final Rule, as well as a full response to the significant comments received and clarifying guidance on how the rule should be interpreted, are set forth in the Section-by-Section Analysis below.

Section-by-Section Analysis

Description of Part 30

The description of part 30 in the existing regulations reads "Equal Employment Opportunity in Apprenticeship and Training." The NPRM proposed to delete the words "and Training" to clarify that the rule applies only to apprenticeship programs registered under the National Apprenticeship Act, and not to other training programs. The proposed change was also consistent with the recent change of the name of the Department's apprenticeship agency to the Office of Apprenticeship, from the Bureau of Apprenticeship and Training. We received no comments on this proposed change. Accordingly, the Department adopts the proposed language describing part 30 in the Final Rule.

Purpose, Applicability, and Relationship to Other Laws (§ 30.1)

The existing § 30.1 set forth the scope and purpose in one paragraph and laid out the range of activities to which the policies apply. The NPRM proposed to revise the title by replacing "Scope and purpose" with "Purpose, applicability, and relationship to other laws," organized the text to fall under these three categories, and provided clarifying

details to enhance readability of the section.

The Department received only one comment, from a national JATC, suggesting that the current text be retained because it contains the same information in a more concise manner. We respectfully disagree, and believe that the expanded nature of proposed § 30.1 makes it helpful to the reader to divide the section's provisions among three separate paragraphs: Proposed § 30.1(a) set forth the purpose of the rule; proposed § 30.1(b) addressed to whom the rule applies; and proposed § 30.1(c) discussed how this regulation relates to other laws that may apply to the entities covered by this regulation. We therefore adopt the structure of § 30.1 as proposed.

Paragraph 30.1(a): Purpose

Proposed § 30.1(a) added age (40 or older), genetic information, sexual orientation, and disability to the list of bases set forth in the rule upon which a sponsor of a registered apprenticeship program must not discriminate. The Department received numerous comments addressing these proposed changes, which were generally supportive, although one commenter cautioned the Department not to discount the fact that prohibiting discrimination on the basis of sexual orientation may raise implementation questions for sponsors and require technical assistance. The Department is prepared to undertake such assistance. Among the several commenters that were supportive of the expanded protections, many suggested additional clarifications.

Starting with those protected bases in the existing rule, the NPRM explained that the Department interprets discrimination on the basis of "sex" to include both pregnancy and gender identity discrimination, and clarified this interpretation in the proposed regulatory text at § 30.3(c), which provided the contents of sponsors' equal opportunity pledge, by explicitly including pregnancy and gender identity in a parenthetical following "sex" to make this clear. The Department received numerous comments advocating that pregnancy and gender identity be explicitly listed as separate grounds of discrimination, rather than considered under the umbrella of sex discrimination. Per the language of relevant authorities and case law, both pregnancy and gender identity have been analyzed as forms of sex discrimination.³⁷ The final rule retains,

in the E.O. pledge set forth in § 30.3(c), the proposed rule's parenthetical explaining that sex discrimination includes discrimination on the basis of gender identity and pregnancy. We include the parenthetical explanation in this one portion of the regulation because it is the language that will be incorporated into registered apprenticeship standards and apprenticeship opportunity announcements and thus more visible to those the rule protects, but this interpretation applies wherever sex is discussed in the regulation. As set forth in the discussion of § 30.3(a)(2) herein, the Department will look to the legal standards and defenses that apply under Title VII and Executive Order 11246, as applicable, in determining whether a sponsor has engaged in discrimination made unlawful by § 30.3(a)(1), including sex discrimination.

The NPRM also proposed to include four new grounds to the list of protected bases upon which a sponsor must not discriminate: Age (40 or older); genetic information; sexual orientation; and disability. The Department responds to the comments received on each in turn.

Age (40 or Older)

Of the few commenters who weighed in on the addition of age discrimination, including a national JATC, an advocacy organization, and one individual, all supported its inclusion as a prohibited ground of discrimination. Among these, a national JATC said its industry's

sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"; 41 CFR 60–20(a) (stating that under Executive Order 11246, sex discrimination includes discrimination on the basis of pregnancy, childbirth, or related medical conditions); *see also* EEOC Facts About Pregnancy Discrimination, available at <https://www.eeoc.gov/eeoc/publications/fs-preg.cfm> (last accessed Sept 14, 2016). Regarding gender identity, *see, e.g.*, 41 CFR 60–20.2(a) (stating that, under Executive Order 11246, discrimination on the basis of sex includes discrimination on the basis of gender identity); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 2016 WL 1089178, * 14 (D. Conn. Mar. 18, 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008). The Department is aware of the recent decision in *Texas v. U.S.*, No. 7:16–cv–00054–O, 2016 WL 4426495 (N.D. Tex. Aug 21, 2016), in which the court issued a preliminary injunction enjoining several Federal agencies, including the Department, from enforcing certain guidance pertaining generally to the issue of transgender access to sex segregated facilities. As of when this rule was sent for publication, the effect of that injunction on the Department's programs is unclear and under consideration by the District Court. *See Order, Texas v. U.S.*, No. 7:16–cv–00054–O (N.D. Tex. Oct. 18, 2016), ECF No. 86 (ordering additional briefing as to whether the injunction applies to Title VII and whether and how the injunction applies to DOL). The Department will monitor this and other cases.

programs have been following the Equal Employment Opportunity Commission (EEOC) interpretations and/or State law and including age as a protected category, and that there are many examples of older workers entering the electrical industry through apprenticeship as second careers. An individual commenter relayed personal experience of being excluded from apprenticeship programs due to age, and thus could benefit from this added protection. Accordingly, the Final Rule adopts the addition of age as a protected basis, as proposed.

Genetic Information

With regard to genetic information, those few commenters weighing in all supported its addition to the list of prohibited grounds of discrimination. The national JATC said joint labor-management committees already are prohibited from discriminating against employees or applicants because of genetic information, so this will not be a change for these apprenticeship programs. Accordingly, the Final Rule adopts the addition of genetic information as a protected basis, as proposed.

Sexual Orientation

Numerous commenters, including advocacy organizations, individual commenters, a professional association, and a State Workforce Agency (SWA), supported the rule's explicit inclusion of sexual orientation on the list of protected bases. Several advocacy organizations said individuals who identify as lesbian, gay, or bisexual face high levels of discrimination and harassment at work based on their sexual orientation and this revision is in line with current law and within the Department's rulemaking authority.

Several of the above commenters plus additional advocacy organizations urged the Department to make clear that sexual orientation discrimination and sex stereotyping discrimination are also prohibited forms of sex discrimination. One of these commenters, an advocacy organization, stated that, while the legal landscape continues to evolve, it is now clear that a division between sexual orientation and sex discrimination is unsustainable and providing this additional clarification in the final regulation would provide the fullest protection for program participants. A national JATC urged some caution, noting that the interpretation announced by the EEOC in its 2015 *Baldwin* decision³⁸ that sexual

³⁷ Regarding pregnancy, *see* 42 U.S.C. 2000e(k) ("The terms "because of sex" or "on the basis of

³⁸ *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015).

orientation discrimination is *per se* sex discrimination under Title VII was not yet settled law.

The Final Rule adopts the NPRM's proposed inclusion of sexual orientation as a stand-alone protected category. As discussed in the NPRM, adding sexual orientation as a protected characteristic is consistent with both the statutory authority requiring the formulation of "labor standards necessary to safeguard the welfare of apprentices,"³⁹ and the Department's purpose and approach since part 30 was first established: to promote equality of opportunity in registered apprenticeship programs and prevent discrimination in the recruitment, selection, employment, and training of apprentices by requiring, among other things, that apprentices and applicants for registered apprenticeship are selected according to objective and specific qualifications relating to job performance. We note further that the addition of sexual orientation as a protected basis aligns with developments in legal protections over the last two decades. At the time of publication, 22 States and the District of Columbia, in addition to numerous additional counties and municipalities across the country, have laws explicitly prohibiting employment discrimination on the basis of sexual orientation in the public and private sectors.⁴⁰ Accordingly, the Final Rule retains sexual orientation as its own protected basis. We do note, as discussed more fully in later sections, that the Final Rule does not require sponsors to collect employee or applicant data on sexual orientation, conduct specific outreach, or otherwise include sexual orientation in the utilization analyses required under AAPs pursuant to § 30.4. This is consistent with the Department's Office of Federal Contract Compliance Programs' (OFCCP) approach to sexual orientation in its programs.

With regard to commenters' requests that the rule state that sexual orientation discrimination is also a *per se* form of sex discrimination, the Department supports this view as a matter of policy. Federal agencies have taken an increasing number of actions to ensure that lesbian, gay, and bisexual individuals are protected from discrimination,⁴¹ and court decisions

have increasingly made clear that individuals and couples deserve equal rights regardless of their sexual orientation.⁴² The Department further notes that this area of title VII law is still developing. In *Baldwin*, the EEOC—the lead Federal agency responsible for administering and enforcing title VII—offered a legal analysis and review of the title VII case law and its evolution, concluding that sexual orientation is inherently a "sex-based consideration" and that discrimination on the basis of sexual orientation is therefore prohibited by title VII as one form of sex discrimination.⁴³ As the EEOC noted in that case, in *Oncala v. Sundowner Offshore Services*, a unanimous Supreme Court stated that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁴⁴ More than fifty years after the passage of the Civil Rights Act of 1964, the contours of the law governing sex discrimination in the workplace have changed significantly. Over the past two decades, an increasing number of Federal court cases, building on the *Price Waterhouse* rationale, have found protection under title VII for those asserting discrimination claims related to their

³⁹ 29 U.S.C. 50.
⁴⁰ <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last accessed May 4, 2016).

³⁹ 29 U.S.C. 50.

⁴⁰ <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last accessed May 4, 2016).

⁴¹ See, e.g., 80 FR 9989 (Feb. 25, 2015) (DOL amendment of the regulatory definition of spouse under the Family and Medical Leave Act (FMLA) so that eligible employees in legal same-sex marriages are treated the same way for FMLA purposes as employees in opposite-sex marriages);

⁴² For example, in 1996, the Supreme Court struck down an amendment to the Colorado constitution that prohibited the State government from providing any legal protections to gay, lesbian, and bisexual individuals. *Romer v. Evans*, 517 U.S. 620 (1996). And, just last year, the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that states may not prohibit same-sex couples from marrying and must recognize the validity of same-sex couples' marriages. See also *United States v. Windsor*, 133 S. Ct. 2675 (2013) (declaring unconstitutional the federal Defense of Marriage Act's definition of "marriage" as only a legal union between a man and a woman); *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring unconstitutional a state statute criminalizing consensual same-sex sexual conduct).

⁴³ *Baldwin*, 2015 WL 4397641 (July 16, 2015). EEOC relied on several analyses to reach this conclusion: a plain reading of the term "sex" in the statutory language, an associational analysis of discrimination based on "sex," and the gender stereotype analysis announced in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁴ *Id.* at 13 (quoting *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (alteration in original) (internal quotation marks omitted)).

sexual orientation.⁴⁵ In light of this legal framework, and for consistency with the position taken by the Department's OFCCP in its recently issued Sex Discrimination regulations and the Department of Health and Human Services in its rule implementing Section 1557 of the ACA, the Department will interpret sex discrimination under this Final Rule to cover treatment of employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. The Department will continue to monitor the developing law on sexual orientation discrimination as sex discrimination, and will consider issuing further guidance on this subject as appropriate.

Disability

Multiple commenters supported the Department's proposal to add disability to the list of protected categories against which apprenticeship programs may not discriminate. An individual commenter asserted the need for more apprenticeship programs that are open to individuals with disabilities, as

⁴⁵ See, e.g., *Prowel*, 579 F.3d at 291–92 (harassment of a plaintiff because of his "effeminate traits" and behaviors could constitute sufficient evidence that he "was harassed because he did not conform to [the employer's] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation"); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (coworkers' and supervisors' harassment of a gay male because he did not conform to gender norms created a hostile work environment in violation of Title VII); *Hall v. BNSF Ry. Co.*, No. C13–2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. September 22, 2014) (plaintiff's allegation that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males" stated a sex discrimination claim under title VII); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (hostile work environment claim stated when plaintiff's "orientation as homosexual" removed him from the employer's preconceived definition of male); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."). Cf. *Videckis v. Pepperdine Univ.*, No. CV 15–00298 DDP (JCx), 2015 WL 1735191, at *8 (C.D. Cal. April 16, 2015) (harassment and adverse treatment of students because of their sexual orientation may state a claim of sex discrimination under title IX, because it is a form of sex stereotyping; indeed, "discrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination even if such discrimination were not based explicitly on gender stereotypes").

individuals with disabilities continue to struggle to find and keep employment. A number of comments raised specific questions about how the proposed disability non-discrimination and affirmative action obligations would be implemented. Many of these comments are addressed in the discussions of §§ 30.7 and 30.11, but we respond to two of these concerns here because they implicate the purpose of the proposed rule and, to some extent, questions of applicability that are germane to § 30.1. Specifically, one commenter cited other federal regulations to which they must adhere that prohibit the employment of workers who perform work that present dangers to themselves, co-workers, and the general public. Other commenters implied generally that employment of individuals with disabilities was problematic in their particular industry due to physical requirements of the position.

As to the first, nothing in this Final Rule requires sponsors to employ individuals who present dangers to themselves or others. The rule incorporates the “direct threat” defense that is well-established in disability law jurisprudence, which specifically allows an employer to require that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. As to the second, to the extent that commenters are seeking exemptions from the disability protection in the Final Rule due to their particular industry, the Department declines to grant such exemptions. Requests to exempt sponsors from disability-related obligations in this Final Rule for safety-sensitive positions or for physically demanding jobs are based on the fundamentally flawed notion that individuals with disabilities as a group are incapable of working in these jobs. The Department does not support this belief and will not construct an avenue to permit sponsors to avoid recruiting and selecting individuals with disabilities for certain apprenticeships. We acknowledge that some individuals with certain disabilities—as well as some individuals without disabilities—may not be able to perform some jobs; this does not countenance broader exclusions from the obligations set forth in this rule.⁴⁶ Not all disabilities have

physical limitations, and not all physical limitations will be relevant to the job at hand.

Proposed Additional Grounds

Several commenters suggested other possible bases for protection against discrimination in apprenticeship programs, including caregiving status (e.g., parental responsibilities), military service, and criminal background. These protected categories are beyond the scope of what was proposed in the NPRM, therefore we did not add them to the Final Rule. However, we note that discrimination based on some of these proposed additional categories may be actionable under already existing categories or under other, already applicable, laws.

Paragraph 30.1(b): Applicability

Proposed § 30.1(b) simplifies the earlier description of the scope of the provision by stating clearly that the rule applies “to all sponsors of apprenticeship programs registered with either the U.S. Department of Labor or a recognized SAA.” A number of comments raised questions regarding how the obligations of this rule would apply differently, if at all, to the different models of sponsors. Some sponsors employ the apprentices and thus their control over the terms and conditions of employment is more clear, while “group” sponsors work with groups of employers where apprentices may be hired or placed and the various types of employment actions prohibited by this rule may be undertaken by these employers, rather than the sponsor.

Throughout the Section-by-Section analysis below, the Department has provided clarification with respect to implementing particular requirements depending on the model of sponsorship. In general, per the text of § 30.1(b), the Department recognizes the sponsor as the entity assuming the equal employment opportunity and affirmative action obligations of this part. To the extent that the sponsor has the ability to control, or otherwise has input into, any of the various employment actions held unlawful by these regulations, its obligations under these regulations are clear. In those situations where discriminatory actions or other actions in violation of this part are taken by participating employers,

typically need no accommodation to work as [a] carpenter. A person with a significant stutter would ordinarily need no accommodation to operate machinery.’ These examples are not an exhaustive list and there are many additional disabilities that, with reasonable accommodation, would not preclude an individual from engaging in even more construction-industry jobs.’) (internal citations omitted).

when the sponsor has knowledge of such actions it has an obligation to undertake steps to address the violation. Historically, this has been accomplished by written agreements entered into between the sponsor and employer setting forth “reasonable procedures . . . to ensure that employment opportunity is being granted,”⁴⁷ as well as through the recordkeeping requirements obligating the sponsor to keep adequate employment records of its apprentices. Were certain categories of sponsors exempted from these general obligations, it could render meaningless many portions of these regulations and the role of the apprenticeship sponsor to help ensure equal employment opportunity that has existed for several decades.

Paragraph 30.1(c): Relationship to Other Laws

Proposed § 30.1(c) clarified that part 30 would not invalidate or limit the remedies, rights, and procedures under any Federal law, or the law of any State or political subdivision, that provides greater or equal protection for individuals under the protected bases. One advocacy organization recommended that the Department work with the EEOC to ensure that part 30 is consistent with other agency directives, including the 2012 EEOC guidance on employer consideration of criminal records. To that end, we note, as we did in the NPRM, that these regulations generally follow Title VII legal principles in their interpretation of the non-discrimination protections in this Final Rule.

An advocacy organization and a State agency commented on the possible linkages between this proposed rule and the Workforce Innovation and Opportunity Act (WIOA). We agree that the two authorities interrelate in important ways to provide broad nondiscrimination protection to apprentices. WIOA encourages the use of registered apprenticeship and the public workforce system provides an opportunity to connect a broad talent pool with the opportunities of apprenticeship, as well as to provide resources and supportive services to assist in connecting individuals to apprenticeship and supporting them through successful completion and career attainment. Section 188 of WIOA also provides comprehensive nondiscrimination protections. The Department will work to ensure that these statutory regimes work in tandem to provide broad and consistent worker protection.

⁴⁶ See *Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 44 (D.D.C. 2014), *aff’d*, 773 F.3d 257 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2836 (U.S. June 15, 2015) (“Indeed, many disabilities would have little effect on employment by construction contractors. For example, ‘a person with an auditory processing disorder would

⁴⁷ See existing 29 CFR 30.4(c)(10).

Proposed § 30.1(c) also recognized as a defense to a charge of violation of part 30 that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action that would otherwise be required by part 30. A national JATC noted that the proposed regulatory text states that “It may be a defense . . .,” and instead recommends that the Department change the word “may” to “shall” in the last sentence of § 30.1(c). The Department respectfully declines to make this change, as whether a defense will succeed is necessarily a fact-specific inquiry which amending the language to “shall” would foreclose. Further, this provision is identical to OFCCP’s regulations implementing section 503 of the Rehabilitation Act of 1973 (section 503) and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) programs,⁴⁸ and the consistency among these DOL programs is desirable, especially for those entities that may need to comply with both.

One specific potential conflict of laws clarification sought by multiple commenters was the interaction of certain obligations under this rule and obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Many apprenticeship programs are employee benefit plans governed by ERISA. Among other things, ERISA provides that, subject to certain exceptions, the assets of an employee benefit plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants and defraying reasonable administrative expenses. In discharging their duties under ERISA, plan fiduciaries must act prudently and solely in the interests of the plan participants and beneficiaries, and in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of ERISA.⁴⁹ Although apprenticeship plans may differ in structure and operations from other ERISA plans, the plan fiduciaries must still abide by the general fiduciary standards in part 4 of title I of ERISA. The Department’s Employee Benefits Security Administration (EBSA) is responsible for interpreting and enforcing the provisions of part 4 of title I of ERISA.

Some commenters asserted that using assets of apprenticeship plans to pay for many of the tasks required in the proposed regulations to gain or maintain registered status under the National

Apprenticeship Act would not be consistent with obligations imposed on plan fiduciaries under ERISA. These commenters cited guidance EBSA issued in 2012 concerning the use of apprenticeship plan assets for graduation ceremonies and to engage in outreach activities and advertise the program to potential apprentices.⁵⁰ The commenters asserted that a plan should have a defense against a violation of the proposed regulations if the apprenticeship plan’s governing board or committee determines that it would violate ERISA to expend plan assets to take compliance actions required to gain or maintain registered status.

EBSA has taken the position that there is a class of activities referred to as “settlor” functions that relate to the formation, design, and termination of plan, rather than the management of the plan, that generally are not activities subject to title I of ERISA. EBSA has concluded that although expenses attendant to settlor activities do not constitute reasonable plan expenses, expenses incurred in connection with the implementation of settlor decisions may constitute reasonable expenses of the plan.⁵¹ A plan sponsor’s decision to register an apprenticeship plan under the National Apprenticeship Act is such a settlor decision of plan design. In the Department’s view, established ERISA guidance on settlor activities supports the conclusion that reasonable expenses incurred in implementing a decision to be a registered apprenticeship plan would generally be payable by the plan to the extent permitted under the terms of the plan’s governing documents.

The commenters also expressed concern about the application of ERISA’s fiduciary standards because registered status may result in benefits for the apprentice plan’s sponsors in addition to the benefits provided to the plan’s participants. In Advisory Opinion 2001–01, dealing with the benefits an employer may secure from sponsoring a tax qualified pension plan, EBSA expressed the view that in the case of such a plan design decision that confers benefits on both the plan sponsor and the plan, a plan fiduciary is not required to take into account the benefits conferred on an employer in determining whether expenses for implementing the plan design decision constitute reasonable expenses of the plan.

A commenter asserted that ERISA may require plan fiduciaries to

withdraw from the Department’s registration program if the increased cost to the plan of compliance with the proposed regulations would be greater than the economic benefits to the plan from registered status. The commenter cited guidance issued by EBSA concerning investments selected because of the collateral economic or social benefits they may further in addition to their investment returns to the plan.⁵² Registered status is clearly connected to the purpose of an apprenticeship plan and provides a range of direct benefits to the plan and the apprentices participating in the plan. Accordingly, EBSA does not believe its guidance in Interpretive Bulletin 2015–02 applies to the decision of whether to maintain a plan as a registered apprenticeship plan.

ERISA requires that plan fiduciaries act prudently and solely in the interest of the plan’s participants in choosing how to comply with the federal regulatory requirements for registered status. Where an apprenticeship program is intended to be registered with the Department, the fiduciaries may treat the reasonable costs of compliance with registration regulations as appropriate means of carrying out the plan’s mission of training workers.

Some commenters requested clarification of ERISA’s impact on the proposal’s requirement that a registered apprenticeship plan establish linkage agreements enlisting the assistance and support of pre-apprenticeship programs, community-based organizations, and advocacy organizations in recruiting qualified individuals for apprenticeship, and in developing pre-apprenticeship programs. These commenters noted that participants in pre-apprenticeship programs are not participants in the apprenticeship plan and pointed out that ERISA plan fiduciaries must discharge their duties for the exclusive purpose of providing benefits to the plan participants and defraying reasonable plan administrative expenses. In the Department’s view, where plan fiduciaries prudently determine that supporting quality pre-apprenticeship programs and other workforce pipeline resources are necessary to maintain the plan’s registration, or are otherwise appropriate and helpful to carrying out the purposes for which the plan is established or maintained, assets of the plan may be used to defray the reasonable expenses of such support. Such advantages could include, among other things, more efficient outreach

⁵⁰ EBSA Field Assistance Bulletin (FAB) 2012–01 (Apr. 2, 2012).

⁵¹ See, e.g., Letter to Carl J. Stoney, Jr. (Advisory Opinion 2001–01A, Jan. 18, 2001).

⁵² 29 CFR 2509.2015–02 (Interpretive Bulletin 2015–02).

⁴⁸ See 41 CFR 60–300.1(c)(2) and 60–741.1(c)(3).

⁴⁹ 29 U.S.C. 1103(c)(1), 1104(a)(1)(A), (B) and (D).

and recruitment, and broadening the base of qualified and diverse applicants. For more information on what qualifies as a quality pre-apprenticeship program, see OA's Training and Employment Notice 13–12 (TEN 13–12), dated November 30, 2012.

Finally, one commenter said it is unclear why these defenses are limited to actions required by another Federal law or regulation, and recommended that these defenses be expanded to include actions required or prohibited by any applicable State law or regulation. This commenter did not specifically identify a provision of State law that would be in conflict with these regulations, and we would decline to introduce any such broad defense contrary to general principles of preemption.

Definitions (§ 30.2)

With regard to definitions included in the NPRM, we did not receive comments on the definitions for “administrator,” “apprentice,” “apprenticeship program,” “Department,” “EEO,” “electronic media,” “employer,” “genetic information,” “journeyworker,” “major life activities,” “Office of Apprenticeship,” “physical or mental impairments,” “race,” “reasonable accommodation,” and “Registration Agency.” We made no changes to the proposed definitions for these terms. The others for which comments were received are discussed below.

“Apprenticeship Committee”

This proposed definition comes from part 29, where this term is also used. An SWA suggested that the definition of “apprenticeship committee” should be revised to encompass group sponsor structures as well as individual sponsor structures, and commented that the language throughout the rule is geared towards an individual sponsor structure and not inclusive of group sponsor structures. The Department notes that this definition is identical to the definition contained in part 29. As worded, it is intended to apply to group sponsors as well as individual sponsors. Accordingly, the Final Rule retains the definition as proposed.

“Direct Threat”

This term was added because the proposed rule included disability among the list of protected bases covered by part 30, and the “direct threat” defense is well-established under the Americans with Disabilities Act (ADA), as amended, and other disability laws. A national JATC expressed concern that the proposed

definition would require apprenticeship programs to hire medical professionals to provide “reasonable medical judgment” because this proposed definition states that the process for determining whether an individual poses a direct threat is based on “reasonable medical judgment.” The commenter warned that this would pose a significant financial burden for sponsors, and said that the definition should either be changed or removed. As discussed above, the proposed definition for this term is taken directly from title I of the ADA, as amended, and from the EEOC implementing regulations. The Department intends that this proposed term will have the same meaning as that set forth in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) and implemented by the EEOC in 29 CFR part 1630. Sponsors and participating employers subject to the ADA, as amended, therefore are already required to comply with this provision under that authority. Any departure would create an unwanted discrepancy between federal disability laws. Further, we note that hiring medical professionals to provide “reasonable medical judgment” is not required by this rule (nor the ADA, as amended). EEOC guidance provides that determining whether a “direct threat” exists is an individual assessment “considering the most current medical knowledge *and/or the best available objective evidence.*”⁵³ (Emphasis added.) The Department interprets this rule consistently with that guidance. Even if medical knowledge were used, it often can be obtained from the individual’s own physician, rather than an in-house physician hired for such purposes. Accordingly, the Final Rule retains the definition as proposed in the NPRM.

“Disability”

This term was added because the proposed rule included disability among the list of protected bases covered by part 30. One commenter explicitly supported this definition as consistent with other Federal laws, most notably the ADA and ADAAA. One commenter requested clarification of the term “disabled individual,” and suggested that the definition and goals should differentiate between individuals with learning disabilities and other types of disabilities. Another commenter, in asking for clarification

⁵³ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, available at <https://www.eeoc.gov/policy/docs/psych.html> (last accessed May 18, 2016).

about the definition of disability, expressed concern that the construction industry is physically demanding on both body and mind, and that its program asks applicants if they can perform the work required in the industry and if they are physically able regardless of any disabilities. Disability law does not distinguish between “types” of disabilities, but rather whether an individual has, or is regarded as having, an impairment that substantially limits one or more major life activities, or has a record of such impairment. We therefore decline to separate out particular “types” of disabilities for different treatment. With regard to selections in particular industries, again, disability law does not differentiate. It is a well-established tenet of disability law that an individual must be qualified to perform the essential functions of the job, with or without reasonable accommodation, in order to be protected. The proposed definition (as well as the selection provisions in § 30.10 herein) reflects that, and we adopt it as proposed.

Regarding the phrase “a record of such an impairment” in the proposed definition of disability, one commenter asked for clarification as to what type of record would be acceptable verification of an individual having a documented disability. Again, this language was intended to mirror identical language in the ADA, etc., and should be interpreted in the same manner as it is in the ADA. Generally, the phrase “record of” does not require a written record, but rather prohibits discrimination against someone because they are known to have had a disability, for instance, a person who has recovered from cancer or mental illness.

As discussed above, the proposed definition for this term is taken directly from title I of the ADA, as amended, and from the EEOC implementing regulations. The Department intends that this proposed term will have the same meaning as what was set forth in the ADAAA and implemented by the EEOC in 29 CFR part 1630.

“Employer”

The NPRM proposed slight modifications to the definition of “employer” in part 30 to conform to the definition of the term in part 29, where this term is also used. We did not intend this alteration to change how the term is interpreted.

Two national unions expressed concern that, by adopting the definitions of “sponsor” and “employer” in 29 CFR part 29, the proposed rule would allow for a sponsor to conduct its workforce analyses of the

relevant incumbent workforce (required in proposed § 30.5(b)) without accounting for “all occupational titles in its registered apprenticeship program,” should that sponsor include subcontractors or other entities owned or controlled by the sponsor in its apprenticeship program. In this way, they assert that a sponsor could otherwise delegate to an employer its obligations under the rule, thus avoiding enforcement and broad equal employment opportunity for apprentices. It proposed that the Department amend both the definition of “sponsor” and “employer” to include subcontractors and other entities owned and controlled by the sponsor or employer. This latter concern was addressed in the discussion of § 30.1, which clarified that the rule’s obligations apply broadly to all sponsors, and will require partnership and information-sharing with employers to effectuate their non-discrimination and affirmative action obligations. The obligations under § 30.5(b) will be discussed in that part of the Section-by-Section analysis. As the revised definition was offered solely to conform with the existing definition of “employer” in part 29, we retain it in the Final Rule as proposed.

“Ethnicity”

An SWA said that the term “Latino” should be used instead of “Hispanic” because the term “Latino” is broader and includes “Hispanic” groups, but the term “Hispanic” does not include all “Latino” groups. Additionally, the commenter said that “Latino” status should not be limited to “Spanish culture or origin” because some groups do not claim a European cultural or ancestral background, and not all groups speak Spanish as a first language (*e.g.*, Brazilians). In response to this comment, the Department notes that the proposed definition is the same as that used under the Office of Management and Budget’s standards for the classification of Federal data on race and ethnicity,⁵⁴ as well as the definition in the EEOC’s EEO-1 reporting requirements. For consistency with other Federal data collection requirements, we retain the definition as proposed.

“Pre-Apprenticeship Program”

The proposed rule included a definition of “pre-apprenticeship program” because the existing rule refers to such programs, but does not define this term. The proposed

definition, drawn from a Training and Employment Notice regarding pre-apprenticeship,⁵⁵ was intended to provide clarity on what constituted and/or qualified as a pre-apprenticeship program. It is worth noting that this Final Rule does not specifically require sponsors to develop their own pre-apprenticeship programs, but rather includes requirements that sponsors partner with appropriate entities, such as pre-apprenticeship programs, as part of an outreach and recruitment strategy to address underutilization and impediments to equal employment opportunity. The Department received numerous comments addressing this proposed definition, which were generally supportive, but which suggested improvements.

One commenter expressed concern that the proposed definition of “pre-apprenticeship program” does not capture the full scope and reach of high-quality pre-apprenticeship programs, and suggested that the definition of a pre-apprenticeship program should not be limited to programs that assist individuals in meeting the minimum qualifications for selection into an apprenticeship program, but should be expanded to include programs that provide training and education to individuals who meet the minimum requirements for selection into an apprenticeship program but seek additional training in order to remain competitive with other applicants. While this commenter identifies laudable objectives that many programs may accomplish, the Department’s primary focus for pre-apprenticeship programs is to enable participants to obtain minimum requirements for selection into apprenticeship programs to grow opportunities for those individuals. Nothing in the rule prevents sponsors and other entities from designing or linking with additional pre-apprenticeship programs that serve the ends noted by the commenter. The Department is, however, revising the definition to align with TEN 13–12, which addresses pre-apprenticeship programs. Among other things, TEN 13–12 provides that pre-apprenticeship programs maintain a documented partnership with at least one Registered Apprenticeship program, to help ensure that the pre-apprenticeship programs have the relationships in place to support the future success of its participants.

Two national unions commented that the Department should also clarify

whether Job Corps programs satisfy the definition of pre-apprenticeship. As indicated in the NPRM, many Job Corps programs have been used and can serve as pre-apprenticeship programs. While not all Job Corps programs are pre-apprenticeship programs, those Job Corps programs consistent with the requirements of TEN 13–12—specifically, those focusing on preparing individuals for entrance into and success in a registered apprenticeship program, and which maintain a partnership with a Registered Apprenticeship program—would qualify as a pre-apprenticeship program.

A national JATC asked for clarification about the intent of the requirement of collaboration in the definition of “pre-apprenticeship program.” The JATC commented that if the intent is for a minimum of two different types of entities to collaborate on a program, then two employers or a single-employer group or a local union could not operate a pre-apprenticeship program on its own. The JATC suggested that the Department should expressly recognize that a joint-labor management committee is an example of employer and union collaboration, and thus could operate a pre-apprenticeship program. The Department notes that the intent is to link the pre-apprenticeship program with an apprenticeship program. This definition is not intended to require a minimum of two entities given the different ways in which such a link could occur.

Several commenters suggested broadly that the proposed definition of “pre-apprenticeship program” should be in alignment with the definition as written in the Department’s TEN 13–12. Commenters encouraged the Department to adopt a definition of “pre-apprenticeship program” that includes elements that are essential for successful linkage of a pre-apprenticeship program to an apprenticeship program, and/or are otherwise described in TEN 13–12. The definition for “pre-apprenticeship” in the proposed rule was specifically drafted to be consistent with the TEN 13–12, including with its description of the elements described therein, and the Department does not view any change to the definition to be necessary. Sponsors should follow TEN 13–12 and other relevant guidance in their interpretation of the definition provided in the rule.

Numerous commenters recommended that the Department’s definition in proposed § 30.2 should otherwise be more expansive in specifically addressing: Barriers unique to women, people of color, and individuals with

⁵⁴ Available at http://www.whitehouse.gov/omb/fedreg_1997standards/ (last accessed June 3, 2016).

⁵⁵ Office of Apprenticeship Training and Employment Notice 13–12 (TEN 13–12), dated November 30, 2012.

disabilities; standards for EEO/affirmative action in technical instruction and selection procedures; and the length of tenure or manner of payment expected in pre-apprenticeship programs. Again, while one aim of pre-apprenticeship programs is to reach groups that are traditionally underrepresented in apprenticeships, and the Final Rule includes multiple ways in which that may happen (such as in the discussion of § 30.8), we believe that sort of elaboration is best accomplished in those sections and in guidance such as TEN 13–12, rather than in the definitions section of the regulation.

The last sentence of the proposed definition included the optional provision of supportive services, such as transportation, child care, and income support, to assist participants in the successful completion of the pre-apprenticeship program. Several comments underscored the need for resources, including from the Federal government, in order to provide support services. We recognize the resources required to provide such supportive services, which is a primary reason why the provision of such services was not mandated in the definition. The Department has generally expanded the role of apprenticeship and provided opportunities for supportive resources under its WIOA program. Additionally, many other Federal agencies offer some level of support for Registered Apprenticeships.⁵⁶ However, because these services are not a mandated part of pre-apprenticeship programs, and because they are not limited to pre-apprenticeship programs but could apply to apprenticeship programs generally, the Final Rule deletes the sentence on supportive services to avoid confusion.

A national JATC recommended that the Department provide guidance that would reduce certain legal risks in operating pre-apprenticeship programs to increase diversity and mitigate claims of reverse discrimination. The JATC suggested that the Department could significantly advance its efforts by providing final regulations that: (1) Permit apprenticeship programs to include in their standards, subject to Department approval, direct interview or direct entry from pre-apprenticeship programs specifically designed for one or more underrepresented groups and not others; (2) ensure that such options, once adopted, would not violate part 30 rights for any other group; and (3)

provide that it is the Department's interpretation that such approved methods do not violate title VII or other Federal civil rights laws and have the same level of protection against claims as if required under Federal law.

Providing guidance on the legality of direct entry programs necessarily requires fact-specific questions as to how, and in what context, that system is administered. Accordingly, we cannot provide broad guidance on the second and third points above. As to the first, generally speaking, an apprenticeship program may include in its standards, with Departmental approval, a direct entry program targeted toward a specific underrepresented group that is designed to address underutilization. Indeed, such measures are specifically countenanced by § 30.8, referenced below. Beyond that, any such guidance necessarily must proceed on a case-by-case basis. For instance, if a single-employer sponsor draws its apprenticeship pool entirely from a direct entry program that is specifically designed to target one racial minority group, resulting in an apprenticeship pool that consists entirely of members from that group, such a process could result in underutilization of another minority group. Such a program, used in concert with other selection mechanisms resulting in a less homogenous apprenticeship pool, may not. The Department is available to provide guidance, in consultation with its Office of the Solicitor, to sponsors with questions about specific scenarios involving direct entry.

Finally, one comment raised the question of further guidance and suggested updating TEN 13–12. One commenter suggested that the Department issue an update to TEN 13–12 that incorporates references to WIOA instead of the Workforce Investment Act of 1998 (WIA), and others suggested that the guidance be updated to link quality pre-apprenticeship programs with industry or sector partnerships as well as apprenticeship-related provisions in WIOA's implementing regulations. The Department updates its guidance periodically with a particular view towards ensuring that references to other complementary legislative schemes are correct, and will do so in this circumstance as well.

In conclusion, the definition is retained in the Final Rule as proposed.

“Qualified Applicant or Apprentice”

The NPRM proposed to add this definition because of the addition of disability to the list of protected bases covered by part 30. The only comments received related to this proposed

definition posed questions about how “qualified applicants” related to the requirement in proposed § 30.5(c)(2) that utilization analyses take into account the availability of those who have the “present or potential capacity for apprenticeship.” Neither of these commenters raised issues with the wording of this definition, which is taken directly from title I of the ADA, as amended and from the EEOC implementing regulations. The concerns raised by these commenters are addressed in the analysis of the comments received relating to § 30.5(c). The definition is incorporated into the Final Rule as proposed.

“Selection Procedure”

The NPRM proposed a definition of “selection procedure” that was consistent with the definition found in the Uniform Guidelines of Employee Selection Procedures (UGESP) at 41 CFR part 60–3,⁵⁷ because program sponsors are already required to comply with those regulations under the current part 30 and should be familiar with that definition. Commenters sought a few minor changes to the definition, but the Department declines to accept these changes in order to maintain consistency with the term as used in UGESP, which has applied to sponsors under these regulations for decades. Subsequent sections of this analysis, particularly the discussion of § 30.10, address some of the finer questions commenters raised about selection procedures. If further questions persist after publication of the rule, the Department will certainly consider further guidance on acceptable selection procedures.

“Undue Hardship”

This proposed definition was added because of the proposed addition of disability to the list of protected bases covered by part 30. The concept of “undue hardship” is a well-established one under the ADA, which provides that employers need not provide certain accommodations if they will cause an undue hardship to the employer. A national JATC suggested that the

⁵⁷ The intent behind UGESP, originally adopted in 1978 by several Federal agencies, including the Department, was to provide a uniform set of principles on the question of the use of tests and other selection procedures in making employment decisions. This uniform set of principles is designed to assist employers, labor organizations, employment agencies, and others to comply with Federal nondiscrimination requirements. UGESP requires that selection procedures which are found to result in an adverse impact on employment opportunities of members of any race, sex, or ethnic group be validated to show that they are correlated with, representative of, or characteristic of successful performance of the job in question.

⁵⁶ Federal Resources Playbook for Registered Apprenticeship, <https://www.doleta.gov/oa/federalresources/playbook.pdf>.

requirements for documentation of undue hardship should be reduced because they add the possibility of a significant administrative burden on a registered apprenticeship program. As discussed above, the proposed definition for this term is taken directly from title I of the ADA, as amended, and from the EEOC implementing regulations. The Department intends that this proposed term will have the same meaning as what was set forth in the ADAAA and implemented by the EEOC in 29 CFR part 1630. For the sake of consistency, the Department has determined that the requirements should remain the same.

An SWA requested clarification on the specific formula and threshold a sponsor would need to reach to meet the eligibility requirements for undue hardship. The EEOC has published guidance discussing in detail the various factors that should be considered in making an “undue hardship” determination,⁵⁸ but these factors focus broadly on the cost of the accommodation weighed against the financial resources of the employer, and thus are necessarily fact-specific. If sponsors have questions about undue hardship in particular circumstances, the Department can provide technical assistance.

Beyond these definitions proposed in the regulations, several commenters proposed additional definitions that should be included in the regulations. These are discussed in turn below.

“Industry” and “Relevant Labor Pools”

A JATC expressed concern that the proposed rule did not provide a definition of the term “industry,” and urged the Department to define the term (as used in proposed § 30.5(b)) more narrowly to avoid comparisons of occupations that require different levels of skill, education, and technical expertise. The commenter also asked the Department to define the term “relevant labor pools” (in proposed § 30.4(a)(2)) to clarify the relationship between the relevant recruitment area and the relevant labor pools. These terms are further discussed in the relevant sections specified above, and so we decline to define the term here. We note that the use of “industry” as the grouping for analyses under the proposed § 30.5 was not carried over into the Final Rule, and thus there is no need to define it.

“Self-Identification as an Individual With a Disability”

Another national JATC recommended that the Department add language to § 30.2 that defines the phrase “self-identification as an individual with a disability,” which is used in proposed § 30.11. The Department declines to define this compound phrase, the meaning of which can be understood in the context of proposed § 30.11.

“Sex”

Many advocacy groups, a professional association, and a national union, urged the Department to include a definition of “sex” in § 30.2 clarifying that discrimination on the basis of childbirth and medical conditions related to pregnancy or childbirth are prohibited forms of sex discrimination. This Department declines to address this concern by adding a definition, but notes that the issue is addressed in the discussion of §§ 30.1 and 30.3(c) herein.

Equal Opportunity Standards Applicable to All Sponsors (§ 30.3)

The existing § 30.3 was divided into six paragraphs and set forth the equal opportunity standards for registered apprenticeship programs: a sponsor’s obligation not to discriminate on the basis of race, color, religion, national origin, and sex and to engage in affirmative action (existing paragraph (a)); and a sponsor’s obligation to incorporate an equal opportunity pledge into its apprenticeship program standards (existing paragraph (b)). The remaining four paragraphs of existing § 30.3 set the effective date of the part 30 regulations for programs presently registered (existing paragraph (c)), the registration requirements for sponsors seeking registration of new programs (existing paragraph (d)); and the bases for exemption from the requirement to develop an AAP (existing paragraphs (e) and (f)).

Proposed § 30.3 reorganized this section by focusing upon the equal opportunity standards in paragraphs (a) and (b) and removed paragraphs (c) through (f), the substance of which was incorporated into other parts of the rule for the sake of clarity. Proposed § 30.3(a) and (b) built upon the equal employment opportunity standards that are contained in current § 30.3(a).

Paragraph 30.3(a)(1): Discrimination Prohibited

Proposed § 30.3(a)(1) set forth the general prohibition against discrimination on the bases of race, color, religion, national origin, and sex—those listed in the current part 30—and added prohibitions against

discrimination on the bases of age (40 or older), genetic information, sexual orientation, and disability. Proposed § 30.3(a)(1) still specified the same general range of aspects of apprenticeship programs that are covered, but reorganized the text, and reworded it to follow the framework used in other equal opportunity laws. This proposed paragraph received several comments.

Several commenters urged the Department to clarify throughout the text of part 30 that the regulations prohibit discrimination on the basis of pregnancy and gender identity as separate categories. As discussed in the analysis of § 30.1, the proposed rule modified the EEO pledge that a sponsor must include in its Standards of Apprenticeship, codified at § 30.3(c) herein, to contain a parenthetical after the listing of “sex” as a protected basis explicitly including discrimination on the basis of gender identity and pregnancy as forms of sex discrimination. This language is retained in the final rule.

Proposed paragraph (a)(1) also listed all the various employment actions that, if undertaken on the basis of a protected category, would be unlawful. One broader comment raised by an SWA, addressed in part in the discussion of § 30.1 above, was that some of the employment actions listed in paragraph (a)(1) were those undertaken by the employer, not the sponsor, in certain group sponsor structures. For instance, the commenter stated that group sponsors do not “hire” apprentices; rather, they place them with an employer. The commenter recommended that this provision include language for all sponsor types. We decline to change the regulatory text accordingly, as we believe it can apply broadly with the following guidance. In the apprenticeship model where the sponsor and the employer are the same entity or otherwise under the control of a common management structure, the prohibited employment actions listed herein are ones that can apply specifically to the sponsor. In the model where the sponsor and employer are different entities, such as the group sponsor structure identified by the commenter, we appreciate that the sponsor may not have direct control over certain of the employment decisions listed. For instance, a participating employer may discipline an apprentice or make a job assignment independent of the participating sponsor. However, as discussed in the analysis of § 30.1, sponsors and employers in such apprenticeship models have historically entered into

⁵⁸ See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at <https://www.eeoc.gov/policy/docs/accommodation.html#undue> (last accessed May 5, 2016).

written agreements setting forth “reasonable procedures . . . to ensure that employment opportunity is being granted.”⁵⁹ To the extent that a participating employer enters into such an agreement and engages in discrimination unlawful under this part, or even absent such an agreement the sponsor otherwise learns of such discrimination (either through complaints or its recordkeeping obligations under part 30), the Department would expect that the sponsor take action to address the discrimination and, if unremedied, take steps to terminate its relationship with the discriminating employer. While this certainly requires a degree of oversight on the part of the sponsor, it is consistent with past practice in group sponsorships and is necessary so as to prevent expansive loopholes that could allow EEO elements of apprenticeship programs to go entirely unregulated, frustrating the purpose of this part.

Other comments were raised as to the specific employment actions delineated in paragraph (a)(1). One commenter noted that the term “placement” is more germane to a sponsor than the term “hiring” may be. Accordingly, we have revised the Final Rule to include “placement” in addition to “hiring,” to the extent that either is more applicable to a given sponsor. The same commenter also asked the Department to clarify the definition of “award of tenure” as used in this section. Upon review, this term does not appear to correspond to aspects of apprenticeship programs. Accordingly, this term is not included in the Final Rule.

Many commenters expressed the need for sponsors to ensure an equitable schedule of rotation, assignments, training, and mentoring to assure that all apprentices achieve core skill competencies. The Department notes that “rotation among work processes,” “hours of training,” and “job assignments” are already included in § 30.3(a)(1)(iii), (vii) and (viii), while a lack of “mentoring” on the basis of a protected category could fall under the proposed § 30.3(a)(1)(x), which covers “any other benefit, term, condition, or privilege associated with apprenticeship,” depending on the specific facts. Similarly, other advocacy organizations recommended that the Department add “work assignments and training opportunities” to the list of activities for which a sponsor cannot discriminate to ensure that these opportunities are afforded to all apprentices equally. The Department agrees that both of these terms describe

possible adverse employment actions, but believes that the proposed § 30.3(a)(1)(x) covers these terms. Finally, one commenter suggested adding a paragraph (a)(1)(xi) that would include supervision by a trained and skilled journeyworker, where “trained” means familiar with EEO concepts and with a passing knowledge of adult learning theory. This suggestion is out of place in this section, which lists types of adverse employment actions that could be unlawful if made on the basis of a protected category.

Paragraph 30.3(a)(2): Discrimination Standards and Defenses

Proposed § 30.3(a)(2) laid out the discrimination standards and defenses in a framework similar to that used in other equal opportunity laws. Proposed subparagraph (a)(2)(i) discussed standards and defenses for race, color, religion, national origin, sex, or sexual orientation; subparagraph (a)(2)(ii) discussed disability; subparagraph (a)(2)(iii) discussed age; and subparagraph (a)(2)(iv) discussed genetic information (numbered incorrectly in the NPRM as (a)(2)(iii)).

Numerous advocacy organizations urged the Department to clarify in § 30.3(a)(2) that, with respect to pregnancy, the Registration Agency will apply the same legal standards and defenses as those applied under the Pregnancy Discrimination Act (PDA) and the ADAAA, as well as EEOC implementing regulations and enforcement guidance when employers make or are obligated to make accommodations for a substantial percentage of others similar in their ability to work. This was the intent of the proposal and is the intent of the Final Rule, and the regulatory language should be interpreted consistent with this intent. Further, these commenters requested that the Department address the need to provide reasonable accommodations for pregnancy and related conditions, not only to the extent required to avoid discrimination on the basis of pregnancy under the Supreme Court’s recent decision in *Young v. United Parcel Service, Inc.*,⁶⁰ but also as an affirmative measure aimed at breaking down barriers to women’s acceptance and advancement in apprenticeship programs. The NPRM explicitly described its intent to follow all relevant PDA and ADA/ADAAA case law, including *Young*, in interpreting nondiscrimination obligations. With respect to the request to require any additional affirmative action to address and provide reasonable

accommodations on the basis of pregnancy, we decline to specifically include such a requirement as beyond the scope of what was proposed, but encourage sponsors to take steps to break down the barriers raised by this comment.⁶¹

An SWA requested clarification regarding the term “apply the same standards and defense” and asked how it would apply those standards to an individual sponsor. This subparagraph is intended to help stakeholders identify the corresponding source of legal standard for each prohibited ground of discrimination. The information included after each explanation is intended to be helpful as an initial reference but was not intended to be an exhaustive explanation. The Department is available to provide technical assistance, in conjunction with its Office of the Solicitor, to answer questions that arise as to what standards or defenses might apply to specific situations.

A commenter expressed concern that the proposed language “determining whether a sponsor has engaged in an unlawful employment practice” is not inclusive of a group sponsor structure because group sponsors are not employers and do not employ apprentices. As set forth in the analysis of § 30.1 and earlier in this section, we believe the non-discrimination provisions can apply to the range of sponsor models, allowing that in a group sponsorship model, certain specific employment actions may be undertaken by the employer, not the sponsor, and thus actionable against the employer under various other civil rights laws. However, the group sponsor, upon knowledge of such violation, retains an obligation to address the violating activity with the employer and, if continuing or otherwise unremedied, take steps to remove the employer from participating in the apprenticeship program it sponsors. For greater clarity beyond the language “unlawful employment practice,” however, the Final Rule revises the text at the end of this section to read “unlawful practice under § 30.3(a)(1),” the section which enumerates the types of actions that, if taken due to a protected basis, would constitute unlawful discrimination.

The Final Rule contains one additional clarifying edit to § 30.3(a)(2)(i), including Executive Order 11246 as a source for the

⁶¹ We note that states may have pregnancy discrimination laws detailing accommodation obligations beyond those in this Final Rule; if such laws apply to sponsors, they will need to take additional steps to comply with these laws.

⁵⁹ See existing 29 CFR 30.4(c)(10).

⁶⁰ 135 S. Ct. 1338 (2015).

standards and defenses that will apply to the protected bases listed under that paragraph. This addition was made because Executive Order 11246, like this Final Rule but unlike title VII, contains explicit protections from discrimination on the basis of sexual orientation and gender identity, and thus the Department will look to interpretations of the Executive Order when evaluating claims under those bases.

Paragraph 30.3(b): General Duty To Engage in Affirmative Action

Proposed § 30.3(b) strengthened and further detailed the affirmative action obligation contained in the existing § 30.3(a)(3), requiring that all sponsors, regardless of size, take a discrete series of affirmative steps to provide equal opportunity in apprenticeship.

Before turning to each of the specific requirements proposed in § 30.3(b), we address some general comments on this paragraph. An SWA expressed concern that the NPRM confounded the roles of sponsor and employer, asserting that some of the proposed requirements in § 30.3(b) do not make sense when considered from the perspective of a sponsor that does not have a relevant workforce but merely coordinates multiple employers in a group program (e.g., proposed requirements relating to training and dissemination of EEO policy). This commenter suggested that the rule should clarify that the sponsor, where different from the employer, must share the relevant affirmative action responsibilities and requested concrete guidance on how the sponsor should ensure employer compliance. The Department recognizes that there is a difference between the roles of sponsor and employer; it also recognizes that under the existing rules, many of these obligations are among the listed outreach and recruitment efforts of which sponsors must undertake “a significant number.”⁶² To be sure, complying with many of these obligations would be facilitated by involvement of participating employers to develop procedures to ensure equal opportunity is being granted; this is precisely the arrangement that has historically been created by sponsor-employer apprenticeship agreements that we expect to continue.

Paragraph 30.3(b)(1): Assignment of Responsibility

Proposed § 30.3(b)(1) requires sponsors to designate an individual to be responsible and accountable for overseeing the sponsor’s commitment to equal opportunity in apprenticeship. A

national JATC recommended that the Department clarify that it is the sponsor, whether employer or JATC, that bears responsibility for all aspects of meeting the requirements of this standard, rather than one individual. Several commenters expressed that identification of an individual to fulfill this role would be burdensome.

In reviewing the comments, the Department wishes to clarify that it is the sponsor that bears the responsibility for meeting the requirements of this standard. The proposed requirement is intended to facilitate the administration and accountability of the program. As stated in the NPRM, the Department anticipates that this requirement would be fulfilled by the individuals who are already providing oversight for the program, such as a named apprenticeship coordinator. This proposal would not create new duties for the sponsor that the sponsor would not already have; rather, it would require the sponsor to identify a point person for overseeing its commitments to equal employment opportunity, whether that person actually performs all the necessary tasks or instead coordinates or monitors the performance of those tasks. While proposed § 30.3(b)(1) requires each sponsor to identify “an individual,” in light of the comments indicating that some sponsors might find placing this responsibility on a single person burdensome, the language has been amended to require each sponsor to identify “an individual or individuals” to provide greater flexibility.

Paragraph 30.3(b)(2): Internal Dissemination of Equal Opportunity Policy

Proposed § 30.3(b)(2) required the sponsor to develop internal procedures to communicate its equal opportunity and affirmative action obligations to apprentices, applicants for apprenticeship, and personnel involved in the recruitment, screening, selection, promotion, training, and disciplinary actions of apprentices. This proposed requirement is similar to that in § 30.4(c)(4) of the existing part 30, which addresses internal communication of the sponsor’s equal opportunity policy. However, proposed § 30.3(b)(2) would be required of all sponsors, regardless of size, and would make this communication mandatory.

An individual commenter suggested that the Department strengthen the language in § 30.3(b)(2) that “the sponsor must require that individuals connected with the administration or operation of the apprenticeship program take the necessary action to aid the

sponsor in meeting its nondiscrimination and affirmative action obligations” by specifying that this includes interceding when observing suspected acts of harassment or discrimination on the job or at school. We respectfully decline to include this specific language in the regulation. It is a well-established principle of discrimination law that, if the employer learns of harassing conduct and fails to take reasonable care to prevent and promptly correct the harassment, the employer can be held liable.⁶³ This principle applies to sponsors in the apprenticeship context as well. Beyond this, we believe the anti-harassment measures and right to file complaints otherwise set forth in this part will address the issue raised by the commenter. We do include one change to the regulatory text in (b)(2), specifying that the target of the dissemination of the equal opportunity policy include “individuals connected with the administration or operation of the registered apprenticeship program.” This is made partly to make this paragraph consistent with others in § 30.3 that use this exact phrasing. It is also to clarify the intent that the dissemination of the equal opportunity policy should be broad, reaching, for instance, supervisors, foremen, journeyworkers, and other non-supervisory employees working alongside apprentices in the sponsor’s program.

Proposed §§ 30.3(b)(2)(i) and (ii) required a sponsor to publish its equal opportunity pledge in apprenticeship standards and in appropriate publications and post the pledge on bulletin boards, including through electronic media, accessible to apprentices and applicants for apprenticeship. Multiple commenters believed the proposed requirements requiring the equal opportunity pledge to be posted in apprenticeship standards and in appropriate publications, posted on bulletin boards, and through electronic media would not be burdensome, but a national JATC asserted the proposed requirement was at least partially redundant of part 29, which already requires insertion of the equal opportunity pledge. The Department notes that the proposed publishing requirement purposely goes beyond what is required in the part 29 equal opportunity pledge to include other appropriate publications. In

⁶³ See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, accessible at <https://www.eeoc.gov/policy/docs/harassment.html> (last accessed May 18, 2016).

⁶² See existing 29 CFR 30.4(c).

response to a question about what constitutes these “appropriate publications,” we note that the proposed regulation specified several types; providing more specificity than this isn’t feasible given that what is appropriate will likely vary from sponsor to sponsor. The Department can provide technical assistance on this issue on a more individualized basis. The Final Rule does make a minor correction to (b)(2)(i), deleting “and other appropriate publications,” which was duplicative language, and replacing it with “or other documents disseminated by the sponsor or that otherwise describe the nature of the sponsorship,” and another non-substantive minor edit for better readability.

While commending the intent of the proposed language requiring wide dissemination of EEO policies, an advocacy organization commented that the use of the term “accessible” in paragraph (b)(2)(ii) carries an additional meaning for individuals with disabilities and urged that dissemination of a sponsor’s EEO policies should be “accessible” in the broadest possible terms. Similarly, another advocacy organization recommended that the Department amend § 30.3(b)(2) to require that any electronic media platform used must be accessible to blind applicants (*i.e.*, compatible with screen-reading technology). The Department notes that here “accessible” was intended to be interpreted broadly, and each sponsor should make its EEO policies available in alternative formats (such as large print, Braille and other means to enable individuals with visual impairments to read for themselves) upon request. This is consistent with existing obligations under disability law that require accommodations of individuals unless to do so would impose an undue hardship on the sponsor’s operations.

An individual commenter recommended that the Department require sponsors to use an inclusion statement to make the workplace environment friendlier to current women in the trades, as well as more welcoming to women considering joining the trade. The requirements to publish and post the equal opportunity pledge are intended to communicate that the apprenticeship programs are welcoming to all apprentices regardless of race, color, religion, national origin, sex, sexual orientation, genetic information, age, or disability. A required inclusion statement was not proposed in the NPRM, and accordingly, the Department declines to so amend this provision. Nonetheless,

the Department encourages such statements to the extent that they serve to further signal to all prospective apprentices that they are welcome, which in turn may help sponsors obtain greater participation from members of certain underrepresented populations.

Proposed § 30.3(b)(2)(iii) required orientation and periodic information sessions for apprentices, journeyworkers who directly supervise apprentices, and other individuals connected with the administration or operation of the sponsor’s program. Many comments received with respect to this requirement were generally positive. One advocacy organization suggested that the Department go beyond the proposal to require sponsors to, at a minimum, hold orientation and information sessions for apprentices, supervisors, and other individuals associated with an apprenticeship program on an annual, rather than periodic, basis to ensure that individuals are aware of the sponsor’s EEO policy with regard to apprenticeship. We decline to incorporate this specificity in order to maintain sponsors’ flexibility to conduct these sessions at intervals that make sense given the schedule at which sponsors onboard new apprentices. Another commenter recommended that the Department reiterate the importance of broadening the awareness of the EEO policy among those on work sites who control the circumstances of training by, for example, making clear that “other individuals connected with the administration or operation” include the foreman and supervisors who establish the accepted practice on the job site. While not included in the regulatory text, we have provided this guidance in this preamble in the discussion of § 30.3(b). We have also clarified in the regulatory text of paragraph (b)(2)(iii) that sponsors include the anti-harassment training required by paragraph (b)(4) of the final rule in these orientation and information sessions in order to make clear at the outset that harassing conduct will not be tolerated.

Many commenters raised concerns regarding the costs of such orientation and information sessions. In crafting this Final Rule, the Department has attempted to balance the burden on sponsors with establishing a meaningful and effective equal opportunity policy dissemination process. For instance, the Department notes that sponsors, as a matter of effective program management, must communicate some information jointly to apprentices and at least some other individuals connected with the administration and operation

of its apprenticeship program during the course of its sponsorship. Accordingly, the sessions established in these regulations need not necessarily require new training sessions or timetables, but can incorporate the communication of the EEO policy information and anti-harassment training into existing sponsor-participant communications and training sessions. We additionally repeat that the schedule for these sessions remains “periodic” to provide sponsors with some timing flexibility.

Several commenters raised issues regarding the implementation of this requirement in various scenarios in which the sponsor is not the employer. These commenters noted generally that the requirement would place a particular burden on multi-employer sponsors, that the employers would generally be better placed to provide EEO training of this sort, and the constantly changing nature of the participating employers and employees further expanded the burden. Accordingly, one commenter recommended that the Department eliminate the proposed requirement that program sponsors conduct training and orientation for journeyworkers who supervise apprentices. The Department recognizes that sponsors operate apprenticeship programs in numerous industries and occupations, involving a wide range of working conditions and environments, and that sponsors are not always the employer of the apprentice. However, the proposal was largely based on existing actions already undertaken by sponsors, such as that set forth in the existing § 30.4(c)(10), to “develop[] reasonable procedures between the sponsor and employers of apprentices to ensure that employment opportunity is being granted” As discussed above, the Department has not prescribed in the proposed rule the exact nature and frequency of these sessions, to allow sponsors some flexibility depending on their circumstances, but expects sponsors to carry out these activities in good faith, which may in many cases involve coordinating with participating employers. Accordingly, we decline to diverge from the existing regulations and create different obligations for different models of sponsorship.

Cost concerns were also raised with respect to the maintenance of records required by proposed § 30.3(b)(2)(iv). To clarify, the Department notes that this obligation is consistent with recordkeeping already required in the existing regulations, which obligate maintenance of “information relative to the operation of the apprenticeship

program.”⁶⁴ For paragraphs (b)(2)(i) and (ii), the obligation could be met simply by retaining a copy of the documents where the EO pledge is included. For paragraph (iii), retaining a copy of any written materials used to effectuate the sessions, as well as some memorialization of when the session occurred and who attended, would suffice for compliance purposes.

Paragraph 30.3(b)(3): Universal Outreach and Recruitment

Proposed § 30.3(b)(3) required all sponsors to ensure that their outreach and recruitment efforts for apprentices extended to all persons available and qualified for apprenticeship within the sponsor’s recruitment area regardless of race, sex, ethnicity, or disability status. Many commenters, including advocacy organizations and an SWA, expressed support for the proposed universal outreach and recruitment requirements. Some advocacy organizations reasoned that, given historical outreach and hiring practices focused primarily on men, broader outreach efforts are necessary to increase women’s awareness of these opportunities.

Other commenters expressed concerns regarding the scope and cost of this outreach requirement. One commenter recommended that the Department remove the proposed requirement in § 30.3(b)(3)(i) that sponsors maintain lists of recruitment sources that will generate referrals from all demographic groups and the proposed requirement in § 30.3(b)(3)(iii) to notify recruitment sources in advance of apprenticeship opportunities, noting that existing advertising mechanisms were sufficient. The Department notes that the proposed revision mirrors outreach and recruitment efforts set forth in the existing § 30.4(c)(1), so the requirement to do so now should not be new for many sponsors. Further, the data in the introduction to this preamble showing widespread underutilization of certain groups indicate that existing advertising mechanisms may not be sufficient to draw interest from as broad and diverse a base as possible.

An SWA expressed concern regarding the costs of outreach activities for small sponsors, such as those with fewer than five apprentices, that were not previously required to conduct mandatory recruitment and outreach activities, and that it might serve as a deterrent to creating new registered apprenticeship programs. To this, in addition to the response above, we note the Department intends to provide guidance to sponsors who need

assistance finding sources for recruitment. While outreach and recruitment activities take some degree of time, when done purposefully they can provide immense benefits to the apprenticeship program, bringing a wide range of previously untapped talent into the workforce.

Finally, another commenter recommended that to limit costs the Department retain the proposed minimum activities but add to § 30.3(b)(3) that a sponsor must engage in recruitment that would “reasonably be expected” to encourage persons with a potential capacity for apprenticeship to submit an application, suggesting the following revised language:

(3) Universal outreach and recruitment. The sponsor will implement measures to ensure that its outreach and recruitment efforts for apprentices extend to all persons available for apprenticeship within the sponsor’s relevant recruitment area without regard to race, sex, ethnicity, or disability and are reasonably expected to encourage persons with a potential capacity for apprenticeship to submit an application regardless of sex, race, ethnicity, or disability.

The language proposed by the commenter appears to add another requirement, thus possibly adding to any burden that might be created. Insofar as the commenter is seeking to soften the requirement that a sponsor “implement measures to ensure that its outreach and recruitment efforts extend to all persons available,” to clarify, the implementation of this provision will be reviewed by evaluating the range of recruitment sources, not by checking that every available person was reached. As noted above, during compliance reviews the Department will consider a sponsor’s good faith efforts in this regard. The Department accordingly declines to amend the provision as requested.

Regarding the question of whether the required outreach activities would result in a benefit to justify the costs, a national JATC commented that the studies cited in the NPRM did not include any empirical evidence that additional outreach by construction industry training funds would result in greater participation of women and minorities in the apprenticeship programs. The commenter said that the studies cited in the NPRM showed that the barriers to female participation are societal and there are no consensus best practices to address them.

As an initial response to this comment, the Department does not agree that there is no evidence that additional outreach would result in greater participation by traditionally underrepresented groups. As stated in

the introduction of the rule, the experience of highway construction apprentices in Oregon, where extensive efforts to increase diversity have occurred, demonstrates that the participation rate of women and minorities can increase markedly when it is prioritized. In response to the comment that underutilization is strictly “societal,” which we interpret to mean out of the control of apprenticeship sponsors to address, while we do not suggest that discrimination is the entire reason for utilization disparities, there is ample evidence that it is a contributing factor. As described earlier, comments received from several women working in the construction trades, including those who have participated in apprenticeship programs, detail repeated examples of differential treatment in job assignments, training, and promotions, as well as sexually harassing work environments. Another commenter cited academic research demonstrating that, despite the ability and interest of women to work in these jobs, external barriers in recruitment, hiring, training, and retention of women persists. Indeed, a 2012 study funded by the U.S. Department of Labor identified “harassment and exclusion at male-dominated worksites” as one of three primary barriers underlying women’s low rate of participation in construction trades apprenticeships,⁶⁵ and a 2013 report from the National Women’s Law Center describes the ways in which both overt and subtle forms of discrimination discourage women from entering and remaining in the construction field.⁶⁶

A number of comments made suggestions for additional specificity. Several advocacy organizations recommended that the Department include all of the protected bases in § 30.3(b)(3) to ensure inclusive outreach and recruitment and avoid prohibited discrimination. Asserting that apprenticeship programs have a history of imposing maximum age requirements and other age-discriminatory practices, one advocacy organization urged the Department to add “age” to the bases on which registered apprenticeship programs have a general duty to engage in affirmative action in outreach and recruitment. As discussed above, the affirmative action provisions of this part follow generally other such affirmative

⁶⁵ An Effectiveness Assessment and Cost-Benefit Analysis of Registered Apprenticeship in 10 States, available at https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_10.pdf (pp. 50–52) (last accessed May 27, 2016).

⁶⁶ Women in Construction: Still Breaking Ground, available at http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf (last accessed May 27, 2016).

⁶⁴ See existing 29 CFR 30.8(a).

action programs which do not require specific outreach and recruitment obligations on the basis of age. Nothing in the rule, however, would prevent a sponsor from engaging in such activities.

Some advocacy organizations urged the Department to add to the list of examples of relevant recruitment sources in § 30.3(b)(3)(i) organizations that represent and serve women, people of color, and other underrepresented populations including individuals with disabilities. Further, these commenters suggested that the Department provide links to such resources on its Web site. As discussed above, the Department expects to provide technical assistance to sponsors to help them identify relevant recruitment sources, either through publication on its Web site or through more targeted communication.

To underscore that outreach alone is not sufficient to recruit women in particular, some advocacy organizations suggested that the Department include language in § 30.3(b)(3) to require that outreach is paired with career education that includes formal and informal apprenticeship information and orientation sessions describing what is entailed in the apprenticeship, the requirements and processes for applying, and explanations of the selection process. Related to this, these commenters recommended OA post on its Web site a list of resources for technical assistance and examples of career education materials, including links to WANTO-developed resources. These comments call for new provisions that, while laudable, go beyond the scope of the outreach efforts proposed in the NPRM, and we decline to require them in the Final Rule. As stated above, the Department intends to provide guidance to sponsors relating to relevant recruitment sources.

An advocacy organization urged the Department to strengthen the universal outreach requirements by requiring that apprenticeship programs report on the results of their outreach efforts (*e.g.*, how many candidates were received from each source, whether those candidates were accepted into the program, and why or why not) and modify outreach efforts over time in accordance with the reported results. The Final Rule requires such reporting in written AAPs for sponsors who are underutilized and required to engage in targeted recruitment, as data would be particularly important to sponsors in that standing, but we decline to extend it to the more general outreach requirement. Similarly, another advocacy organization recommended that the Department propose

accountability targets for outreach, recruitment, and retention. This is largely the purpose of the utilization goals set forth in the sections dealing with the written AAP obligations.

A national union and a national JATC said that the Department should clarify the scope of the “relevant recruitment area,” as that term is used throughout § 30.3(b)(3). Explaining that JATCs are often located in remote areas, such that the training centers are not in the same labor market as the work opportunities provided by the signatory contractors, these commenters recommended that the Department add clarifying language to § 30.3(b)(3). The Department addresses the proper interpretation of “relevant recruitment area” in the discussion of § 30.5, and submits that sponsors should use that interpretation to understand the meaning of the term in this section as well.

Commenters also recommended that the Department develop, update, and disseminate annually lists of recruitment resources, including contact information, by occupation and industry that sponsors can use. The commenters suggested that this would ease compliance determinations made by Registration Agencies, in addition to easing the cost burden on sponsors so that they could expend recruitment resources on direct contact and ongoing coordination with the staff of recruitment resources and meeting with groups of potential candidates. The Department and SAAs maintain relationships with some recruitment sources, and we provide such information to sponsors, as available and appropriate. The Department intends to increase technical assistance available to sponsors and provide additional recruitment sources to the extent that our resources allow.

Another commenter expressed concern that requiring sponsors to “develop and update annually a list of current recruitment sources that will generate referrals from all demographic groups within the relevant recruitment area,” could result in Registration Agencies holding sponsors accountable if recruitment and referral sources do not refer qualified applicants, despite good faith efforts on the part of the sponsor. For this reason, the commenter recommended revising the language from “sources that will generate referrals” to “sources likely to generate referrals” We decline to make this change. In the circumstance that the commenter raises, we would expect that the sponsor, upon realizing that the sources it is using are not fulfilling the intent of this provision, would seek alternative or additional sources that are

more effective at referring qualified applicants. The obligation is intended to be a dynamic one in which sponsors actively engage, rather than a rote, “check the box” requirement.

Regarding the proposed § 30.3(b)(3)(iii) requirement that sponsors provide recruitment sources advance notice, preferably 30 days, of apprenticeship openings, we received comments on all sides of the issue. Several commenters urged the Department to require no less than 30 days advance notice, which these commenters said would allow sufficient time for the notice of an opening to be processed, acted upon, and disseminated by the recruitment source and reach prospective applicants. These advocacy organizations stated that, historically, short public notice of opening periods disadvantaged nontraditional pools of applicants who did not have the benefit of familial or collegial connections to become aware of apprenticeship opportunities and the application processes, selection methods, and/or criteria for competitive candidates.

By contrast, another commenter recommended that the Department eliminate the requirement to provide 30 days advance notice of apprenticeship openings. This commenter reasoned that when an apprenticeship opening occurs, it may not always be feasible to provide referral sources with 30 days advance notice, particularly when new openings occur as a result of a new project or when someone suddenly discontinues participation in the apprenticeship program. Another proposed that the Department revise the provision to read “provide recruitment sources notice of such openings within 30 days of the opening being published,” that is, 30 days after the opening. Finally, one commenter said the time set forth in the regulation should not be “preferred,” but rather a concrete amount of time.

We note in the first instance that the proposed language mirrored a provision at § 30.4(c)(1) of the existing regulations that established 30 days in advance as a firm deadline, rather than a preferred one. Thus, the intent was to carry over an obligation that was familiar to sponsors, but provided more flexibility to account for differing logistical possibilities. Taking into consideration the comments we received on both sides, we believe this approach remains the best one for those reasons, and thus we retain the proposed text in the Final Rule.

Paragraph 30.3(b)(4): Maintaining Apprenticeship Programs Free From Harassment, Intimidation, and Retaliation

Proposed § 30.3(b)(4) required a sponsor to develop and implement procedures to ensure that its apprentices are not harassed because of their race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability, and to ensure that its workplace is free from harassment, intimidation, and retaliation. The proposal included four specific requirements set forth in separate subparagraphs: (i) Communicating to all personnel that harassing conduct will not be tolerated; (ii) providing anti-harassment training for all personnel; (iii) ensuring that facilities and apprenticeship activities are available to apprentices without regard to protected bases; and (iv) establishing procedures for handling and resolving complaints about harassment.

Several commenters generally supported the proposal. Numerous advocacy organizations, a professional association, and individual commenters expressed support for anti-harassment protections as being critical to prevent and confront the discrimination that is often pervasive at work sites, including sexual harassment and stereotypes, and to increase retention over time. One individual commenter stated that when women apprentices are isolated on jobs with only men they are subject to harassment and unsafe working conditions. Several women submitted comments describing their personal experiences being subject to sexual harassment as an apprentice on a work site. An advocacy organization commented that age-based harassment is a growing problem, citing EEOC Enforcement & Litigation statistics.

Several advocacy organizations urged the Department to strengthen further the proposed anti-harassment provisions in § 30.3(b)(4). One of these organizations cited a study that it asserted shows that 3 in 10 women respondents in an interview study reported frequent sexual harassment, harassment on the basis of their sexual orientation, or on the basis of their race or ethnicity. In particular, these organizations asserted that strong anti-harassment measures will help ensure that more women complete their apprenticeship programs and recommended that the Department add to the anti-harassment measures at § 30.3(b)(4)(i)–(iv) a requirement that sponsors must make all work assignments and training opportunities available without regard to the protected

bases under the proposed rule. This principle is already protected by § 30.3(a)(1).

An industry association recommended that the Department clarify what “workplace” means in § 30.3(b)(4) because, in many cases, apprenticeship sponsors are not the employers of the apprentices and only have control over what takes place within their own facilities. To address this concern, the Department has replaced the term “workplace” with “apprenticeship program,” to clearly indicate the sponsor’s role in preventing harassment, intimidation, and retaliation. This can apply to both individual and group sponsors, in the manner discussed previously.

One commenter suggested strengthening the proposed § 30.3(b)(4)(i), which requires sponsors to communicate to all personnel that harassing conduct will not be tolerated, to include opportunities for apprentices to share information about harassment or intimidation on the job or at school to identify common problems, which could create a valuable feedback mechanism for sponsors interested in confronting harassment. The Department also received significant comments regarding proposed § 30.3(b)(4)(ii) requiring that sponsors “provide anti-harassment training to all personnel.” A number of commenters expressed concerns about the costs they asserted sponsors would incur as a result of the proposed requirement that sponsors must provide anti-harassment training to all personnel. For example, a national JATC urged the elimination of this provision in the Final Rule because many union-sponsored apprenticeship programs are statewide or regional and the costs of bringing in every journeyworker for anti-harassment training would impose a large burden on the program. Further, this commenter reasoned that the provision is unnecessary because contractors are required by law to maintain a nondiscriminatory workplace and union representatives can assist in helping them do so. In contrast to the comments raising the issue of burden, some commenters urged the Department to require additional training or add more specific language to the proposed requirement that sponsors must “provide anti-harassment training to all personnel.” These suggestions included requiring regular and ongoing professional development on cultural competency, anti-discrimination, and affirmative action requirements for apprenticeship training staff, instructors, administrators, and support staff, both in classroom-related

instruction and on work sites, as well as best practice guidelines.

To address these competing concerns, the Department has maintained the proposal’s requirements that sponsors communicate that harassment will not be tolerated and provide anti-harassment training, but we clarify the proposal in three ways. First, in response to concerns that the proposal’s requirement to provide training and communications to “all personnel” was too broad, we revise the Final Rule to state that sponsors must ensure these obligations reach “individuals connected with the administration and operation of the apprenticeship program, including all apprentices and journeyworkers who regularly work with apprentices.” This is narrower than the “all personnel” language proposed, but, as stated in the discussion of paragraph (b)(2) where this language is also used, should be broadly interpreted to include apprentices, supervisors, foremen, journeyworkers, and other non-supervisory employees working regularly alongside apprentices in the sponsor’s program. It would not require, for instance, communication to employees of participating employers who do not work in proximity to, or otherwise interact with, apprentices in these programs, although we maintain that the broadest possible communication of anti-harassment principles and obligations is a best practice.

Second, paragraph (b)(4)(i) of the Final Rule requires that sponsors are required to provide training for this same narrower category of personnel, and clarifies that this must not be a mere passive transmittal of information, but must include participation by trainees in a training program, such as attending a training in person or completing an interactive training program online.

Third, the Final Rule clarifies that the training content must include, at a minimum, the communication of the following information: A statement that harassing conduct will not be tolerated; a definition of harassment and examples of the types of conduct that would constitute unlawful harassment; and the right to file a harassment complaint. We believe communicating these elements as part of anti-harassment training is fundamental to creating an environment where it is broadly understood what constitutes harassment and that such harassment has no place in an apprenticeship program.

We expect that some sponsors, in the course of their normal business practices, already provide anti-

harassment training that covers some or all of what this Final Rule requires. To the extent that sponsors can simply modify existing training modules (including the orientation and information sessions set forth in paragraph (b)(2)(iii) above) to include this training obligation, doing so will limit the associated time and expense for compliance. Further, to help sponsors comply with this training obligation, the Department will provide technical assistance, including links to materials relevant to the required contents of the anti-harassment training, that sponsors and/or participating employers can use.

Proposed § 30.3(b)(4)(iii) required that “if the sponsor provides restrooms or changing facilities, the sponsor must provide separate or single-user restrooms and changing facilities to assure privacy between the sexes.” An individual commenter urged the Department to require job sites to have separate male and female restrooms. Some advocacy organizations urged the Department to require sponsors to have external locks on all single-user and sex-segregated restrooms and changing facilities and to ensure that all restrooms and changing facilities are enclosed, including a roof, to ensure privacy between the sexes and support safety and health measures in accordance with the findings and recommendations of the Advisory Committee on Occupational Safety and Health in its report “Women in the Construction Workplace: Providing Equitable Safety and Health Protection.” Commenting that unsafe sanitary facilities are a large challenge for women in nontraditional trades, two individual commenters also recommended that the regulations ensure that women have access to secure, safe, locked sanitary facilities. The Department notes that rules regarding the sanitation of restrooms and changing facilities apply more broadly to workplaces than to those that are part of an apprenticeship program and this type of specificity was not proposed in the NPRM. Nonetheless, the language “to assure privacy” implies that such restrooms and changing facilities must be secure. For this reason, the Department does not change the proposal on this account.

One advocacy organization suggested that the Department should include specific language regarding access to appropriate sex-segregated facilities for all workers in apprenticeship programs. Numerous other advocacy organizations urged the Department to clarify that program sponsors must permit transgender persons to access restrooms

and changing facilities based on their gender identity. As discussed earlier, § 30.3(a)(2) of the regulation provides that the Department will look to relevant legal authorities to interpret whether sponsors are engaging in unlawful sex discrimination.⁶⁷ The Department will continue to monitor the developing law related to the issues raised by the commenters, and will consider issuing further guidance on this subject as appropriate. Accordingly, the proposed paragraph (b)(4)(iii) is retained in the Final Rule as paragraph (b)(4)(ii).

Proposed § 30.3(b)(4)(iv) required that sponsors implement procedures for handling and resolving complaints about harassment and intimidation. An individual commenter requested that the Department require sponsors to post such internal procedures in common areas of schools, work sites, and meeting spaces. The requirement to “establish and implement” implies providing notice that such procedures exist and posting such procedures where apprentices would see them. The Final Rule retains proposed paragraph (b)(4)(iv) in the Final Rule as paragraph (b)(4)(iii), with the addition of a line stating that the establishment and implementation of procedures for handling and resolving complaints applies to complaints about retaliation, as well as harassment and intimidation. This is in keeping with the broader focus of paragraph (b)(4).

Paragraph 30.3(b)(5): Compliance With Federal and State Equal Employment Opportunity Laws

Proposed § 30.3(b)(5) required all sponsors to comply with all applicable Federal and State laws and regulations requiring EEO without regard to race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability. Proposed paragraph (b)(5) largely duplicates the existing § 30.10.

An SWA commented that the § 30.3(b)(5) assignment of EEO obligations to the sponsor “or [in the case of a] joint apprenticeship training committee, parties represented on such

committee” seems to transfer responsibility from a sponsor to the applicable managers and union officials, which would protect the sponsor from ever being sanctioned (*i.e.*, deregistered). The commenter asked why this privilege applies only to joint committees and whether non-joint committees are materially different in this regard. The Department clarifies that, as stated earlier, the obligations of this part apply to all sponsors. It recognizes that the language in parentheses “or where the sponsor is a joint apprenticeship committee, the parties represented on such committee” could be understood as an exception. Therefore this language has been stricken.

Moreover, this commenter asserted that the reference to other laws in proposed § 30.3(b)(5) would require registered apprenticeship stakeholders to enforce policies of programs and systems that are outside of their familiar venue (*e.g.*, vocational rehabilitation, gender equity, or disability rights). The commenter asked whether officials in those other policy areas will have reciprocal duties to enforce registered apprenticeship standards. In response, the Department notes that proposed § 30.3(b)(5) carried forward the provisions from existing § 30.10. With this in mind, we clarify that this proposed provision is not intended to incorporate by reference the requirements of all Federal and State non-discrimination laws and regulations. Rather, it recognizes that many sponsors may already be subject to such laws, etc., and to the extent they are, they must comply with them. Failure to do so may be grounds for enforcement action under proposed § 30.15. Such action would only be taken if the violations of other Federal and State non-discrimination laws are applicable to the sponsor and relate to the employment opportunity of apprentices. To make this clear, language from existing § 30.10, “if such noncompliance is related to the equal employment opportunity of apprentices and/or graduates of such an apprenticeship programs under this part,” has been inserted in the Final Rule.

Paragraph 30.3(c): Equal Opportunity Pledge

Proposed § 30.3(c) carried forward the requirement set forth in the current § 30.3(b) for an equal opportunity pledge and include age (40 or older), genetic information, sexual orientation, and disability on the list of bases upon which a sponsor must not discriminate, and included a parenthetical stating that

⁶⁷ Multiple cases have held that failure to provide access to restrooms consistent with an individual's gender identity violated Title VII. See *Lusardi v. Dep't of Army*, EEOC Appeal Doc. 0120133395, 2015 WL 1607756, at *8 (April 1, 2015); *Hart v. Lew*, 973 F. Supp. 2d 561, 581–82 (D. Md. 2013) (recognizing a transgender plaintiff's title VII sex discrimination claim based in part on her employer's repeated denial of access to the women's restroom). However, as noted previously, the effect of the preliminary injunction issued in *Texas v. U.S.*, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. Aug 21, 2016) is unclear at the time this rule went to publication.

sex discrimination included discrimination on the basis of gender identity and pregnancy. Apart from the comments addressed earlier recommending that the ground of sex discrimination expressly recognize sexual orientation discrimination and sex stereotyping as additional forms of sex discrimination, which has already been discussed, no other comments were received. Accordingly, the text is adopted as proposed.

Paragraph 30.3(d): Compliance

In order to clarify the time a sponsor has to comply with obligations in this rule, rather than a catch-all “effective date” provision as was set forth in the proposed § 30.20, the Final Rule sets forth in the specific sections, as needed, when a sponsor must come into compliance with the obligations set forth in that section. If no such date is provided, it is intended that the sponsor must comply with a particular section as of the effective date of the Final Rule.

Proposed § 30.20 required that currently registered apprenticeship programs have 180 days to come into compliance with the provisions of § 30.3, but did not specify a similar compliance deadline for sponsorships newly registered after the effective date. This new § 30.3(d) carries over the 180-day compliance date for currently registered programs from the proposed § 30.20, and clarifies that sponsors registered after the effective date will need to comply with § 30.3 upon registration or 180 days after the effective date of this rule, whichever is later. This is consistent with the proposal and will ensure that sponsors registered shortly after the rule’s effective date in no circumstance will have to come into compliance more quickly than currently registered sponsors.

Affirmative Action Programs (§ 30.4)

The existing § 30.4 set forth the regulatory requirements with respect to AAPs, addressing: The adoption of an AAP in § 30.4(a); the definition of affirmative action in § 30.4(b); the requirements for broad outreach and recruitment in § 30.4(c); the mandate that a sponsor include goals and timetables where underutilization occurs in § 30.4(d); the factors for determining whether goals and timetables are needed in § 30.4(e); the establishment and attainment of goals and timetables in § 30.4(f); and that the Secretary of Labor will make available to program sponsors data and information on minority and female labor force characteristics in § 30.4(g). Exemptions from the requirement to

adopt an AAP were found in the existing part 30 at § 30.3(e) and (f).

The NPRM proposed to restructure this section in order to streamline, clarify, update, and improve the AAP requirements by making clear the purpose of AAPs, stating who must adopt an AAP, listing the required elements of AAPs, explaining the exemptions for maintaining an AAP, and laying out the proposed new timing for internal review of AAPs.

A number of commenters expressed concern with the burden associated with maintaining AAPs generally. For example, a national JATC remarked that the proposed AAP requirements would put a time and resource burden on sponsors and an individual commenter warned that the proposed rule could divert already-limited resources away from training programs and opposed any rules that would increase costs for purposes of tracking and reporting. A national JATC expressed concern that proposed § 30.4 would make affirmative action requirements more difficult to understand and comply with in general.

The Department understands the voluntary nature of apprenticeship and that many program sponsors are under resource constraints, but notes that the requirement to maintain an AAP is not a new requirement and that all non-exempt sponsors (*i.e.*, sponsors with 5 or more apprentices) are currently required to develop and maintain such plans with respect to women and minorities. As explained in the NPRM, maintaining an AAP need not be an unduly burdensome undertaking. Thousands of registered apprenticeships with AAPs have been established under the existing regulations, and many have maintained and grown the number of apprenticeships and the skill of their individual workers notwithstanding the AAP obligations, and because of these obligations have taken strides to diversify their program to more closely reflect the available workforce. While these regulations add some new obligations to the AAP, the intent was to streamline and clarify the AAP as a whole, making it simpler to understand what compliance means and easier to measure and achieve meaningful success—both for existing apprenticeship programs and for the many companies looking to create apprenticeship programs now and in the future. The Department has thoroughly considered the concerns raised by the commenters with regard to burden and, as described in the discussions of sections 30.4–30.8 herein, the Final Rule contains several changes from the proposal designed to reduce further the burden of AAP compliance for sponsors

while maintaining an effective overall program.

Paragraph 30.4(a): Definition and Purpose

Proposed § 30.4(a) included a revised definition of “affirmative action program” and explained that, in addition to identifying and correcting underutilization, AAPs also are intended to institutionalize the sponsor’s commitment to inclusion and diversity by establishing procedures to monitor and examine the sponsor’s employment practices and decisions with respect to apprenticeship, so that the practices and decisions are free from discrimination, and barriers to equal opportunity are identified and addressed.

Multiple commenters, including a national JATC and SWAs, disagreed with the premise laid out in paragraph (a)(2) that “absent discrimination, over time a sponsor’s apprenticeship program, generally, will reflect the sex, race, ethnicity, and disability profile of the labor pools from which the sponsor recruits and selects.” These commenters argued that the goals set forth in § 30.4(a) do not take into account the societal and cultural factors that influence an individual’s decision to pursue apprenticeship and that lack of diversity is not necessarily a direct result of discrimination, and suggested that the Department remove paragraph (a)(2). Specifically, one commenter said that it is impossible for the sponsor to address underlying societal problems that influence lack of participation by underrepresented groups, such as lack of access to childcare or transportation. Some commenters remarked that compliance with affirmative action requirements should be determined by whether the sponsor has made significant efforts to meet its goals and timetables.

We respectfully disagree with many of the comments on this proposed language, which mirrors language in the OFCCP affirmative action regulations and describes well-established rationales for affirmative action. The idea behind maintaining an AAP is to combat any existing societal factors that may have been influenced by previous discriminatory norms and practices and that may continue to deter underrepresented groups from seeking jobs in certain sectors. The data cited at the beginning of this preamble demonstrates that stark underutilization of the protected groups persists to the present. While some amount of this disparity may not be directly attributable to discrimination, the comments we received from individuals

in the trades and advocacy organizations describing widespread harassment and other behavior that has a chilling effect on these groups entering apprenticeships cannot be ignored. While a sponsor's goals are aspirational, it should take underutilization as a signal that it should look closely at its employment and outreach practices to ensure that its practices are not preventing underrepresented groups from applying to, participating, and advancing in apprenticeship. The targeted outreach, recruitment, and retention practices outlined in § 30.8 are designed to help sponsors experiencing underutilization overcome societal barriers to apprenticeship that may exist in that field. As discussed more fully in § 30.6, this is not a purely arithmetic exercise. Each sponsor's compliance with its affirmative action obligations will be determined in significant part by reviewing the nature and extent of the sponsor's good faith affirmative action activities and the appropriateness of those activities to identify equal employment opportunity problems. A sponsor's compliance is measured by whether it has made good faith efforts to meet its goals; failure to meet goals is not itself a violation of these regulations.

An SWA requested a definition of the term "barriers" as it applies to § 30.4(a)(1) and (a)(2), and requested clarification about how to detect and remove barriers. A national JATC and a national union suggested that the Department provide guidance on "specific, practical steps" to address barriers to equal opportunity to comply with § 30.4(a)(2).

"Barriers" are any practices that prevent individuals from realizing an equal opportunity to apply for and participate in apprenticeship programs. These could include lack of effective outreach so that certain populations are unaware of apprenticeship opportunities, selection mechanisms that are not job related that disfavor certain protected groups, attitudes toward or treatment of certain individuals that are hostile or otherwise unwelcoming, or the failure to provide equal opportunity in training, pay, work assignments, discipline, or other employment actions. AAPs are tools designed to assist a sponsor in detecting and diagnosing where barriers may exist in its program and how they may be impacting certain groups. By documenting and collecting information at various stages of its program, including recruitment, selection, training, and assignment, a sponsor can analyze whether any element of its program is adversely impacting

individuals within certain racial, sex, or ethnic groups. If a sponsor discovers that its program is underutilized for women or one or multiple underrepresented groups, this may be a sign that barriers currently exist for those groups. The Department has identified specific steps that a sponsor must take with regards to its outreach, recruitment, and retention activities if it discovers that it is underutilized, as set forth in § 30.8, *infra*. Each sponsor is also encouraged to take any additional steps it concludes could help eliminate barriers. The Department can also provide more individualized guidance and technical assistance to sponsors in order to help identify and overcome any barriers to equal opportunity in apprenticeship.

Commenters, including a national JATC and a national union, suggested that the Department should clarify § 30.4(a)(3), which refers to internal auditing as a tool to measure the sponsor's progress in achieving an apprenticeship program that would be expected absent discrimination, by specifying where the discrimination is presumed to take place (*e.g.*, on the construction site or in the classroom or other training centers). One commenter suggested that this internal auditing should be used to find specific areas of the sponsor's program where practices might be causing a disparate impact on certain groups throughout different phases of the program.

AAPs are designed to assist sponsors in identifying possible discrimination that could be occurring at any point in the apprenticeship program, whether that discrimination is occurring in the application process, in job assignments, through harassment at a work site, or any other element of the program. There is no single step in the apprenticeship program where discrimination is presumed to occur and the internal audit and review that accompanies a sponsor's AAP should be thorough and detailed enough to allow the sponsor to learn of any potential discrimination throughout its program. The Department encourages each sponsor, when reviewing its compliance with AAP obligations, to identify any specific areas or practices that may be adversely affecting certain groups. An AAP is designed to be a tool to assist sponsors in identifying any specific practices that may be deterring or excluding women and/or minorities from participating fully in the program.

Commenters also sought guidance on how the EEO responsibilities of JATCs might differ from those of non-joint committees that directly employ apprentices. Similarly, an industry

association asserted that it would be difficult to meet the requirements detailed in § 30.4(a)(4) related to monitoring, examining, evaluating, and revising employment decisions and policies because apprentices may be involved in a JATC program that involves work for multiple employers, arguing that these programs would be unable to monitor the employment policies of each employer. An SWA commented that the proposed rule language confuses the roles of sponsors and employers, and suggested that the language could be clarified to define specific new responsibilities for sponsors.

These comments raise issues addressed previously in the discussion of §§ 30.1 and 30.3. Generally speaking, it is—and has been historically under these regulations—the responsibility of the sponsor to ensure that all aspects of its program are being administered in a non-discriminatory manner and to implement an AAP. This clearly applies to the sponsor's own employment practices, policies, and decisions. In programs where participating employers, rather than the sponsor, control certain aspects of the apprenticeship experience, ensuring the program's broad compliance with affirmative action obligations has been accomplished through written agreements between sponsor and employer setting forth procedures to ensure that employment opportunity is being granted. This would include sponsors communicating with participating employers about policies that could be resulting in discrimination and addressing complaints of discrimination. As stated previously, while this requires a degree of purposeful oversight on the part of the sponsor, it is consistent with past practice in group sponsorships and is necessary so as to prevent expansive loopholes that could frustrate the purpose of this part.

An industry association suggested that the Department should use the term "equal opportunity program," as opposed to "affirmative action program." The Department declines to accept this suggestion. As is made clear by the definition of "affirmative action program" that was contained in the NPRM, and that is adopted in this Final Rule, an AAP is "more than mere passive nondiscrimination" and requires sponsors to "take affirmative steps to encourage and promote equal opportunity, to create an environment free from discrimination, and to address any barriers to equal opportunity in apprenticeship." They share many similarities with "affirmative action

programs” administered by OFCCP. Referring to these programs as “affirmative action programs,” a broadly used and well understood concept, reinforces the idea that sponsors must not only refrain from discriminating against apprentices and applicants for apprenticeship, but must also take positive steps to correct any barriers to equal employment. Additionally, many sponsors already maintain AAPs under the current regulations, and changing the name of the program would create unnecessary confusion and inconsistency.

Paragraph 30.4(b): Adoption of Affirmative Action Programs

Proposed § 30.4(b) detailed who must adopt an AAP, and further stated that, unless otherwise exempted by proposed § 30.4(d), each sponsor must develop and maintain a written AAP, which must be made available to the Registration Agency any time thereafter upon request.

A comment from an SWA stated that affirmative action activities proposed would be difficult for smaller apprenticeship program sponsors with limited staffing and financial resources and may discourage potential new sponsors from registering their programs. An exemption for smaller apprenticeship programs is discussed in § 30.4(d), below. With regard to the more general burden concerns dissuading entities from entering into or continuing registered apprenticeship programs, the Final Rule allows sponsors, both existing and new, more time to comply with AAP requirements than was proposed in the NPRM. Sponsors will have two years, either from the effective date (for sponsors registered with a Registration Agency at the time this Final Rule becomes effective) or from the date of registration (for new sponsors) in which to complete a written AAP. Details regarding the compliance date of each of these components can be found in the respective sections of this Final Rule, but in general, the Final Rule provides more time than the NPRM to complete these steps, allows more time between subsequent reviews of these obligations, and increases the assistance provided by Registration Agencies to sponsors in order to complete these obligations. As one example, during a new apprenticeship program’s provisional review conducted within one year of registration, the Registration Agency will provide further guidance to assist in the completion of the initial written AAP.

Paragraph 30.4(c): Contents of Affirmative Action Programs

Proposed § 30.4(c) provided an outline of the five required elements of an AAP: (1) Utilization analyses for race, sex, and ethnicity; (2) establishment of utilization goals for race, sex, and ethnicity, if necessary; (3) establishment of utilization analyses and goal setting for individuals with disabilities; (4) targeted outreach, recruitment, and retention, if necessary; and (5) a review of personnel processes.

The Department’s responses to specific comments addressing the five required elements of AAPs are explained in those respective sections of the preamble (§ 30.5–§ 30.9). In addition to the five elements outlined above, a few advocacy organizations urged the Department to include sexual orientation in AAPs and suggested that individuals should be given the opportunity to self-identify as lesbian, gay, bisexual, or transgender (LGBT). The Final Rule adds sexual orientation as a protected basis upon which a sponsor may not discriminate, but, consistent with OFCCP’s AAPs, it does not include sexual orientation as a basis upon which a sponsor must collect information or engage in action-oriented programs.

A national JATC encouraged the Department to retain the existing § 30.4(c), which provides, in part, that “the Department may provide such financial or other assistance as it seems necessary to implement the requirements of this paragraph.” This commenter said that deleting this section sends the wrong message to the regulated community and the public because it appears the Department is leaving the JATCs to use their own resources to comply with requirements.

While the Department will provide extensive technical assistance to sponsors in complying with the AAP obligations of this Final Rule, as discussed in greater detail in later sections, it has always been and will continue to be the responsibility of each sponsor to allocate sufficient resources to ensure that its program is being operated in a non-discriminatory manner. Nonetheless, the Department does not need a regulatory requirement in order to provide such assistance and the Department may continue to offer such assistance in the future. Accordingly, the Department declines to retain the prior language of § 30.4(c), and adopts the language in proposed paragraph (c) without change.

Paragraph 30.4(d): Exemptions

Proposed § 30.4(d) set forth the two exemptions to the requirement that a sponsor develop an AAP: Programs with fewer than five apprentices; and programs already subject to an approved equal employment opportunity program providing for affirmative action in apprenticeship that includes the use of goals for each underrepresented group. These exemptions are the same as those that were contained in the existing regulations. With regards to the exemption for programs subject to an approved equal employment opportunity program, however, proposed § 30.4(d) required that a sponsor with an approved equal employment opportunity program agree to extend that program to include individuals with disabilities to ensure that all protected bases set forth in the proposal would be addressed and that the sponsor was taking the appropriate actions to ensure that protected individuals are employed as apprentices and advanced in employment.

Paragraph (d)(1) of this section exempted sponsors with fewer than five apprentices from the AAP obligations. Two industry associations, an SAA, and an individual commenter expressed support for the exemption for programs with fewer than five apprentices. One industry association commented that the exemption should be expanded to exempt even larger programs from the AAP requirement. In contrast, many commenters suggested that all sponsors should be required to create AAPs, regardless of the size of the apprenticeship program, arguing that the exemption would exclude a significant portion of apprenticeship programs from the equal opportunity requirements that the regulations aim to provide. Two national unions commented that the proposed exemption is contrary to the recommendation of the Advisory Committee on Apprenticeship. These commenters suggested that the Department should require all programs to maintain AAPs but support those programs with limited resources through technical assistance.

Commenters also expressed concern that exempting small programs would exclude programs in the early years of growth, when the AAP has the greatest potential for positive, long-term impact. A national union and a national JATC warned that there would be faster growth in small programs rather than large programs, and that these new programs would not have to maintain AAPs under the exemption. An SAA concluded that, at a minimum, small

sponsors should be required to provide a strategy for outreach and recruitment of a diverse workforce.

A national union and an industry association stated that the staff and resource capacity that would be needed to comply with the affirmative action requirements would also be needed to comply with the universal outreach requirements in § 30.3, and therefore there is no additional reason to exempt small programs from the AAP requirements. Similarly, two national unions argued that, by the Department's own analysis, the burden to develop and maintain an AAP would be minimal, and the benefits of ensuring EEO for all apprentices would outweigh whatever burden was associated with maintaining the AAP. Some commenters also argued that exempting small programs was inconsistent with other Departmental programs, including those applying to federal contractors.

Many commenters further argued that the exemption should not be based on number of apprentices, but on the resources available to the sponsor. For example, some commenters suggested that the exemption should be tied to the sponsor's total number of employees, rather than the number of apprentices, or to the contributions received by the sponsor. Several unions and an industry association commented that most large apprenticeship programs are trusts created by collective bargaining agreements and are funded by contributions, which often have limited flexibility in terms of resource allocation and subjects programs funded by collective bargaining to the same cost-sensitivity as small programs. On the other hand, a State agency commented that entities with fewer than five apprentices are often large employers with sufficient resources to comply with an AAP. A national union commented that the exemption should only apply to sponsors that truly do not have the resources to maintain an AAP, and should not just apply to small programs across the board.

An SWA also asked whether the exemption would apply to sponsors that operate multiple programs, each with fewer than five apprentices, but with more than five apprentices across all programs.

Acknowledging the range of opinions on this topic, the Final Rule retains the current exemption without change. Although some commenters argue that the AAP requirement is so burdensome that even fewer programs should be required to maintain these plans, the majority of commenters and the Advisory Committee on Apprenticeship supported eliminating the exemption

altogether, claiming that the benefits of EEO far outweighed any burden imposed by maintaining an AAP. The Department agrees that the exemption should not be expanded, as currently approximately seventy-five percent of apprenticeship programs already fall within this exemption, and no compelling evidence has been presented to increase the apprenticeship threshold for the exemption.

However, the Department believes that eliminating the exemption entirely would be detrimental as well. While the creation and management of an AAP need not be an unduly burdensome process, the exemption for programs with fewer than five apprentices is a longstanding one. We further disagree with the comment asserting that the obligations under § 30.3 are the same as those required by the AAP; the AAP contains data collection and analysis obligations that § 30.3 does not. Although some commenters noted that not all small programs have resource constraints and that, conversely, not all large programs have resources sufficient to conduct AAPs, the Department assumes that programs with fewer than five apprentices will generally have fewer staff members administering the program than those with significantly more apprentices. And, for any larger programs with limited resources, these programs are currently subject to the AAP requirements and should therefore have already absorbed the cost of conducting an AAP into their operational budget. Furthermore, the Department will provide technical assistance to programs in developing their AAPs to ease any burden associated with this requirement.

In addition to the Department's concerns regarding the burden imposed on small programs, the Department also notes that programs with fewer than five apprentices may be less likely to generate enough data to provide meaningful utilization analyses, given the smaller sample size presented by each apprenticeship class. Moreover, in light of the stronger equal opportunity standards—as outlined in § 30.3—that now apply to all sponsors, even those programs that are not required to maintain AAPs will be required to take specific, proactive steps to ensure nondiscrimination and increase their recruitment and outreach efforts. The Department believes that these requirements will increase the participation of underrepresented groups across all programs, including those with fewer than five apprentices.

In response to those comments claiming that the exemption for small sponsors is inconsistent with the

requirements imposed upon federal contractors, the Department notes that, while the nondiscrimination provisions of Executive Order 11246, which are administered by the Department's OFCCP, apply to contractors regardless of size so long as they have qualifying contracts totaling \$10,000 or more in a calendar year, OFCCP's AAP requirements only apply to those contractors with 50 or more employees and a single contract of \$50,000 or more.⁶⁸

Finally, in response to the SWA's question regarding the application of the exemption, any program that employs fewer than five apprentices is exempt from the AAP requirement, regardless of the size of any other programs that the sponsor may administer.

With regard to paragraph (d)(2)'s exemption of programs subject to approved equal employment opportunity programs, which is carried over from the existing rule in large part, many commenters supported the exemption for programs that were already in compliance with an AAP, so long as that AAP was extended to cover individuals with disabilities. Some commenters sought clarification on how the exemption would operate. For example, a State agency requested clarification as to whether a sponsor would need to develop an AAP under proposed § 30.4 if apprenticeship is not specifically dealt with as a sub-classification or sub-goal in a plan developed for compliance with other Federal programs such as E.O. 11246. Additionally, an industry association asked for clarification as to whether or not there would be an exemption for association program sponsors that obtain apprentices from participating employers that are already in compliance with other AAP requirements. With regard to the issue of including apprenticeship as a sub-classification or sub-goal, the sponsor would need to demonstrate that its plan extended to the operation of its apprenticeship program, meaning that the apprentices would need to be covered by the plan's nondiscrimination and affirmative action standards. The sponsor would not need to develop separate goals for its apprenticeship program, however, so long as the goals established pursuant to the pre-existing plan are likely to equal or exceed the goals that would be required pursuant to this Final Rule. With regard to the second request for clarification, a sponsor must develop its own AAP and may not simply rely on an AAP in place for its participating employers.

⁶⁸ See 41 CFR 60–1.5, 60–2.1.

Paragraph 30.3(e): Written Affirmative Action Plans

Finally, proposed § 30.4(e) incorporated the existing practice of requiring internal reviews of AAPs on an annual basis, but also allowed a sponsor who could demonstrate that it was not underutilized in any of the protected bases for which measurements are kept (race, sex, and disability) and that its review of personnel practices did not require any necessary modifications to meet nondiscrimination objectives, to wait two years to complete its next AAP review. The Department sought comments on this proposal, including specifically whether stakeholders believe such an approach would incentivize AAP success without compromising the overall goals of promoting and ensuring equal employment opportunity in registered apprenticeship.

Several advocacy organizations expressed support for allowing sponsors to wait two years to complete the next internal AAP review if the review does not indicate underutilization or any necessary modifications. These commenters suggested, however, that this extension on the review period should only be allowed for sponsors that have not received any substantiated complaints of discrimination, arguing that this would provide a strong incentive for meeting affirmative action and nondiscrimination obligation. An SWA expressed concern that this requirement might be overly burdensome, and requested guidance on how Registration Agencies should enforce the requirement to self-monitor. Some advocacy groups were also concerned that external review mechanisms should be in place. A few commenters suggested that sponsors should be required to submit their written AAPs, or a summary of their annual or biannual review, to the Registration Agency upon completion. Similarly, an individual commenter suggested that sponsors should be required to publish written AAPs, goals, and timetables on their Web sites to increase transparency, accountability, and community engagement. In order to better understand whether participation among underrepresented groups is improving, an advocacy organization also urged the Department to publish the participation of apprentices by sex, race, ethnicity, and disability status annually. Finally, an individual commenter asked for clarification as to whether or not AAPs need to be approved by the Registration Agency prior to implementation.

The Department removes the proposed paragraph 30.4(e) from the Final Rule and instead addresses the timeline for completing and/or updating the particular elements of an AAP within each of those respective sections of the Final Rule. As set forth in these sections, the schedule for each respective AAP element will also apply uniformly and will not depend whether a sponsor has met its utilization goals. While the biannual review schedule for sponsors meeting their goals would have reduced the burden for those sponsors from what is required under the existing regulations, the Final Rule's timeline for the review of AAP elements in many cases further reduces the frequency with which sponsors need to review certain elements of their AAPs, thereby reducing burden even further for all covered sponsors. This will also increase consistency in sponsor obligations and streamline compliance reviews for Registration Agencies.

In place of the proposed paragraph 30.4(e), the Final Rule sets forth the obligation for creating a written AAP document. Written AAPs are already required under the existing regulations, and are required to be updated annually per existing § 30.8. However, in practice, most sponsors did not fully update their written AAPs until they were scheduled for a compliance review, for reasons discussed further in § 30.5, below. Paragraph 30.4(e) establishes that initial written AAPs must be completed within 2 years of the effective date of the Final Rule for sponsors with existing apprenticeship programs, and within 2 years of registration for all apprenticeship programs registered after the effective date. Written AAPs must be subsequently revised every time the sponsor completes workforce analyses for race, sex, and disability as required by §§ 30.5(b) and 30.7(d)(2) of this part. In order to facilitate compliance and ease the burden of this obligation, the Department will provide model written AAPs that each sponsor may tailor to its own program. The Department will also provide a timeline chart that clearly sets out when the sponsor must comply with each AAP obligation.

In response to those commenters suggesting that sponsors should publish or submit their written AAPs to the Registration Agency, the Department declines to adopt these suggestions, as doing so would be unnecessarily burdensome both for the sponsor and the Registration Agency. Instead, the Registration Agency will ensure during the sponsor's compliance review that the sponsor properly conducted and documented all reviews and analyses

that were required between compliance evaluations. OA will also look into providing more information regarding diversity in apprenticeship on its Web site. Regarding the requests for clarification, existing written AAPs do not need to be submitted to the Registration Agency, but will be reviewed for compliance with this Final Rule at the sponsor's next compliance review.

Utilization Analysis for Race, Sex, and Ethnicity (§ 30.5)

In the NPRM, the Department proposed to move the topic in the existing § 30.5, selection of apprentices, to § 30.10. In its place, the Department proposed a new § 30.5, which provided guidelines for assessing whether possible barriers to apprenticeship exist for particular groups of individuals by determining whether the race, sex, and ethnicity of apprentices in a sponsor's apprenticeship program is reflective of the population available for apprenticeship by race, sex, and ethnicity in the sponsor's relevant recruitment area. This proposed § 30.5 clarifies and expands upon the existing § 30.4(e), "Analysis to determine if deficiencies exist," which requires the sponsor to compute availability for minorities and women in its program. The existing § 30.4(e) required that sponsors take at least five factors into account when determining whether deficiencies exist. It did not, however, explain how these factors relate to the availability of qualified individuals for apprenticeship, nor did it indicate how a sponsor should consider or weigh each of these factors when determining availability.

In short, proposed § 30.5 was intended to incorporate elements of the existing process for analyzing race, sex, and ethnicity utilization while clarifying and streamlining the process for determining availability and utilization. This was to be accomplished by decreasing the number of data sources sponsors must analyze in determining the labor market composition, clarifying the steps required to do the utilization analysis, and providing clear directions for establishing goals. However, we received a number of comments that the revisions were not clear, and placed additional burden on sponsors to conduct analyses that they historically had not undertaken, but rather were performed with the assistance of Registration Agencies at compliance reviews. As described below, in response to these comments, the Final Rule provides further clarity sought by the commenters and reassigns the

burden associated with these analyses so they more closely resemble existing practice.

Paragraph 30.5(a): Purpose

Proposed § 30.5(a) explained that the purpose of a utilization analysis was “to provide sponsors with a method for assessing whether possible barriers to apprenticeship exist for particular groups of individuals by determining whether the race, sex, and ethnicity for apprentices in a sponsor’s apprenticeship program is reflective of persons available for apprenticeship by race, sex, and ethnicity in the relevant recruitment area.” It further explained that where there was significant disparity between availability and representation in the sponsor’s apprenticeship program, the sponsor was required to establish a utilization goal.

The Department received one comment on this paragraph, which asked the Department to define or clarify what it meant by “significant disparity.” As discussed in reference to § 30.6, a sponsor may use several different methods for calculating underutilization, although the most frequently used are the “80 percent rule,” and the “two standard deviation rule.” A finding of underutilization pursuant to either of these methods means that there is a significant disparity between the sponsor’s utilization of that particular group within its apprenticeship workforce and that group’s availability in the relevant recruitment area.

Paragraph 30.5(b): Analysis of Apprenticeship Program Workforce

The NPRM laid out the first step of the utilization analysis in proposed § 30.5(b), which required sponsors to identify the racial, sex, and ethnic composition of their apprentice workforces. Rather than review the composition for each occupational title represented in a sponsor’s apprenticeship program, proposed § 30.5(b) simplified the analysis by only requiring the sponsor to group the occupational titles represented in its registered apprenticeship program by industry.

Some commenters were confused about the extent of the sponsor’s workforce that would be included in the program’s workforce analysis. For example, a State Department of Labor questioned whether journeyworkers should be included in the apprentice workforce, and a national union urged the Department to state that entities operated by the sponsor under another name should also be covered for

purposes of the utilization analysis. For purposes of conducting the apprentice program workforce analysis, sponsors should include all active apprentices. Sponsors should not include apprentices or employees who are not enrolled in the program in question. Unlike laws governing federal contractors, this Final Rule only regulates sponsors with regard to the administration of its apprenticeship program; this Rule does not require sponsors to conduct utilization analyses for its non-apprentice workforce.

Several commenters, including an SWA and a national union, expressed concern with assessing the racial, sex, and ethnic composition of a program by industry, as opposed to by occupation. Some commenters argued that grouping occupations by industry could result in industries that consist of occupations with varying skill level requirements, advancement opportunities, and compensation, and that this grouping could be conducted in an arbitrary manner. Other commenters were concerned that grouping occupations by industry would make it more difficult to know if female or minority apprentices were being concentrated in lower paying positions within an industry, or in positions with little potential for advancement. One commenter also asserted that the industry-wide requirement conflicts with the directive in proposed § 30.5(c)(3) that “in determining availability, the sponsor must consider at least the following factors for each occupational title represented in the sponsor’s registered apprenticeship program.”

The Department agrees with many of these comments, and therefore the Final Rule requires each sponsor to group its apprenticeship programs by occupational title, rather than by industry, for purposes of conducting the workforce analysis. This will require the sponsor to identify each occupation within its apprenticeship program according to the methods currently used (either by RAPIDS code or the appropriate six-digit Standard Occupational Classification (SOC) or O*NET code⁶⁹) and then, for each occupation represented, the sponsor must identify the race, sex, and ethnicity of its apprentices within that occupation. The Department believes that this approach will provide a more precise mechanism for assessing the demographic composition of a sponsor’s apprenticeship program, using the most discrete data set, and will allow each sponsor to review its workforce for

those issues identified in the comments, such as channeling or the concentration of women and minorities in certain occupations that may earn lower wages or have fewer advancement opportunities than other similar occupations. This method will also be more consistent with the methods many sponsors currently employ to evaluate their workforces, thereby making it easier for sponsors to come into compliance with this Final Rule. With regard to the last comment, the inclusion of “occupational title” in the proposed § 30.5(c)(3) was an inadvertent error; it was intended to be “industry,” for consistency with the remainder of the utilization analysis. As discussed below, however, the Final Rule contains a slight revision to the utilization and availability analyses, requiring that they be done according to “major occupation group” rather than industry, and so this provision has been changed in the Final Rule to say “major occupation group.”

The Final Rule also clarifies the timing for conducting the apprenticeship program workforce analysis. As detailed below, the Department received many comments from sponsors expressing concern with the potential burden of conducting their own availability analysis. In response, the Final Rule incorporates a procedure much more similar to the existing one, wherein Registration Agencies actively assist sponsors in conducting their availability analysis and setting their utilization goals. Under paragraph (c), therefore, a sponsor will be required to work with the Registration Agency at the time of its regular compliance review to reassess the availability of women and minority groups within its relevant recruitment area and to update its utilization goals, if necessary. Under paragraph (b), however, each sponsor will retain the responsibility for conducting its workforce analysis pursuant to the steps discussed above. The Department is adding paragraph 30.5(b)(2) to clarify that each sponsor must conduct a workforce analysis at each regular compliance review, and again if three years have passed without a compliance review.

The Department is also clarifying, in new paragraph 30.5(b)(3), when each sponsor will first need to come into compliance with this provision and conduct its initial workforce analysis pursuant to this section. For a sponsor registered with a Registration Agency as of the effective date of this Final Rule it will have up to two years from the effective date in which to conduct its initial workforce analysis. As discussed above, this does not require the sponsor to conduct an availability analysis, or to

⁶⁹ <https://www.onetonline.org/> (last accessed June 9, 2016).

set utilization goals. Each sponsor should continue operating under its existing goals until its next compliance review. A new sponsor registering after the effective date of this Final Rule will have two years from the date of its registration in which to complete its first workforce analysis. Following the initial workforce analysis, a covered sponsor will conduct workforce analyses at each regular compliance review and once between compliance reviews, no later than three years after the sponsor's most recent compliance review, as mentioned above.

Paragraph 30.5(c): Availability Analysis

The next step in the utilization analysis, under existing practice and pursuant to proposed § 30.5(c), was to determine the availability of qualified individuals by race, sex, and ethnicity. The purpose of the availability analysis, as explained in the NPRM, is to establish a benchmark against which the demographic composition of the sponsor's apprenticeship program can be compared in order to determine whether barriers to equal opportunity may exist with regard to the sponsor's apprenticeship program. Proposed paragraph § 30.5(c) described the steps required to perform an availability analysis, simplifying the process by reducing the number of factors sponsors must consider from five to two. The two factors proposed were: (i) The percentage of individuals available with the present or potential capacity for apprenticeship in the sponsor's relevant recruitment area broken down by race, sex, and ethnicity; and (ii) the percentage of the sponsor's employees with the present or potential capacity for apprenticeship broken down by race, sex, and ethnicity. In addition, proposed § 30.5 required that a sponsor consider the availability of qualified individuals for apprenticeship by race, sex, and ethnicity, rather than continue the current approach, which requires the sponsor to analyze availability and utilization for women and then for minorities as an aggregate group.

The Department received numerous comments on the availability analysis. The majority of comments received from sponsors expressed confusion over how to conduct an availability analysis and concern that conducting such an analysis would be unduly burdensome for sponsors. Many commenters urged the Department to retain current § 30.4(g), which states that the Department shall provide data and information on minority and female labor force characteristics for each Standard Metropolitan Statistical Area, rather than placing the burden on

sponsors to derive this information. Two national unions said its survey of affiliates' apprenticeship programs indicated that the process of establishing this benchmark is not something in which most sponsors currently engage, and that they were unaware of any data sources that measure abilities and interests. An industry association also sought guidance on how the construction industry specifically should be determining availability.

As mentioned above, in response to the perception held by many sponsors that conducting an availability analysis and setting a utilization goal would be challenging for sponsors to do themselves, the Department is revising § 30.5(c) to comport more closely with the current practice wherein Registration Agencies work closely with each sponsor at its regular compliance reviews to develop and conduct an availability analysis and to set or reassess utilization goals for race, sex, and ethnicity, if necessary. Paragraph 30.5(c)(3) has been revised to clarify that the responsibility for conducting availability analyses will not fall solely to the sponsor, and that the sponsor and the Registration Agency will work together to conduct availability analyses. The Department is also revising paragraph 30.5(c)(5) to remove references to specific data sources for use in availability analyses. This was included in the NPRM in order to help sponsors complete utilization analyses, but the Final Rule instead will follow the existing practice of Registration Agencies taking the lead in performing these analyses. Accordingly, paragraph 30.5(c)(5) of the Final Rule includes a more general statement that availability "will be derived from the most current and discrete statistical information available."

The Department also notes that, although it is adopting commenters' suggestion that the workforce analysis be conducted at the occupation level, the Final Rule requires that availability and utilization analyses be conducted according to major occupation group. A major occupation group, or job family, is a grouping of occupations based upon work performed, skills, education, training, and credentials.⁷⁰ All Standard Occupational Classification (SOC) codes are organized into 23 major occupation groups and the first two digits of an O*Net or SOC code correspond to the appropriate major occupation group.⁷¹

⁷⁰ <https://www.onetonline.org/find/family> (last accessed June 13, 2016).

⁷¹ http://www.bls.gov/soc/major_groups.htm (last accessed June 13, 2016).

As explained in the NPRM, the Department had proposed grouping occupations by industry in order to allow sponsors with small numbers of apprentices in each occupation to aggregate their apprentices in a way that would provide a more meaningful statistical analysis. The Department has determined that aggregating by major occupation group serves the same general purpose as aggregating by industry, but is more consistent with the format used for the occupation-level workforce analysis. Sponsors and Registration Agencies will more easily be able to group the program's occupations into major occupation groups than industries.

This system that combines occupation-level workforce review with major occupation group-level utilization analyses will allow each sponsor to review its workforce for barriers or problems at a more discrete level, but to then use a more aggregated data set for purposes of assessing availability (and setting utilization goals, if necessary). Furthermore, permitting sponsors to aggregate occupations into major occupation groups would minimize the administrative burden for sponsors and Registration Agencies performing the analyses, particularly for those sponsors who have apprenticeship programs in which more than one occupational title is represented. Accordingly, each sponsor will organize the occupational titles represented in its apprenticeship program by major occupation group or job family, and will then compare the racial, sex, and ethnic representations within each of those major occupation groups to the representations of those groups available in the relevant recruitment area according to each major occupation group. For the many sponsors with only one major occupation group represented in their program, this may involve performing a single utilization analysis for the entire program.

The Final Rule adds a paragraph 30.5(c)(6) to establish the schedule for conducting availability analyses. As indicated above, this new paragraph makes clear that a sponsor need only conduct an availability analysis in conjunction with the Registration Agency at the time of the sponsor's compliance review. A sponsor need not conduct separate availability analyses in between compliance reviews. At a sponsor's compliance review, the sponsor will work with the Registration Agency to define its relevant recruitment area, and the Registration Agency will assist the sponsor in calculating the availability of women

and minorities in the relevant recruitment area.

In the NPRM, the Department referred to those individuals who were eligible and available for apprenticeship as having “present or potential capacity for apprenticeship.” This term was drawn from § 30.4(e)(5) of the existing regulations. This fact notwithstanding, several commenters were unsure of what it meant to have present or potential capacity for apprenticeship, and how they were supposed to identify those available individuals that have present or potential capacity for apprenticeship within the broader labor force. An industry association said the requirement to measure “potential” capacity should be deleted because an applicant must have immediate capacity to enter the program. Relatedly, commenters also sought clarification on how to apply educational or skill requirements when calculating availability. Some commenters noted that, in addition to any educational requirements, an individual’s mechanical aptitude, high school transcript, prior work experience, and interest were all factors that should be considered in deciding who has “present or potential capacity.” A national union also asked whether JATCs may exclude persons who fail to meet physical standards in determining potential capacity for apprenticeship. An individual commenter asked if “potential capacity for apprenticeship” would refer to apprenticeship programs requiring prior occupational training as a minimum requirement.

Some commenters, on the other hand, were concerned that limiting the availability analysis to those individuals who had “present or potential capacity” could exclude relevant individuals from the sponsor’s availability analysis. Many commenters urged the Department to clarify explicitly that apprenticeships are entry-level positions, generally requiring no previous experience or minimal requirements other than being at least 18 years of age and holding a high school diploma or equivalent and that a particular group’s availability figures for apprenticeship programs would largely correspond its representation within the overall civilian labor force in the relevant recruitment area. To do otherwise, these commenters argue, could perpetuate existing underrepresentation of women and people of color in apprenticeship industries.

As discussed above, the Department hopes that its continued involvement in assisting sponsors with performing the availability analysis will help to answer these questions and allay commenters’

concerns. Additionally, in response to the comments received, the Department is replacing the term “individuals available with the present or potential capacity for apprenticeship” with “individuals who are eligible for enrollment in the apprenticeship program.” This change makes clear that the availability analysis should focus on those individuals who meet the basic qualifications for the apprenticeship program. However, in following with basic precepts of employment law, sponsors may not use basic qualifications or other criteria that have an adverse impact on one or more protected groups unless they are job-related and consistent with business necessity. This does not mean that every available individual would be accepted into an apprenticeship program, only that any one of those individuals could potentially be selected as an apprentice. A sponsor may still refine its applicant pool, through interviews or other selection procedures, by determining which individuals would be best suited for an apprenticeship.

In response to commenters inquiring about the source of data to use for determining availability, we note that this may vary depending on the nature of the apprenticeship, and so the Final Rule states only that current and discrete data shall be used. In some cases, such as in certain entry-level apprenticeships, the best data to determine eligibility may be the civilian labor force participation rate. Sponsors that apply minimum educational or certification requirements may work with their Registration Agency to further refine the relevant labor pool by calculating the availability of those individuals meeting the requirements of that program.

Many commenters also sought guidance on how to define their relevant recruitment area. One commenter was confused as to how to draw its relevant recruitment area because it advertises on the internet and could possibly draw applicants from anywhere. Another commenter asserted that the labor market areas cited in the existing rule, which are based on metro- and micro-political statistical boundaries and reflect workforce commuting patterns, are the most objective, unbiased, and realistic scope for recruitment. An SWA also explained that some sponsors are correctional facilities that recruit apprentices solely from inmates assigned to their facility and requested clarification that, in those cases, the “relevant recruitment area” for a correctional program could be limited to the actual facility, rather than the surrounding area.

The relevant recruitment area is defined in paragraph 30.5(c)(4) as the geographical area from which the sponsor usually seeks or reasonably could seek apprentices. A relevant recruitment area is similar to a labor market area, but focuses more on where the sponsor draws apprentices from, rather than where workers reside in surrounding geographic areas. A relevant recruitment area recognizes that individuals may be willing to relocate in order to participate in an apprenticeship program. So, for instance, if the sponsor regularly advertises and recruits in areas that would require an individual to relocate, that would make the sponsor’s relevant recruitment area broader than their labor market area.

Each sponsor’s relevant recruitment area is unique and may depend on how that sponsor chooses to advertise its apprenticeship program and the distance that past apprentices were willing to travel to attend the apprenticeship program. Proposed § 30.5 attempted to offer sponsors greater flexibility in defining this area so long as the sponsor justified the scope of its recruitment area and did not draw the relevant recruitment area in such a way as to have the effect of excluding individuals based on race, sex, or ethnicity from consideration. A sponsor may determine that a metro- and micro-political area, such as those used under the existing regulation, is the best representation of its relevant recruitment area. In that case, a sponsor may continue to utilize the availability data for that metro- and micro-political area.

While it is possible that a sponsor could attract an applicant from outside its standard recruitment area, the sponsor’s availability analysis need only account for those individuals available for apprenticeship who are likely to be reached by the sponsor’s recruitment efforts and who are likely able to commute or relocate to the program. For those sponsors advertising on the internet, the advertisement may reach a national or international audience, but the sponsor would need to consider whether individuals from other cities or states are likely to commute from those locations when the sponsor is drawing its relevant recruitment area. Similarly, a correctional facility sponsor that only recruits from within its own inmate population would simply need to explain in its written AAP that the recruitment area is limited to that facility because of the focus and requirements of the apprenticeship program. The Department will provide technical assistance to sponsors in

determining the appropriate relevant recruitment area, and sponsors are encouraged to work with their Registration Agency in unique situations.

With regards to the second factor in the availability analysis, two commenters took issue with the use of the term “employees” in proposed § 30.5(c)(3)(ii). An industry association said the requirement to analyze the numbers of current “employees” does not make sense for program sponsors that do not “employ” any apprentices. The commenter suggested that perhaps the proposed rule intended to reference minorities and women “participating” as apprentices, which is not as confusing as use of the term “employees.” Similarly, a national union stated the term “employee” is inapplicable to JATCs that do not employ apprentices or persons seeking to become apprentices. The commenter recommended that the Department provide guidance that is germane to joint labor-management committees in determining the availability of qualified individuals for apprenticeship.

The Department acknowledges that not all sponsors will recruit from within their own workforce, and that the sponsor’s current employees, or the employees of participating employers, may not be relevant to the sponsor’s availability. In response to these comments, the Department notes that sponsors may accord the two factors in determining availability different weights. So, for example, a sponsor that conducts only external recruiting, and does not accept any of its employees into the apprenticeship program, would not give this factor any weight. On the other hand, a sponsor that drew apprentices equally from external sources and from within its own workforce would weigh the two factors equally. Additionally, the Final Rule revises this factor to reflect that any employees being considered in the availability analysis should be those “who are eligible for enrollment in the apprenticeship program” rather than who have “the present and potential capacity for apprenticeship,” for the reasons discussed above.

Paragraph 30.5(d): Rate of Utilization

Finally, proposed § 30.5(d) required each sponsor to establish a utilization goal when the sponsor’s utilization of women, Hispanics or Latinos, or individuals of a particular racial minority group is “less than would be reasonably expected given the availability of such individuals for apprenticeship.” This requirement is

largely carried over from the existing regulations at § 30.4(d)(3) and (4).

Some commenters, including numerous advocacy organizations, urged the Department to clarify that the phrase “less than would be reasonably expected” means that the sponsor’s utilization of women, Hispanics or Latinos, and/or individuals of a particular ethnic or racial minority group is “less than the percentage available for apprenticeship in the relevant recruitment area.” Another advocacy organization asked the Department to clarify that “utilization” should be understood as a measure of the number of hours worked by women apprentices and apprentices of color, rather than a measure of the number of women apprentices or apprentices of color accepted into the program. A State Department of Labor requested that the language from the preamble clarifying the methods by which a sponsor can calculate underutilization (e.g., “the 80 percent rule”) be promulgated as part of the rule.

The Department adopts § 30.5(d) largely as proposed, but clarifies that a sponsor’s utilization of women, Hispanics or Latinos, or individuals of a particular racial minority group is “less than would be reasonably expected” when the utilization falls significantly below that group’s availability in the relevant recruitment area. Sponsors are permitted to calculate their utilization using any appropriate model, but recognizing that the “80 percent rule,” (i.e., whether actual employment of apprentices, broken down by race, sex, and ethnicity, is less than 80 percent of their availability) or the “two standard deviations” analysis, (i.e., whether the difference between availability and the actual employment of apprentices by race, sex, and ethnicity exceeds the two standard deviations test of statistical significance) are most commonly employed. The Department declines to include this in the regulatory text, but notes that either of these methods would be considered appropriate under the Final Rule. The Department also declines to measure utilization in terms of hours, as the availability data used in utilization analyses is recorded in terms of individuals, not hours worked, so it is unclear what benchmark a sponsor could use to compare the number of hours worked by individuals of particular racial, sex or ethnic groups. Additionally, sponsors are required to make job assignments in a non-discriminatory manner.

The Department also reiterates that a finding of underutilization does not by itself constitute a violation. However, as

described in § 30.8, upon determining that the sponsor is underutilizing a particular racial, sex, or ethnic group, and setting a utilization goal for that group, the sponsor must engage in targeted outreach, recruitment, and retention efforts to attempt to reduce or eliminate any barriers facing the underutilized group.

Establishment of Utilization Goals for Race, Sex, and Ethnicity (§ 30.6)

In the NPRM, the Department proposed to move current § 30.6, entitled “Existing lists of eligibles and public notice,” to § 30.10, and insert a new § 30.6 that described the procedures for establishing utilization goals. Proposed § 30.6 would carry over, clarify, and expand upon existing procedures set forth in § 30.4(f) of the existing part 30, which required a sponsor to establish goals and timetables based on the outcome of the sponsor’s analyses of its underutilization of minorities in the aggregate and women. The existing part 30 does not provide specific instructions on how to set a goal, and the form of goal that a sponsor is required to set depends on the nature of the selection procedure used.

Proposed § 30.6 simplified the goal-setting process by requiring only one type of goal, regardless of the selection procedure used, and eliminated references to timetables. It also specified that a sponsor’s utilization goal for a particular underutilized group in its apprenticeship program must be at least equal to the availability figure derived for that group in the utilization analysis, and only required that goals be set for the individual racial or ethnic group(s) that the sponsor identified as being underutilized, rather than for minorities in the aggregate. Finally, proposed § 30.6 made clear that quotas are expressly forbidden and that goals may not be used to create set-asides or supersede eligibility requirements for apprenticeship.

Many commenters, including JATCs, individuals, and SWAs, supported the establishment of goals generally, but stated that goals equal to the percentage of available apprentices in some segments of the population is unrealistic, particularly with regards to women in certain industries. Sponsors worried that, despite increased outreach efforts to women, they would still struggle to meet their goals because women were not applying for positions and suggested that sponsors not be unduly penalized in this situation. There were some commenters, though, that objected to the use of goals entirely, arguing that utilization goals would

coerce program sponsors to implement unconstitutional hiring quotas and cited to *Lutheran Church—Missouri Synod v. FCC*⁷² for the proposition that the imposition of goals encourages employers to grant preferences to applicants based on their race, ethnicity or gender.

Advocacy groups and individuals, however, wanted to ensure that sponsors made real progress in increasing the representation of women and minorities in their apprenticeship programs. An individual commenter suggested that the Department require apprenticeship programs with low numbers of female apprentices to report their utilization rate to the Registration Agency and that such programs be audited annually until their numbers rise. Others suggested that sponsors should implement interim goals to ensure steady progress towards accomplishing the § 30.6 utilization goal. Several commenters urged the Department to make clear that compliance with the AAP requirements will be determined by whether the sponsor has made a good faith effort to meet its goals and timetables. These commenters further stressed that good faith efforts should be judged by whether the sponsor is following its AAP and attempting to make it work, including evaluation and changes in the program when necessary to increase utilization of minorities.

The Department largely adopts proposed § 30.6 in the Final Rule, but amends paragraph (a) to make clear that a utilization goal is set for each major occupation group where underutilization is found and that a sponsor will set its utilization goals with the Registration Agency at the time of its regular compliance reviews. These goals will still reflect the availability percentage of the particular racial, sex, or ethnic group in the relevant recruitment area, as described in the NPRM. Again, the Registration Agency will assist the sponsor in conducting the availability analysis during the sponsor's compliance review and the goals established under this section will reflect the availability percentages as determined in that analysis. While some sponsors may fall short of these goals, the Department reminds sponsors that their determination that a utilization goal is required constitutes neither a finding nor an admission of discrimination, and that a sponsor's compliance will be determined based upon its good faith efforts to eliminate impediments to equal employment

opportunity and not purely on whether the sponsor has met its goals.

In response to concerns that these aspirational goals nevertheless have the effect of rigid quotas, the Final Rule, as did the NPRM, goes to great lengths to explicitly state that these goals are not and should not be interpreted to serve as quotas, and that they do not permit sponsors to create set-asides for specific groups. In response to the comment regarding *Lutheran Church—Missouri Synod v. FCC*, the Department notes that this Final Rule makes merit selection principles the basis for all employment decisions. This regulation requires both that employment decisions be made in a nondiscriminatory manner and that utilization goals may not be used to supersede merit selection or justify a preference being extended to any person on the basis of race, sex, or ethnicity. The clear distinction between this framework and a rigid quota system is further evidenced by the fact that sponsors will not be held liable for any violation of this part simply for failing to meet a utilization goal. By contrast, sponsors explicitly can be held liable for any personnel decisions made on the basis of a protected category, which would include preferential treatment in order to meet a goal.

The Department also declines to set any specific goals for women and minorities that sponsors must reach, and further declines to require sponsors to reach tiered or interim goals. If the Registration Agency determines that a sponsor is not meeting its goals, the Registration Agency will work with that sponsor to identify potential problem areas in the program and devise corrective, action-oriented programs pursuant to § 30.8.

Commenters also sought clarification on some aspects of proposed § 30.6. For example, a State agency requested clarification regarding what it meant to have “just one type of goal” for an apprenticeship program. To clarify, the new requirement that a sponsor only set “one type of goal” means that the sponsor will set the same type of utilization goal for each racial, sex, and ethnic group within its apprenticeship workforce, regardless of the way in which the sponsor selects its apprentices. This is in contrast to the existing requirement to set a different goal depending on which selection method the sponsor uses. For selections based on rank from a pool of eligible applicants, for instance, sponsors are currently required to establish a percentage goal and timetable for the admission of minority and/or female applicants into the eligibility pool. However, if selections are made from a

pool of current employees, sponsors are required to establish goals and timetables for actual selection into the apprenticeship program. The Final Rule will simplify this process, such that the sponsor's goals will simply reflect the utilization of that race, sex, or ethnic group in the sponsor's overall workforce.

Finally, the Final Rule slightly revises paragraph (d)(3), which reaffirms that goals do not create “set asides” nor are intended to achieve equal results, to more closely conform with similar language in OFCCP's 41 CFR part 60–2 regulations.

Utilization Goals for Individuals With Disabilities (§ 30.7)

The existing § 30.7 is reserved. In the NPRM, the Department proposed to assign a new section entitled “Utilization goals for individuals with disabilities” to § 30.7, which would establish a single, national utilization goal of 7 percent for individuals with disabilities that applies to all sponsors subject to the AAP obligations of this part. As with utilization goals for race, sex, and ethnicity, the utilization goals for individuals with disabilities is designed to establish a benchmark against which the sponsor must measure the representation of individuals with disabilities in the sponsor's apprentice workforce by major occupation group, in order to assess whether any barriers to EEO remain. However, in contrast to the framework set forth for establishing utilization goals for race, sex, and ethnicity, the proposed § 30.7 established one goal for every covered sponsor, regardless of the availability data in that sponsor's particular relevant recruitment area.

Paragraph 30.7(a): Utilization Goal

Proposed § 30.7(a) put forth the national utilization goal of 7 percent for individuals with disabilities, derived in part from disability data collected as part of the American Community Survey. This goal mirrors that established by OFCCP in the affirmative action obligations of its section 503 regulations, which now apply to hundreds of thousands of Federal contractor and subcontractor and Federally-assisted contractor and subcontractor establishments. Advocacy organizations generally supported the establishment of this utilization goal and stated that the goal, if met, could result in an additional 26,000 job training opportunities for persons with disabilities. Some commenters sought higher goals or inquiry into other data sources to establish this goal. One advocacy organization suggested that

⁷² 141 F.3d 344 (D.C. Cir. 1998).

the utilization rate should be 16.5 percent, which is equal to the current percentage of individuals with disabilities within the working-age population, or that sponsors should base their goal for individuals with disabilities on demographic statistics of persons with disabilities in their geographic location. Other advocacy organizations suggested that the Social Security Administration, the Department of Education, academic Rehabilitation Research and Training Centers, associations for State workforces, vocational rehabilitation agencies, special education transition programs, disability advocacy organizations, Independent Living Centers, Career One-stop centers, and IDEA-funded parent centers could all be sources of information on the availability of individuals with disabilities in the relevant area. Still other advocacy organizations recommended the Department raise the utilization goal by adopting a methodology that utilizes the ADA's broader definition of "disability," rather than the American Community Survey, which the commenter said uses a more narrow definition of "disability" than the ADA. To ensure that people who have severe disabilities are not neglected, an advocacy organization recommended that the Department establish an additional sub-goal of 3 percent for individuals with targeted severe disabilities.

A number of JATCs and industry associations, on the other hand, worried that the 7 percent goal was unrealistically high because of the physical demands of their apprenticeship programs and because self-identification is voluntary and persons with disabilities are reluctant to identify as disabled. For example, an industry association stated that this utilization goal would be particularly burdensome for the trucking industry because many individuals with disabilities are prohibited from driving commercial motor vehicles, and a local JATC stated that it would be difficult to place disabled individuals with its partner construction contractors because of their workers compensation insurance providers and the fact that a condition of their disability compensation may preclude them from working on a construction site. Some of these commenters recommended that the goal be phased in, or gradually increased over time. One company recommended that the Department observe each industry for two years and establish better-suited goals. Another commenter expressed concern with the

proposed 7 percent utilization goal, stating that persons with disabilities are already protected from discrimination by existing Federal regulations and expressed doubt that utilization goals are attainable given geographic disparities as well as differing abilities and qualifications of those seeking employment. An industry association suggested the Department adopt the same goals as established by the OFCCP under section 503, which applies to Federal contractors and subcontractors. A national JATC commented that the Department should review the goal on an annual basis.

As stated in the NPRM, the Department believes that a utilization goal for individuals with disabilities is a vital element that, in conjunction with other requirements of this part, will enable sponsors and Registration Agencies to assess the effectiveness of specific affirmative action efforts with respect to individuals with disabilities, and to identify and address specific workplace barriers to apprenticeship. Both the unemployment rate and the percentage of working-age individuals with disabilities who are not in the labor force remain significantly higher than that of the working-age population without disabilities. The establishment of a utilization goal for individuals with disabilities is not, by itself, a "cure" for this longstanding problem, but the Department believes that the establishment of this utilization goal could create more accountability within a sponsor's organization and provide a much-needed tool to help ensure that progress toward equal employment opportunity is achieved.

The Department explained in great detail in the NPRM the process that OFCCP used when it issued revised regulations implementing section 503 and established the same national utilization goal of 7 percent for individuals with disabilities for all covered contractors. OFCCP derived this utilization goal in part from the disability data collected as part of the American Community Survey (ACS). Although the definition of disability used by the ACS is not as broad as that in the ADA and proposed here, and therefore may not capture all of the individuals who would be considered disabled under this Final Rule, the Department has concluded, for reasons discussed extensively in the NPRM, that the ACS is the best source of nationwide disability data available today, and, thus, an appropriate starting place for developing a utilization goal. The Department, therefore, declines to change the goal, or to implement tiered goals that would not be reflective of the

availability of individuals with disabilities.

OFCCP arrived at the 7 percent figure by starting with the mean disability data for the "civilian labor force" and the "civilian population" across EEO-1 groups, based on the 2009 ACS data, which resulted in 5.7 percent as a starting point. This figure is the Department's estimate of the percentage of the civilian labor force that has a disability as defined by the ACS. However, the Department acknowledges that this number does not encompass all individuals with disabilities as defined under the broader definition in the ADA, as amended, and this part. Further, this figure most likely underestimates the percent of individuals with disabilities who are eligible for apprenticeship because it reflects the percentage of individuals with disabilities who are currently in the labor force with an occupation and individuals need not have an occupation or be in the labor force in order to be eligible for apprenticeship.

The Department was also concerned that this availability figure did not take into account discouraged workers, or the effects of historical discrimination against individuals with disabilities that has suppressed the representation of such individuals in the workforce. OFCCP estimated the size of the discouraged worker effect by comparing the percent of the civilian population with a disability (per the ACS definition) who identified as having an occupation to the percent of the civilian labor force with a disability who identified as having an occupation. Though not currently seeking employment, it might be reasonable to believe that those in the civilian population who identify as having an occupation, but who are not currently in the labor force, remained interested in working should job opportunities become available. Using the 2009 ACS EEO-1 category data, the result of this comparison is 1.7 percent. Adding this figure to the 5.7 percent availability figure above results in the 7.4 percent, which OFCCP rounded to 7 percent. OA agrees that this calculation reflects the most accurate availability figure currently available, and therefore adopts the 7 percent utilization goal. Pursuant to proposed 30.7(c), which the Department adopts in this Final Rule, OA will review the goal periodically and update the goal as appropriate.

The Department revises paragraph (a), however, to reflect that the utilization goal will apply to each major occupation group within a sponsor's apprentice workforce, rather than to each industry, as was proposed in the

NPRM. This is consistent with the changes adopted for the utilization analyses for race, sex, and ethnicity. The reasons for using major occupation groups, rather than industry, in the utilization analysis are addressed in the discussion of § 30.5(c).

In response to those commenters who advocated that sponsors should be able to derive their own availability figures for individuals with disabilities within the sponsor's relevant recruitment area, the Department notes that replicating the race, sex, and ethnicity goals framework would not be the most effective approach for the establishment of goals for individuals with disabilities. Sponsors establishing goals for minorities and women typically use the Special EEO Tabulation of census data to assist them. The results of the decennial census can be tabulated for hundreds of occupation categories and thousands of geographic areas. However, because the ACS disability data is based on sampling, and because the percentage of that sample who identify as having a disability is considerably smaller than the percentage that provide race and gender information, it cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender. In addition, the race, sex, and ethnicity goals framework does not include consideration of discouraged workers in computing availability, a factor particularly important in the context of disability. Accordingly, the Department is retaining the 7 percent national utilization goal and declines to allow sponsors to set their own goals based on availability in the relevant recruitment area.

The Department also declines to adopt a sub-goal at this time. The commenters suggesting a sub-goal did not provide a clear methodology or data source for the identification of a sub-goal target. Moreover, establishing a sub-goal would, in many instances require sponsors to ask for detailed disability-related information, beyond the mere existence of a specific condition, so that the sponsor could determine whether an individual has a "severe" physical or mental impairment that is encompassed by the sub-goal. This does not mean that sponsors may not, on their own, for affirmative action purposes, establish appropriate mechanisms and goals to encourage the employment of individuals with significant or severe disabilities. However, these regulations do not include such requirements.

As stated above, many sponsors were concerned that they would not be able to meet the 7 percent utilization goal

because of the physical demands of their industry. First, the Department notes that the goal only applies to "qualified individuals with disabilities," and the application of a utilization goal does not require or authorize a sponsor to hire an individual who is not eligible or qualified for apprenticeship. The objection to adopting a utilization goal at all, however, is based on the flawed notion that individuals with disabilities as a group are incapable of working in these jobs. As stated previously in this preamble, the Department acknowledges that some individuals with certain disabilities may not be able to perform some jobs, but this Final Rule does not require a sponsor to hire an individual who cannot perform the essential functions necessary for apprenticeship, or who poses a direct threat to the health or safety of the individual or others.

Additionally, the goal is not a quota and failure to meet the goal will not, in and of itself, result in any violation or enforcement action. The Registration Agency will look at the totality of the sponsor's affirmative action efforts to determine whether it is in compliance with its affirmative action obligations under this section. As discussed below, if the sponsor has complied with the requirements of this part and no impediments to equal employment opportunity exist, then the fact that the sponsor does not meet the goal will not result in a violation.

Lastly, some sponsors were concerned that the new utilization goal would be unduly burdensome for sponsors to comply with. A regional JATC commented that forcing sponsors to identify individuals with disabilities, especially mental or intellectual disabilities, puts a burden on sponsors if the program must hire a psychiatric professional to conduct evaluations.

First, the Department notes that all sponsors covered by § 30.4(b) are currently required to maintain an AAP and conduct a utilization analysis for race, sex, and ethnicity, so the additional utilization analysis for individuals with disabilities will pose minimal burden, especially because the sponsor is not responsible for setting the utilization goal. Second, the identification of individuals within the apprenticeship workforce that have a disability is done through self-identification, and the sponsor should not be attempting to identify individuals with disabilities who do not self-identify. If an apprentice has an obvious visible disability (*i.e.*, someone is blind or missing a limb), a sponsor may include that individual as an individual

with a disability within its workforce analysis. Otherwise, a sponsor should be relying only on self-identification as the method for capturing disability within its apprenticeship workforce. A sponsor should also not be attempting to verify whether an apprentice does, in fact, have a disability. Further detail on how the self-identification mechanism should work is set forth in the discussion of § 30.11, below.

To further ease any burden upon sponsors associated with the implementation of the utilization goal for individuals with disabilities, sponsors will have additional time to come into compliance with these provisions. The revised compliance dates are detailed in paragraph 30.7(d)(2), below.

Paragraph 30.7(b): Purpose

Proposed § 30.7(b) explained that the purpose of the utilization goal for individuals with disabilities was to establish a benchmark against which the sponsor must measure the representation of individuals with disabilities in the sponsor's apprentice workforce and that the goal was to serve as an equal opportunity objective that should be attainable by complying with all of the affirmative action requirements of part 30.

The Department received no comments on this specific paragraph. The Final Rule changes the reference from "industry" to "major occupation group" to be consistent with changes in other sections, and makes other non-substantive edits so the text of the regulation conforms more closely to the corresponding section of OFCCP's section 503 regulations.

Paragraph 30.7(c): Periodic Review of Goal

Proposed § 30.7(c) stated that the Administrator of OA would periodically review and update the national utilization goal, as appropriate. The Department received one comment on this paragraph from a national JATC that expressed support for a fixed utilization goal but cautioned that because of the untested nature of the proposed 7 percent goal the Department should review the goal on an annual basis.

The Department declines to adopt a set review period for the goal. This flexibility will enable the Administrator to review the goal whenever it is deemed necessary. Accordingly, the Department adopts paragraph (c) without change.

Paragraph 30.7(d): Utilization Analysis

Proposed § 30.7(d) set out the steps that the sponsor must use to determine

whether it has met the utilization goal. Similar to the utilization analysis required under § 30.5 for race, sex, and ethnicity, proposed § 30.7(d) stated that the sponsor must first conduct a review of its apprenticeship workforce to evaluate the representation of individuals with disabilities in the sponsor's apprentice workforce grouped by industry. The sponsor identifies the number of apprentices with disabilities based on voluntary self-identification by the individual apprentices. This figure would then be compared to the 7 percent utilization goal to determine if the sponsor is underutilizing individuals with disabilities. Proposed § 30.7(d)(3) required that the sponsor evaluate its utilization of individuals with disabilities in each industry group annually (or every two years, if it meets the conditions set forth in the proposed § 30.4(e)).

An advocacy organization supported the proposed disability workforce analysis requirements in § 30.7(d)(2) because it would ensure that individuals with disabilities will be represented in all industries. A number of commenters, however, opposed the utilization analysis because it would require identifying those individuals within the sponsor's program that had a disability. Many commenters worried about asking applicants and apprentices to self-identify as having a disability and were concerned that a lack of self-identification would make it difficult for sponsors to meet the utilization goal. An industry association argued that although the D.C. Circuit upheld the OFCCP's adoption of a utilization goal for individuals with disabilities in the case of *Associated Builders and Contractors, Inc. v. Shiu*,⁷³ the holding in that case did not justify extension of the identical data collection and utilization analysis in the apprenticeship context. Finally, a State Department of Labor sought clarification as to when, under proposed § 30.7(d)(3), sponsors would be required to evaluate their utilization of individuals with disabilities and how that timing related to the timing for review of AAPs established in proposed § 30.4(e).

Comments expressing specific concerns about asking individuals to self-identify are addressed later in the preamble under § 30.11. In response to those commenters who expressed concerns with meeting the goal as a result of under-reporting by apprentices with disabilities, the Department concedes the possibility that self-reported data regarding disability, as with any demographic data employers

maintain, will not be entirely accurate. While not perfect, the data that will result from the invitation to self-identify will nevertheless provide the sponsor and the Department with important information that does not currently exist pertaining to the participation of individuals with disabilities in the sponsor's applicant pools and labor force. This will allow the sponsor and the Department to better identify and monitor the sponsor's hiring and selection practices with respect to individuals with disabilities, and to more effectively ensure that the benefits of apprenticeship are accessible to individuals with disabilities. The Department again reminds sponsors that failure to meet the utilization goal for individuals with disabilities is not itself a violation of this Final Rule, and so sponsors will not be penalized if they fail to meet the goal because some apprentices with disabilities choose not to self-identify.

As was the case for OFCCP in *Associated Builders and Contractors, Inc. v. Shiu*, the Department is concerned that individuals with disabilities have lower participation rates in the workforce and higher unemployment rates than those without disabilities. We therefore seek to advance the employment of qualified individuals with disabilities through this Final Rule. To do so is well within the Department's authority to "formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices . . ." ⁷⁴ In *ABC v. Shiu*, the court upheld the 7 percent national utilization goal established by OFCCP and stated that "the agency adequately explained why the best available data did not allow it to create a tailored goal and why the uniform goal advances its regulatory objective." ⁷⁵ The Department sees no reason to depart from that analysis here.

As we did for the workforce analysis for race, sex, and ethnicity (discussed in § 30.5(b)), the Department is requiring that each sponsor conduct its apprentice workforce analysis for individuals with disabilities at the occupation level and its utilization analysis for individuals with disabilities at the major occupation level. This, again, will allow sponsors to be able to review their workforce at a more granular level, but will only require that utilization goals apply at the major occupation group level.

With regard to the timing of the workforce analysis that sponsors must conduct under this section, this should

be conducted at the same time that a sponsor performs its workforce analysis for race, sex, and ethnicity, pursuant to § 30.5(b). As explained in revised paragraph 30.7(d)(2)(ii), this process should be performed at each regular compliance review and no later than three years after a sponsor's most recent compliance review. Paragraph 30.7(d)(2) is revised to reflect this new schedule. Again, this schedule will apply uniformly across covered sponsors and will not depend on whether a sponsor has met its utilization goals.

Furthermore, as mentioned above, the Department is allowing both existing and new sponsors additional time in which to implement the apprenticeship workforce analysis requirements for individuals with disabilities. Similar to the compliance dates established in § 30.5, an existing sponsor will have two years from the effective date of this Final Rule in which to incorporate the 7 percent utilization goal into its AAP and to conduct a workforce analysis under this section. Paragraph 30.7(d)(2)(iii)(A) is revised to reflect this change.

Also, as with the workforce analysis for race, sex, and ethnicity, detailed in § 30.5(b), a sponsor registered with a Registration Agency as of the effective date of this Final Rule will have up to two years from the effective date in which to conduct a conforming workforce analysis for individuals with disabilities, pursuant to § 30.7(d)(2). This section of the Final Rule also establishes that new sponsors registering after the effective date of this Final Rule will have two years from the date of their registration to complete their written AAP.

Generally, the workforce analyses required by §§ 30.5(b) and 30.7(d)(2) should be performed simultaneously. Following the initial workforce analysis, all covered sponsors will be required to conduct workforce analyses at each regular compliance review and again if they have gone three years since their last compliance review. The schedule of evaluations is discussed in more detail in paragraph (d)(3), below.

Paragraph 30.7(e): Identification of Problem Areas

When the percentage of apprentices with disabilities in one or more industry groups was less than the utilization goal proposed in § 30.7(a), proposed § 30.7(e) required that the sponsor take steps to determine whether and where impediments to equal opportunity exist. Proposed § 30.7(e) explained that when making this determination, the sponsor must look at the results of its assessment of personnel processes and the

⁷⁴ 29 U.S.C. 50.

⁷⁵ 773 F.3d at 265 (D.C. Cir. 2014).

⁷³ 773 F.3d 257 (D.C. Cir. 2014).

effectiveness of its outreach and recruitment efforts as required by proposed § 30.9.

The Department received a few comments in regards to paragraph (e). An advocacy organization commented that this type of self-education is important to raising sponsors' attention to the pool of individuals with disabilities that could contribute to and benefit from their apprenticeship program. An industry association suggested that the Department revisit the requirements of § 30.7(e) as the proposed rule implied that failure to reach the utilization goal for individuals with disabilities meant that there must automatically be a barrier to equal employment. The commenter also requested examples of "impediments to equal opportunity" and sought guidance on how sponsors would be able to identify and measure such impediments. A national JATC was concerned that such a review process would require the assistance of a professional. Another national JATC expressed concern that the regulations did not account for the fact that non-attainment of the disability utilization goal does not mean that a program is discriminatory in its practices; rather, non-attainment could be that disabled individuals did not apply to the program, that they could not meet the requirements of the program, or they were unwilling to self-disclose disabilities.

With the exception of two changes discussed below, the Final Rule adopts § 30.7(e) as it appeared in the NPRM. The Department emphasizes that, if a sponsor is underutilizing individuals with disabilities, it does not mean that a problem area definitely exists or that the cause of the underutilization is discrimination. This finding simply serves as a notification to the sponsor that they must review their personnel processes and outreach to determine if such problem areas do exist. A sponsor is only required to engage in action-oriented programs, pursuant to §§ 30.7(f) and 30.8, if it discovers problem areas during the course of this review. To reflect this understanding, the regulatory text is changed slightly to read "the sponsor must take steps to determine whether *and/or* where impediments to equal employment opportunity exist" (emphasis added). As for types of "impediments to equal opportunity," these would be the same as the "barriers" described in § 30.4(a)(2) of this Section-by-Section Analysis. The Department also revises this paragraph in the Final Rule to indicate that utilization analyses will be conducted according to major

occupation group, rather than industry, consistent with changes in other paragraphs.

Paragraph 30.7(f): Action-Oriented Programs

In proposed § 30.7(f), the NPRM stated that if, in reviewing its personnel processes, the sponsor identifies any barriers to equal opportunity, it would be required to undertake action-oriented programs designed to correct any problem areas that the sponsor identified. Only if a problem or barrier to equal opportunity is identified must the sponsor develop and execute an action-oriented program.

The Department received no comments on this paragraph that have not already been addressed elsewhere, and so adopts proposed § 30.7(f) without change.

Paragraph 30.7(g)

Proposed § 30.7(g) clarified that the sponsor's determination that it has not attained the utilization goal in one or more industry groups would not constitute either a finding or admission of discrimination in violation of part 30. The Department noted, however, that such a determination, whether by the sponsor or by the Registration Agency, would not impede the Registration Agency from finding that one or more unlawful discriminatory practices caused the sponsor's failure to meet the utilization goal and that, in that circumstance, the Registration Agency would take appropriate enforcement measures.

The Department received no comments on this paragraph. Accordingly, the Department is only revising this paragraph consistent with other changes throughout this section to clarify that the utilization analysis will be performed according to major occupation group.

Paragraph 30.7(h)

Finally, proposed § 30.7(h) stated that the 7 percent utilization goal must not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities as apprentices. One commenter argued that the proposed 7 percent utilization goal was essentially a national hiring quota for individuals with disabilities. An industry association expressed concern that even though the Department stated that the proposed 7 percent utilization rate for persons with disabilities was a "goal," program sponsors may feel pressure to meet the goal and hire individuals who may not be as qualified as other applicants. A local JATC argued that the proposed disability utilization

goal would invite claims of reverse discrimination and lawsuits by able-bodied persons who were not admitted to the program because of the inclusion of an applicant with a disability.

The Department declines to make any changes to paragraph (h), as these comments are premised on a flawed understanding of the function of the disability goal. The Department has made clear, both in this paragraph and throughout the preamble, that the goal is not a quota and failure to meet the goal will not, in and of itself, result in any violation or enforcement action. Rather, a failure to meet the goal simply triggers a review by the sponsor of its employment practices to determine if impediments to EEO exist. The goal is intended to serve as a management tool to help sponsors measure their progress toward achieving equal employment opportunity for individuals with disabilities and does not require disability-based decision making. The Department recognizes that a failure to meet the 7 percent utilization goal does not necessarily mean that the sponsor is discriminating against individuals with disabilities and that there may be other explanations. It is for this reason that proposed § 30.7(g) stated that a sponsor's determination that it has not attained the utilization goal in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part. Finally, with regard to the comment fearing reverse discrimination actions, we note that the ADA, as amended, prohibits claims of discrimination because of an individual's lack of disability, and we interpret this Final Rule consistent with that.⁷⁶

Targeted Outreach, Recruitment, and Retention (§ 30.8)

The Department proposed to revise the existing § 30.8 entitled "Records" and to move that language to proposed § 30.12, as discussed later in the preamble. Proposed § 30.8 instead replaced the current requirements related to outreach and positive recruitment discussed in § 30.4(c) of the existing regulation by addressing the regulatory requirements related to targeted outreach, recruitment, and retention. Under proposed § 30.8, when a sponsor is underutilizing a specific group or groups pursuant to proposed § 30.6, and/or when a sponsor determines, pursuant to proposed § 30.7(f), that there were impediments to equal opportunity for individuals with

⁷⁶ 42 U.S.C. 12201(g).

disabilities,⁷⁷ the sponsor was required to undertake targeted outreach, recruitment, and retention activities likely to generate an increase in applications for apprenticeship and improve retention of apprentices from the targeted group or groups and/or from individuals with disabilities as appropriate. These targeted activities would be in addition to the sponsor's universal outreach and recruitment activities required under § 30.3(b)(3).

Paragraph 30.8(a): Minimum Activities Required

Proposed paragraph § 30.8(a)(1) set forth the minimum, specific targeted outreach, recruitment, and retention activities that the Department proposed to require of a sponsor that had found underutilization of a particular group or groups pursuant to § 30.6 and/or who had determined pursuant to § 30.7(f) that there were problem areas with respect to its outreach, recruitment, and retention activities impacting individuals with disabilities. These activities included, but were not limited to: (1) Dissemination of information to community-based organizations, local high schools, local community colleges, local vocational, career and technical schools, career centers at minority serving institutions (including Historically Black Colleges and Universities, Hispanic-Serving Institutions, and Tribal Colleges and Universities), and other groups serving the underutilized group; (2) advertising openings for apprenticeship opportunities by publishing advertisements in newspapers and other media, electronic or otherwise, that have wide-spread circulation in the relevant recruitment area; (3) cooperating with local school boards and vocational education systems to develop and/or establish relationships with pre-apprenticeship programs inclusive of students from the underutilized groups, preparing them to meet the standards and criteria required to qualify for entry into apprenticeship programs; and (4) establishing linkage agreements enlisting the assistance and support of pre-apprenticeship programs,

community-based organizations and advocacy organizations in recruiting qualified individuals for apprenticeship and in developing pre-apprenticeship programs. In the NPRM, the Department requested comments on whether there were circumstances under which sponsors would have difficulty completing any of these activities.

In addition, to foster awareness of the usefulness of a sponsor's outreach, recruitment, and retention activities, proposed § 30.8(a)(2) also required the sponsor to evaluate and document the overall effectiveness of its outreach, recruitment, and retention activities after every selection cycle for registering apprentices. This review was designed to allow the sponsor to refine these activities as needed, as set forth in proposed § 30.8(a)(3). Finally, proposed § 30.8(a)(4) required the sponsor to maintain records of its outreach, recruitment, and retention activities and any evaluation of these activities.

Several commenters supported the outreach, recruitment, and retention requirements in § 30.8. Multiple advocacy organizations stated that these minimum steps are among the most effective approaches, are more effective and efficient than general outreach, and should be reasonable for every program to undertake. Many advocacy organizations expressed support for the inclusion of linkage agreements between sponsors and groups representing underutilized populations given their proven success in increasing participation of underutilized populations. In response to the Department's request for information on how the proposed rule's targeted outreach requirements to organizations that serve individuals with disabilities would impact sponsors, an advocacy organization for persons with disabilities stated that it would welcome the opportunity to form relationships with apprenticeship sponsors.

Several commenters, on the other hand, asserted that the requirements in proposed § 30.8 would be too burdensome for apprenticeship programs. Unions and JATCs stated that the proposed requirements would be a drain on their resources and time. A national JATC said that while disseminating information on job opportunities was not a significant burden, as apprenticeship programs already do so, partnering with other groups would add a lot of time and work to the program. The commenter recommended that the current outreach, recruitment, and retention requirements under 29 CFR part 30 remain the same because the requirements to formally document its recruitment efforts after

every apprenticeship cycle, which are continuously occurring, would create even more burdens on their program. A number of JATCs and industry associations expressed concern about the proposed outreach, recruitment, and retention requirements and suggested that the § 30.8(a) activities should be suggestions, rather than requirements, and that sponsors should be given more flexibility in deciding what activities are most effective. An SWA also supported giving sponsors greater flexibility to encourage creative and diverse mechanisms to diversify their workforce.

The Department retains the four specific activities outlined in proposed § 30.8(a)(1) in the Final Rule, as several comments reinforced the Department's belief that these were effective mechanisms for outreach, recruitment, and retention, and that sponsors who discover they are underutilized should be required to use them to attempt to correct their underutilization. The Department believes that these minimum requirements provide sponsors with enough guidance to be effective in improving their outreach methods, but still leaves sponsors with flexibility to decide on other, additional recruitment mechanisms. The Department further believes that the four minimum activities outlined in § 30.8(a)(1) will not be overly burdensome for sponsors. As one sponsor pointed out, the requirements are largely representative of the kinds of good faith efforts the Department has required to date for a sponsor to meet its EEO obligations required in §§ 30.3 and 30.4 of the current part 30.

Many commenters stressed that retention was a major issue for women because they are often targets for isolation, harassment, discrimination, stereotyping, and a lack of training rotation on the job. An advocacy organization expressed concern with minority apprenticeship completion rates, stating that, in 2013, 30.3 percent of African Americans completed their program in the construction industry in comparison to 46.7 percent of whites. Some commenters suggested that the Department create a separate section in the rule to address apprentice retention specifically, which should include requirements that apprenticeship program sponsors: (1) Analyze their apprentice retention rates for women, people of color, and individuals with disabilities; (2) set forth in their written AAPs the specific retention activities they plan to take for the upcoming program year, as appropriate; (3) conduct exit interviews of each apprentice leaving the sponsor's

⁷⁷ As set forth in more detail in the discussion of § 30.7, the different "triggers" for engaging in action-oriented programs for race/sex versus disability are necessary because of the differences in labor market demographic data maintained for each. Because disability data is not available at the granular level that race/sex data is, and because there is not a data source for individuals with disabilities that matches exactly with the definition of disability found in the ADA, this Final Rule, like the Section 503 Final Rule, includes an additional step wherein sponsors must identify whether impediments to equal employment opportunity exist before the sponsor is required to engage in good faith efforts to correct the problem.

apprenticeship program prior to completion; and (4) implement policy and professional development practices designed to build staff capacity to support and serve traditionally underrepresented groups. Individual commenters recommended using members of the workforce that represent the marginalized populations to perform outreach to the particular underrepresented group and recommended that the Department encourage mentoring as a means for increasing retention.

The Department recognizes the importance of retention activities in building greater diversity within apprenticeship programs, but declines to include these specific suggestions as mandatory. Many of the retention activities suggested by commenters were, in fact, already included in proposed § 30.8(b). Furthermore, the Department anticipates that sponsors will evaluate their program's completion rates as part of their review of personnel processes under § 30.9.

An advocacy organization also recommended that language be added to § 30.8 to require apprenticeship programs to work with their local workforce development system as a fifth required outreach, recruitment, and retention activity because the workforce development system serves individuals that are largely members of populations currently underrepresented in the registered apprenticeship system. Similarly, two State vocational rehabilitation (VR) agencies recommended that the Department revise § 30.8(a) to specifically refer to State VR agencies.

The Department notes that, pursuant to § 30.3(b)(3)(i), all sponsors are already required to maintain a list of current recruitment sources that will generate referrals from all demographic groups within the relevant area, and that these sources could include One-Stop Centers. However, recognizing that the public workforce system can play a key role in linking sponsors to a diverse pool of apprenticeship candidates, § 30.8(a)(1)(i) of the Final Rule includes reference to workforce system partners, including One-Stop Career Centers, as examples of entities to which sponsors must disseminate information regarding its apprenticeship program.

Two advocacy organizations suggested that the Department add the language "including those who serve underrepresented populations" to each of the four requirements detailed in proposed § 30.8(a)(1) through (4). The commenters stated that this language would not create an additional burden to apprenticeship programs and would

signal the Department's intent to reach these populations, creating opportunities for further engagement with these groups.

The Department agrees with these comments that the activities outlined in § 30.8(a)(1) should focus more on what type of population these outreach and recruitment efforts are reaching, rather than prescribing the specific organizations that sponsors must reach out to. Accordingly, § 30.8(a)(1)(i) of the Final Rule is revised to focus on disseminating information to organizations serving the underutilized group regarding the nature of apprenticeship, requirements for selection for apprenticeship, availability of apprenticeship opportunities, and the equal opportunity pledge of the sponsor. The Final Rule further specifies that these organizations may include community-based organizations, local high schools, local community colleges, and local vocational, career and technical schools, thus providing the sponsor with greater flexibility in deciding which organizations will serve as the best partners in reaching out to the specific community in which the sponsor is underutilized.

Some commenters identified specific outreach, recruitment, and retention activities that they thought were not effective. A JATC stated that the proposed rule's newspaper advertising requirement in § 30.8(a)(1)(ii) would be a waste of money and suggested that the sponsors be given more flexibility to advertise in media formats that are more affordable and more effective in reaching targeted audiences. An industry association argued that registered apprenticeship programs should be encouraged—not required—to establish partnerships with pre-apprenticeship programs because this would effectively require apprenticeship programs to establish and operate their own pre-apprenticeship programs. Many commenters were concerned about what they perceived to be a requirement that sponsors establish pre-apprenticeship programs.

The Department agrees that some of these requirements, as written, may be overly prescriptive for sponsors. The Department is therefore making two additional changes to § 30.8(a). First, the Department will remove the requirement that sponsors advertise their apprenticeship opportunities in newspapers, referring instead to "appropriate media" which have a wide circulation in the relevant recruitment areas. Second, the Department reaffirms, as it did originally in the preamble to the NPRM, that linkage agreements need

not be highly formal, detailed arrangements, but rather are intended to be straightforward, dynamic partnerships that can be easily tailored to meet sponsors' needs. The Department also emphasizes that nothing in the Final Rule requires a sponsor to establish a pre-apprenticeship program; the rule only requires that sponsors leverage existing pre-apprenticeship programs as sources for recruitment into the sponsors' programs. To make this clear, the Department is amending § 30.8(a)(1)(iv) to read: "Establishment of linkage agreements or partnerships enlisting the assistance and support of pre-apprenticeship programs, community-based organizations, advocacy organizations, or other appropriate organizations, in recruiting qualified individuals for apprenticeship" (emphasis added). Amending the "and" to "or" also clarifies that linkage agreements need not be entered into with all of these organizations, but with any of the types of organizations that may assist in increasing outreach to underutilized groups.

Two national unions and a local JATC urged the Department to clarify whether the ERISA would permit joint labor-management programs governed by ERISA to use their resources to support pre-apprenticeship programs, such as by funding pre-apprenticeship programs or providing pre-apprenticeship training to the community. This comment was addressed within the larger discussion of how this rule coexists with ERISA fiduciary obligations in § 30.1, above.

A number of commenters also suggested examples of technical assistance that the Registration Agency could provide. For instance, several advocacy organizations recommended that the Department develop a standardized but customizable evaluation tool which would include the criteria that should be used to evaluate the effectiveness of such outreach, recruitment, and retention activity, and would allow sponsors to self-document deficiencies and self-identify remediation activities. Several advocacy organizations also recommended that the Department reference in the Final Rule and/or on its Web site the technical assistance tools and materials that can be used to facilitate sponsors' outreach, recruitment, and retention efforts, including those developed by Women in Apprenticeship Act (WANTO) grantees.

As resources permit, the Department will gather effective tools for compliance assistance and will work to provide guidance to sponsors reflecting

recommended practices for outreach, recruitment, and retention.

Paragraph 30.8(b): Other Activities

In addition to the activities required in proposed § 30.8(a), as a matter of best practice, proposed § 30.8(b) encouraged but did not require sponsors to consider other outreach, recruitment, and retention activities that may assist them in addressing any barriers to equal opportunity in apprenticeship. Such activities included but were not limited to: (1) Use of journeyworkers and apprentices from the underutilized group or groups to assist in the implementation of the sponsor's AAP; (2) use of individuals from the underutilized group or groups to serve as mentors and to assist with the sponsor's targeted outreach and recruitment activities; and (3) conducting exit interviews of each apprentice leaving the sponsor's apprenticeship program prior to receiving his/her certificate of completion to understand better why the apprentice is leaving and to help shape the sponsor's retention activities.

Several advocacy organizations recommended that the Department make it mandatory for sponsors to conduct an exit interview with each apprentice leaving the program early, rather than an encouraged activity under § 30.8(b), reasoning that it would help program sponsors better understand the reason for early departure. An advocacy organization also recommended that the Department add direct entry as an encouraged, but not required, approach to outreach. Further, this commenter suggested that the Department should encourage program sponsors to administer their own in-house programs to prepare the members of targeted classes for the program's entrance exam. The Department declines to incorporate these activities into the regulatory text. Nonetheless, sponsors are once again encouraged to use these, or any other outreach, recruitment, and retention method that it feels will be most useful in increasing the diversity of its program.

Finally, some commenters put forth suggestions, or sought clarification, on how parties can work together to conduct outreach activities. An industry association recommended that the Department give smaller programs the option to pool their outreach efforts and have their efforts be executed by a single entity or a third party. An industry association stated that, while they do not oppose the proposed four required recruitment activities, association-sponsored programs that rely primarily

on their employer members to supply apprentices to chapter programs should be entitled to rely on the outreach and recruitment efforts of the actual employers of the apprentices in question. In such circumstances, this commenter suggested that association program sponsors should be exempted from requirements of § 30.8, and/or should be permitted to rely on the affirmative action efforts that their participating employer members have engaged in to establish the necessary outreach and recruitment efforts.

Sponsors are encouraged to work with each other, with their employers, with outside parties and organizations, and with industry groups and consortia, as appropriate, to improve the effectiveness of their outreach and recruitment efforts. Ultimately, however, it will be the sponsor's responsibility to ensure that its program is meeting the standards established in this Final Rule. The Final Rule does not provide for exemptions for joint-programs, and the Department declines to include one, for the reasons discussed in previous sections addressing the joint sponsor issue.

Review of Personnel Practices (§ 30.9)

Proposed § 30.9 required that any sponsor subject to the AAP requirements in this proposed rule (*i.e.*, those with five or more apprentices who are not otherwise exempt) must review its personnel processes on at least an annual basis to ensure that it is meeting its obligations under part 30.

Paragraph 30.9(a)

Several advocacy groups supported the proposed annual personnel processes review requirements under § 30.9 and recommended that it would be beneficial to involve apprentices and journeyworkers in the review. Another advocacy group supported the proposed proactive review approach in § 30.9 and recommended reviewing affirmative action measures as frequently as monthly during the first year, making the results of such reviews public, and involving community stakeholders in the reviews.

In contrast, several commenters disagreed with the annual review requirements. A State Department of Labor asserted that the proposed annual review of personnel process may be excessive and costly and could deter the opening and expansion of apprenticeship programs. A national JATC stated that although personnel process reviews were good business practice, the reviews should not be required every year. Instead, the JATC recommended reviews only in the event

that data indicate a deficiency in certain demographics and that the review would be a part of the effort to correct the deficiency. An industry association requested the Department eliminate the requirement that program sponsors review personnel practices every year and instead recommended that reviews be conducted on an "as needed" basis or no less than every 3 years. Commenting that sponsors do not indenture new participants every year, a State Department of Labor recommended that the Department require personnel process reviews only in advance of recruitment and that sponsors maintain records of these reviews to supply to the Registration Agency upon request.

In the NPRM, the Department commented that this requirement was a good business practice that many entities should already be conducting themselves to help determine whether they are in compliance with the EEO obligations that they have undertaken under current part 30. Indeed, the proposal drew upon provisions in the existing regulations, such as those providing for "periodic audits of affirmative action programs and activities" set forth under current § 30.4(c)(10). We disagree with the commenter suggesting that such reviews should occur only when a sponsor is underutilized in women or a particular racial/ethnic group. This is because the aim of ensuring that an apprenticeship program is operating free from discrimination goes beyond the simple numbers of individuals from various protected groups, and discrimination can exist absent a finding of underutilization. For instance, a careful review of personnel policies at the program, industry, and occupational level can uncover occupational segregation in which women and/or minorities are more likely to be in lower paying occupations than higher paying occupations, as well as unequal treatment in compensation, work assignments, performance appraisals, discipline, the handling of accommodation requests—all of which are important elements of equal employment opportunity that may go largely undetected in utilization analyses. Indeed, the idea that an AAP is purely numerical-driven helps to feed the flawed notion that it constitutes "quotas." The Final Rule is revised to clarify that these reviews are required whether or not there is underutilization, and that this review must look at program, industry, and occupational policies and practices to fully examine

whether there are impediments to equal employment opportunity.

We understand the concerns of commenters asserting that an annual review may be burdensome and serve to discourage interest in new entities creating apprenticeship programs, but have concluded that this review is a valuable exercise for sponsors to follow so that they can uncover any barriers to EEO within their programs. One commenter suggested that AAP reviews should include employment practices as well as personnel processes and administration of the program, reasoning that diverse work assignments and rotation among work processes are critical to apprenticeship training. The commenter said that creating record systems to capture actual on-the-job training and maintaining those records throughout the course of an apprenticeship is necessary to ensure quality training. The proposed rule (and in turn the Final Rule) incorporated these ideas, listing a number of employment practices that would be part of the review in § 30.9, and the recordkeeping requirement of § 30.12 requires retaining information relative to the operation of the apprenticeship program, specifying a number of employment actions relevant to apprenticeship including “hours of training provided.”

Several commenters requested clarification of the requirements in proposed § 30.9 as they would relate to group sponsors. A national union and a national JATC stated that proposed § 30.9 does not distinguish between JATCs and employers and, thus, imposes obligations on JATCs that are inapplicable to these programs since they do not employ apprentices or individuals seeking to be apprentices. The commenters stressed that because JATCs do not promote apprentices or establish wages, only the employers have the ability and obligation to address harassment and discrimination affecting recruitment and retention. Specifically, an industry association recommended that the Department remove the requirements in § 30.9(a), reasoning that the requirements to review the listed personnel practices would be impossible for joint employer apprenticeship programs in the construction industry to meet. The commenter stressed that construction apprentice programs provide training to apprentices who at various times work for different construction employers, all of whom have separate employment policies and procedures. The commenter reasoned that the construction apprentice programs have no ability to monitor employment

policies or procedures of each individual employer.

The Final Rule requires the review of all sponsors. As discussed in several previous sections raising the issue of how the obligations will apply to group sponsors, we recognize that certain personnel actions may be undertaken by participating employers, rather than the sponsors themselves. In such cases, the reviews may correspond to the structure of the sponsor’s program, but in keeping with historical practice and provisions of the existing rules, sponsors will need to coordinate with the participating employers in order to ensure that the sponsors are not coordinating apprenticeship programs with employers that are actively discriminating against the apprentices placed there. OA will provide further guidance modeling what an appropriate review will look like under these regulations.

An industry association requested clarification on how penalties would be assessed in the event of noncompliance with § 30.9. In particular, the commenter asked whether a penalty would be assessed against the sponsor entity or the individual EEO officer designated by the sponsor as “responsible” and “accountable” for overseeing and implementing the sponsor’s AAP, per proposed § 30.3(b)(1). As has been the case historically, OA’s interest is in apprenticeship programs that are successful—in the development of apprentices, employers, and in the promotion of equal employment opportunity. To that end, OA concentrates its resources on providing technical assistance so sponsors comply in the first place, and in the event violations occur, having sponsors voluntarily correct them. The latter part is embodied in the Final Rule’s discussion of compliance evaluation findings at § 30.13(b), below. However, if sponsors refuse to correct deficiencies identified, OA ultimately may seek to deregister the program per § 30.15 of the Final Rule.

Finally, as with previous sections describing AAP obligations, the Final Rule adds a new paragraph to § 30.9, at 30.9(a)(1), describing when sponsors must come into compliance with the obligations specified therein. In short, those who are already sponsors of registered apprenticeships as of the effective date of this rule will have two years to come into compliance with this section. Sponsors who register apprenticeship programs for the first time after the effective date of the rule will have two years from the date of registration to comply with this section.

Paragraph 30.9(b)

Proposed § 30.9 also required a sponsor to retain records of its annual review of personnel practices, and to identify any modifications that the sponsor has made or plans to make as a result of this review. A SWA requested clarification on the proposed § 30.9(b) requirement that program sponsors “include a description of its review.” The commenter stated that the language was unclear as to whether the rule required the sponsor to detail when and how steps were conducted and present its findings, or if the program sponsor was required to publish the procedure used for the review. Generally speaking, the memorialization of the review could include both of these things, but the focus should be on the former—how, when, and which personnel processes were reviewed, as well as any modifications made as a result of this review. As stated above, OA will provide further guidance modeling what an appropriate review would look like under this section, including a model written AAP.

Finally, a commenter requested that the Department remove the proposed § 30.9(b) requirement that sponsors include descriptions of these reviews in their written AAPs, reasoning that personnel processes may need to be revised frequently and should not be tied to AAP review schedules. Furthermore, the commenter argued that these reviews of personnel processes may be difficult for the Registration Agencies to monitor because there would be little consistency among sponsors as to how they perform the review.

As to the first point, we first clarify that not all personnel process revisions need to be retained, but only those made to the program “as a result of its review” required by § 30.9(a), that is, the review for EEO compliance. We note that also this review under § 30.9(a) occurs annually and the schedule for updating the written AAP is less frequent, occurring at each compliance evaluation and then again three years later if there has been no intervening compliance evaluation. As a matter of best practice, we would expect the sponsor to memorialize any changes made to their personnel practice at the time they are being made, but OA will measure compliance by whether the sponsor has memorialized the changes in its written AAP. While updating the written AAP occurs not less than every three years, each update should include the results of the reviews from each year since its last written AAP. As for the point regarding consistency, as stated above,

OA will provide models for what the review should include, which should help to promote some consistency.

Selection of Apprentices (§ 30.10)

Under the existing section covering selection of apprentices, § 30.5, sponsors could select any one of four methods of selecting apprentices: (1) Selection on the basis of rank from pool of eligible applicants; (2) random selection from pool of eligible applicants; (3) selection from pool of current employees; or (4) an alternative selection method which allows the sponsor to select apprentices by means of any other method including its present selection method, subject to approval by the Registration Agency. Alternative selection methods could include, for example, the use of interviews as one of the factors to be considered in selecting apprentices, pre-apprenticeship programs, “direct entry” programs,⁷⁸ or a combination of two or more selection methods.

Proposed § 30.10 (renumbered due to reorganization of this part) sought to simplify the current regulatory requirements related to procedures used by sponsors to select apprentices to adopt any method for selection of apprentices, provided that the method used: (1) Complies with the UGESP at 41 CFR part 60–3; (2) is uniformly and consistently applied to all applicants for apprenticeship and apprentices; (3) complies with the qualification standards set forth in title I of the ADA; and (4) is facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability. Commenters expressed varying views, some general and some specific, on the proposed revisions.

With regard to general comments, a State JATC and an industry association supported the streamlined approach for apprenticeship programs articulated in § 30.10 and stated that the proposed rule would provide greater flexibility to apprenticeship programs in their selection methods. The State JATC argued that the current approach requiring program sponsors to utilize one apprenticeship selection process prevents programs from attracting a broader range of applicants because it does not account for factors like geographic location, wherein one selection method may be suitable for one location, but not another. The JATC reasoned that the “one size fits all”

approach disrupted the administration of intake practices at their training centers and was ineffective at reaching out to potential apprentices. Many commenters further supported the proposed requirement that sponsors’ selection method(s) be facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability (§ 30.10(b)(4)), as well as the requirement that sponsors must evaluate the impact of their selection procedure(s) on race, sex, and ethnic groups (Hispanic or Latino/non-Hispanic), but some requested that gender identity, pregnancy, and caregiver status be added to this list. We decline to do so, for reasons previously provided.

However, several commenters generally preferred the current requirements relating to selection of apprentices because they were specific and descriptive, and expressed concern that the proposed regulations were lacking in this regard and would not encourage or enable apprentice selection procedures that are more equitable than the processes already in use by apprenticeship programs. In addition, several commenters expressed concern that proposed § 30.10 would impose a significant burden upon sponsors. An SWA argued that the proposed regulations would require expenditure of financial and human capital resources to determine if their selection procedures meet the compliance requirements of UGESP, Title I of the ADA, and EEOC regulations. Another State agency expressed concern that the requirement to comply with UGESP regulations may drive away potential sponsors who find the administration of the regulation overly burdensome.

As to the burden concern connected with familiarization of the UGESP, we note that the existing regulations required that sponsors follow the procedures set forth in UGESP when they were selecting on the basis of rank from a pool of eligible applicants or any alternative selection methods using qualification standards.⁷⁹ The proposed regulation was therefore in keeping with the existing regulations in that respect, and thus should not add any additional burden.⁸⁰ Relatedly, with regard to

some commenters’ preference for previous selection models, the Final Rule does not prevent sponsors from using the same selection devices they’ve used under the previous regulations if they prefer to do so, so long as these selection devices do not discriminate as specified in this part. An industry association recommended language like this in the regulatory text, but given that references to “the previous edition of CFR 29 part 30” will soon become obsolete, we believe the guidance stated here is sufficient.

Numerous commenters recommended that the Department explicitly state that sponsors are permitted and encouraged to implement a different selection procedure(s) or extend or reopen selection periods if the initial selection procedure or period was not effective in complying with EEO requirements and/or making progress towards affirmative action goals. The proposed rule is broadly worded in order to provide flexibility to sponsors so that they may use the selection method or methods that fit their program, including any of the methods included in the formal rule. Thus clarified, there is no need to add this proposed wording to the rule.

Some commenters addressed direct entry programs as a selection procedure. An industry association expressed support for the proposed rule’s mention of direct entry programs as a potential selection processes, commenting that many of its members preferred this method. An advocacy organization also supported the Department’s express allowance of direct entry programs to apprenticeship selection, stating that it was an effective method for improving inclusion of underrepresented groups. In the NPRM and in this preamble, the Department has underscored that the flexible approach in the proposed § 30.10 would permit sponsors to use direct entry as a selection method, but does not believe that this approach must be explicitly mentioned in the language of the rule above other methods.

One national JATC was concerned that the proposed rule’s treatment of direct entry processes as a selection procedure would require them to discontinue using their direct entry program. It argued that direct entry methods should not be treated as selection procedures. The commenter asserted that although the proposed rule recognized direct entry programs as an acceptable selection procedure, the language in the preamble requiring that selection methods apply “to all applicants for apprenticeship and

selection procedure, random selection, also does lend itself to analysis under UGESP.

⁷⁹ See existing 29 CFR 30.5(b)(1), 30.5(b)(4)(B).

⁸⁰ A third selection procedure in the existing regulations, selection from a pool of current employees, did not include a requirement for UGESP compliance, but this is largely because such selections are frequently based on seniority, and there is built into UGESP an exemption for bona fide seniority systems. 41 CFR 60–3.2(C). The fourth

⁷⁸ Under this selection method, the application process is waived so that qualified applicants can enter directly into an apprenticeship program, where the individual applicant demonstrates specific education and/or skills previously attained.

apprentices' would result in apprenticeship programs not being able to obtain apprentices from any other source. The commenter stressed that its direct entry apprenticeship program was meant to supplement existing pools of applicants, not to be the sole entry into the apprenticeship program. In a similar vein, an industry association asked the Department to clarify that pre-apprenticeship programs are not required to be an exclusive source of apprentice recruitment, and suggested clarifying language to proposed § 30.10(b)(2) to address this. A State JATC stated that with the increasing potential for non-union apprenticeship programs, union apprenticeship programs should be permitted to employ more than one intake method to ensure that union apprenticeship programs would survive.

We have considered the commenters' points, and have clarified the regulatory text in response. The proposed § 30.10(b)(2) stated that "[t]he selection procedure must be uniformly and consistently applied to all applicants and apprentices." One reading of that language is that sponsors must use only one selection procedure; that was not the intent. The intent, as stated in the NPRM preamble, was to allow sponsors flexibility to use one or more selection procedures, and that the selection procedures must be uniformly and consistently applied to those applicants within each procedure. To clarify this point, the Department has revised "method" and "procedure" to include the plural as appropriate throughout this provision. The Department has also revised § 30.10(b)(2) by adding "within each selection procedure utilized."

A few commenters asked the Department to clarify how sponsors should comply with UGESP requirements. An SWA stated that the inclusion of UGESP and ADA regulations leave program sponsors with no clear idea of what is acceptable. An industry association echoed these comments and suggested that the Department should clarify that apprenticeship qualifications derived from the 29 CFR part 29 rules on apprenticeship standards are consistent with the UGESP. A State agency and an industry association stated that the UGESP regulations are complex and requested clarification on how the requirements would be applied to apprenticeship programs. For example, a State agency stated that 41 CFR part 60-3 requires validation of selection procedures but the proposed rule did not state how this provision would be applied. The commenter also raised a further question suggesting that the

implementation of this requirement to follow the UGSEP procedures could be complicated for group sponsors. The commenter stated that 41 CFR part 60-3 applies to individual employers with Federal contracts, whereas apprenticeship programs may or may not be individual employers. In particular, this commenter said that in the construction trade often sponsors are a joint apprenticeship committee or non-joint committee. The commenter stated that the apprenticeship program sponsors develop the selection procedures and the apprenticeship compliance review is conducted on the sponsor not the individual employer. Therefore, the commenter asserted that the Department's reference to UGESP must be clarified.

As noted above, under the current provisions addressing selection procedures, program sponsors, whether individual or group sponsors, are already required to comply with those regulations under the current part 30. In addition, as clarification, the procedures in 41 CFR part 60-3 are not limited to individual employers with Federal contracts; rather they provide a uniform framework to a variety of entities for the proper use of tests and other procedures. Nonetheless, the Department expects to provide guidance to stakeholders in order to facilitate implementation of the new rule.

Other commenters also encouraged the Department to provide guidance. An advocacy organization suggested that the Department should issue guidance on best practices in selection procedures. The commenter stated that this guidance should include references to linkages with pre-apprenticeship programs as an eligible pool of workers, as well as "analysis of selection procedures, such as relying on interviews or base apprenticeship program selection on a homogeneous pool of current candidates that can reinforce underrepresentation the regulations seek to remedy." An individual commenter suggested that the Department provide uniform guidelines on employee selection using the process that created the Advisory Committee on Apprenticeship's guidance on quality pre-apprenticeship programs. Numerous commenters recommended that the Department establish guidelines for standardizing direct entry into apprenticeships for graduates of pre-apprenticeship programs that adhere to the quality framework to be set out in § 30.2. As stated throughout, the Department anticipates issuing technical assistance guidance in advance of the applicable effective and/or compliance dates of this

rule, and will give strong consideration to incorporating these specific requests.

Numerous advocacy organizations suggested that the regulations should explicitly require that skills requirements, including strength and/or physical abilities tests or standards that are used to screen and/or rank apprenticeship candidates, must be related to and necessary for the actual on-the-job performance requirements and must meet the requirements listed in the current regulations at § 30.5(b)(1)(iii). Some of these commenters reasoned that these tests had sometimes been used to exclude certain groups of applicants. In response, the Department notes that the requirements of current § 30.5(b)(1)(iii) are carried forward by the requirement that the use of the selection procedure comply with the UGESP in 41 CFR part 60-3, as well as the standard non-discrimination obligations set forth in § 30.3.

Finally, some advocacy organizations stated that, if a program sponsor wanted to maintain a selection procedure that resulted in an adverse impact to underrepresented groups, it must demonstrate there is no alternate procedure available to meet the business necessity. This comment is already addressed by the rule, as it generally states the obligations for employers under the UGESP whose selection procedure(s) have resulted in an adverse impact. The Department notes that the term "underrepresented groups" is not necessarily synonymous with "protected groups," under the rule, and clarifies that UGESP applies only to race, sex, and ethnic groups.

Invitation To Self-Identify as an Individual With a Disability (§ 30.11)

The Department proposed to move the language in current § 30.11 entitled "Complaint procedure," to § 30.14, and to add a new § 30.11 entitled "Invitation to Self-Identify as an Individual with a Disability." This section of the NPRM proposed to require sponsors required to maintain an AAP to invite applicants for apprenticeship to voluntarily self-identify as an individual with a disability protected by this part at three stages: (1) At the time they apply or are considered for apprenticeship; (2) after they are accepted into the apprenticeship program but before they begin their apprenticeship; and (3) once they are enrolled in the program. Thereafter, proposed § 30.11 required sponsors to remind apprentices yearly that they may voluntarily update their disability status, thereby allowing those who have subsequently become disabled or who did not wish to self-

identify during the application and enrollment process to be counted. Proposed § 30.11 also clarified that sponsors would not be permitted to coerce individuals to self-identify, required that sponsors maintain self-identification information in a confidential manner, and emphasized sponsors' continuing responsibility to take affirmative action with respect to known disabilities and to refrain from discriminating against individuals with disabilities.

The Department received a number of comments regarding the requirement to invite self-identification. Many commenters opposed to the requirement argued that applicants or apprentices would not choose to self-identify and that this would result in inaccurate data. For example, unions worried that apprentices and trainees would be reluctant to disclose disabilities, particularly those working in the construction industry where the work often requires certain physical capabilities. These commenters also opposed any penalty that would be applied to sponsors for failing to meet their utilization goal for individuals with disabilities when the failure to reach the goal could be due to apprentices and applicants choosing not to self-identify. A number of other commenters, including SWAs, also questioned the accuracy of the data produced by self-identification and requested clarification on the proper disability eligibility determination procedures, including how apprentices would know if they have an eligible disability and how sponsors can determine if the individual has an eligible disability. One commenter suggested that sponsors be permitted to track and report applicants or apprentices who request and document that they need accommodations for a disability, even if they have not voluntarily self-identified.

The Department is retaining the requirement to invite self-identification in the Final Rule. We concede the possibility that there may be underreporting of individuals with disabilities reporting as such, especially at the beginning when the requirement is new. The Department does not think, however, that this is a sufficient reason to remove the requirement to invite self-identification. While not perfect, the data that will result from this requirement will provide, for the first time, some degree of quantitative data regarding the participation of individuals with disabilities in the sponsor's apprenticeship workforce and applicant pools. This, in turn, should allow the sponsor and the Department

to better identify, monitor, and evaluate the sponsor's recruitment and employment practices with respect to individuals with disabilities. We also believe that the response rate to the invitation to self-identify will increase over time, as people become accustomed to the invitation and workplaces become more welcoming to individuals with disabilities. The use of standardized language issued by the Administrator in the invitation will also reassure applicants that the request is routine and executed pursuant to obligations created by OA, and will hopefully also increase the response rate. Sponsors should also work to develop an inclusive and welcoming culture and provide support for its apprentices and applicants with disabilities. OA will provide technical assistance and guidance regarding methods for increasing participation in the self-identification process.

Additionally, the standardized invitation language contains information to help individuals know if they have, or had, a disability. Sponsors should accept the identification provided by the individual without seeking to further verify the nature of the individual's disability. The standardized language proposed in the NPRM, and adopted in the Final Rule, prescribes a narrow inquiry so as to minimize privacy concerns and the possibility of misuse of disability-related information. The required invitation asks only for self-identification as to the existence of a "disability," not as to the general nature or type of disability the individual has, or the nature or severity of any limitations the individual has as a result of their disability.

Furthermore, the Department reiterates that failure to meet the utilization goal for individuals with disabilities will not, by itself, result in any violations of this part. Therefore, even if apprentices with disabilities choose not to self-identify, the sponsor would not be subject to any enforcement actions as a result of its underutilization. Again, failure to meet the goals would simply require the sponsor to assess whether impediments to equal opportunity exist in its program. If a sponsor discovers that apprentices are refusing to self-identify, the sponsor could note that as a possible reason for its underutilization, and also attempt to take steps that would encourage apprentices to feel more comfortable self-identifying. We note that OFCCP has published on its Web site a video explaining why job applicants and employees are asked to voluntarily self-identify if they have a

disability under Section 503, the important role that self-identifying plays in ensuring equal employment opportunity for individuals with disabilities, and offering employers the option of disseminating the video to their applicants and employees as guidance to increase self-identification.⁸¹

With regard to the question of sponsors identifying individuals with disabilities who do not self-identify, the Department agrees that it is important that the reporting of disability demographic information be as accurate as possible. The Department therefore believes that it is appropriate to allow sponsors to identify an individual as having a disability for the purposes of § 30.7, if the individual does not voluntarily self-identify when: (1) The disability is obvious (*e.g.*, someone is blind or missing a limb) or (2) the disability is known to the sponsor (*e.g.*, an individual says that he or she has a disability or requests reasonable accommodation that is clearly related to a disability). This is consistent with the approach that OFCCP has used for disability identification in its Section 503 program, as well as the approach used to identifying ethnicity for those who have not disclosed under its Executive Order 11246 program.⁸² The Department believes that this approach strikes the appropriate balance between the privacy concerns of those with disabilities and the need for reporting information to be as accurate as possible. Sponsors may not guess or speculate when identifying an individual as having a disability. Nor may they assume that an individual has a disability because he or she "looks sickly" or behaves in an unusual way. As one commenter suggested, a sponsor may also include individuals who request reasonable accommodations as individuals with disabilities, even if those individuals choose not to self-identify.

Some commenters, including JATCs and a local union, asserted that the proposed § 30.11 requirements would place additional human resources, reporting, and cost burdens on apprenticeship programs and would delay the processing of applications. A State agency recommended that the Department should not require program sponsors to request that individuals self-

⁸¹ See Office of Federal Contract Compliance Programs: Disability Inclusion Begins with You, available at <https://www.dol.gov/ofccp/SelfIdVideo.html> (last accessed May 9, 2016).

⁸² See <http://kb.dol.gov/DOLArticlePage?agency=OFCCP&parentCatValue=Employer&article=ka1i0000000WEq1AAG> (last accessed June 21, 2016).

identify for one year and that the Department should take additional time to work through an implementation strategy for the new requirements. The commenter also stated that additional guidance and technical assistance would be necessary prior to sponsors implementing the requirements in § 30.11.

To ease the burden on sponsors in implementing this provision, the Department is giving sponsors more time to come into compliance with this provision, as detailed below in new paragraph 30.11(h). The Department will provide technical assistance to sponsors during the transition time. As discussed above, the Department is also prescribing the language that sponsors must use when inviting apprentices or applicants to self-identify. Sponsors, therefore, will not need to spend time creating their own self-identification language. The Department also notes that application processing need not be significantly slowed as a result of including the self-identification invitation form. As the Final Rule states that the invitation must be detachable from the application for apprenticeship, the applicant's self-identification form can be reviewed for data analysis purposes at a later time and need not be reviewed in conjunction with the application for apprenticeship.

Paragraph 30.11(a): Pre-Offer

Proposed § 30.11(a) required the sponsor to invite each applicant to voluntarily self-identify as an individual with a disability at the time they apply for or are considered for apprenticeship. Proposed § 30.11(a) further explained that the invitation may be included with the application materials, but must be separable or detachable from the application for apprenticeship and that the sponsor was required to use the language prescribed by the Administrator, pursuant to § 30.11(b).

Multiple commenters expressed concern with the pre-offer invitation, claiming that it conflicted with the ADA and its implementing regulations. One commenter requested that the term "voluntarily" be inserted prior to "inform the sponsor," as is currently the case under Section 30.11(1)(c). A Member of Congress asserted that, despite the EEOC's position that invitations to self-identify as part of an AAP would not violate the ADA, individuals could still pursue litigation against employers under the ADA. A number of commenters, including a company and a State agency, remarked that inquiring about an individual's disability status, particularly at the pre-offer stage, could conflict with state law

as well. An industry association asked how a person's status as an individual with a disability can be used for affirmative action purposes if it cannot be used by hiring managers in the decision-making process.

As detailed in the NPRM, the requirement to give applicants and employees the opportunity to self-identify is consistent with the ADA. Although the ADA generally prohibits inquiries about disability prior to an offer of employment, it does not prohibit the collection of this information by a sponsor in furtherance of its part 30 affirmative action obligation to provide equal opportunity in apprenticeship for qualified individuals with disabilities. The EEOC's regulations implementing the ADA state that the ADA "does not invalidate or limit the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities" than does the ADA.⁸³ The OA part 30 rule is one such law. In the course of OFCCP's Section 503 rulemaking, counsel for the EEOC provided a letter stating that OFCCP's pre-offer self-identification process, which is functionally identical to that included in this Final Rule, was permissible under the ADA. That interpretation would apply with equal power to this Rule. Accordingly, the Department adopts § 30.11(a) as proposed.

With regard to the concern that, notwithstanding the legality of this provision, sponsors may face increased discrimination complaints as a result, we do not believe this will present a significant obstacle. While knowledge of the existence of a disability, like knowledge of a person's race, ethnicity, or gender, is a component of an intentional discrimination claim, to find intentional discrimination it must be proven not only that the sponsor knew that a person had a disability but that the sponsor treated the person less favorably because of his or her disability.⁸⁴ We note, moreover, that sponsors have long had knowledge of the disabilities of applicants who have visible disabilities, such as blindness, deafness, or paraplegia, but that the Department has had no means of knowing that such individuals were present in the applicant pool or their experience in the application and

selection process. Requiring sponsors to invite pre-offer self-identification will help fill this void.

The Department points out that, generally, self-identification information should not be provided to interviewing, testing, or hiring officials, as it is confidential information that must be kept separate from regular personnel records. This will help ensure that these officials do not, in fact, have knowledge of which applicants have chosen to self-identify as having a disability. In response to the question regarding how self-identification information can be used for affirmative action purposes if hiring managers cannot use it in the decision-making process, this fundamentally misunderstands the purpose of the data collection. The regulations make clear that selection officials should never base their employment decisions on a protected basis, including an individual's disability status. The purpose of the self-identification and utilization goal is to collect data that will enable the sponsor to assess whether barriers to apprenticeship exist for individuals with disabilities, *e.g.*, a decreasing rate of applications from individuals with disabilities over the years may suggest that further or different outreach and recruitment efforts should be conducted; it is not designed to encourage sponsors to select individuals based on their disability status.

As mentioned above, some commenters claimed that the requirement to invite self-identification could conflict with state laws, but did not indicate any specific provisions of state law that would be problematic. The Department notes that OFCCP's regulations implementing Section 503 of the Rehabilitation Act also require contractors to invite employees and applicants to self-identify as individuals with disabilities, and no contractor has yet raised the issue of a conflicting state law provision. Furthermore, to the extent that any provision of state law did conflict with these regulations, the Final Rule would preempt the state law provision, and would not serve as a defense for failing to comply with this Part.

Proposed § 30.11(a)(2) required that the sponsor invite applicants to self-identify "using the language and manner prescribed by the Administrator and published on the OA Web site." The Department sought comments on the specific language OA proposed to prescribe that the sponsor use when inviting applicants to self-identify at the pre-offer stage. That language was as follows:

⁸³ 29 CFR 1630.1(c)(2).

⁸⁴ In cases where there has been a denial of a reasonable accommodation, the knowledge that comes from a self-identification form provides no additional basis for a complaint, as individuals need to disclose their disability in order to request an accommodation.

1. Why are you being asked to complete this form? Because we are a sponsor of a registered apprenticeship program and participate in the National Registered Apprenticeship System that is regulated by the U.S. Department of Labor, we must reach out to, enroll, and provide equal opportunity in apprenticeship to qualified individuals with disabilities. [42] To help us measure how well we are doing, we are asking you to tell us if you have a disability or if you ever had a disability. Completing this form is voluntary, but we hope that you will choose to fill it out. If you are applying for apprenticeship, any answer you give will be kept private and will not be used against you in any way.

If you already are an apprentice within our registered apprenticeship program, your answer will not be used against you in any way. Because a person may become disabled at any time, we are required to ask all of our apprentices at the time of enrollment, and then remind them yearly, that they may update their information. You may voluntarily self-identify as having a disability on this form without fear of any punishment because you did not identify as having a disability earlier.

2. How do I know if I have a disability? You are considered to have a disability if you have a physical or mental impairment or medical condition that substantially limits a major life activity, or if you have a history or record of such an impairment or medical condition.

Disabilities include, but are not limited to: Blindness, deafness, cancer, diabetes, epilepsy, autism, cerebral palsy, HIV/AIDS, schizophrenia, muscular dystrophy, bipolar disorder, major depression, multiple sclerosis (MS), missing limbs or partially missing limbs, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, impairments requiring the use of a wheelchair, intellectual disability (previously called mental retardation).

Please check one of the boxes below:

- YES, I HAVE A DISABILITY (or previously had a disability)
 NO, I DON'T HAVE A DISABILITY
 I DON'T WISH TO ANSWER

Your name:

Date:

Many advocacy organizations supported the proposed language regarding the invitation to self-identify because it mirrored OFCCP language used for Federal contractors in the regulations implementing Section 503 of the Rehabilitation Act. Some recommended, however, that the instructions for defining a disability should be clearer and broader. A state

agency also expressed concern that the sponsor may be a committee, rather than an individual employer and that, in that case, the committee may not be the entity extending the bona fide job offer.

The Department believes that the invitation language proposed in the NPRM is sufficiently clear to enable individuals to decide whether or not they have a disability. Additionally, the language states that "Disabilities include, but are not limited to . . .," indicating that conditions other than those listed on the invitation may qualify as a disability. Furthermore, this language is consistent with that used in other Department programs. As stated before, the Department thus adopts the proposed language without change and will make this invitation form available to sponsors. With regard to the question of sponsor structure, as addressed in previous sections where the issue has arisen, sponsors have historically entered into apprenticeship agreements with participating employers that have included provisions that the parties will coordinate to satisfy the obligations of part 30, and we expect this practice to continue. Sponsors should be extending the invitation to self-identify at the point at which apprentices are accepted into the apprenticeship program, even if sponsors are not the ones that would extend ultimate offers of employment to apprentices. For sponsors that are not responsible for selecting the apprentices that participate in this program, the sponsor would need to ensure that its participating employers invited apprentices and applicants for apprenticeship to self-identify at the time the employer reviews and selects the applicant. Sponsors would then be under a continuing duty to remind apprentices that they also have the opportunity to submit their self-identification to the sponsor.

Lastly, the reference to inviting self-identification as part of a sponsor's "general duty to engage in affirmative action" is amended to clarify that the requirement to invite apprentices and applicants to self-identify only applies to sponsors that are required to maintain an AAP, and that inviting self-identification is part of their AAP requirements. Inviting self-identification is not required as part of the sponsor's general duty to engage in affirmative action pursuant to 30.3(b), and sponsors that do not maintain an AAP should not invite apprentices to self-identify as individuals with disabilities.

Paragraph 30.11(b): Post Offer

Proposed § 30.11(b)(1) required that the sponsor invite applicants, after acceptance into the apprenticeship

program, but before they begin their apprenticeship, to voluntarily self-identify as individuals with disabilities. This post-offer invitation to self-identify is in addition to the invitation at the pre-offer stage, so that individuals with hidden disabilities who fear potential discrimination if their disability is revealed prior to being accepted into the program will, nevertheless, have the opportunity to provide this valuable data. Proposed § 30.11(b)(2) again required that the sponsor invite self-identification using the language and manner prescribed by the Administrator and published on the OA Web site.

The Department did not receive any specific comments on this paragraph that were not already discussed. The Department therefore adopts proposed § 30.11(b) as proposed.

Paragraph 30.11(c): Apprentices

In addition to the pre- and post-offer invitations to self-identify, proposed § 30.11(c) required that the sponsor invite each of its apprentices to voluntarily self-identify as an individual with a disability at the time the sponsor becomes subject to the requirements of part 30 and then remind apprentices yearly that they may update their disability status at any time. Allowing apprentices enrolled in a registered apprenticeship program to update their status will ensure that the sponsor has the most accurate data possible.

While some commenters supported the requirement to remind apprentices that they can update their disability status throughout the apprenticeship program, other sponsors questioned whether apprentices would falsely identify as having a disability because they simply do not possess the required skill for the trade and want to complete the program. These comments appear to misconstrue the proposal and/or the relevant law. At the outset, the Department notes that self-identifying as an individual with a disability does not entitle someone to preferential selection—indeed, that is unlawful under the rule—nor does it automatically entitle someone to an accommodation to stay in the program. It is a well-established principle of disability law that if the individual is unable to perform the essential functions of a position with or without reasonable accommodation, the individual is not entitled to remain in that position.

The Department is revising paragraph (c) to eliminate the requirement that sponsors must extend an invitation to those in its apprenticeship program "each time an apprentice is enrolled into an apprenticeship program." Upon

reflection, we believe this was largely redundant, given that the one-time invitation to the apprenticeship workforce during the first year of compliance, coupled with the invitation to all those that receive an offer to join the program, should ensure that everyone is provided the self-identification form to complete and return. The one-time self-ID solicitation for existing apprentices is set forth in paragraph (c)(1) of the new rule, and the time for compliance with this one-time self-ID invitation is set forth in new paragraph (h).

Paragraph 30.11(d)

Proposed § 30.11(d) emphasized that the sponsor is prohibited from compelling or coercing individuals to self-identify. A commenter had expressed concern that the proposed rule could cause sponsors to “encourage” or pressure applicants and apprentices to self-identify in order to meet the utilization goal. The Department adopts § 30.11(d) as proposed to make clear that all self-identifications should be submitted on a strictly voluntary basis and that sponsors are not permitted to coerce individuals to self-identify.

Paragraph 30.11(e)

Proposed § 30.11(e) emphasized that all information regarding self-identification as an individual with a disability must be kept confidential and maintained in a data analysis file in accordance with proposed § 30.12, and may not be included in an individual’s personnel file. Proposed § 30.11(e) also states that self-identification information must be provided to the Registration Agency upon request and that the information may only be used in accordance with this part.

Many commenters, including various State agencies and JATCs, expressed concerns regarding the interaction between this provision and the privacy protections afforded by the Health Insurance Portability and Accountability Act (HIPAA). Other commenters stated that the requirement to develop systems to maintain confidentiality and segregate information regarding self-identification from the actual hiring process may disproportionately burden small sponsors. This commenter suggested that employers would need technical assistance from Registration Agencies to comply with the proposed requirement to invite applicants to self-identify a disability.

The Department adopts proposed § 30.11(e) without change, and notes that it will provide assistance to

sponsors in complying with this part. The data analysis file need not be complex, but simply provide a method by which the sponsor can retain and track self-identification information in the aggregate, rather than as connected to each apprentice’s personnel file. Maintaining the disability demographic information in a file separate from each apprentice’s personnel file will also make it easier for sponsors to provide the self-identification information to OA when requested to do so.

In response to the concerns over sharing the self-identification information with the Registration Agency, the Department notes that HIPAA privacy requirements generally do not apply to employers in their capacity as employers.⁸⁵ Rather, the privacy standards of HIPAA only apply to covered entities under the statute, which are generally limited to health plans, health care clearinghouses, health care providers who transmit health information in electronic form, and their business associates. The regulations implementing HIPAA also exclude employment records from the definition of “protected health information.”⁸⁶ While HIPAA may not apply to this self-identification information, sponsors are obligated, under this part, to maintain this information in a confidential manner. This requirement does not prevent the sponsor from providing this information to the Registration Agency when requested.

Paragraph 30.11(f)

Proposed § 30.11(f) stated that nothing in this section may relieve the sponsor of its obligation to take affirmative action with respect to those applicants and apprentices of whose disability the sponsor has knowledge.

Regarding proposed § 30.11(f), an industry association requested that the Department provide further clarification of what it means for the sponsor’s “obligation to take affirmative action with respect to those applicants and apprentices of whose disability the sponsor has knowledge.” The Department included paragraph (f) to remind sponsors that they are under a continuing obligation to provide a reasonable accommodation to those individuals with a known disability, even if the individual chooses not to self-identify and even if the individual does not specifically request a reasonable accommodation.

⁸⁵ Public Law 104–191, sec. 1172 (a).

⁸⁶ 45 CFR 160.10.

Paragraph 30.11(g)

Proposed § 30.11(g) clarified that nothing in this proposed section may relieve the sponsor from liability for discrimination in violation of this part. The Department did not receive any comments on this specific provision, and so adopts § 30.11(g) as proposed.

Paragraph 30.11(h): Compliance Dates

As discussed above, in response to those comments expressing concern over the burden associated with complying with the self-identification requirements of this section, the Department is extending the time in which both current and new sponsors must come into compliance with this section. Paragraph (h) sets a compliance date two years after the effective date of the Final Rule for current sponsors. This means that the requirement to invite apprentices and applicants to self-identify will not apply until two years after the effective date of the Final Rule. Current sponsors will also have up to two years from the effective date in which to invite each of its current apprentices to voluntarily inform the sponsor whether the apprentice believes that he or she is an individual with a disability. The sponsor would be expected to complete a workforce analysis for individuals with disabilities pursuant to § 30.7(d)(2) as soon as it has completed this invitation to current apprentices, as this will provide some data upon which to base the analysis. Subsequent workforce analyses will be based on the pre-offer and post-offer self-identification data, as well as any changes to self-identification status that have been made as a result of the annual reminder per paragraph (c) of this section.

New sponsors will follow a similar timetable, but the two years will be based on the date their program is registered rather than the effective date of the rule. During the program’s provisional review conducted within one year of registration, the Registration Agency will provide further guidance on the AAP requirements for individuals with disabilities so that when the compliance date arrives the new sponsor is well equipped to take the necessary steps to satisfy its obligations.

Recordkeeping [§ 30.12]

Existing § 30.8 required sponsors to keep records for each applicant, including a summary of the qualifications of each applicant, the basis for evaluation and for selection or rejection of each applicant, the records pertaining to interviews of applicants,

the original application for each applicant, and other data. The rule states that records pertaining to individual applicants, selected or rejected, shall be maintained in such manner as to permit identification of minority and female (minority and nonminority) participants. Sponsors were also required, under the existing regulations, to retain a statement of its AAP required by § 30.4 and review their AAPs annually and update them where necessary, including the goals and timetables. Sponsors were also required to maintain evidence that their qualification standards have been validated in accordance with the requirements set forth in § 30.5(b), and maintain records for 5 years and make them available upon request to the Department or other authorized representative. The NPRM proposed to remove the existing § 30.12 entitled "Adjustments in schedule for compliance review or complaint processing" because the information contained within this section has been incorporated into the proposed sections addressing EEO compliance reviews and complaints, and reinsert a new section on recordkeeping in its place.

Proposed § 30.12 prescribed the recordkeeping requirements that would apply to registered apprenticeship program sponsors, and concluded that a sponsor's failure to comply with these requirements would constitute noncompliance with the part 30 regulations. Proposed § 30.12 retained, in large part, the recordkeeping requirements currently in § 30.8, subject to basic editing, and updated them to reflect the development and use of electronic recordkeeping, and the broadened scope of the proposed rule to provide for equal opportunity, affirmative action, and nondiscrimination for applicants and apprentices with disabilities.⁸⁷ Proposed § 30.12, therefore, included a new provision regarding the confidentiality and use of medical information that is obtained pursuant to part 30, including information regarding whether an applicant or apprentice is an individual with a disability.

⁸⁷ OA maintains guidance that provides more explanation on exactly what documents must be maintained, and how sponsors should maintain it. See Bulletin 2010-11a Apprenticeship Program Standards Section XVIII Maintenance of Records and Appendix D, Section VI Maintenance of Records <http://www.doleta.gov/OA/bul10/Bulletin%202010-11%20Revised%20Boilerplates.pdf>. (last accessed September 10, 2015). In addition, OA will provide publicly available materials in conjunction with this NPRM that will update this guidance consistent with this proposal.

In addition, proposed § 30.12 removed the reference to the recordkeeping requirements of State Apprenticeship Councils. The Department proposed to move these requirements to proposed § 30.18, the section addressing SAAs. This proposed change would ensure that all requirements specific to SAAs can be found in one location.

Paragraph 30.12(a): General Obligation

Proposed paragraph (a) of Proposed § 30.12 required sponsors to collect data and maintain records as the Registration Agency finds necessary to determine whether the sponsor has complied or is complying with the requirements of this part. Proposed § 30.12(a)(3), in particular, required the sponsor to collect information relative to the operation of the apprenticeship program, including, but not limited to, job assignments in all components of the occupation as required under § 29.5(b)(3), promotion, demotion, transfer, layoff, termination, rates of pay, other forms of compensation, conditions of work, hours of work, hours of training provided, and any other personnel records relevant to EEO complaints filed with the Registration Agency under § 30.14 or with other enforcement agencies.

A national union and a national JATC commented that proposed § 30.12(a)(3) includes requirements for a sponsor to retain information that is inapplicable to the relationship between a JATC and a registered apprentice, including information related to promotion, demotion, termination, and layoff. The commenters urged the Department to revise this section as it applies to JATCs so that only those records that are applicable to the relationship between a JATC and its registered apprentices must be maintained. These commenters said that some of the terms that are inapplicable to JATCs may be applicable for programs administered solely by one or more employers since employer-sponsors have direct control over both an apprentice's progression through a program and advancement on the job. The commenters suggested that separate recordkeeping requirements for JATCs and employer-sponsors may be necessary to ensure that employer-sponsors retain records that are pertinent to both roles.

The Department recognizes the distinction between group sponsors and their member employers, as well as JATC sponsors' concerns about their responsibilities and how their duties to the apprentice are distinct from those of employers. However, the information required in § 30.12(a)(3) is important to

determining the relative success of a sponsor's AAP. The language in § 30.12(a)(3) provides that sponsors must collect and maintain records relative to the operation of the apprenticeship program, and the Department will not require sponsors to record information that they do not have access to. The Department anticipates that JATCs will be able to collect this information from partner employers. We note that similar recordkeeping obligations were prescribed under the existing regulations and applied to sponsors generally. As has been detailed before, it is common practice currently for sponsors and their participating employers to enter into agreements detailing obligations and seeking the employers' cooperation in the sponsor's compliance with part 30. We expect that this will continue under this Final Rule.

An individual commenter suggested that summary information about gender, ethnicity, and disability status should be available to interested apprentices and journeyworkers in the relevant trade at no cost to them, and sought to add new paragraphs under §§ 30.12(a) and 30.12(f) seeking this data in a format accessible to apprentices and journeyworkers. While the information provided on a chart summarizing demographics of apprenticeship programs may be useful, the Department does not feel that creating an additional requirement for apprenticeship programs is necessary at this time. We note further that publication of this data could raise privacy, confidentiality, and other legal issues.

Paragraph 30.12(b): Sponsor Identification of Record

Proposed 30.12(b) stated that for any record that the sponsor maintains pursuant to the regulation, the sponsor must be able to identify the race, sex, ethnicity, and, when known, the disability status of each apprentice and supply this information upon request to the Registration Agency. When possible, the sponsor should identify the race, sex, ethnicity, and disability status of each applicant and supply this information upon request to the Registration Agency.

A State Department of Labor and an industry association expressed concern that current § 29.7(l) appears to be inconsistent with proposed § 30.12(b) in that § 29.7(l) requires a request for demographic data while proposed § 30.12(b) requires that sponsors be able to identify this data. The industry association requested clarification about how a program should maintain the information about race, sex, ethnicity, and disability status required in

proposed § 30.12(b) in cases where the apprentice refuses to provide the requested information. The industry association said that the § 30.12(b) language should be amended to clarify that the sponsor should be required to make a good faith effort to obtain the described information. A State Department of Labor similarly requested clarification of § 30.12(b) to ensure that sponsors must identify the demographics of their apprentices only when it is available.

At the outset, we note that sponsors address this issue already, because the existing regulations require them to conduct a workforce analysis establishing the race/sex/ethnicity makeup of its apprenticeship program in order to determine whether they are underutilized. To provide greater guidance on how to do so, the NPRM proposed the language in § 30.12(b), which is identical to that used in OFCCP's program at 41 CFR 60–1.12(c). This was purposeful, in order to set forth similar standards across AAPs to the extent possible, which would likely be more familiar to those in the employer community. In interpreting its regulation, OFCCP has stated the following:

[We have] not mandated a particular method of collecting the information. Self-identification is the most reliable method and preferred method for compiling information about a person's gender, race and ethnicity. Contractors are strongly encouraged to rely on employee self-identification to obtain this information. Visual observation is an acceptable method for identifying demographic data, although it may not be reliable in every instance. If self-identification is not feasible, post-employment records or visual observation may be used to obtain this information. Contractors should not guess or assume the gender, race or ethnicity of an applicant or employee. . . . OFCCP would not hold a contractor responsible for applicant data when the applicant declines to self-identify and there are no other acceptable methods of obtaining this information.⁸⁸

OA interprets the NPRM consistent with this interpretation. It does not mandate any particular collection method but notes with favor self-identification, allowing that sponsors may record the data by visual observation if there is a factual basis for doing so. Further, it will not hold sponsors responsible when certain documents cannot be identified by protected category if that information has not been provided or cannot otherwise be easily ascertained.

An advocacy organization urged the Department to amend the language at § 30.12(b) to require programs to identify the age of qualified applicants or apprentices so that patterns of age discrimination can be detected. We decline to require this. Generally speaking, data collection is sought in connection with a sponsor's AAP, and the part 30 AAP is limited to race, sex, ethnicity, and disability.

Paragraph 30.12(c): Affirmative Action Programs

Proposed paragraph 30.12 required that sponsors required to develop and maintain an AAP under § 30.4 must retain that written AAP and documentation of any efforts required by § 30.8. We note that most sections of the regulations comprising the AAP obligations have their own recordkeeping requirements that must be complied with. However, to ensure a broad overarching recordkeeping obligation, the proposed § 30.12(c) is revised to simply state that the AAP recordkeeping obligations applies to each of the component parts of the AAP.

Paragraph 30.12(d): Maintenance of Records

Proposed § 30.12(d) decreased the amount of time that sponsors are required to keep documentation from five to three years. An SWA suggested that the Department retain the current requirement that sponsors maintain records for 5 years, reasoning that under the proposal a sponsor that has a 4-year program would have the ability to discard an apprenticeship agreement before the apprentice leaves the program. Alternatively, this commenter suggested that the Department revise the requirement to retain records to align with the entire length of the apprenticeship program, which the commenter said is usually 4 years. An individual commenter recommended that the Department require records be kept for an additional amount of time after an apprentice's term has ended so that data is available for evaluations and tracking a sponsor's progress. The commenter expressed concern that recordkeeping could be disrupted by personnel changes or economic changes within a 3-year span and said that this could lead to incomplete records. In contrast, an industry association remarked that the amount of time sponsors are required to retain records should be further reduced to 2 years, reasoning that this would align with other labor laws already in place. This commenter also suggested that the rule specify the type of records to be retained.

Upon review of the comments, the Department has decided to revert to the existing requirement that records be maintained for 5 years. While the Department sought to decrease the time period for document retention in an effort to decrease burden, we believe the concerns raised about a document retention period that is shorter than the normal compliance review cycle, which is approximately 5 years, would be problematic, particularly given that under the Final Rule utilization analyses are to be performed concordant with sponsors' compliance review cycle and with significant input from the Registration Agency.

Paragraph 30.12(e): Confidentiality and Use of Medical Information

Proposed § 30.12(e) provided that any information collected that concerns the medical condition or history of an applicant or apprentice must be maintained in separate forms and in separate medical files and treated as confidential, and that such information must not be used for any purpose inconsistent with part 30.

Some commenters expressed concerns with proposed § 30.12(e). An industry association suggested that joint apprenticeship programs will need to develop and implement safeguards to ensure the confidentiality of medical records. An SAA expressed concern that developing systems to maintain confidentiality and segregate information regarding self-identification from the actual hiring process may disproportionately burden small entities or sponsors that do not have highly-developed human resource systems or personnel processes. And several commenters requested further guidance on how to comply with the proposed requirement.

We addressed many similar concerns in the discussion of § 30.11, above. As stated there, OA plans to provide guidance materials to sponsors regarding their recordkeeping responsibilities and ensuring the confidentiality of employee records.

Some commenters said that there is inconsistent terminology used in part 29 and part 30 to describe advancement of an apprentice through a program. The commenters remarked that the term "progression" is used in part 29 whereas "promotion" is used in part 30. These commenters also stated that there are discrepancies between the use of the terms "suspension" and "cancellation" in part 29 and "demotion" and "termination" in part 30. The commenters remarked that the term "transfer" in part 29 means transfer

⁸⁸ <http://kb.dol.gov/DOLArticlePage?agency=OFCCP&parentCatValue=Employer&article=ka1i000000WEq1AAG> (last accessed May 9, 2016).

from one program to another instead of from one job to another.

The Department has reviewed the language and does not believe further clarifying regulatory text is necessary. Each of the terms raised above in part 30 has specific significance in the equal employment opportunity context distinguishing them from how they or similar terms are used in part 29. For instance, “suspension” and “cancellation” in part 29 refer to actions taken against the apprenticeship program; “demotion” and “termination” in part 30 are describing personnel actions taken against an apprentice that could potentially be discriminatory if based on a protected basis.

Paragraph 30.12(f): Access to Records

Proposed § 30.12(f) set forth the obligations of sponsors to provide access to records for the purpose of conducting compliance reviews and investigations of complaints. We received no comments specific to this section not addressed elsewhere, so we adopt the proposed paragraph as § 30.12(f) in the Final Rule.

Equal Employment Opportunity Compliance Reviews [§ 30.13]

The NPRM sought to clarify exactly what is intended by EEO compliance reviews, with more specific accountabilities articulated for the sponsor and for the Registration Agency. Thus, the proposed rule provided a stand-alone § 30.13 devoted to EEO compliance reviews, as opposed to the existing regulation’s § 30.9 which addressed compliance reviews of all types. EEO compliance reviews are to be conducted along with overall program performance reviews. There is intended to be uniformity in EEO compliance reviews across Registered Apprenticeship programs and across Registration Agencies. The proposed rule outlined how compliance reviews would be conducted, how sponsors would be notified of compliance review findings, how sponsors can come into compliance if there is a finding of a violation, and when enforcement actions may occur.

Paragraph 30.13(a): Conduct of Compliance Reviews

In paragraph (a), the proposed rule sets forth that the Registration Agency would regularly conduct EEO compliance reviews to determine if the sponsor was in compliance with part 30, and will also conduct EEO compliance reviews when circumstances so warrant. It further detailed the variety of forms compliance reviews might take, including off-site reviews of records,

desk audits of records submitted to the Registration Agency, and on-site reviews at a sponsor’s establishment involving document review and interviews with relevant personnel.

Commenters expressed concern about what exactly “regularly” means in terms of frequency of conducting reviews and/or audits. There are no pre-set timelines for compliance reviews, and the review cycle will vary by the Registration Agency. Historically in states administered by OA, as a general matter reviews have been conducted approximately every five years during a program’s existence. There is somewhat more variance in states where apprenticeship is administered by an SAA. One commenter urged OA, once the regulation is adopted, to disseminate a circular detailing the minimum requirements for all EEO compliance reviews and “audits.” OA currently has a checklist of questions and protocols that can be sent to the sponsor before a compliance review. OA will continue to provide such technical assistance on EEO compliance reviews, but will take the comment under advisement in considering further guidance in the implementation of this rule.

Paragraph 30.13(b): Notification of Compliance Review Findings

The proposed rule provided that Registration Agencies would provide a Notice of Compliance Review Findings within 45 days of completing the review. If the review uncovered deficiencies in part 30 compliance, this Notice would identify them, how they could be remedied, the timeframe for doing such remedying, and specifying that failure to do so could result in an enforcement action. The overall intent of this proposed text is that increased specificity would again provide for greater consistency and standardization of procedures across the National Registered Apprenticeship System. We did not receive any specific comments for this provision, so we retain the proposed language in the Final Rule.

Paragraph 30.13(c): Compliance

The proposed § 30.13(c) set forth the next step in the compliance review process: When a Notice indicated deficiencies in compliance, the requirement that a sponsor must, within 30 business days, implement a compliance action plan. This plan included four specific provisions: A commitment to correct the deficiency, a listing of the actions that will be taken, how long it will take, and the name of the person responsible. Assuming these steps are undertaken, the sponsor would be considered in compliance.

There were a number of comments regarding this paragraph (c) proposed text. An SAA commented that the 30 business days for sponsors to develop an effective plan to address EEO compliance deficiencies did not provide enough time. This SAA suggested that sponsors should be given 30 business days to submit rebuttal arguments to the Registration Agency, and that the SAA should be given 30 days to respond to the rebuttal argument in writing. If the findings of noncompliance were upheld after the opportunity to contest allegations, this SAA recommended that the sponsor would then have 30 days to submit a remediation plan.

In response to these comments, we have modified the Final Rule in two ways. First, the Final Rule states that within 30 days the sponsor must either implement a compliance action or provide a written response responding to the specific violation(s) cited by the Registration Agency within 30 days. This latter option addresses commenters’ suggestions for an opportunity to respond to allegations. If, after reviewing the response, the Registration Agency upholds the findings of noncompliance, the sponsor then has 30 days to submit a remediation plan. Second, the Final Rule provides that the 30 day period may be extended for another 30 days by the Registration Agency for good cause shown. We note that this only applies to the original 30 day period; if the sponsor submits a rebuttal which the Registration Agency then denies, the Rule does not provide for an extension of the resulting 30 day period to come into compliance.

One advocacy organizational commenter suggested that sponsors in need of a compliance action plan should be provided with technical assistance to help rectify the situation: Specifically, a list of reliable technical assistance providers, as well as resources and materials to include in the design, development, and implementation of the compliance action plan (for example, resources developed via the Women in Apprenticeship and Nontraditional Occupations program). In particular, for sponsors falling short of EEO goals, this commenter recommended that the DOL provide a list of tradeswomen organizations for purposes of technical assistance. This type of technical assistance is already a part of Registration Agencies’ compliance review process; we will continue to provide this assistance, as resources permit, to assist in bringing sponsors into EEO compliance.

Several advocacy organizations commented that sponsors found to have

deficiencies need more attention and resources devoted to rectifying their situations, either through more rigorous EEO obligations or having compliance results published in a national registry for additional visibility. Some commenters went specifically further and suggested that the DOL should require the Registration Agency to evaluate a sponsor's compliance action plan for effectiveness "regularly" until the sponsor attains the plan goals. The Department acknowledges the comment, but declines to add these measures at this time. We believe the enhancements announced in this Final Rule will increase the efficacy of sponsor EEO and affirmative action efforts. Further, the Registration Agency's focus historically has been on a technical assistance model, helping sponsors succeed and come into compliance wherever possible, rather than a more punitive approach. We do note that for programs that will not take corrective action to cure violations, the Registration Agency retains the authority to deregister such programs.

Some commenters suggested that the Department include completion rates as a factor when evaluating whether a sponsor is making a good faith effort to comply with part 30 requirements, reasoning that completion rates are an important benchmark in assessing economic advancement of groups traditionally underrepresented in registered apprenticeship programs. As discussed in § 30.8 above, the Department recognizes the importance of retention activities in building greater diversity within apprenticeship programs, and has included some options for addressing retention issues in § 30.8(b).

Paragraph 30.13(d): Enforcement Actions

Proposed § 30.13(d) specified that any sponsor that fails to implement its compliance action plan within the specified timeframes may be subject to an enforcement action under proposed § 30.15. One commenter suggested that the word "may be subject" be replaced by "must be subject," to help underscore the need to enforce the regulation. The Department has reviewed the comment and declines to adopt the suggestion, as it would be inconsistent with current practice and eliminate certain flexibilities that may be helpful in a given matter.

Complaints [§ 30.14]

The Department proposed moving the existing § 30.14 entitled "Reinstatement of program registration" to § 30.16. In its place, the NPRM proposed a section

devoted to complaint processing and handling, borrowed in part from the existing § 30.11, with additional revisions to improve readability and clarify requirements of program sponsors and Registration Agencies for addressing complaints. For instance, proposed § 30.14 incorporated subheadings so that an apprentice or applicant for apprenticeship who wishes to file a complaint of discrimination under this part with a Registration Agency may easily identify the required components. Proposed § 30.14 deleted the provisions concerning private review bodies in the current part 30, at § 30.11(a) and (b). Through feedback received prior to the publication of the NPRM from the SAAs, stakeholders at the town hall meetings, and the administration of the National Registered Apprenticeship System, the Department has found that apprenticeship program sponsors generally do not have or use private review bodies. Additionally, stakeholders expressed the opinions that such bodies could not objectively evaluate or prescribe remedies for complaints of discrimination. Thus, the proposed rule eliminated the use of private review bodies.

Paragraph 30.14(a): Requirements for Individuals Filing Complaints

Proposed § 30.14(a)(1) through (3) describe who has standing to file a complaint, the time period for filing a complaint, and the required contents of the complaint.

Relating to the proposed § 30.14(a) requirements for individuals filing complaints, a number of comments suggested ways to broaden the procedure for filing complaints in order to increase its potential as an avenue of protecting the rights of apprentices. One commenter made the suggestion to allow journeyworkers or higher status workers to file complaints on behalf of apprentices, as it was believed that apprentices are not well positioned in the workplace hierarchy to file a complaint without fear of risking their job or personal safety. Similarly, another urged the ability to file anonymous complaints. Many commenters recommended that the Department establish opportunities for third party complaints from stakeholder organizations (*i.e.*, pre-apprenticeship programs and other referral agencies) challenging policies or practices that result in exclusionary outcomes for apprentices and provide suggested remedial actions. Finally, a commenter suggested a number of suggested changes to complaint procedures, including required onsite diversity and

compliance staff who are able to communicate with apprentices, gather feedback, identify areas of concern, and ultimately refer repeat offenders for training or additional counseling; dual-path complaint options so complaints are forwarded to a neutral party (to address situations in which the Registration Agency may not be perceived as neutral); and expansion of the complaint procedure window to 300 days (in line with EEOC regulations when a State law prohibits the discrimination on the same basis).

The Department recognizes that its primary objective is to safeguard the welfare of apprentices, and wishes to have as robust and effective a complaint procedure in order to effectuate the protections of this part. With regard to third-party complaints, either by higher ranking employees or stakeholder groups, we believe the NPRM already provided such mechanisms. The proposed rule allowed for individual complaints filed "through an authorized representative;" these parties could satisfy that role. Further, the proposed regulations in § 30.13 provide that the Registration Agency "will also conduct EEO compliance review when circumstances so warrant." If the Registration Agency receives specific evidence from a third party that a violation of part 30 has occurred, that could be a circumstance warranting such a compliance review. With regard to the question of anonymous complaints, the regulations are clear that, at least at some juncture prior to perfecting a complaint, the identity of the complainant must be made known to the Registration Agency so that it can furnish relief to the appropriate person(s). We finally note that, assuming the sponsor or employer that has discriminated is covered by EEOC's jurisdiction, apprentices may file complaints directly with the EEOC if they so choose. These entities are required to post "EEO is the Law" posters in their workplace which would provide information on how to file complaints with the EEOC. To clarify this, we have updated the language in the notice poster to indicate that apprentices may also file complaints with Federal, state, and local agencies assuming they have jurisdiction to review the sponsor and/or employer.

As for the filing period, we agree with the comment and extend the filing period to 300 days. As the commenter notes, this matches the statute of limitations for filing with the EEOC in all but the few "non-deferral" states that do not have their own State employment discrimination law.

In order to further effectuate the complaint process, the Department plans to issue guidance that sponsors can use to inform apprentices about their rights and the process for filing complaints in the course of the periodic orientation sessions set forth in § 30.3(b)(2)(iii).

The Final Rule retains § 30.14(a) as proposed with one revision—§ 30.14(a)(1) of the Final rule specifically lists retaliation as a basis on which individuals may file complaints. Retaliation was specifically prohibited in the proposed § 30.17, but it was inadvertently omitted as a basis upon which individuals could file complaints.

Paragraph 30.14(b): Requirements of Sponsors Relating to Complaints

Proposed § 30.14(b) requires sponsors to provide notice to all applicants for apprenticeship and apprentices of their right to file a discrimination complaint with the Registration Agency and the procedures for doing so. Proposed § 30.14(b) also specifies the required wording for this notice. A sponsor may combine this notice and its equal opportunity pledge in a single posting for the purposes of this proposed section and proposed § 30.3(b)(2)(ii). The Department received no comments specific to this section not addressed elsewhere, and thus retains the paragraph in the Final Rule as proposed.

Paragraph 30.14(c): Requirements of the Registration Agency Relating to Complaints

Also, in an effort to ensure consistency in how Registration Agencies process complaints and conduct investigations, proposed § 30.14(c) would add uniform procedures that Registration Agencies must follow. These uniform procedures would ensure that the Registration Agency acknowledges and thoroughly investigates complaints in a timely manner, parties are notified of the Registration Agency's findings, and the Registration Agency attempts to resolve complaints quickly through voluntary compliance.

Proposed § 30.14(c)(3) provides that a Registration Agency may, at any time, refer a complaint to an appropriate EEO enforcement agency. This provision would allow Registration Agencies to safeguard the welfare of apprentices by making use of existing Federal and State resources and authority. For example, a Registration Agency might refer a complaint to the EEOC if it finds a violation of title VII, the ADA, or the ADEA, but does not think it could achieve a complete remedy for the

complainant through voluntary compliance procedures or enforcement action under proposed § 30.15.

Proposed § 30.14(c)(4) would allow an SAA to adopt different complaint procedures, but only if it submits the proposed procedures to OA and receives OA's approval. This provision would codify the Department's current practice and would be consistent with § 29.12(f) of this title.

An SWA requested clarification as to whether the failure of SAAs to meet deadlines under § 30.14(c)(1) for conducting and reporting an investigation would lead to the sponsor being absolved. The commenter expressed concern that some complaints are impossible to analyze or resolve in the mandated time frame. Regarding the proposed § 30.14(c)(2) directive that, when a complaint investigation indicates a violation of nondiscrimination requirements, a "Registration Agency must resolve the matter quickly and informally whenever possible," this commenter requested clarification as to what it would mean to resolve a complaint informally. The Department agrees with this comment, noting that some complaints, depending on the facts and various other circumstances, may take longer to complete than the time proposed in the NPRM. Accordingly, paragraph 30.14(c) is revised to redact the specific timetables for Registration Agency completion of the various steps, and instead includes language similar to that suggested by the commenter that Registration Agencies will conduct its investigation as expeditiously as possible. Additionally, the Final Rule revises 30.14(c)(2) to state that Registration Agencies "should" attempt to resolve matters "at the Registration Agency level" and quickly whenever "appropriate," rather than "must" resolve them "informally" and when "possible," respectively. This is meant to communicate three things: First, that informal resolution of some matters, such as those raising particularly egregious violations, may not be appropriate; second, that the term "informally" can be interpreted in ways other than intended, which was to signify before referral to a federal or state equal opportunity agency; and third, for those matters where Registration Agency-level resolution may be appropriate, a quick resolution is desirable but not at the expense of arriving at one that effectively addresses the underlying problem. Toward that end, Registration Agencies should pursue resolutions that not only attempt to remedy the individual complainant, but those that include broader

programmatic relief—such as trainings, information sessions, or other modifications to personnel policies and practices—that would prevent the issue from recurring when appropriate.

A State Department of Labor expressed support for allowing Registration Agencies to maintain complaint review procedures that are already in place. This Registration Agency said that it currently requires discrimination complaints be referred for review by the State Division of Human Rights or a private review body established by a sponsor, and requested clarification as to whether or not it could continue to do so by having its complaint review procedure approved by the Administrator if it is not already permitted by the proposed rule at § 30.14(c)(3) without such approval. More broadly, this commenter remarked that the expertise in anti-discrimination laws and regulations necessary for ensuring compliance with the § 30.3 requirements is beyond the scope of a Registration Agency's role. The agency suggested that States should defer to EEO experts and provide assistance as a referral body to the proper regulating agency. In addition, the commenter warned that requiring Registration Agencies to assume responsibility for enforcement of laws and regulations already enforced by other entities would be duplicative and not cost-effective. This commenter recommended that the Department clarify or revise the regulation to permit complaints of discrimination filed with a Registration Agency to be referred to the proper oversight agency with jurisdiction over the complaint area.

To address these issues, the Final Rule builds in flexibility to adopt complaint review procedures for discrimination complaints, provided that they are approved by the Administrator, and the rule also allows the Registration Agency the discretion to refer matters to other agencies, including the EEOC or State Fair Employment Practices Agency, that may be more appropriate for a given case. Accordingly, we believe the rule offers sufficient flexibility as proposed and we retain it as written in the Final Rule.

Finally, an individual commenter recommended that each apprenticeship Registration Agency should have a designated contact person to handle discrimination complaints related to hiring and training, asserting that this is a normal function in other education and employment entities. We note that the NPRM included a requirement that the notice of rights "must include the address, phone number, and other contact information for the Registration

Agency that will receive and investigate complaints filed under this part,” and this is retained in the Final Rule.

Enforcement Actions [§ 30.15]

The Department proposed to revise current § 30.15 entitled “State Apprenticeship Councils” by moving that language to § 30.18 and incorporating provisions similar to those in the existing § 30.13, entitled “Sanctions,” into the proposed § 30.15. The existing § 30.13 stated that when the Department has reasonable cause to believe that an apprenticeship program is not operating in accordance with part 30, and where the sponsor fails to voluntarily take corrective action, the Department will initiate deregistration proceedings or refer the matter to the EEOC or the United States Attorney General with a recommendation for initiation of a court action. The rest of the section describes the procedures for deregistration proceedings.

In the NPRM, the Department proposed to change the title of § 30.15, to “Enforcement actions,” in order to demonstrate the Department’s emphasis on enforcing regulations governing discrimination in apprenticeship. Second, we proposed to replace “Department,” as used throughout this section, with the term “Registration Agency” to clarify that both the Department (more specifically, OA) and SAAs have the authority to take enforcement action against a non-complying sponsor. Third, proposed § 30.15(b) introduced a new enforcement procedure in which a Registration Agency would suspend registration of new apprentices until the sponsor has achieved compliance with part 30 through the completion of a compliance action plan or until a final order is issued in formal deregistration proceedings. Suspension pursuant to proposed § 30.15(b) was intended as a temporary, remedial measure to spur return to compliance with the proposed part 30 regulations; it was not intended to be punitive. If a sponsor had not taken the necessary corrective action within 30 days of receiving notice of suspension, the Registration Agency would initiate de-registration proceedings as provided in part 29. Fourth, proposed § 30.15(c) would adopt the deregistration procedures of §§ 29.8(b)(5) through (8) of this title, including the hearing procedures in § 29.10, for consistency and simplicity. And finally, proposed § 30.15(d) would authorize Registration Agencies to refer a matter involving a potential violation of equal opportunity laws to appropriate Federal or State EEO agencies.

Many commenters were concerned about punitive actions being taken against sponsors without the Registration Agency having explicitly defined criteria about how the judgment would be made or laying out the exact penalty structure. The continuum of technical assistance to punitive action was a source of concern and confusion for at least one commenter.

There were a significant number of comments regarding the Registration Agency’s ability to “suspend the sponsor’s right to register new apprentices” in § 30.15(b). Construction industry related entities (union and non-union) were particularly interested in this text. Although there was some commenter support for the “proposal to allow temporary suspension rather than program cancellations in the event of a violation,” other commenters expressed concern that the language could result in “damage” to Registered Apprenticeship training programs because of the Registration Agency suspension ability. Due process concerns, particularly related to apprentice suspension, were raised by a number of commenters. For example, some national unions noted that this proposed sanction is inconsistent with part 29, which only mentions deregistration as a sanction, not suspension of apprentices. Union commenters wanted to make clear that due process rights, including notice, hearing, and a written decision by the Secretary of Labor, must be afforded to a sponsor. There was also concern that the proposal contained “no durational limit” on the suspensions, with a commenter conclusion that “adoption of administrative hearing procedures such as those used in deregistration would address the issues discussed.”

As stated at the outset, the option of suspending a sponsor’s right to register new apprentices was not intended as a punitive measure, but rather as an intermediate step that Registration Agencies could take in an attempt to persuade sponsors to remedy violations of part 30 before taking the ultimate action to deregister the program. The proposed suspension afforded sponsors notice, in that it required a written notification from the Registration Agency of the specific violation(s) and allowed 30 days for the sponsor to address the violation before any action would be taken. It was also limited in duration; if the sponsor did not address the violation within 30 days of the suspension, the suspension would end with the initiation of formal deregistration proceedings, where a hearing is afforded. In order to further address the comments raised, however,

the Final Rule includes additional steps wherein, upon being notified of a violation, rather than requiring compliance within 30 days, the sponsor may submit a response to the notice of violation within 30 days which the Registration Agency will consider. If the Registration Agency upholds its initial determination, the sponsor has 30 days from notification of this decision to implement a compliance plan, or suspension proceedings may ensue. This opportunity to respond, in conjunction with the notice of violation and the limited duration of the suspension, affords adequate process rights to sponsors. Moreover, if the Registration Agency does not institute proceedings to deregister the suspended program within 45 days of the start of the suspension, the suspension is then lifted. The Department emphasizes, though, that a Registration Agency will work with all program sponsors prior to instituting any deregistration proceedings to offer technical assistance and attempt to bring the sponsor into compliance. This process will involve active communication between the sponsor and the Registration Agency, and a sponsor that disagrees with the Registration Agency’s findings regarding its compliance should bring that to the Registration Agency’s attention. The Department reiterates that enforcement is a last resort for non-complying sponsors.

Finally, several national unions warned about difficulty in enforcement due to a “lack of clarity as to scope and applications of duties of the program sponsor to other entities it owns and controls and to subcontractors,” a particular concern expected in the construction industry. These commenters want to see consistency in enforcement activity with that of the OFCCP in order to ensure a “consistent regulatory scheme,” regardless of whether a sponsor is operating under Federal contracting regulations or under the Registered Apprenticeship affirmative action regulations. This issue has been addressed in previous sections; the sponsor is ultimately responsible for maintaining an apprenticeship program that complies with part 30, which has historically included agreements between the sponsor and participating employers to ensure that all elements of the apprenticeship program are operating in accordance with these regulations.

Reinstatement of Program Registration [§ 30.16]

The NPRM removed the existing § 30.16, entitled “Hearings.” As explained earlier in the preamble, the

Department proposes to incorporate the part 29 procedures for hearings into part 30, so that a sponsor need only follow one set of procedures regardless of whether the issue at hand addresses the labor standards set forth in part 29 or the equal opportunity standards set forth in part 30. The existing § 30.14 stated that any apprenticeship program that had been deregistered pursuant to part 30 may be reinstated by the Secretary, upon presentation of adequate evidence that the program is operating in accordance with part 30. Proposed § 30.16 was revised to align with part 29, which provides that requests for reinstatement must be filed with and decided by the Registration Agency.

These proposed revisions, which are consistent with §§ 29.8, 29.9, 29.10 and 29.13 of this title, implement Secretary's Order 1–2002, 67 FR 64272, Oct. 17, 2002. Accordingly, the proposal provides that requests for reinstatement must be filed with and decided by the Registration Agency. The Department received no comments associated with this issue.

Intimidation and Retaliation Prohibited [§ 30.17]

The existing § 30.17 stated that a sponsor must not intimidate, threaten, coerce, or retaliate against any person for the purpose of interfering with any right or privilege secured by title VII or Executive Order 11246. Proposed § 30.17 revised this language to state that sponsors would be prohibited from intimidating or retaliating against any individual because he or she has opposed a practice prohibited by this part or any other Federal or State equal opportunity law or participated in any manner in any investigation, compliance review, proceeding, or hearing under part 30 or any Federal or State equal opportunity law.

An advocacy organization recommended that the Department include measures that would protect from retaliation those who help educate fellow program participants about the regulations and those who bring forward complaints or concerns.

The proposed language in § 30.17 prohibited discrimination and retaliation against “any individual” who files a complaint or opposes a practice prohibited by this regulation, and this language is retained in the Final Rule. This includes program participants and anyone else who brings forward complaints or concerns. As for specific scenarios that raise the question of whether protected activity has been undertaken such as the one proposed, we note that it is often a fact-based

inquiry and we will follow relevant title VII case law and interpretative guidance in analyzing such claims. The Final Rule does revise slightly paragraphs (a) and (b) to clarify the intent that it is unlawful for a participant to be retaliated against by anyone connected with the apprenticeship program.

State Apprenticeship Agencies [§ 30.18]

In the NPRM, the Department proposed to revise the existing § 30.18 entitled “Nondiscrimination,” which stated that the commitments contained in a sponsor's AAP must not be used to discriminate against an apprentice or applicant for apprenticeship on the basis of race, color, religion, national origin, and sex, and to incorporate those revisions into proposed § 30.4, as discussed earlier in the preamble.

Proposed § 30.18 revised current § 30.15, which requires State Apprenticeship Councils to adopt State plans. These proposed revisions were necessary to make proposed part 30 consistent with the part 29 procedures for recognition of SAAs. Proposed § 30.18 differed significantly from the current § 30.15, because proposed § 30.18 did not include State Apprenticeship Councils as entities eligible for recognition. As provided in § 29.13 of this title, the Department will only recognize an SAA that complies with the specified requirements, granting that Agency authority to register apprenticeship programs and apprentices for Federal purposes. Therefore, proposed § 30.18 would delete references to “State Apprenticeship Councils” as the entities required to submit a State EEO plan and the entities eligible for recognition, and replace it with the appropriate term, “State Apprenticeship Agency.”

A company commented that SAAs are underfunded and understaffed, and asserted that the burden of the proposed § 30.18 requirements would make it difficult to achieve the goal President Obama has set for apprenticeships.

In promulgating this Final Rule, the Department carefully considered balancing the interests of state agencies, sponsors, and apprentices, and the Department's need to implement these regulations in an efficient and effective manner. The Department believes that the standards it is establishing in this rulemaking for SAAs will not limit the growth of apprenticeship programs or create a significant burden for sponsors and state agencies.

Paragraph 30.18(a): State Plan

Proposed § 30.18(a) set forth requirements for a State EEO plan. The proposed rule would require, within

one year of the effective date of the Final Rule, with no extensions permitted, that SAAs provide to OA a State EEO plan that includes the State apprenticeship law that corresponds to the requirements of this part and requires all apprenticeship programs registered with the State for Federal purposes to comply with the requirements of the State's EEO Plan within 180 days from the date that OA provides written approval of the State EEO plan. The Department's determination of compliance with this part is separate from submission of the State EEO plan. Therefore, proposed § 30.18(a) also specified a collaborative, iterative process whereby SAAs seeking recognition can achieve conformity with this part. Proposed § 30.18(a) also would provide clarity regarding requirements for demonstration of conformity, while maintaining flexibility to accommodate the unique circumstances of a particular SAA.

A State Department of Labor said that it would be unreasonable to require SAAs to submit a State EEO plan and a copy of the State's statute within one year from the effective date of the final regulation. Asserting that implementation of the regulation would take well over a year to pass through State legislation, the Administrative Process Act, and internal agency review, the State suggested that the Department grant SAAs three years to submit a State EEO plan. Another State Department of Labor echoed the concern that one year would be an insufficient amount of time to complete the review process and requested that SAAs be given two years to submit their plan.

Regarding the proposed § 30.18(a)(1)(i) requirement that the State EEO plan submitted to OA include a copy of the State apprenticeship law that corresponds to the requirements of part 30, an SWA asked the Department to clarify if this means the SAA must submit proposed draft State regulations before rule finalization.

As for the proposed § 30.18(a)(1)(ii) requirement that the State EEO plan must require all registered apprenticeship programs in the State to comply with the requirements of the State's EEO plan within 180 days of OA approval, an industry association and an SWA said this was not enough time, reasoning that the State would need to host a series of town hall meetings to explain the new regulations to stakeholders and provide other technical assistance to sponsors. Instead, the SWA recommended that registered apprenticeship programs have two years to come into compliance with the new State EEO plan, and the

industry association said the timeline should be extended to one year from the date of OA State EEO plan approval.

The Department has carefully considered SAA's needs in accordance with the proposed regulations and has determined to amend this clause to require that, within one year, SAAs provide to OA a State EEO plan that includes, at a minimum, draft State apprenticeship authorizing language—which, depending on the State, could be either legislation, regulation, or executive order—corresponding to the requirements of this part. The Final Rule further requires all apprenticeship programs registered with the State for Federal purposes to comply with the requirements of the State's EEO Plan, within 180 days from the date that OA provides written approval of the State EEO plan. The State may request an extension from OA to the one-year State's EEO Plan requirement, which the Administrator may grant for good cause shown.

The Department believes that one year, with the opportunity for extension if there is good cause, is a reasonable amount of time to develop an EEO plan. The Department has also determined that 180 days is an adequate amount of time for registered apprenticeship programs to comply with the requirements of the State's EEO plan. The Department's intent is to have SAAs come into compliance with these regulations as quickly as possible. We understand there may be logistical difficulties with this in certain circumstances, which we believe the extension request provision addresses.

Paragraph 30.18(b): Recordkeeping Requirements

Proposed § 30.18(b) carried forward existing recordkeeping requirements from the existing § 30.8(d), using the term "State Apprenticeship Agency" instead of "State Apprenticeship Council." Regarding the proposed § 30.18(b) requirement that SAAs must keep all compliance records for three years from the date of creation, an individual commenter said that maintaining records on compliance reviews and complaints for five to 10 years would place SAAs in a "better position to monitor the impact of technical assistance over the course of an apprenticeship cohort's procession through an apprenticeship cycle as well as identify sponsors that exhibit patterns of stagnation in progress toward goals and/or repeated complaints."

The Department considered this suggestion and determined that it will amend the proposed rule to require

SAAs to keep all compliance records for five years, for consistency across program regulations.

Paragraph 30.18(c): Retention of Authority

Proposed § 30.18(c) also carried forward provisions in § 30.15(a)(4), which state that OA retains full authority to conduct EEO compliance reviews of apprenticeship programs, investigate complaints, deregister for Federal purposes an apprenticeship program registered with a recognized SAA, and refer any matter pertaining to these EEO compliance reviews or these complaints to the EEOC, the U.S. Attorney General, or the Department's OFCCP. In addition, proposed § 30.18(c) clarified that OA retains authority to conduct complaint investigations to determine whether any program sponsor registered for Federal purposes is operating in accordance with this part.

An SAA sought to confirm that the OA authority to conduct compliance reviews and complaint investigations only applies to programs registered for Federal purposes and not to programs that are not Federally registered or do not implicate Federal purposes. In response, we clarify that, in SAA states the Office of Apprenticeship will only conduct compliance reviews and complaint investigations on national programs that are registered with the Federal government, such as federal prisons or military bases.

Paragraph 30.18(d): Deregistration

Proposed § 30.18(d) clarified that SAAs will be subject to the deregognition procedures established in § 29.14 of this title, for failure to comply with the requirements of this part.

A SWA remarked that the rule seems to prevent the decertification of SAAs for failure to enforce EEO. The commenter stated that although proposed § 30.18(a)(3) and (d) reference § 29.14 deregistration proceedings, § 29.14 attributes that authority to parts 29 and 30, which would no longer provide that authority.

Section 29.14 is entitled "Deregognition of State Apprenticeship Agencies" and states that "The recognition for Federal purposes of a State Apprenticeship Agency may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of parts 29 and 30." Furthermore, that section provides that "deregognition proceedings for reasonable cause will be instituted in accordance with the following: (a) Deregognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in

Apprenticeship must be processed in accordance with the procedures prescribed in this part." Accordingly, we disagree with the comment, and believe that § 29.14 provides the Department with the authority to undertake deregognition for failure to comply with § 30.18.

Exemptions [§ 30.19]

Section 30.19 of the existing rule addresses exemptions. Under the existing § 30.19, a sponsor may submit a written request to the Secretary for an exemption from part 30, or any part thereof, and such a request may be granted by the Secretary for good cause. State Apprenticeship Councils are required to notify the Department of any such exemptions granted that affect a substantial number of employers and the reasons therefore.

The Department proposed minor revisions to this section. First, proposed § 30.19 required that requests for exemption be submitted to the Administrator, rather than the Secretary, to reflect a shift in Departmental decision-making. Second, proposed § 30.19 required that SAAs, not State Apprenticeship Councils, request and receive approval from the Administrator to grant an exemption from these regulations. As discussed above, State Apprenticeship Councils are not eligible for recognition under § 29.13 of this title. This proposed regulatory requirement is to ensure consistency with respect to when exemptions may be granted.

Under proposed § 30.19, a sponsor may submit a written request to the Registration Agency for exemption from part 30, or any part thereof, and such a request may be granted by the Registration Agency for good cause. A company inquired as to why the proposed part 30 did not include an exclusion for organizations that are already in compliance with EEO rules, as exists in the old part 30. The Final Rule does include such an exemption, at § 30.4(d)(2).

Effective Date [§ 30.20]

The proposed rule created a new § 30.20 that established the dates by which sponsors needed to come into compliance with certain provisions in the regulations. The Final Rule removes this section and instead incorporates the compliance dates in the individual sections to which they apply. Discussion of the comments on the compliance dates provided is therefore found in each of these sections, above.

Proposed Amendments to Part 29 Regulations, Labor Standards for Registration of Apprenticeship Programs

The part 29 regulations governing Labor Standards for Registration of Apprenticeship Programs include references to sections in part 30 that are changed through this proposed rule. This NPRM proposed technical, non-substantive changes for consistency and conformity with the proposed changes to part 30. We received no comments on these changes that have not been addressed in other sections of this preamble, so we adopt the proposed language changes to part 29 as proposed.

Regulatory Procedures

Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, the Office of Information and Regulatory Affairs must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments, or communities in a material way (also referred to as an “economically significant” rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement 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.

The Office of Management and Budget has determined that the Final Rule is not an economically significant regulatory action under paragraph 3(f)(1) of Executive Order 12866. This rulemaking is not expected to adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. In fact, the Final Rule is expected to increase the effectiveness and efficiency of EEO compliance within apprenticeship programs and to reduce the burden imposed on sponsors in several respects. It has, however, been determined that the Final Rule is a significant regulatory action under paragraph 3(f)(4) of the Executive Order and, accordingly, OMB has reviewed the Final Rule.

1. Need for Regulation

As explained in the preamble, the Department is updating the equal opportunity regulations that implement the National Apprenticeship Act of 1937. The existing regulations set forth at 29 CFR part 30 prohibit discrimination in registered apprenticeship on the basis of race, color, religion, national origin, and sex, and require that sponsors take affirmative action to provide equal opportunity in such programs. The Final Rule updates the part 30 regulations by including age (40 or older), genetic information, sexual orientation, and disability among the list of protected bases upon which a sponsor must not discriminate, and by detailing mandatory actions a sponsor must take to satisfy its affirmative action obligations.

In part, the Department is making this update so that the part 30 regulations align with 2008 revisions made to the Department’s other set of regulations governing the National Registered Apprenticeship System at part 29. In addition, the part 30 regulations have not been amended since 1978 and EEO law has evolved since that time. The changes in the Final Rule will ensure that the National Registered Apprenticeship System is consistent and in alignment with EEO laws as they have developed over the past 30 years, as discussed in Section I of the Final Rule, and to ensure that apprentices and applicants for apprenticeship receive equal opportunity in apprenticeship programs.

The Department is concerned that many segments of society continue to face substantial barriers to equal opportunity in apprenticeship.

Accordingly, a principal goal for the Final Rule is to strengthen the EEO for the National Registered Apprenticeship System, and improve the effectiveness of an apprenticeship program sponsor’s required affirmative action efforts, as well as improve sponsors’ compliance with part 30. To achieve this goal, the Department is making several changes to part 30, including:

(1) Updating the equal opportunity standards to include age (40 or older), genetic information, sexual orientation, and disability to the list of protected bases upon which sponsors of registered apprenticeship programs must not discriminate;

(2) Requiring all sponsors, regardless of size, to take certain affirmative steps to provide equal opportunity in apprenticeship;

(3) Streamlining the utilization analysis required of sponsors with five or more apprentices to determine whether any barriers to apprenticeship exist for individuals based on race, sex, or ethnicity, and clarifying when and how utilization goals are to be established;

(4) Requiring targeted outreach, recruitment, and retention activities when underutilization of certain protected groups have been found and a utilization goal has been established per § 30.6 and/or where a sponsor has determined pursuant to § 30.7(e) that impediments to equal opportunity exist for individuals with disabilities;

(5) Simplifying procedures for selecting apprentices;

(6) Standardizing procedures Registration Agencies⁸⁹ must follow for conducting compliance reviews;

(7) Clarifying requirements of program sponsors and Registration Agencies for addressing complaints;

(8) Aligning more closely with 29 CFR part 29 procedures for deregistration of SAAs, derecognition of apprenticeship programs and hearings; and

(9) Requiring an invitation to self-identify as an individual with a disability.

These provisions will help to ensure that all individuals, including women, minorities, and individuals with disabilities, are afforded equal opportunity in registered apprenticeship programs. Moreover, the addition of age (40 or older), genetic information, sexual orientation, and disability to the

⁸⁹ As explained in Section I of the Final Rule, part 29 prescribes procedures concerning the recognition of State Apprenticeship Agencies as Registration Agencies that can then register, cancel, and deregister apprenticeship programs within that State with the same authority as the Department and in accordance with the policies and procedures in part 29.

list of those bases upon which a sponsor must not discriminate will bring the National Registered Apprenticeship System into alignment with the protected bases identified in the various Federal laws applicable to most apprenticeship sponsors. These provisions will also ensure these underrepresented groups have increased access to programs. The Department's interest in updating part 30 to improve the effectiveness of sponsors' affirmative action efforts, as well as Registration Agencies' efforts to enforce and support compliance with this rule, lies in assuring that the Department's approval of a sponsor's apprenticeship program does not serve to support, endorse, or perpetuate discrimination.

2. General Comments Received on the Economic Analysis in the Notice Period of Proposed Rulemaking

The Department received several public comments that addressed the economic analysis in the NPRM. We carefully considered the comments received. The significant comments and summaries of the Department's analyses and determinations are discussed below:

a. Specific Steps To Provide Equal Opportunity—Staff Designation

Comments: In the NPRM, the economic analysis estimated that no additional burden would be incurred by the requirement to designate an individual to be responsible and accountable for overseeing the sponsor's commitment to EEO. Several commenters questioned this assumption by stating that staff already had full time jobs and the assumption that a human resource manager is already on staff may be inaccurate.

Department Response: Because businesses already have EEO provisions that they have to comply with through other federal regulations, it is the Department's interpretation that businesses will not need to provide additional staffing and that these responsibilities will fall under the existing staffing infrastructure. Additionally, the Department is committed to providing adequate technical assistance to sponsors and does not expect to increase the sponsor's need for staffing or other resources. The Final Rule language has been modified to clarify that the EEO designation can be provided to one individual or to multiple individuals so it is not a single person that has to address the requirements of this rule.

b. Specific Steps To Provide Equal Opportunity—Orientation and Periodic Information Sessions

Comments: In the NPRM, the economic analysis estimated that 5 apprentices and 5 journeyworkers would attend orientation and periodic information sessions. Several commenters stated that many programs could have considerably more apprentices, which would require much more of their time and possibly entail additional logistical costs associated with hosting meetings of that size.

Department Response: Based on program data and the growth model for apprentices and sponsors in this analysis, the Department estimated that 24 apprentices and 24 journeyworkers would attend orientation and periodic information sessions for all sponsors in 2017. Over the 10-year analysis period (2017–2026) these numbers would gradually increase to 34 apprentices and 34 journeyworkers in 2026.⁹⁰ Because sponsors already have in place a system to provide training and messaging to apprentices and journeyworkers, the Department believes that sponsors will be able to work in the additional EEO requirements that need to be communicated into their existing outreach structure with minimal additional cost. Additionally, the Department intends to provide guidance to sponsors relating to areas such as relevant recruitment sources and links to materials that sponsors and/or participating employers can use for anti-harassment communications and training.

c. Revised Methodology for Utilization Analysis and Goal Setting

Comments: The NPRM estimated that the revised utilization methodology would have streamlined the process and resulted in a reduced burden of the Final Rule. Several commenters disagreed with that estimation and indicated that the revised guidelines required more statistical expertise than staff typically possess. The inference that the Department would no longer be providing "availability" percentages would also increase staffing requirements and labor.

Department Response: In response to these concerns, the Department has

⁹⁰ Using program data from the Registered Apprenticeship Partners Information Data System (RAPIDS) and the growth model for apprentices and sponsors used in the analysis, the Department estimated that there are on average 24 apprentices per sponsor in 2017; 26 in 2018; 27 in 2019; 28 in 2020; 29 in 2021; 31 in 2022; 32 in 2023; 32 in 2024; 33 in 2025; and 34 in 2026. The Department further assumes a one-to-one ratio between apprentice and journeyworker in estimating the cost of orientations and periodic information sessions.

revised the utilization analysis described in the Final Rule to largely revert to existing practice, in which the Registration Agency provides significant support, and lessened the frequency with which the analysis has to be done—resulting in minimal additional burden for sponsors. Further, the Department intends to build a data tool that will assist in future iterations of the utilization analysis. Although this data tool will reduce burden for sponsors to conduct the utilization analysis in the long-run, the Department's analysis has accounted for additional upfront costs for time associated with familiarization with the tool for sponsors that choose to use it. In total, the Department is providing a data tool that will assist sponsors with conducting their utilization analysis approximately every five years. The Department has calculated costs to sponsors both for familiarization with the data tool and for using the tool to assist in conducting the analysis.

d. Invitation to Self-Identify as an Individual With a Disability

Comments: The NPRM estimated that 10 individuals would apply to each of 5 job postings per year, would choose to self-identify their disability status, and that an administrative assistant would spend 30 minutes reviewing and record-keeping the identification forms. Several commenters pointed out that the proposed rule would require self-identification to happen at 3 different points in the process. Additionally, it was noted that if the Final Rule requires additional outreach, a job posting could receive more than 10 applicants.

Department Response: The Department has updated the economic analysis to reflect that the invitation to self-identify takes place two times. In addition, the Department has increased the assumed number of applicants to a job posting to 15 individuals based on our historical experience and in consultation with program staff. The Department has observed that rural areas tend to receive 10 applications per apprentice opening, high density areas receive 12–15, and statewide programs receive more than 15 applications. In order to avoid under-estimating the costs, the Department assumes 15 applications across all program sponsors. In addition, the Department has updated this provision to allow for a 2-year phase-in of the requirement.

e. Overall Rule Costs and ERISA

Comments: Several commenters indicated that many apprenticeship sponsors are joint labor-management apprenticeship funds covered by ERISA.

These sponsors are not legally allowed to use funds to promote social, environmental, or other public policy causes at the expense of the interests of the plans' participants and beneficiaries. Some indicated that this may reduce the number of apprenticeship sponsors because firms subject to both requirements (the Final Rule and ERISA) may leave the apprenticeship program.

Department Response: The Final Rule specifies that sponsors who are operating under employee benefit plans governed by ERISA may now be eligible to use certain plan assets that support quality pre-apprenticeship programs and other workforce pipeline resources. Where support for such programs is necessary to maintain the plan's registration, or is otherwise advantageous to the plan, assets of the plan may be used to defray the reasonable expenses of such support. Therefore, the Department does not anticipate the number of jointly-sponsored apprenticeship programs to decrease because of the requirements of the Final Rule.

f. Percentage of Firms With Fewer Than Five Apprentices

Comments: The NPRM estimated that 75 percent of sponsors would have fewer than 5 apprentices and thus be exempt from certain Final Rule requirements. One commenter took issue with the assumption that the 25 percent of sponsors with five or more apprentices will be static over time. Due to increased federal funding launching apprenticeship programs into fields not typically represented (e.g., information technology), the commenter predicted that much of the growth of the program would come from new programs with more than five apprentices.

Department Response: While the Department agrees that the percentage of sponsors with 5 or more apprentices may change year-to-year and we expect the number of sponsors to increase over time, we expect the increase to occur across all industries. This includes those with long-time apprenticeship programs and those within new industries. The Department is not aware of information suggesting that this growth would be biased in favor of large or small sponsors, as new programs can be developed by any size of sponsor. Consequently, we assume that the percentage of sponsors with 5 or more apprentices will remain constant as the Apprenticeship program grows.⁹¹

⁹¹ The Department has estimated that the average number of apprentices per sponsor will increase over time in its model of apprentice and sponsor

3. Economic Analysis

The Department derives benefit and cost estimates by comparing the baseline (the program benefits and costs under the 1978 Final Rule⁹²) with the benefits and costs of implementing the provisions in the Final Rule. Only the additional benefits and costs that are expected to be incurred due to the changes in this regulation are included in the analysis.

The Department sought to quantify and monetize the benefits and costs of the Final Rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. This analysis covers a 10-year period (2017 through 2026) to ensure it captures major benefits and costs that accrue over time. In this analysis, we have sought to present benefits and costs both undiscounted and discounted at 7 and 3 percent, respectively, following OMB guidelines.⁹³

The 10-year monetized costs of the Final Rule range from \$370.27 million to \$458.90 million (with 7 and 3 percent discounting, respectively). The 10-year monetized benefits of the Final Rule range from \$4.56 million to \$5.83 million (with 7 and 3 percent discounting, respectively). The annualized costs of the Final Rule range from \$52.72 million (with 7 percent discounting) to \$53.80 million (with 3 percent discounting). The annualized monetized benefits of the Final Rule are \$0.65 million (with 7 percent discounting) and \$0.68 million (with 3 percent discounting).

In addition, we expect the Final Rule to result in several overarching benefits to apprenticeship programs as well as some specific benefits resulting from a clearer and more systematic rule. As discussed below, equal opportunity policies may result in both efficiency gains and distributional impacts for

growth. This does not, however, directly contradict the assumption that the share of sponsors with 5 or more apprentices will remain constant. The average number of apprentices per sponsor can increase because both small and large sponsors grow their programs, but if small programs continue to keep their programs below 5 apprentices, the shares that have 5 or more apprentices and that have fewer than 5 apprentices can remain constant. Without being aware of any information that suggests that growth will be biased in favor of large or small sponsors or that suggests a large number of small sponsors will choose to increase the size of their programs to 5 apprentices or above, the Department believes that assuming the percentage of sponsors with 5 more apprentices will remain constant is the correct approach.

⁹² 43 FR 20760, May 12, 1978 (requiring the inclusion of female apprentices in AAPs).

⁹³ OMB Circular No. A-4, "Regulatory Analysis," M-03-21 (Sept. 2003).

society. The Final Rule may reduce barriers to entry in apprenticeship programs for women, minorities, persons with disabilities, and LGBT individuals, fostering an equitable distributional effect, and may alleviate the inefficiencies in the job market these barriers create. After considering both the quantitative and qualitative benefits of the Final Rule, the Department has concluded that the benefits would justify the costs of the Final Rule.

In the remaining sections, we first present the overall benefits of the Final Rule, followed by a subject-by-subject analysis of the costs and benefits. We then present a summary of the costs and benefits, including total costs over the 10-year analysis period. Finally, we conclude with a cost-benefit analysis of five regulatory alternatives (including the Final Rule).

a. Potential Overall Benefits and Distributional Effects of the Final Rule

This subsection presents the economic benefits and distributional effects of policy interventions related to equal employment opportunity. Information on these impacts is derived from an extensive body of empirical labor market research published over the last two decades in peer-reviewed publications. We assume that similar effects would be attributable to this rule's combination of provisions, not necessarily to a single provision. Some additional benefits associated with specific provisions of the Final Rule are presented in the next section.

The Final Rule clarifies and improves the regulations on equal opportunity employment from the 1978 Final Rule by encouraging better recruiting and hiring practices. These improved affirmative action policies may lead to both efficiency effects and distributional effects, as directed by OMB Circular A-4.⁹⁴

Equal opportunity hiring practices increase diversity in the workplace, which has been shown to have positive effects. Several studies have found that well-managed diversity can add value by increasing the variety of perspectives in a team or company, therefore fostering creativity.⁹⁵ Research has also proven that diverse groups can perform better on problem-solving tasks than a

⁹⁴ OMB Circular No. A-4, p. 14.

⁹⁵ Bassett-Jones, N., "The Paradox of Diversity Management, Creativity, and Innovation," *Creativity and Innovation Management*, 14 (2005); Orlando, R., "Racial Diversity, Business Strategy, and Firm Performance: A Resource-Based View," *The Academy of Management Journal*, 43 (2000); Roberge, M., and van Dick, R., "Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?," *Human Resource Management Review*, 20 (2010).

group of strong individual performers.⁹⁶ Having diverse perspectives and diverse ways of interpreting and acting on new information improves the collective ability to both anticipate challenges and find effective solutions. Increased diversity can also be beneficial to the employer, as evidenced by a 2007 paper by Hernandez and McDonald, which studied the effects of hiring workers with disabilities. They found that compared to those without a disability, disabled workers had longer tenure, reduced absenteeism, identical job performance, and did not require significantly more supervision.⁹⁷ Further, a study by Schotter and Weigelt (1992) showed that equal opportunity policies increase the efforts of all workers, not just the underutilized workers.⁹⁸

Among all diversity-improvement measures, affirmative action programs have been shown to lead to the broadest increases in diversity.⁹⁹ Further, they have not been found to generate losses in efficiency for an organization.¹⁰⁰ Although evidence suggests that minorities who benefit from affirmative action often have weaker *credentials*, there is little evidence suggesting that their labor market performance is weaker.¹⁰¹ Even when job applicants have comparable credentials, employers have still been found to discriminate based on race, and therefore lose out on this skilled workforce.¹⁰² Without policies to combat this discrimination, workers in groups that are subject to discrimination are often left with the belief that certain jobs are unattainable, and lack the incentive to improve their observable skills or invest in education. Personal education and training investments not only help the individual, but may have positive externalities in the long run, as

⁹⁶ Page, Scott. E., "The Difference: How the Power of Diversity Created Better Groups, Firms, Schools, and Societies," Princeton University Press, (2011).

⁹⁷ Hernandez, B., & McDonald, K. (2007). "Exploring the bottom line: A study of the costs and benefits of workers with disabilities." Chicago, IL: DePaul University.

⁹⁸ Schotter, A., and Weigelt, K. (1992). "Asymmetric Tournaments, Equal Opportunity Laws and Affirmative Action: Some Experimental Results," *The Quarterly Journal of Economics*.

⁹⁹ Kalev, A., Kelly, E., and Dobbin, F. (2006), "Best Practices or Best Guesses? Assessing the Efficacy for Corporate Affirmative Action and Diversity Policies," *American Sociological Review*, 71.

¹⁰⁰ Holzer, H. and Neumark, D. (2000). "Assessing Affirmative Action," *Journal of Economic Literature*, 38.

¹⁰¹ Holzer, H. (2007). "The Economic Impact of Affirmative Action in the US," *Swedish Economic Policy Review* 53.

¹⁰² Bertrand, M. and Mullainathan, S. (2002) "Are Emily and Brenden More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," *Chicago Booth Review*.

discussed further below. Additionally, by hiring more workers from underrepresented groups, firms naturally create mentors and expand networking opportunities for these groups.¹⁰³ These two factors can increase employee retention, directly benefiting the apprenticeship sponsors who will see the return on their initial recruitment and training investments.

Anti-discrimination policies provide economic benefits to disadvantaged groups, in the form of both higher wages and increased employment. One study estimated that 15 to 20 percent of aggregate wage growth between 1960 and 2008 was attributable to the increase in workforce participation by women and minorities, including participation increases from the adoption of civil rights laws and changing social norms.¹⁰⁴ The Civil Rights Act of 1964 improved both employment levels and wages for Black workers, as evidenced in cases such as the South Carolina textile industry.¹⁰⁵ The implementation of affirmative action policies has also been shown to increase the odds of women and minorities in management.¹⁰⁶ Not only do these efforts help disadvantaged workers, but effects such as reduced unemployment benefit the economy as a whole.

The Final Rule can also be expected to result in a beneficial distributional effect. The direct beneficiaries of the Final Rule will be underrepresented workers: Women, minorities, and persons with disabilities. According to Holzer and Neumark (2000), "affirmative action offers significant redistribution toward women and minorities." Evidence indicates that women are more likely than men to be classified as working poor and that Blacks or African Americans and Hispanics or Latinos are more than twice as likely as their white counterparts to be among the working poor.¹⁰⁷ In addition, persons with disabilities have a poverty rate of 28.5 percent, over twice as high as the

¹⁰³ Blau, F. and Winkler, A. (2005), "Does Affirmative Action Work?" *Countering Stereotypes by Changing the Final Rule, Regional Review* Q1.

¹⁰⁴ Hsieh, C., Hurst, E., Jones, C., and Klenow, P. (2013). "The Allocation of Talent and U.S. Economic Growth," *NBER Working Paper*.

¹⁰⁵ Heckman, J., and Payner, B. (1989). "Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina," *79 American Economic Review*, 138.

¹⁰⁶ Kalev, A., Kelly, E., and Dobbin, F. (2006), "Best Practices or Best Guesses? Assessing the Efficacy for Corporate Affirmative Action and Diversity Policies," *American Sociological Review*, 71.

¹⁰⁷ "A Profile of the Working Poor, 2014" Report 1060, Bureau of Labor Statistics.

poverty rate of persons without disabilities of 12.3 percent.¹⁰⁸ Education and training investments for these underrepresented groups can result in lifetime earnings benefits.

Apprenticeship participants see average lifetime earnings benefits of nearly \$100,000, and for those completing apprenticeships, there are average lifetime earnings benefits of over \$240,000 compared to similar individuals who do not enter an apprenticeship.¹⁰⁹ Construction, the largest represented industry sector in the National Registered Apprenticeship System, offers a higher median wage than many traditionally female-dominated jobs and many other jobs that do not require a college education for advancement, thus providing opportunity to move out of poverty or working poor status.¹¹⁰ Reducing barriers to entry in apprenticeship programs for women, minorities, persons with disabilities, people over age 40, and LGBT individuals can have additional long term impacts to beneficiaries; one study found that individuals that participated in an apprenticeship program are 8.6 percent more likely to be employed both six and nine years after participation.¹¹¹

As apprenticeship expands in the United States, the Department is committed to ensuring that this expansion benefits the entire American workforce, including individuals with disabilities, and that it provides them a path to good jobs and careers with living wages such as those that apprenticeships offer. To illustrate the impacts the Final Rule will have on individuals with disabilities, the

¹⁰⁸ These poverty rates are for individuals ages 18 to 64. U.S. Census Bureau, Current Population Reports, "Income and Poverty in the United States: 2014," available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf> (last accessed June 10, 2016).

¹⁰⁹ Reed, D., Yung-Hsu Liu, A., Kleinman, R., et al., "An effectiveness assessment and cost-benefit analysis of registered apprenticeship in 10 states," Mathematica Final Report 06689.090 and 40096, Mathematica Policy Research, (2012).

¹¹⁰ Median weekly earnings of full-time wage and salary workers in Construction and Extraction occupations were \$749 in 2015. This is significantly higher than the earnings of workers in many traditionally female-dominated occupations such as childcare workers; secretaries and administrative assistants; receptionists and information clerks; and nursing, psychiatric, and home health aides. The median weekly earnings of full-time wage and salary workers in these occupations in 2015 were \$437, \$687, \$575, and \$467 respectively. Source: Bureau of Labor Statistics analysis of Current Population Survey data available at <http://www.bls.gov/cps/cpsaat39.htm>.

¹¹¹ Reed, D., Yung-Hsu Liu, A., Kleinman, R., et al., "An effectiveness assessment and cost-benefit analysis of registered apprenticeship in 10 states," Mathematica Final Report 06689.090 and 40096, Mathematica Policy Research, (2012).

Department estimated the number of individuals with disabilities expected to benefit from its provisions if the Final Rule’s utilization targets are met and apprenticeship increases by the growth rates assumed in this analysis. We first obtained estimates of the prevalence of disabilities among workers in different industries by analyzing American Community Survey (ACS) data on workers ages 18 to 64 from the years 2008 to 2012. These estimates are shown in Exhibit 1. Next, in the absence of data relating to the number of persons with disabilities enrolled in apprenticeship programs by industry, we assumed that in a given industry the share of new apprenticeship enrollees that are persons with disabilities will be

the same as the share of workers in that industry with disabilities. We see, for example that in the Construction industry, 5.4 percent of all workers have a disability. We assume, therefore, that 5.4 percent of apprentices in the Construction industry similarly have disabilities and that in the absence of the Final Rule that percentage would be maintained as employers enrolled new apprentices with disabilities at the same rate as they dismissed apprentices with disabilities. The utilization goal for individuals with disabilities set forth in the Final Rule is 7 percent of enrollees, thus an additional 1.6 percent of enrollees (7 percent goal minus the 5.4 percent assumed to be currently enrolled) will be expected to be persons

with disabilities if the utilization goal of 7 percent is attained. Because the number of new apprentices in a 10-year span (2017–2026) in Construction is projected by the Department to be 276,591 the Final Rule’s goal of a 7 percent enrollment rate would result in $(0.07 - 0.054) \times 276,591 = 4,342$ more persons with disabilities as new apprentices in the Construction industry.

This calculation, when repeated over all industries, gives a total estimate of an additional 9,243 individuals with disabilities who would be enrolled out of the total of 541,061 new apprentices projected over the next 10 years (2017–2026).

EXHIBIT 1—IMPACT ESTIMATES FOR INDIVIDUALS WITH DISABILITIES

Industry	Share of workers in industry with disabilities (%) (A)	Projected new apprentices over a 10-year period (B)	Gap (%) (C) = 7% - A	Projected new apprentices with disabilities (D) = B * C
Administrative-Support	5.5	2,389	1.5	36
Agriculture	6.2	759	0.8	6
Construction	5.4	276,591	1.6	4,342
Education	4.3	64,686	2.7	1,747
Oil, Gas, Mineral Extraction	5.7	266	1.3	3
Finance	3.9	218	3.1	7
Information	4.8	1,017	2.2	22
Medical Services	5.1	8,810	1.9	167
Manufacturing	5.3	61,516	1.7	1,021
Professional	4.8	1,096	2.2	24
Retail	5.9	4,747	1.2	55
Personal Service and Care	8.7	791	- 1.7	- 14
Service	6.0	2,987	1.0	31
Transportation	6.2	64,017	0.8	512
Utilities	4.5	48,134	2.5	1,208
Wholesale	4.9	3,576	2.1	75
Total .....	.....	541,601	.....	9,243

Source: Department tabulations, November 2014 and ACS 2008–2012.

4. Subject-by-Subject Analysis

The Department’s analysis considers the expected benefits (beyond those discussed above) and costs of the changes to part 30. This analysis considers the impacts of each change to part 30 separately. This analysis measures the costs and benefits as they accrue to sponsors, the Office of Apprenticeship at the Department, and State partnering agencies. It is estimated that the number of sponsors will grow over time and our annual cost calculations reflect this growth. This analysis primarily discusses how the first-year costs were calculated and indicates that the analysis repeats that calculation across the 10-year time frame using the appropriate number of sponsors in any given year. Exhibit 2

presents the number of total and new sponsors in each year.¹¹²

¹¹² The Department determined the growth rates applied to apprenticeships and apprenticeship sponsors in each industry by examining previous program growth in the RAPIDS database and extrapolating based on historical trends and regulatory requirements. The growth model also accounted for the increased budgetary resources the program has received to expand the program. In the growth model, the Department used higher industry-specific growth rates in 2017 than in 2026 to reflect the fact that the Department expects faster initial growth in the first years of the 10-year window followed by somewhat slower steady growth in the final years. Over the course of the 10-year window, the growth rates steadily decrease from the higher 2017 rates to the lower 2026 rates. Were higher sponsor growth rates in each industry to be assumed to approximately account for the President’s ambitious goal to double the number of apprentices by the end of 2019 and should those higher growth rates be continued in subsequent years, the total cost of the Final Rule would increase from \$370.27 million to \$708.65 million

EXHIBIT 2—TOTAL ACTIVE AND NEW SPONSORS (2017–2026)

Year	Total active sponsors	New sponsors ¹¹³
2017	23,811	2,942
2018	25,231	3,005
2019	26,606	3,046
2020	27,915	3,062
2021	29,137	3,052
2022	30,250	3,013
2023	31,233	2,946
2024	32,069	2,850
2025	32,739	2,727

(with 7 percent discounting) and from \$458.90 million to \$909.22 million (with 3 percent discounting) over the 10-year period (2017–2026). The monetized benefit would also increase from \$4.56 million to \$9.14 million (with 7 percent discounting) and from \$5.85 million to \$11.95 million (with 3 percent discounting) over the 10-year period.

EXHIBIT 2—TOTAL ACTIVE AND NEW SPONSORS (2017–2026)—Continued

Year	Total active sponsors	New sponsors ¹¹³
2026	33,230	2,578

a. Familiarization With the Final Rule

To estimate the cost of initial rule familiarization, we multiplied the number of apprenticeship sponsors in 2017 (23,811)—the first full year in which the Final Rule will be in effect—by the amount of time required to read the new rule (4 hours) and by the average hourly compensation of a private-sector human resources manager (\$73.90).¹¹⁴ In the first year of the Final Rule, the cost to sponsors amounts to approximately \$7.04 million in labor costs. We repeated this calculation for each remaining year in the analysis period using the estimated number of new sponsors for each year, resulting in an annualized cost ranging from \$1.69 million to \$1.57 million with 7 percent and 3 percent discounting, respectively.¹¹⁵ In subsequent years, this cost is only applied to new sponsors because existing sponsors will

¹¹³Note that the number of new sponsors in a given fiscal year is larger than the difference between that year's total active sponsors and the previous year's total active sponsors because the Department has accounted for the fact that there will be some turnover among sponsors as some sponsors end their programs and are replaced by new sponsors. To calculate this annual turnover, the Department looked at historical RAPIDS data from FY2010 through FY2015, and determined that, on average, approximately 6.3 percent of total active sponsors in a given year were new sponsors that had simply replaced old sponsors in the total active sponsor count. To calculate total new sponsors in a given year in the analysis's 10-year window, the Department multiplied this 6.3 percent by the number of total active sponsors in a given year and added this to the difference between each year's total active sponsor count and the total active sponsor count of the preceding year.

¹¹⁴We calculated the hourly compensation rate for a human resource manager (Occupation code 11-3121) by multiplying the median hourly wage of \$51.32 (source: Bureau of Labor Statistics (BLS), May 2015 National Occupation Employment and Wage Estimates by Ownership: Cross-industry, Private ownership only, <http://www.bls.gov/oes/current/000001.htm#11-0000>) by 1.44 to account for private-sector employee benefits (source: BLS, June 2016 Employer Costs for Employee Compensation, <http://www.bls.gov/news.release/eccec.nr0.htm> BLS ECI series CMU2010000000000D, CMU2010000000000P, CMU2020000000000D, CMU2020000000000P). The hourly compensation rate for a human resource manager is thus \$73.90 (\$51.32 × 1.44).

¹¹⁵To calculate the labor burden, we multiplied the time to complete the task by the hourly compensation rate for sponsors (\$73.90 × 4 = \$295.60). The total cost for sponsors in 2017 is the labor cost multiplied by the total number of sponsors (23,811), or \$7.04 million (\$295.60 × 23,811). This burden occurs in the first year of the analysis period for all sponsors, and every year thereafter only for new sponsors.

have already familiarized themselves with the Final Rule in previous years.

b. Addition of Age (40 or Older), Genetic Information, Sexual Orientation, and Disability to the List of Protected Bases

The Final Rule updates the EEO standards to include age (40 or older), genetic information, sexual orientation, and disability to the list of protected bases upon which sponsors of registered apprenticeship programs must not discriminate (§ 30.3(a)). As explained in the preamble, the addition of these bases to the types of discrimination prohibited by part 30 should not result in any significant additional cost to sponsors as most of the National Registered Apprenticeship System's sponsors must already comply with Federal, State, and local laws and regulations prohibiting or otherwise discouraging discrimination against applicants and employees based on age (40 or older), genetic information, sexual orientation, and disability. Even among those sponsors not covered by such laws, many have internal EEO policies that prohibit discrimination on these bases. Therefore, the Department does not expect that the addition of age (40 or older), genetic information, sexual orientation, and disability to the list of protected bases in §§ 30.1(a) and 30.3(a) would result in any significant costs to sponsors.

c. Specific Affirmative Steps To Provide Equal Opportunity

The Final Rule requires all sponsors, regardless of size, to take certain affirmative steps to provide equal opportunity in apprenticeship. The Final Rule language in § 30.3(b) will, for the first time, obligate sponsors to take the following basic steps to ensure EEO in apprenticeship.

First, sponsors are required to designate an individual or individuals to be responsible and accountable for overseeing the sponsor's commitment to EEO (§ 30.3(b)(1)). The Department expects the burden of this requirement on sponsors to be minimal. Most, if not all, sponsors have an apprenticeship coordinator who is in charge of the apprenticeship program. The Department anticipates that this requirement will be fulfilled by individuals currently providing coordination and administrative oversight functions for the program sponsor. We expect that the designation will be a relatively minor administrative matter, but one that will result in institutionalizing a sponsor's commitment to equal opportunity.

Second, the Final Rule requires for the first time that sponsors post their equal opportunity pledge on bulletin boards and through electronic media, such that it is accessible to all apprentices and applicants to apprenticeship programs (§ 30.3(b)(2)). We assume that sponsors choose to put up a physical copy of the pledge and also post it on their Web site.¹¹⁶ The cost of this requirement is minimal. The Department assumes it will take a sponsor 5 minutes (0.08 hour) to post the pledge and that this task will be performed by an administrative assistant at an hourly compensation rate of \$23.10.¹¹⁷ We multiplied the time estimate for this provision by the hourly compensation rate to obtain a total labor cost per sponsor of \$1.85 (\$23.10 × 0.08). Updating the EO pledge to include age (40 or older), genetic information, sexual orientation, and disability will not create any new burden because it is already covered by the existing requirements. To estimate the materials cost, the Department assumed that the pledge is one page, and that the cost per page for photocopying is \$0.08, resulting in a materials cost of \$0.08 (\$0.08 × 1) per sponsor. The total cost of putting up a physical copy of the pledge per sponsor is therefore \$1.93 (\$1.85 + \$0.08).

The Department also assumes it will take a sponsor 10 minutes (0.17 hours) to post the pledge on its Web site and that this task will be performed by a web developer at an hourly compensation rate of \$45.24.¹¹⁸ The cost of posting the pledge on the sponsor's Web site is \$7.69 (\$45.24 × 0.17). The total per sponsor cost of this provision, including the posting of physical copy of the pledge and the posting of the

¹¹⁶Some sponsors may already be undertaking some actions that would count toward compliance with this obligation and, consequently, the cost calculation for this provision is likely an overestimate.

¹¹⁷We calculated the hourly compensation rate for an administrative assistant (Occupation code: 43-6014) by multiplying the median hourly wage of \$16.04 (source: BLS, May 2015 National Occupation Employment and Wage Estimates by Ownership: Cross-industry, Private ownership only, <http://www.bls.gov/oes/current/000001.htm#11-0000>) by 1.44 to account for private-sector employee benefits. Thus, the hourly compensation rate for an administrative assistant is \$23.10 (\$16.04 × 1.44).

¹¹⁸We calculated the hourly compensation rate for a web developer (Occupation code: 15-1134) by multiplying the median hourly wage of \$31.42 (source: BLS, May 2015 National Occupation Employment and Wage Estimates by Ownership: Cross-industry, Private ownership only, <http://www.bls.gov/oes/current/000001.htm#11-0000>) by 1.44 to account for private-sector employee benefits. Thus, the hourly compensation rate for a web developer is \$45.24 (\$31.42 × 1.44).

pledge on the sponsor's Web site, is therefore \$9.62 (\$1.93 + \$7.69).

Multiplying this sum (\$9.62) by the total number of sponsors (23,811) in the first year (2017) results in a cost of \$229,033 for this provision. The posting of the equal opportunity pledge is a one-time cost; costs after the first year are only incurred by new sponsors. Looking over the full ten-year period, the annualized cost of this provision is \$55,015 (with 7 percent discounting) and \$51,044 (with 3 percent discounting).

The Final Rule § 30.3(b)(2) also requires each sponsor to conduct orientation and periodic information sessions for apprentices, journeyworkers who directly supervise apprentices, and other individuals connected with the administration or operation of the sponsor's apprenticeship program to inform and remind such individuals of the sponsor's equal employment opportunity policy with regard to apprenticeship. The orientation and information sessions required by § 30.3(b)(2)(iii) underscore the sponsor's commitment to equal opportunity and its affirmation action obligations. These sessions also institutionalize a sponsor's EEO policies and practices, providing a mechanism by which the sponsor may inform everyone connected with the apprenticeship program of the sponsor's obligations under part 30, and ensure that all individuals involved in the program understand these obligations and the policies instituted to implement them. Under § 30.3(b)(4)(i), sponsors are also required to provide anti-harassment training, which will be incorporated into these periodic orientation and information sessions. This training must include active participation by trainees, such as attending a training session in person or completing an interactive training online and will include at a minimum communications to apprentices and journeyworkers who directly supervise apprentices that harassing conduct will not be tolerated, the definition of harassment and types of conduct that constitute harassment, and the right to file a harassment complaint.

Using 2015 data from the Registered Apprenticeship Partners Information Data System (RAPIDS) and the growth model for apprenticeship and sponsors in this analysis, the Department calculated that there are on average 24 apprentices per sponsor in 2017.¹¹⁹ The Department further assumes a one-to-

¹¹⁹ The Department estimated that there are on average 24 apprentices per sponsor in 2017; 26 in 2018; 27 in 2019; 28 in 2020; 29 in 2021; 31 in 2022; 32 in 2023; 32 in 2024; 33 in 2025; and 34 in 2026.

one ratio between apprentice and journeyworker in estimating the cost of orientations and periodic information sessions. The Department first estimated that the 23,811 sponsors in the first year (2017) will hold one 45-minute regular orientation and information session with an average of 24 apprentices (\$18.72 per hour)¹²⁰ and 21 journeyworkers (\$31.68 per hour)¹²¹ per sponsor. The Department estimated that a human resource manager (\$73.90 per hour) will need to spend 2 hours to develop and prepare written materials for the session in the first year, and the 2 hours also cover maintaining the training materials which were already saved on the computer (\$3.52 million = 23,811 sponsors × 2 hours × \$73.90).

This calculation results in a total cost for this provision of approximately \$26.44 million in the first year (2017).¹²² All sponsors are assumed to hold one 45-minute regular orientation and information session annually. This calculation is repeated in subsequent years (with the requirement that an HR manager develop written materials only applicable for new sponsors). The annualized cost ranges from \$34.18 million (with 7 percent discounting) to \$34.87 million (with 3 percent discounting).

Third, under the existing § 30.4(c) sponsors are required to engage in appropriate outreach and recruitment activities to organizations that serve women and minorities, and the regulations list the types of appropriate

¹²⁰ We calculated the hourly compensation rate for an apprentice by multiplying the median hourly wage of \$13.00 (as published by PayScale for an apprentice electrician) by 1.44 to account for private-sector employee benefits (source: OES survey). Thus, the hourly compensation rate for an apprentice is \$18.72 (\$13.00 × 1.44). We used the wage rate for an apprentice electrician in this analysis because electrician is one of the most common occupations in the apprenticeship program.

¹²¹ We calculated the hourly compensation rate for a journeyworker by multiplying the median hourly wage of \$22.00 (as published by PayScale for a journeyworker electrician) by 1.44 to account for private-sector employee benefits (source: OES survey). Thus, the hourly compensation rate for a journeyworker electrician is \$31.68 (\$22.00 × 1.44). We used the wage rate for a journeyworker electrician in this analysis because electrician is one of the most common occupations in the apprenticeship program.

¹²² The total cost was derived from the cost for an HR manager to develop materials (2 hours) and attend the training (0.75 hours), as well as 24 apprentices and 24 journeyworkers to attend the training. In 2017, with 23,811 active sponsors, material development cost \$3.52 million (\$73.90 × 2 × 23,811), HR manager attendance cost \$1.32 million (\$73.90 × 0.75 × 23,811), apprentice attendance cost \$8.03 million (\$18.72 × 0.75 × 24 × 23,811), and journeyworker attendance cost \$13.58 million (\$31.68 × 0.75 × 24 × 23,811) the total cost for all 23,811 sponsors is \$23.74 million in 2017.

activities a sponsor is expected to undertake. The exact mix of activities depends on the size and type of the program and its resources; each sponsor, however, is "required to undertake a significant number of appropriate activities" under the existing § 30.4. Under the Final Rule, all sponsors are required to reach out to a variety of recruitment sources, including organizations that serve individuals with disabilities, to ensure universal recruitment (§ 30.3(b)(3)). Including individuals with disabilities among the groups of individuals to be recruited is a new focus for sponsors. Sponsors are required to develop a list of recruitment sources that generate referrals of women, minorities, and persons with disabilities with contact information for each source. Further, sponsors are required to notify these sources in advance of any apprenticeship opportunities; while a firm deadline is not set, the Final Rule suggests 30 days' notice if possible under the circumstances. This may lead employers to incur costs due to the additional delay in the hiring process resulting from this rule. The Department, however, does not have enough information to estimate this potential cost.

The kinds of activities we anticipate the sponsor engaging in to satisfy this requirement include distributing announcements and flyers detailing job prospects, holding seminars, and visiting some of the sources that will likely provide access to individuals with disabilities. The Department assumed that the cost to sponsors to distribute information to persons with disabilities will be the labor cost to comply with this provision. We also assumed that the activity to satisfy this provision will be performed by a human resource manager and an administrative assistant with hourly compensation rates of \$73.90 and \$23.10, respectively. We assumed that this task will take 30 minutes (0.5 hour) of a human resource manager's time and 30 minutes (0.5 hour) of an administrative assistant's time per targeted source. We calculated the cost of this provision per affected sponsor by multiplying the time each staff member devotes to this task by their associated hourly compensation rates. We then multiplied the total labor cost by the assumed number of outreach sources (5) and by the total number of sponsors.¹²³ All sponsors are assumed

¹²³ To estimate the cost of this provision, we calculated the labor cost per affected sponsor by multiplying the time required for the task by the hourly compensation rate for both a human resource manager (\$73.90 × .5 = \$36.95) and an

to conduct this outreach in all years.¹²⁴ The resulting cost of this provision is \$5.77 million in the first year, with an annualized cost ranging from \$6.94 million (with 7 percent discounting) to \$7.02 million (with 3 percent discounting).

Because universal outreach may involve a range of activities, the Department conducted a sensitivity analysis on the total time allocated to universal outreach. Mirroring the calculation above, the Department estimated a low allocation of time (15 minutes, or 0.25 hour) and a high allocation of time (1 hour and 15 minutes, or 1.25 hour) for both the administrative assistant and the human resource manager. The resulting range of costs for the first year is \$2.89 million to \$14.44 million with an annualized cost ranging from \$3.47 million (with 7 percent discounting) to \$3.51 million (with 3 percent discounting) at the lower bound to \$17.35 million (with 7 percent discounting) to \$17.56 million (with 3 percent discounting) at the higher bound.¹²⁵

Fourth, the Final Rule requires that all sponsors develop and implement procedures to ensure that their apprentices are not harassed because of their race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability and to ensure that the workplace is free from harassment, intimidation, and retaliation (§ 30.3(b)(4)(iv)). As explained in the preamble, this requirement should not result in new burdens on sponsors who are already

administrative assistant ($\$23.10 \times .5 = \11.55). We then multiplied the total per-sponsor labor cost by the total number of sponsors in 2017 (23,811) and by the five sites for which each sponsor is to provide outreach. This results in a total cost of \$5.77 million ($(\$36.95 + \$11.55) \times 23,811 \times 5$) in 2017. We repeated this calculation for each year of the analysis period, using the projected number of sponsors for each year.

¹²⁴ This cost for all sponsors may be an overestimate because some sponsors are already undertaking some outreach activities on their own under the existing regulations.

¹²⁵ To estimate the range of costs for this provision, we calculated the labor cost per affected sponsor by multiplying the time required for the task by the hourly compensation rate for both a human resource manager ($\$73.90 \times 0.25 = \18.48 for the low cost and $\$73.90 \times 1.25 = \92.38 for the high cost) and an administrative assistant ($\$23.10 \times 0.25 = \5.78 for the low cost and $\$23.10 \times 1.25 = \28.88 for the high cost). We then multiplied the total per-sponsor labor cost by the total number of sponsors in 2017 (23,811) and by the five sites for which each sponsor is to provide outreach. This results in a total cost of \$2.89 million for the low time assumption ($(\$18.48 + \$5.78) \times 23,811 \times 5$) and \$14.44 million for the high time assumption ($(\$92.38 + \$28.88) \times 23,811 \times 5$) in 2017. We repeated this calculation for each year of the analysis period, using the projected number of sponsors for each year. Totals may not add due to rounding.

subject to Federal laws that prohibit harassment in the workplace. Because title VII, Executive Order 11246 as amended by Executive Order 13672, the ADEA, GINA, and the ADA prohibit these actions, and most sponsors are already subject to these laws. Because time has been calculated for compliance with the periodic orientation/information sessions in 30.3(b)(2)(iii) of which the anti-harassment training is a part, the cost of this requirement has already been accounted for in this analysis. As mentioned in the preamble, the Department will also provide anti-harassment materials that can be used by sponsors.

d. Revised Methodology for Workforce and Utilization Analysis and Goal Setting

The Final Rule streamlines the workforce and utilization analysis required of sponsors with five or more apprentices and clarifies when and how utilization goals are to be established for women and minorities (§§ 30.5 through 30.7). Specifically, the Final Rule requires sponsors to consider two factors when determining the availability of individuals for apprenticeships rather than the five currently listed in the part 30 regulations: The percentage of individuals eligible for enrollment in apprenticeship programs within the sponsors relevant recruitment area and the percentage of the sponsor's employees eligible for enrollment in the apprenticeship program, both to be detailed by race, sex, and ethnicity. The Final Rule further reduces the frequency with which the workforce and utilization analyses must be conducted—from annually under the existing rule to at the time of the compliance review for the utilization analysis (every five years on average) and within three years of the compliance review for the workforce analysis (effectively every two and a half years on average). In addition, the Final Rule explains in clear terms the steps required to determine whether any particular groups of individuals are being underutilized and the Registration Agency will provide direction as to when and how goals are to be established. First, sponsors will conduct a workforce analysis to identify the racial, sex, and ethnic composition of their apprentices. Second, an availability analysis will establish a benchmark against which the existing composition of apprentices will be compared. Sponsors will establish utilization goals and engage in targeted outreach, recruitment, and retention efforts when the sponsor's utilization of

women, Hispanics or Latinos, or individuals in racial minority groups are “significantly less than would be reasonably expected given the availability of such individuals for apprenticeship.” Registration Agencies will work closely with sponsors during compliance reviews to assist in the development of an availability analysis and setting or reassessing utilization goals for race, sex, and ethnicity. The Department will be further developing a data tool to assist in the collection and analysis of relevant demographic data for the purposes of goal setting. The Department has determined that there are three types of costs associated with this provision: Costs associated with the development of and familiarization with the data tool, costs associated with the workforce analysis, and costs associated with the utilization analysis.

Although it is the Department's expectation that this activity will result in long-term efficiencies and burden reductions for both the Department and affected sponsors, it understands that there will be costs associated with both the development of the data tool and the time sponsors will need to familiarize themselves with the tool. To develop the tool, the Department estimates that it will use a GS–13 Department employee at an hourly compensation rate of \$64.71 for 60 hours¹²⁶ to advise a contractor to build the tool. Based on the Department's requirements for similar assignments, the cost of contracting for building the tool is estimated to be \$55,000. The total one-time cost to the Department for building the tool is therefore estimated to be \$58,883.

To quantify the cost associated with sponsor familiarization with the data tool, the Department assumed that the data tool is developed in 2017 and that the following year (2018) all sponsors (25,231) with 5 or more apprentices (25 percent) will incur one hour of HR manager labor (\$73.90 per hour) to familiarize the organization with the

¹²⁶ The GS–13 salary is from the Office of Personnel Management's 2015 Salary Table. This wage is further multiplied by the Federal benefits multiplier of 1.63 for an hourly compensation rate of \$64.71 ($\39.70×1.63). The Federal multiplier of 1.63 is the result of a two-step estimate: The average ratio of total compensation to total wages in the private sector in 2015 (1.44) multiplied by the ratio of loaded wage factors for federal workers compared to private sector workers (1.13). Totals may not add due to rounding. See Bureau of Labor Statistics. (2016). *2015 Employer Costs for Employee Compensation*. Retrieved from: http://www.bls.gov/schedule/archives/ecec_nr.htm; Congressional Budget Office. (2012). *Comparing the compensation of federal and private-sector employees*. Tables 2 and 4. Retrieved from: https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/01-30-FedPay_0.pdf.

tool. This is estimated to have a cost of \$466,143 ($25,231 \times 25$ percent \times \$73.90 \times 1) in 2018. We repeated this calculation for the following years only for new sponsors to the program who will still need to acclimate themselves with the tool. This provision has an annualized cost of \$98,197 (with 7 percent discounting) and \$93,348 (with 3 percent discounting).

To calculate the cost of the new workforce analysis, the Department first determined the baseline (current) cost of the workforce requirements under existing regulations. The existing workforce analysis required 1 hour of HR manager labor (\$73.90 per hour) for all sponsors (23,811 in 2017) with 5 or more apprentices (25 percent) annually.

The Department then determined that the new methodology for conducting workforce analyses under the Final Rule—including the conducting of workforce analyses for individuals with disabilities—would result in 2 hours of HR manager labor (\$73.90 per hour) for all sponsors (25,231 in 2018) with 5 or more apprentices (25 percent). All sponsors with 5 or more apprentices must conduct their first new workforce analysis within two years of the Final Rule's effective date and every 2.5 years after that. The Department calculated that the new workforce analyses in 2018—the first year in which the new workforce analyses would be undertaken per the compliance date set forth in § 30.5(b)(3) for all sponsors with 5 or more apprentices—will cost \$932,285 (2 hours \times \$73.90 \times (25,231 \times 25 percent)). In calculating costs for the year 2019 and afterward, the Department divided the number of applicable sponsors in each year by 2.5 to reflect the assumption that in 2019 and after sponsors will conduct the analysis per the 2.5-year timeline. This means that in any given year 40 percent of these sponsors will conduct the new workforce analysis or that it would take 2.5 years to have these sponsors conduct the new workforce analysis. We repeated this calculation for the following years using the appropriate number of sponsors in any given year, resulting in an annualized cost of \$445,815 (with 7 percent discounting) and \$449,806 (with 3 percent discounting) for sponsors.

To calculate the cost of the new utilization analysis, the Department determined that the utilization analysis will result in 0.5 hour of HR manager time (\$73.90 per hour) for all sponsors (26,606 in 2019) with 5 or more apprentices (25 percent) every 5 years. There is no baseline cost for this portion of the analysis, as previously the Department was providing the analysis

with minimal burden to sponsors. The cost of conducting the first utilization analyses in 2019—the first year that utilization analyses are likely to be conducted—is \$49,155 (0.5 hour \times \$73.90 \times (26,606 \times 25 percent)/5 years). We repeated this calculation for the following years, and conducting utilization analyses has an annualized cost of \$41,235 (with 7 percent discounting) and \$43,348 (with 3 percent discounting) for sponsors.

Benefits

Once the data tool is developed, the Department estimates it will reduce the time required for its GS-13 employee (\$64.71 per hour) to conduct a utilization analysis from the existing 2 hours to 1 hour using the data tool jointly with sponsors. Furthermore, the frequency of conducting the utilization analysis is reduced from annually to once every 5 years. This will result in a cost saving to the Department of \$774,753 in 2019 ((26,606 \times 25 percent \times (2 hour – (1 hour/5 years)) \times \$64.71) and an annualized cost saving ranging from \$649,925 (with 7 percent discounting) to \$683,240 (with 3 percent discounting).

e. Requiring Targeted Outreach, Recruitment, and Retention for Underutilized Groups

In addition to the normal outreach, recruitment, and retention activities required of all sponsors under § 30.3(b), the Final Rule requires a sponsor of an apprenticeship program, whose utilization analyses revealed underutilization of a particular group or groups of individuals pursuant to § 30.6 and/or who has determined pursuant to § 30.7(e) that there are impediments to EEO for individuals with disabilities, to engage in targeted outreach, recruitment, and retention for all underutilized groups in § 30.8. We assume that this additional outreach will happen in the same manner as the universal outreach discussed above.

We further assume that this targeted outreach, recruitment, and retention is newly required for individuals with disabilities of all sponsors who employ five or more apprentices, who failed to meet the 7 percent utilization goal, and whose existing recruitment efforts are not effective and need to be revised, since the Final Rule now requires that such sponsors engage in affirmative action of individuals with disabilities. The Department recognizes, however, that some sponsors may already be meeting the 7 percent utilization goal for persons with disabilities. Others may be employing them at less than 7 percent, but nevertheless do not need to

engage in targeted outreach and recruitment because their review of their activities did not reveal any barriers to equal opportunity. Therefore, the analysis below may overestimate the number of sponsors that need to engage in targeted outreach and recruitment and consequently overestimate total costs of this provision.¹²⁷

We assume that the cost to sponsors to distribute information about apprenticeship opportunities to organizations serving individuals with disabilities will be the labor cost. We also assume that the labor for this provision will be performed by a human resource manager and an administrative assistant with hourly compensation rates of \$73.90 and \$23.10, respectively. Lastly, we assume that this additional outreach will first occur two years after the Final Rule goes into effect. At the first compliance review—which for the first group of sponsors to conduct compliance reviews will occur approximately two years after the Final Rule's effective date—sponsors need to conduct a utilization analysis and an internal review to identify underutilization for women, minority groups, or individuals with disabilities. Sponsors who need to engage in targeted outreach and recruitment for the first time should continue to do so annually until the next compliance review.

The Department estimated that this dissemination task will take 30 minutes (0.5 hour) of a human resource manager's time and 30 minutes (0.5 hour) of an administrative assistant's time per targeted source. A sensitivity analysis for a range of time spent conducting targeted outreach to organizations that serve individuals with disabilities is presented further below. The cost of this provision per affected sponsor is the time each staff member devotes to this task multiplied by their associated hourly compensation rates. This calculation resulted in a labor cost of \$48.50 (($\73.90×0.5) + ($\$23.10 \times 0.5$)) per source. We then multiplied this total labor cost by the number of outreach sources (5),¹²⁸ the

¹²⁷ For this analysis, we assumed that the percent of all sponsors employing five or more apprentices (25 percent) remains constant throughout the 10-year analysis period. In reality, this percentage will fluctuate as sponsors take on new apprentices and as apprentices complete their programs. We also expect that, over time, successful outreach will lead to more hiring of persons with disabilities and that sponsors will meet their recruitment goals and not be required to complete this additional outreach.

¹²⁸ The Department believes that most sponsors will not have underutilization in all AAP protected bases (race, ethnicity, sex, and disability) requiring outreach under § 30.8; however, this analysis

share of sponsors with five or more apprentices (25 percent), the share of sponsors that will undertake a utilization analysis in any given year (20 percent¹²⁹) and the share of sponsors that will identify underutilization and/or problem areas in one or more of the relevant demographic groups—(95 percent¹³⁰). This calculation ($\$48.50 \times 26,606 \times 5 \times 25 \text{ percent} \times 20 \text{ percent} \times 95 \text{ percent}$) results in a total cost of this provision of approximately \$306,468 in 2019. The number of sponsors who will undertake a utilization analysis and identify underutilization and/or problem areas in 2019 is 1,264 ($26,606 \times 25 \text{ percent} \times 20 \text{ percent} \times 95 \text{ percent}$). Because sponsors who need to engage in targeted outreach and recruitment for the first time must continue to do so annually until the next compliance review, the number of sponsors needing to engage in targeted outreach and recruitment in 2020 will become 2,590, which is the sum of 1,264 and 1,326 ($27,915 \text{ sponsors in } 2020 \times 25 \text{ percent} \times 20 \text{ percent} \times 95 \text{ percent}$). The number of sponsors who we estimate will need to engage in targeted outreach and recruitment will eventually reach 95 percent of the total sponsors with 5 or more apprentices in 2023 and after.¹³¹

We repeated this calculation for the following years using the appropriate number of sponsors in any given year. The annualized cost ranges from \$936,998 (with 7 percent discounting) to \$1.02 million (with 3 percent discounting).

f. Affirmative Action Program Reviews

Affirmative action program reviews in the Final Rule result in three additional activities beyond the baseline: personnel process reviews, written affirmative action plan updates during compliance reviews, and written

assumes that sponsors will, on average, engage in outreach to five different organizations in order to comply with its obligations under 30.8(a). This assumption is, if anything, likely an overestimate, as some sponsors may be able to address the underlying issues with connections to fewer organizations, and some sponsors will not have the underutilization/impediments to EEO that would trigger the § 30.8 outreach obligation in the first place.

¹²⁹ This is the percentage of sponsors who undergo compliance review each year, as determined by the 5-year schedule on which sponsors undergo compliance reviews.

¹³⁰ In the consultation with regional directors, the Department assumed that 95 percent of sponsors that conduct a utilization analysis will discover underutilization of a particular group or groups of individuals pursuant to § 30.6 and/or problems with respect to its outreach, recruitment, and retention activities pursuant to § 30.7(f).

¹³¹ Should the 95 percent (share of sponsors that will identify underutilization and/or problem areas) fall over time, the cost estimate of this provision will likely be an overestimate.

affirmative action plan updates within three years of compliance reviews (estimated to occur 2.5 years later in this analysis). The Final Rule requires sponsors with five or more apprentices to review personnel processes annually (§ 30.9). Requiring this scheduled review of personnel processes emphasizes the philosophy the Department intends to convey throughout the regulation that affirmative action is not a mere paperwork exercise but rather a dynamic part of the sponsor's management approach. Affirmative action requires ongoing monitoring, reporting, and revision to address barriers to EEO and to ensure that discrimination does not occur.

As required by the 1978 Final Rule (the analysis baseline), sponsors with 5 or more apprentices in a registered apprenticeship program are required to develop and maintain an affirmative action program. The scope of each sponsor's program depends on the size and type of its program and resources. However, each sponsor is required, under the existing rule, to undertake a significant number of appropriate activities to satisfy its affirmative action obligations. The 1978 Final Rule lists examples of the kinds of activities expected, including "periodic auditing of the sponsor's affirmative action programs and activities" (29 CFR 30.4(c)(10)). We assume that, at the very least, these program sponsors currently conduct this audit on an annual basis because elsewhere in the 1978 Final Rule, sponsors are required to review their affirmative action programs annually and update them where necessary (29 CFR 30.8).

To calculate the cost of these three activities, the Department first determined the cost of the baseline that is being replaced by the Final Rule (annual affirmative action program reviews). The Department calculated that all sponsors (25,231 in 2018) with 5 or more apprentices (25 percent) currently incur 8 hours of HR manager labor (\$73.90 per hour) to conduct the existing annual reviews. The cost of the baseline in 2017 is \$3.73 million ($25,231 \times 25 \text{ percent} \times 8 \text{ hours} \times \73.90). This baseline is being replaced by less frequent affirmative action program reviews and an annual personnel process review for all sponsors (all of these provisions do not begin until the second year (2018) due to the two-year phase-in).

To determine the cost of the new annual personnel process review, the Department calculated the cost for all sponsors in 2018 (25,231) with 5 or more apprentices (25 percent) to spend

8 hours of HR manager labor conducting the review. This provision will result in an undiscounted cost of \$3.73 million in 2018 ($25,231 \times 25 \text{ percent} \times 8 \text{ hours} \times \73.90).

To determine the cost of the written affirmative action plan update at the time of the compliance review, the Department calculated the cost for all sponsors in 2018 (25,231) with 5 or more apprentices (25 percent) to spend 12 hours¹³² of HR manager labor every 5 years at the time of the compliance review. With the existing compliance review rate at 20 percent, this means that approximately one in five of these sponsors will undergo a compliance review every year. This provision will result in an undiscounted cost of \$1.12 million in 2018 ($25,231 \times 25 \text{ percent} \times 12 \text{ hours} \times (\frac{1}{5}) \times \73.90).

To determine the cost of the written affirmative action plan update within three years of the compliance review, the Department calculated the cost for all sponsors in 2018 (25,231) with 5 or more apprentices (25 percent) to spend 6 hours¹³³ (estimated to be less because of the lesser workload from not overlapping with the compliance review) of HR manager time every 5 years. This provision results in an undiscounted cost of \$559,371 in 2018 ($25,231 \times 25 \text{ percent} \times 6 \text{ hours} \times (\frac{1}{5}) \times \73.90). We repeated this calculation for the following years using the appropriate number of sponsors in any given year.

The total cost of this provision is \$1.68 million in 2018 ($\$559,371 + \$1.12 \text{ million} + \$3.73 \text{ million} - \3.73 million). The annualized cost ranges from \$1.69 million to \$1.75 million at 7 percent and 3 percent, respectively.

g. Simplified Procedures for Selecting Apprentices

Under the 1978 Final Rule, selection of apprentices must be made using one of four specific selection methods. Under the Final Rule (§ 30.10), sponsors are required to adopt any method for the selection of apprentices provided that

¹³² A workforce analysis (1); a utilization analysis (2); goal-setting (if necessary) (3); and a full update of the written affirmative action plan (4) need to be undertaken at the compliance review. Because we have already costed out (1), (2), and (3), the sponsor would need additional 12 hours to fully update the written affirmative action plan.

¹³³ A written affirmative action program review within three years of compliance reviews contains (1) workforce analysis and (2) updating the written affirmative action plan to include the updated workforce analysis and a description of the review of personnel practices and any changes made as a result of that review (see 30.9(b)). Because we have already costed out (1), the 6 hours are for including updated the workforce analysis and a description of the review of personnel practices and any changes made as a result of that review (see 30.9(b)).

the method (1) complies with Uniform Guidelines on Employee Selection Procedures (USGEP); (2) is uniformly and consistently applied to all applicants and apprentices; (3) complies with the qualification standards set forth in title I of the ADA; and (4) is facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), and disability. This approach greatly simplifies the regulatory structure currently governing selection procedures and affords sponsors greater flexibility in fashioning a selection procedure; it also aligns this provision of part 30 with how other equal opportunity laws regulate employers' use of selection procedures.

Benefits

This provision, aimed at simplifying selection procedures, is expected to reduce sponsors' cost of compliance because we expect that sponsors will be able to more quickly and easily adopt a method for selection consistent with how they currently select applicants or employees under other EEO laws. Although this analysis did not quantify any benefits under this provision, it is expected that this will result in efficiencies for sponsors.

h. Standardizing Compliance Review Procedures for Registration Agencies

The Final Rule standardizes procedures Registration Agencies must follow for conducting compliance reviews (§ 30.13). The provision on compliance reviews carries forward the existing provision at § 30.9 addressing compliance reviews and includes several modifications to improve readability. First, the Final Rule revises the title from "Compliance reviews" to "Equal employment opportunity compliance reviews" to clarify that the reviews are to assess compliance with the part 30 regulations and not the companion regulations at part 29.

Second, the term "Registration Agency" is used throughout § 30.13 instead of the term "Department," because this section applies to both the Department and to SAAs when conducting an EEO compliance review.

Third, the Final Rule provides more specificity for the procedures Registration Agencies must follow in conducting compliance reviews. This increased specificity provides for greater consistency and standardization of procedures across the National Registered Apprenticeship System. For instance, § 30.13(b) requires the Registration Agency to notify a sponsor of any findings through a written Notice of Compliance Review Findings within

45 days of completing a compliance review. The Notice of Compliance Review Findings must include whether any deficiencies (*i.e.*, failures to comply with the regulatory requirements) were found, how they are to be remedied, and the timeframe within which the deficiencies must be corrected. The Notice of Compliance Review Findings also must notify a sponsor that sanctions may be imposed for failing to correct the aforementioned deficiencies.

These changes add clarity to the procedures but do not fundamentally change the process and, therefore, do not represent a significant additional burden to sponsors or SAAs. The Department believes the additional specificity will ease some of the burden on States.

Sponsors are subject to onsite or offsite compliance reviews by either the SAA or OA where the corresponding agency is expected to notify the sponsor of the review findings. Although the notice of compliance reviews already occurs with SAAs and OA, the Final Rule makes the practice standard and common among all entities. Under the Final Rule, the notice of review findings is required to be sent via registered or certified mail, with return receipt requested within 45 days of the completed equal opportunity compliance review.

The costs associated with this provision are limited to the use of registered mail, the materials, and the labor to send the letter. The actual review process remains unchanged from the 1978 Final Rule. To determine the cost of the notice of compliance reviews, we estimated the labor cost to mail and compile the notice (assumed to be completed by an administrative assistant) and the cost of materials to send the notice. The labor cost is comprised of the time an administrative assistant dedicates to the task (15 minutes, or 0.25 hour) multiplied by the hourly compensation rate (\$29.55 for SAAs and \$30.68 for OA).¹³⁴ The total materials cost is the cost to send a letter via registered mail (\$12.20) plus the cost of the envelope (\$0.07) plus the cost to photocopy the one-page document (\$0.08), or \$12.35 (\$12.20 + \$0.07 + \$0.08).

To estimate the total cost of this provision in the first year, we summed labor and material costs and then

¹³⁴ We calculated the hourly compensation rate for an administrative assistant by multiplying the hourly wage of \$18.82 (GS-7 step 5) by 1.57 for the State agency and 1.63 for the Federal agency to account for public-sector employee benefits. Thus, the hourly compensation rate for an administrative assistant at a State agency is \$29.55 (\$18.82 × 1.57) and \$30.68 (\$18.82 × 1.63) at a Federal agency.

multiplied by the total number of reviewed sponsors resulting in \$46,997 for SAAs and \$47,670 for OA.¹³⁵ We then repeated this calculation for each year of the analysis period using the projected number of sponsors for each year. The annualized cost to SAAs ranges from \$56,499 (with 7 percent discounting) to \$57,163 (with 3 percent discounting) and the annualized cost to OA ranges from \$57,308 (with 7 percent discounting) to \$57,981 (with 3 percent discounting).

i. Clarifying Complaint Procedures

In an effort to ensure consistency with how Registration Agencies process complaints and conduct investigations, § 30.14(c) adds uniform procedures that Registration Agencies must follow. These uniform procedures ensure that Registration Agencies acknowledge and thoroughly investigate complaints in a timely manner, that parties are notified of the Registration Agency's findings, and that the Registration Agency attempts to quickly resolve violations. Since the complaint process is not a new process, the Department does not expect that these provisions will add significantly to the burden on Registration Agencies; they simply standardize the procedures and define a timeline. Therefore, while the Department does not expect significant changes in burden, there may still be negligible one-time costs as Registration Agencies adjust their complaint procedures to reflect newly standardized requirements. These procedures will benefit both sponsors and apprentice complainants since claims will be handled in a clear and consistent fashion.

j. Adopting Uniform Procedures Under 29 CFR Parts 29 and 30 for Deregistration, Derecognition, and Hearings

The Final Rule generally aligns part 30 with part 29 procedures for deregistration of apprenticeship programs, derecognition of SAAs, and hearings (§§ 30.15 through 30.16). For consistency and simplicity, § 30.15(c) adopts the deregistration procedures of § 29.8(b)(5) through (8) of this title, including the hearing procedures in § 29.10. This revision a more closely aligned set of procedures for matters arising from management of the

¹³⁵ To calculate the labor cost, we multiplied the time required by the hourly compensation rate, resulting in a cost of \$7.38 (0.25 × \$29.55) for State Apprenticeship Agencies and \$7.67 (0.25 × \$30.68) for OA. We then multiplied each labor cost by the percentage of sponsors subject to compliance reviews (20 percent) and by 50 percent (we assumed that half of the sponsors respond to SAAs and the rest respond to OA).

National Registered Apprenticeship System. These provisions are not expected to impose a burden because SAAs are already following these procedures in part 29.

k. Invitation To Self-Identify as an Individual With a Disability

The Final Rule under § 30.11 requires sponsors with 5 or more apprentices to invite applicants for apprenticeship to voluntarily self-identify as an individual with a disability protected by this part at two stages: (1) At the time they apply or are considered for apprenticeship; and (2) after they are accepted into the apprenticeship program but before they begin their apprenticeship. Within the first two years of the program, existing sponsors will be required to survey their current apprentices.

The purpose of this section is to collect important data pertaining to the participation of individuals with disabilities in the sponsor's applicant pools and apprenticeship program. This data will allow the sponsor and the Department to better identify and monitor the sponsor's enrollment and selection practices with respect to individuals with disabilities and also enable the Department and the sponsor to assess the effectiveness of the sponsor's recruitment efforts over time, and to refine and improve the sponsor's recruitment strategies, where necessary. In addition, data related to apprentices once they are in the program will help sponsors assess whether there may be barriers to equal opportunity in all aspects of apprenticeship and may improve the effectiveness of retention strategies or help sponsors evaluate whether such strategies are necessary.

Within the first two years of this program, sponsors with 5 or more apprentices will need to survey their current workforce with the invitation to self-identify. The Department assumed that sponsors would survey their current workforce for the first time in 2018 and calculated that sponsors (33,939 in 2018) with 5 or more apprentices (25 percent) will survey an average of 41 apprentices with an invitation to self-identify provided by the Department.¹³⁶ The Department estimated that it would take an

¹³⁶ The average number of apprentices at sponsors with 5 or more apprentices using 2015 RAPIDS data was 33 in 2015. Over the 10-year analysis period, the Department assumed that the average number of apprentices for sponsors with 5 or more apprentices would grow at the same rates that were estimated for all sponsors. The Department estimated that there are on average 38 apprentices per sponsor with 5 or more apprentices in 2017; 41 in 2018; 42 in 2019; 44 in 2020; 46 in 2021; 49 in 2022; 50 in 2023; 50 in 2024; 52 in 2025; and 53 in 2026.

apprentice (\$18.72 per hour) 5 minutes (0.08 hours) to complete the form. Furthermore, an administrative assistant (\$23.10 per hour) would need to spend 0.5 hour annually to record and keep the forms. This provision has a cost in 2018 of \$458,811 $((25,231 \times 25 \text{ percent} \times 41 \times 0.08 \text{ hour} \times \$18.72) + (25,231 \times 25 \text{ percent} \times 0.5 \text{ hour} \times \$23.10))$.

In subsequent years, all sponsors with 5 or more apprentices will be required to administer the invitation to self-identify twice: Once to all applicants prior to the offer of apprenticeship, and once after the offer of apprenticeship to those who have been extended offers. The Department estimates that sponsors post 42 positions in 2019 and receive 15 applicants per posting.¹³⁷ Of those positions, the Department estimated that 42 offers of enrollment are made and 42 apprentices choose to enroll in 2019. This requirement has an undiscounted cost in 2019 of \$6.84 million $(26,606 \times 25 \text{ percent} \times ((15 \text{ applications} \times 42 \text{ job listings} \times .08) + (42 \text{ offers of apprenticeship} \times .08)) \times \$18.72 + 26,606 \times 25 \text{ percent} \times 0.5 \times \$23.10)$. For the 10-year analysis period, this provision has an annualized cost of \$6.54 million and \$6.91 million (at 7 percent and 3 percent discounting, respectively).¹³⁸ In addition, sponsors with 5 or more apprentices are required to remind apprentices yearly that they can update their invitation to self-identify. The Department assumed that these sponsors would send out an annual reminder email beginning in 2018 at the cost of \$12,292 $(25,231 \times 0.25 \text{ percent} \times 0.08 \text{ hour} \times \$23.10)$. We repeated this calculation for each remaining year in the analysis period using the estimated number of sponsors for each year. This provision in total has an annualized cost of \$4.53 million and \$4.76 million (at 7 percent and 3 percent discounting, respectively).

l. Other

The Final Rule will result in three additional costs. First, SAAs will be required to revise their State equal opportunity plan to conform to the new requirements. Second, the Final Rule will create an intermediary step between a registered sponsor and a deregistered sponsor (registration suspension). Third, sponsors will likely hire or retain more qualified apprentices

¹³⁷ The Department determined the number of positions posted from conversations with programs of various sizes. We determined that the largest, statewide programs post more than 15 jobs, but the Department used this as an average for all apprentices to avoid under-estimating the costs.

¹³⁸ It is assumed that there will be 100 percent participation in the invitation to self-identify and therefore, the cost of this provision is likely overestimated.

with disabilities under the Final Rule and this may result in additional costs of providing appropriate job accommodations.

Revision of State Equal Opportunity Plan

The process of updating a State equal opportunity plan may potentially involve various different people at different stages of implementation. Updating the plan will include drafting the new plan and completing all administrative procedures that may apply, such as revisions to a State's apprenticeship law or policy that may require a public notice and comment period, training for SAA staff on the revised State EEO Plan, and outreach to program sponsors to inform them of the relevant aspects of the revised State EEO plan once it has been approved by the Department. The updates to State equal opportunity plans include changing language and existing requirements such that they align with the regulatory changes herein. To calculate the costs, the Department assumed that the process to revise the State equal opportunity plan will take a full year of effort (2,080 hours) to complete.¹³⁹ This is the Department's best estimate for updating the existing State equal opportunity plan. For simplicity, we assumed that an SAA human resource manager will complete the task at an hourly compensation rate of \$62.33.¹⁴⁰ This amounts to a one-time cost of \$3.24 million in the first year $(2,080 \text{ hours} \times \$62.33 \times 25)$.¹⁴¹

Intermediate Step Between a Registered Sponsor and a Deregistered Sponsor

The Final Rule creates an intermediary step regarding suspending new apprentices before deregistration proceedings are instituted (§ 30.15(b)). Currently, deregistration of an

¹³⁹ Note that this calculation is only the administrative costs of updating the State equal opportunity plan, as opposed to the costs of implementing the new plan, or any new burdens on State Agencies. Since the updated State equal opportunity plan should reflect the Federal regulations, these costs should be accounted for and addressed elsewhere in the analysis under discussions of costs.

¹⁴⁰ We calculated the hourly compensation rate for a human resource manager at a State agency by multiplying the hourly wage of \$39.70 (GS-13 step 5) by 1.57 for the State agency. The hourly compensation rate for a human resource manager at a State agency is thus \$62.33 $(\$39.70 \times 1.57)$.

¹⁴¹ The estimated time to complete the revisions is 12 months (2,080 hours). The 2017 calculation used the hourly compensation rate for a state human resource manager (\$62.33) multiplied by 2,080 (the assumed number of work hours in a year) and by the total number of State Apprenticeship Agencies (25) to obtain a total cost of \$3.24 million $(2,080 \times \$62.33 \times 25)$. This cost only accrues in the first year of the ten-year analysis period.

apprenticeship program occurs when the sponsor fails to demonstrate compliance with the 1978 Final Rule. The new suspension step allows sponsors an adequate span of time to update their practices and be in compliance without having to be deregistered and then reregistered at a later date. Under this procedure, a Registration Agency may suspend a registration of new apprentices until the sponsor has achieved compliance with part 30 through the completion of a voluntary compliance action plan or until deregistration proceedings are initiated by the Registration Agency.

The intermediary step represents a benefit because it allows sponsors to comply without having to be deregistered and then reregister or abandon their program. The benefits of this provision are difficult to quantify because some programs eligible for deregistration may seek deregistration voluntarily.

Workplace Accommodations for Apprentices With Disabilities

The Final Rule prohibits discrimination against individuals with disabilities and requires sponsors to take affirmative action to provide equal

opportunity in apprenticeship to qualified individuals with disabilities. With respect to the sponsor's duty to ensure non-discrimination based on disability, the sponsor must provide necessary reasonable accommodations to ensure applicants and apprentices with disabilities receive equal opportunity in apprenticeship. Since most, if not all, sponsors already are subject to the ADA as amended, and if a Federal contractor to section 503 of the Rehabilitation Act, sponsors already have a duty under existing law to provide reasonable accommodations for qualified individuals with disabilities, and thus there is no new burden associated with any duty to provide reasonable accommodation under part 30, as that duty already exists under Federal law. For any sponsor that may not already be required under the law to provide such accommodations (*e.g.*, any sponsor with fewer than 15 employees would not be covered by the ADA), we expect the resulting burden to be small. A recent study conducted by the Job Accommodation Network (JAN), a service of the Department's Office of Disability Employment Policy (ODEP), shows that the majority of employers in

the study (57 percent) reported no additional accommodation costs and the rest (43 percent) reported one-time costs of \$500 on average.¹⁴² This study shows that the benefits to employers, such as improving productivity and morale, retaining valuable employees, and improving workplace diversity, outweigh the low cost.

4. Summary of Cost-Benefit Analysis

Exhibit 3 presents a summary of the first-year costs of the Final Rule, as described above. As shown in the exhibit, the total first-year cost of the Final Rule is \$42.88 million. The Department was able to only quantify benefits (*i.e.*, cost-savings) of the Final Rule resulting from the benefit from more efficient utilization analysis and goal setting by the Department. The Department estimated that this time saving yield \$4.56 or \$5.83 million in benefits over the 10-year period (with 7 percent and 3 percent discounting, respectively).

¹⁴² Beth Loy, "Accommodation and Compliance Series Workplace Accommodations: Low Cost, High Impact," Job Accommodation Network (2014), <http://askjan.org/media/lowcosthighimpact.html>.

Exhibit 3: Summary of First-Year Cost			
	Provision	Entity Affected	Monetized Costs (\$ Million)
1	Post equal opportunity pledge	Sponsor	\$0.23
3	Universal outreach	Sponsor	\$5.77
4	Notice of compliance review	SSA	\$0.05
5	Notice of compliance review	OA	\$0.05
6	Revision of state EEO plan	SSA	\$3.24
7	Time required to read and review NPRM	Sponsor	\$7.04
8	Orientation and periodic information sessions	Sponsor/Apprentice	\$26.44
11	Data tool development	Sponsor	\$0.06
	<i>Total First-Year Cost</i>		\$42.88

Exhibit 4 presents a summary of the monetized costs and benefits associated with the Final Rule over the 10-year analysis period. The monetized costs

and benefits displayed are the yearly summations of the calculations described above. Costs and benefits are presented as undiscounted 10-year

totals, and as present values with 7 and 3 percent discount rates.

Exhibit 4: Summary of Monetized Benefits and Costs		
Year	Monetized Benefits	Monetized Costs
	\$ Million/year	\$ Million/year
2017	\$0.00	\$42.88
2018	\$0.00	\$36.84
2019	\$0.77	\$45.50
2020	\$0.81	\$49.32
2021	\$0.85	\$53.12
2022	\$0.88	\$58.28
2023	\$0.91	\$61.93
2024	\$0.93	\$63.50
2025	\$0.95	\$66.29
2026	\$0.97	\$68.76
<i>Undiscounted</i>	\$7.08	\$546.42
<i>7% Discounted</i>	\$4.56	\$370.27
<i>3% Discounted</i>	\$5.83	\$458.90
<i>Annualized 7%</i>	\$0.65	\$52.72
<i>Annualized 3%</i>	\$0.68	\$53.80

Primary estimates of the 10-year monetized costs of the Final Rule are \$370.27 million and \$458.90 million (with 7 and 3 percent discounting, respectively). The 10-year monetized benefits of the Final Rule are estimated at \$4.56 million or \$5.83 million (with 7 and 3 percent discounting, respectively).¹⁴³

Due to data limitations, the Department did not quantify several important benefits to society provided by the Final Rule. The Final Rule is expected to result in several overarching benefits to apprenticeship programs and specific benefits resulting from a clearer, more systematic rule. As discussed above, equal opportunity policies may lead to both efficiency gains and distributional impacts for society. The Final Rule may reduce barriers to entry in apprenticeship programs for women, minorities, and individuals with disabilities, fostering a distributional effect, and may alleviate the inefficiencies in the job market these barriers create. It may also benefit businesses, as discussed above.

The Final Rule focuses on making the existing EEO policy consistent and standard across the National Registered Apprenticeship System. In doing so, several tasks already undertaken by sponsors, apprentices, and Registration Agencies have been simplified. For instance, the clarified complaint process better informs apprentices, sponsors, and Registration Agencies of their roles and expectations. The Final Rule also develops a simpler methodology for the apprentice selection process and offers sponsors the flexibility to choose a mechanism that aligns with their State's specific equal opportunity regulations. Much of the new language provides consistency with existing equal opportunity laws and part 29 already applicable to these affected entities. Finally, the Final Rule streamlines procedures already in place under the 1978 Final Rule.

5. Regulatory Alternatives

In addition to the Final Rule, the Department has considered four

regulatory alternatives: (a) Take no action, that is, to leave the 1978 Final Rule intact; (b) increase the Department's enforcement efforts of the 1978 Final Rule; (c) apply the same affirmative action requirements set forth in this rule to all sponsors, regardless of size; and (d) rely on individuals participating in the National Registered Apprenticeship System to identify and report to Registration Agencies potential cases of discrimination based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability.

The Department conducted economic analyses of the four alternatives to better understand their costs and benefits and the implied tradeoffs (in terms of the costs and benefits that would be realized) relative to the Final Rule. Below is a discussion of each alternative along with an estimation of their costs and benefits. All costs and benefits use the 1978 Final Rule as the baseline for the analysis. Finally, we summarize the total costs and benefits of each alternative.

a. Take No Action

This alternative yields no additional costs to society because it does not deviate from the baseline, that is, the 1978 Final Rule. This alternative, however, also yields no additional benefits in terms of ensuring equal opportunities for women, minorities, individuals with disabilities, LGBT individuals, and those ages 40 or older.

b. Increase Enforcement of Original Regulation

This alternative maintains the original 1978 Final Rule but increases the monitoring of apprenticeship programs. This alternative increases the burden on the SAAs and the Department to enforce the equal opportunity standards. To determine the cost of this alternative, we assumed that the frequency of compliance reviews will increase by 50 percent, implying that sponsors would be evaluated by the Registration Agency (the Department or SAAs) on a more frequent basis. With the existing

compliance review rate at 20 percent—meaning that approximately one in five sponsors undergoes a compliance review every year—a 50 percent increase would constitute an extra 10 percent of sponsors (20 percent \times 0.5) undergoing compliance reviews each year for a total of 30 percent of sponsors (20 percent + 10 percent) undergoing annual compliance reviews.

To calculate the cost of this alternative, the Department assumed that each compliance review takes 40 hours to complete. This estimate includes time for preparation, conducting the review, writing up the findings and guidance to sponsors, reviewing and approving the final documents to be provided to sponsors, and providing technical assistance, where appropriate. We multiplied the 40 hours needed to complete a review by the increase in the annual number of reviews by 10 percent (2,381 = 23,811 \times 10 percent in 2017) by the hourly compensation rate of an SAA human resource manager (\$62.33) and by the hourly compensation rate of an OA human resource manager (\$64.71).¹⁴⁴ We also multiplied this number by 50 percent, assuming that half of the sponsors report to a SAA and half report to OA. The cost of increased compliance reviews in the first year is \$2.97 million for SAAs (23,811 \times 50 percent \times \$62.33 \times 40 \times 10 percent) and \$3.08 million for OA (23,811 \times 50 percent \times \$64.71 \times 40 \times 10 percent). The annualized costs range from \$3.57 million to \$3.61 million for SAAs (with 7 and 3 percent discounting, respectively) and from \$3.70 million to \$3.75 million for OA (with 7 and 3 percent discounting, respectively). The 10-year costs for this alternative range from \$51.08 million to \$62.77 million (with 7 and 3 percent discounting, respectively).

Exhibit 5 presents a summary of the monetized costs of this alternative option over the 10-year analysis period. Costs are presented as undiscounted 10-year totals, and as present values, using 7 percent and 3 percent discount rates.

¹⁴³ The Department believes that the overhead costs associated with the Final Rule are small because the additional activities required by the Final Rule will be performed by existing employees whose overhead costs are already covered. The Department acknowledges that it is possible that additional overhead costs might be incurred, however, and has conducted a sensitivity analysis by calculating the impact of more significant overhead costs (an overhead rate of 17 percent). This rate, used by the U.S. Environmental Protection Agency (EPA) in its final rules (see, for example, EPA Electronic Reporting under the Toxic

Substances Control Act Final Rule, Supporting and Related Material), is based on a Chemical Manufacturers Association study. An overhead rate from chemical manufacturing might not be appropriate for all industries, so there may be substantial uncertainty concerning the estimates based on this illustrative example. Over the 10-year period, using an overhead rate of 17 percent would increase the total cost of the Final Rule from \$370.27 million to \$433.11 million and from \$458.90 million to \$536.79 million (with 7 and 3 percent discounting, respectively). For the reasons stated above, the Department believes this estimate

overestimates the additional costs arising from overhead costs while recognizing that there is not one uniform approach to estimating the marginal cost of labor.

¹⁴⁴ We calculated the hourly compensation rate for a human resource manager at OA by multiplying the hourly wage of \$39.70 (GS-13 step 5) by 1.63 to account for public-sector employee benefits. The hourly compensation rate for a human resource manager at a Federal agency is thus \$64.71 (\$39.70 \times 1.63).

Exhibit 5: Costs of Increasing Enforcement				
Year	Costs	Sponsors	SAA	OA
	\$ Million/year	\$ Million/year	\$ Million/year	\$ Million/year
2017	\$6.05	\$0.00	\$2.97	\$3.08
2018	\$6.41	\$0.00	\$3.15	\$3.27
2019	\$6.76	\$0.00	\$3.32	\$3.44
2020	\$7.09	\$0.00	\$3.48	\$3.61
2021	\$7.40	\$0.00	\$3.63	\$3.77
2022	\$7.69	\$0.00	\$3.77	\$3.91
2023	\$7.94	\$0.00	\$3.89	\$4.04
2024	\$8.15	\$0.00	\$4.00	\$4.15
2025	\$8.32	\$0.00	\$4.08	\$4.24
2026	\$8.44	\$0.00	\$4.14	\$4.30
<i>Undiscounted</i>	\$74.25	\$0.00	\$36.43	\$37.82
<i>7% Discounted</i>	\$51.08	\$0.00	\$25.06	\$26.02
<i>3% Discounted</i>	\$62.77	\$0.00	\$30.80	\$31.97
<i>Annualized 7%</i>	\$7.27	\$0.00	\$3.57	\$3.70
<i>Annualized 3%</i>	\$7.36	\$0.00	\$3.61	\$3.75

Increasing monitoring and evaluation of current efforts will increase administrative costs to the Department and may improve compliance to the existing requirements, but it would not modernize the rule to be consistent with current law affecting workers with disabilities and older workers. Therefore this would not be a preferred option, as it excludes a major area of focus for the Department: Improving access to good jobs for individuals with disabilities, such as those offered by Registered Apprenticeship opportunities.

c. Apply the Same Affirmative Action Policy to All Sponsors Regardless of Size

The 1978 Final Rule and the Final Rule require that all sponsors with five or more apprentices maintain and update their AAPs. This alternative would apply the same AAP to all sponsors regardless of size. The Department believes that the incremental benefit of this action would be minimal compared to its incremental cost. This policy directly impacts the segment of the population that both qualifies as a small entity and also has few apprentices. Sponsors of small apprenticeship programs often have very few employees. Such sponsors would likely be overly burdened by the targeted outreach, recruitment, and retention requirements in § 30.8. For example, they might not have the staff and resource capacity to adequately conduct outreach to multiple organizations.

We believe that the original 1978 Final Rule restriction of requiring only those sponsors with five or more

apprentices to develop, maintain, and update their AAPs is an appropriate way to not disproportionately burden small entities.

To calculate the cost and benefits of this alternative, the Department completed the same calculations conducted for the Final Rule but increased the number of sponsors who have to establish an AAP. This new calculation assumed that all sponsors must determine utilization rates and underutilization and participate in targeted outreach and recruitment.

To calculate the costs associated with this alternative, we first calculated the cost for all sponsors to complete the utilization analysis. As discussed above, we assumed this process takes 0.5 hour of a human resource manager's time at an hourly compensation rate of \$73.39. We then divided the number of sponsors by 5 years to reflect that new utilization analyses occur approximately every five years. The resulting cost in 2019 is \$196,618 $((0.5 \times \$73.90 \times 26,606)/5)$. We repeated this calculation for each remaining year in the analysis period using the estimated number of sponsors for each year, resulting in an annualized cost ranging from \$164,939 (with 7 percent discounting) to \$173,394 (with 3 percent discounting).

To quantify the cost associated with sponsor familiarization with the data tool for the utilization analysis, the Department assumed that all sponsors (25,231 in 2018) will incur one hour of HR manager labor (\$73.90 per hour) to familiarize the organization with the tool. This is estimated to have a cost of \$1.86 million in 2018 $(25,231 \times \$73.90$

$\times 1)$. We repeated this calculation for the following years only for new sponsors to the program who will still need to acclimate themselves with the tool. This provision has an annualized cost of \$392,786 (with 7 percent discounting) and \$373,391 (with 3 percent discounting).

Once the data tool is developed, the Department estimates it will take one hour for a GS-13 employee (\$64.71 per hour) to conduct a utilization analysis for sponsors with fewer than 5 apprentices. This will result in a cost to the Department of \$258,251 in 2019 $(26,606 \times 75 \text{ percent} \times 1 \text{ hour} \times \$64.71/5)$ and an annualized cost ranging from \$216,642 (with 7 percent discounting) to \$178,378 (with 3 percent discounting).

The Department next calculated the costs for all sponsors to conduct a workforce analysis. All sponsors with five or more apprentices must conduct the first new workforce analysis within two years of the Final Rule's effective date and every 2.5 years after that. For these sponsors, this process is expected to take 2 hours of an HR manager's time (\$73.90 per hour) in 2018 compared to a baseline of 1 hour of an HR manager's time. We multiplied this 1 hour by an HR manager's wage and by 25 percent of active sponsors, resulting in a cost of \$466,143 $((25,231 \times 25 \text{ percent} \times 1 \text{ hour} \times \$73.90)$. For sponsors with fewer than five apprentices, this process is expected take 2 hours of an HR manager's time (\$73.90 per hour) and they are currently not required to conduct a workforce analysis. We multiplied \$73.90 by 75 percent of active sponsors and 2 hours for sponsors with fewer than 5 apprentices. The

resulting cost in 2018 is \$2.80 million ($(25,231 \times 75 \text{ percent} \times 2 \text{ hours} \times \$73.90)$) and the total cost for all sponsors in 2018 is \$3.26 million ($\$466,143 + \2.80 million).

In subsequent years after 2018, for sponsors with five or more apprentices, this process is expected to take 2 hours of an HR manager's time ($\$73.90 \text{ per hour}$) every 2.5 years compared to a baseline of 1 hour of an HR manager's time annually, for a net saving of 0.2 hour per year. We multiplied this 0.2 hour by an HR manager's wage and by 25 percent of active sponsors, resulting in cost savings in 2019—the first year in which new workforce analyses will be conducted—of $\$98,309$ ($(26,606 \times 25 \text{ percent} \times 0.2 \text{ hour} \times \$73.90)$). For sponsors with fewer than five apprentices, this process is expected to take 2 hours of an HR manager's time ($\$73.90 \text{ per hour}$) every 2.5 years and they are currently not required to conduct a workforce analysis. We multiplied $\$73.90$ by 75 percent of active sponsors and 2 hours, dividing by 2.5 years to reflect that the new workforce analyses occur approximately every two and a half years. The resulting cost in 2019 is $\$1.18 \text{ million}$ ($(26,606 \times 75 \text{ percent} \times 2 \text{ hours} \times \$73.90) / 2.5$).

The cost for all sponsors to conduct a workforce analysis in 2019 is $\$1.08 \text{ million}$ ($\$1.18 \text{ million less } \$98,309$). This calculation was repeated in subsequent years, resulting in an annualized cost ranging from $\$1.31 \text{ million}$ to $\$1.32 \text{ million}$ with 7 percent and 3 percent discounting, respectively.

We next calculated the costs of expanding the requirements for all apprenticeship sponsors to conduct targeted outreach. The cost of targeted outreach and recruitment mirrors the cost above except that we no longer scale it by the 25 percent of sponsors. We again assumed that each sponsor contacts five organizations; that a human resource manager would take 30 minutes (0.5 hour) to complete this task at an hourly compensation rate of $\$73.90$; and that an administrative assistant would spend 30 minutes (0.5 hours) at an hourly compensation rate of $\$23.10$.

The cost of this provision per affected sponsor is the time each staff member devotes to this task multiplied by their associated hourly compensation rates. This calculation resulted in a labor cost of $\$48.50$ ($(\$73.90 \times 0.5) + (\$23.10 \times 0.5)$) per source. We then multiplied this labor cost by the number of outreach sources (5); the number of sponsors (26,606 in 2019); 95 percent for sponsors whose utilization analyses revealed underutilization; and 20 percent for sponsors who undergo

compliance review each year. This calculation results in a total cost of $\$1.23 \text{ million}$ in 2019 ($\$48.50 \times 5 \times 26,606 \times 95 \text{ percent} \times 20 \text{ percent}$). We repeated this calculation for each remaining year in the analysis period using the estimated number of sponsors for each year, resulting in an annualized cost ranging from $\$3.75 \text{ million}$ to $\$4.07 \text{ million}$ with 7 percent and 3 percent discounting, respectively.

Within the first two years of this program, all sponsors will need to survey their current workforce with the invitation to self-identify. The Department calculated that sponsors (25,231 in 2018) will survey an average of 26 apprentices with an invitation to self-identify provided by the Department. The Department estimated that it would take an apprentice ($\$18.72 \text{ per hour}$) 5 minutes (0.08 hours) to complete the form. Furthermore, an administrative assistant ($\$23.10 \text{ per hour}$) would need to spend 0.5 hour annually to record and keep the forms. This provision has a cost of $\$1.27 \text{ million}$ in 2018 ($(25,231 \times 26 \times 0.08 \text{ hour} \times \$18.72) + (25,231 \times 0.5 \text{ hour} \times \$23.10)$).

In subsequent years, all sponsors will be required to administer the invitation to self-identify twice: once to all applicants prior to the offer of apprenticeship, and once after the offer of apprenticeship to those who have been extended offers. The Department estimates that sponsors post 27 positions per year and receive 15 applicants per posting in 2019. Of those positions, the Department estimated that 27 offers of enrollment are made and 27 apprentices choose to enroll. This requirement has an undiscounted second year (2019) cost of $\$17.47 \text{ million}$ ($26,606 \times ((15 \text{ applications} \times 27 \text{ job listings} \times .08) + (27 \text{ offers of apprenticeship} \times .08)) \times \$18.72 + 26,606 \times 0.5 \times \23.10). For the 10-year analysis period, this provision has an annualized cost of $\$16.76 \text{ million}$ and $\$17.71 \text{ million}$ (at 7 percent and 3 percent discounting, respectively).¹⁴⁵ In addition, all sponsors are required to remind apprentices yearly that they can update their invitation to self-identify. The Department assumed that sponsors would send out an annual reminder email beginning in 2018 at the cost of $\$49,168$ ($25,231 \times 0.08 \text{ hour} \times \23.10). We repeated this calculation for each remaining year in the analysis period using the estimated number of sponsors for each year. This provision in total has

¹⁴⁵ It is assumed that there will be 100 percent participation in the invitation to self-identify and therefore, the cost of this provision is likely overestimated.

an annualized cost of $\$16.80 \text{ million}$ and $\$17.75 \text{ million}$ (at 7 percent and 3 percent discounting, respectively).

Lastly, we calculated the cost of affirmative action plan reviews for all sponsors. Assuming a two-year phase-in and the same time requirements for each element of the review, we estimate that, in 2018, the personnel process review will cost $\$14.92 \text{ million}$ ($25,231 \times 8 \text{ hours} \times \73.90), the written affirmative action program review at the time of the compliance review will cost $\$4.47 \text{ million}$ ($(25,231 \times 12 \text{ hours} \times \$73.90) / 5 \text{ years between reviews}$), and the written affirmative action program review conducted within three years of the compliance review will cost $\$2.24 \text{ million}$ ($(25,231 \times 6 \text{ hours} \times \$73.90) / 5 \text{ years between reviews}$) for a total cost of $\$21.63 \text{ million}$. We repeated this calculation for each remaining year in the analysis period using the estimated number of sponsors for each year, resulting in an annualized cost ranging from $\$21.82 \text{ million}$ to $\$22.50 \text{ million}$ with 7 percent and 3 percent discounting, respectively.

The remaining costs for this alternative are the same as for the Final Rule. The total 10-year costs of this alternative range from $\$589.29 \text{ million}$ to $\$736.27 \text{ million}$ (with 7 percent and 3 percent discounting, respectively).

d. Rely on Individuals Participating in the National Registered Apprenticeship System To Identify and Report Potential Cases of Discrimination

Under this alternative, individuals participating in the National Registered Apprenticeship System would be responsible for identifying and reporting potential cases of discrimination to Registration Agencies, in contrast to both the existing and the Final Rule's part 30 regulatory structures, which require Registration Agencies to monitor and enforce the EEO and affirmative action obligations via regular compliance reviews. This alternative reduces the burden on sponsors by relying on a complaint-based system.

Under this alternative, apprentices' rights for non-discrimination would still be protected, but Registration Agencies would have a more passive role in how they monitor and evaluate program sponsors' compliance with the regulations. OA and SAAs would still conduct compliance reviews (in § 30.11 and existing § 30.9) but not as frequently.

Under this alternative, to identify when discrimination may be occurring and whether sponsors are violating the non-discrimination and affirmative action requirements in the part 30 regulations, the Registration Agencies

would primarily rely on: (1) The complaints filed under § 30.12 and existing § 30.11 and self-evaluations from sponsors, and (2) a process where sponsors conduct a self-evaluation and report back to the Registration Agency. The Department believes that this approach to regulating discrimination and non-compliance with the part 30 regulations would not adequately prevent discrimination and promote equal opportunity in apprenticeship programs.

Registration Agencies under this alternative would provide sponsors with a format and process to conduct a self-evaluation relative to their compliance with these EEO regulations. Sponsors would then submit their self-evaluation to the Registration Agency for review and analysis. If the Registration Agency is satisfied with the findings from the self-evaluation, the sponsor would be informed accordingly, and no additional actions would be necessary at that time. If the Registration Agency's review of sponsor's self-evaluation identifies deficiencies, then the Registration Agency would conduct an on-site review and provide technical assistance as appropriate.

These complaints and self-evaluations would serve as a "trigger" for Registration Agencies to adopt a more active role of visiting program sites to conduct compliance reviews and provide technical assistance, as appropriate.

The Department assumes that the SAA and OA would reduce the number of compliance reviews by 20 percent. To calculate this cost savings, we multiplied the total number of sponsors (23,811 in 2017) by the percentage decrease in reviews. This results in 952 fewer reviews in the first year ($23,811 \times 20 \text{ percent} \times 20 \text{ percent}$). We then multiplied the total number of reviews by 50 percent assuming that the SAAs handle half the reviews and OA handles the remaining half. Finally, we multiplied the total reduction in reviews for each agency ($476 = 0.5 \times 952$) by the hours needed to complete each review (40 hours) and by the

human resource managers' wages (\$62.33 and \$64.71 per hour for the SAAs and OA respectively). The resulting cost savings in the first year is \$1.19 million ($476 \times \62.33×40) for SAAs and \$1.23 million ($476 \times \64.71×40) for OA. We repeated this calculation for each year using the projected number of sponsors in each year. This results in an annualized savings for the SAAs of \$1.42 million (with 7 percent discounting) to \$1.44 million (with 3 percent discounting) and \$1.48 million (with 7 percent discounting) to \$1.50 million (with 3 percent discounting) for OA.

To estimate the cost of completing the self-evaluations, the Department assumes that each sponsor completes one evaluation each year and that the sponsor will dedicate 8 hours to complete this review. We multiplied this labor time by the hourly compensation rate of a human resource manager (\$73.90) and by the total number of sponsors (23,811). The cost to the sponsors is thus \$14.08 million ($23,811 \times 1 \times 8 \times \73.90) in 2017. This calculation was repeated according to the projected number of sponsors each year, with an annualized cost ranging from \$16.92 million (with 7 percent discounting) to \$17.12 million (with 3 percent discounting).

The self-evaluations will then be reviewed by either the SAAs or OA. The Department calculates this burden by assuming that half of the evaluations are completed by the SAAs and the rest are completed by OA; thus each agency reviews 11,906 ($23,811 \times 50 \text{ percent}$) evaluations in the first year. We multiplied the number of self-evaluations by the time needed to review the evaluation, 5 hours, and finally by the corresponding hourly compensation rates (\$62.33 and \$64.71 for the SAAs and OA, respectively). The cost in 2017 is \$3.71 million for the SAAs and \$3.88 million for OA. This calculation was repeated according to the projected number of sponsors each year, with an annualized cost of \$4.49 million (with 7 percent discounting) to \$4.54 million (with 3 percent

discounting) for SAAs and \$4.66 million (with 7 percent discounting) to \$4.71 million (with 3 percent discounting) for OA.

Lastly, the Department estimated the cost of completing and reviewing the individual complaints. The apprentices would be filling out these individual complaints and although the process existed in the 1978 rule, the Department expects that through general outreach the number of complaints would increase by 100 per year. We assumed that each individual complaint takes 15 minutes to file (0.25 hours). We then multiplied the 0.25 hours by the hourly compensation rate for an apprentice (\$18.72) to estimate a labor cost of \$4.68 and a total cost of \$468 ($\4.68×100) each year of the analysis period.¹⁴⁶

The Department again assumed that half of these complaints go to SAAs and half go to OA, or 50 complaints total for each agency. To calculate the cost, we multiplied the time needed to review each complaint (8 hours) by 50 complaints and by the compensation rate for a human resource manager. The resulting cost in 2017 is \$24,932 ($50 \times 8 \times \62.33) for the SAAs and \$25,884 ($50 \times 8 \times \64.71) for OA. This calculation was repeated for the nine remaining years in the analysis period. The total 10-year costs of this alternative range from \$183.08 million to \$224.95 million (with 7 percent and 3 percent discounting, respectively).

e. Summary of Alternatives

Exhibit 6 below summarizes the monetized benefits, costs, and net present values for the alternatives discussed above. We again use discount rates of 3 and 7 percent, respectively, to estimate the benefits, costs, and net present values of the alternatives over the 10-year analysis period.

¹⁴⁶ We calculated the hourly compensation rate for an apprentice by multiplying the median hourly wage of \$13.00 (as published by PayScale for an apprentice electrician) by 1.43 to account for private-sector employee benefits (source: OES survey). Thus, the hourly compensation rate for an apprentice is \$18.59 ($\13.00×1.43).

Exhibit 6: Summary of Alternatives					
Totals (in Million \$)					
7-percent discount		Benefits	Annualized benefits	Costs	Annualized costs
	No action	\$0.00	\$0.00	\$0.00	\$0.00
	Final Rule	\$4.56	\$0.65	\$370.27	\$52.72
	Increased enforcement	\$0.00	\$0.00	\$51.08	\$7.27
	Same policies regardless of size	\$16.74	\$2.38	\$589.29	\$83.90
	Complaint-based	\$20.43	\$2.91	\$183.08	\$26.07
3-percent discount		Benefits	Annualized benefits	Costs	Annualized costs
	No action	\$0.00	\$0.00	\$0.00	\$0.00
	Final Rule	\$5.83	\$0.68	\$458.90	\$53.80
	Increased enforcement	\$0.00	\$0.00	\$62.77	\$7.36
	Same policies regardless of size	\$21.37	\$2.51	\$736.27	\$86.31
	Complaint-based	\$25.11	\$2.94	\$224.95	\$26.37

Regulatory Flexibility Act

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 their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses.¹⁴⁷ 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 and 604. As part of a regulatory proposal, the RFA requires a federal agency to prepare, and make available for public comment, an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. *Id.* at 603(a). When an agency expects that a proposed rule will not have a significant economic impact on small entities, or the number of small entities impacted would be less than substantial, the agency may certify those results to the

Chief Counsel for Advocacy of the Small Business Administration (SBA). *Id.* at 605(b). The certification must include a statement providing the factual basis for the agency's determination. *Id.*

Based on the analysis below, the Department has notified the Chief Counsel for Advocacy, SBA, under the RFA at 5 U.S.C. 605(b), and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

1. Classes of Small Entities

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. 5 U.S.C. 601(3); 15 U.S.C. 632. The definition of small entity

¹⁴⁷ Public Law 96–354 (Sept. 19, 1980), Public Law 104–121 (March 29, 1996).

varies from industry to industry to properly reflect industry size differences. 13 CFR 121.201. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. Using SBA size standards, the Department has conducted a small entity impact analysis on small entities in the five industry categories with the most registered apprenticeship programs and for which data were available: Construction, Manufacturing, Service, Transportation and Communication, and Trade.¹⁴⁸ These top five industry categories account for 86 percent of the total number of apprenticeship sponsors who had active apprenticeships in FY 2015.¹⁴⁹

One industry, Public Administration, made the initial top-five list but is not included in this analysis because no data on the revenue of small local jurisdictions were available. Local jurisdictions are classified as small when their population is less than 50,000. 5 U.S.C. 601(5).

Registered apprenticeship program sponsors may be employers, employer associations, industry associations, or labor management organizations and, thus, may represent businesses, multiple businesses, and not-for-profit organizations. The requirements of the Final Rule, however, fall on the sponsor, and therefore we used sponsor data to create the industry breakdowns.

The Department has adopted the SBA small business size standard for each of the five industry categories. Since the industry categories include multiple NAICS sectors, some industry categories will reflect multiple SBA definitions. We accounted for industries included in each industry category. In broader NAICS categories, such as Manufacturing (NAICS 31–33), the SBA has designated different standards for each six-digit NAICS code within the larger category. The Department recorded these narrower standards in its

¹⁴⁸ According to RAPIDS, the percent of programs (of all sizes) in the selected sectors in 2015 were as follows: Construction, 40.2 percent; Manufacturing, 26.7 percent; Service, 8.6 percent; Transportation and Communication, 7.3 percent; and Trade, 2.7 percent.

¹⁴⁹ RAPIDS includes a portion of all registered apprenticeship programs and apprentices nationwide because SAAs that are recognized by the Department of Labor to serve as the Registration Agency may choose, but are not required, to participate in RAPIDS. Therefore, RAPIDS includes individual level apprentice and apprenticeship program data for the 25 states in which OA is the Registration agency and 7 SAAs that participate in RAPIDS. Therefore, RAPIDS includes data from 32 of the 50 states and the Department estimates that they represent 55 to 60 percent of all sponsors and 50 to 55 percent of all apprentices. We assume that our data set is a good predictor of the population of apprenticeship programs nationwide.

analysis; in this document, we offer the lowest and most restrictive standard where multiple standards exist. We follow the SBA standards, which are based on annual revenue for some industries and on number of employees for other industries.

The “Construction” industry category follows NAICS exactly (NAICS 23) and, thus, we used the SBA definitions of revenue less than or equal to \$36.5 million for NAICS 236 and 237 and \$15 million for NAICS 238. All sponsors included in the data fell into one of these three NAICS codes.

The “Manufacturing” industry category includes the standard sector for Manufacturing (NAICS 31–33), but also covers Logging (NAICS 113310); Sand, Gravel, Clay, and Ceramic and Refractory Minerals Mining and Quarrying (NAICS 21232); and Newspaper, Periodical, Book, and Directory Publishers (NAICS 5111). The corresponding SBA small size standards are as follows: Manufacturing—500 employees or less; Newspaper, Periodical, Book, and Directory Publishers—500 employees or less; Logging—500 employees or less; Sand, Gravel, Clay, and Ceramic—500 employees or less; and Refractory Minerals Mining and Quarrying—500 employees or less.¹⁵⁰

The “Service” industry category covers the largest number of NAICS sectors, subsectors, and industries.¹⁵¹ The majority of these industries use the SBA small business size standard of revenue of less than or equal to \$7.5 million, with the exception of Motion Picture and Video Production, which uses \$32.5 million; and Dental Laboratories, which uses 500 employees or less.

The “Transportation and Communication” industry category includes transportation and warehousing (NAICS 48–49), Marinas (NAICS 713930), Other Nonhazardous

¹⁵⁰ When an industry breakdown uses multiple sector codes, we used the more specific NAICS code. Typically, the definition of the industry category centers on a particular sector (for example, Manufacturing) but it may also include some satellite industries. For example, Logging is the only industry in Agriculture, Forestry, Fishing, and Hunting (NAICS 11). Thus, including the entire sector would be a poor representation of the “Manufacturing” industry category.

¹⁵¹ The included industry sectors are Arts, Entertainment and Recreation (NAICS 71); Accommodation (NAICS 721); Other Services (NAICS 81); Administrative and Support and Waste Management and Remediation Services (NAICS 56); Professional, Scientific, and Technical Services (NAICS 541); Rental and Leasing Services (NAICS 532); Motion Picture and Video Production (NAICS 512110); Dental Laboratories (NAICS 339116); Radio, Television and Other Electronic Stores (NAICS 44312); Educational Services (NAICS 611); and Health Care and Social Assistance (NAICS 62).

Waste Treatment and Disposal (NAICS 562219), Telecommunication (NAICS 517), Radio and TV Broadcasting (NAICS 5151), and Utilities (NAICS 221). The SBA size standard for these industries is revenue less than or equal to \$7.5 million or 500 employees or less for Transportation and Warehousing and Marinas; \$32.5 million or 1,500 employees or less for Telecommunication; \$38.5 million for Other Nonhazardous Waste Treatment and Disposal; and \$32.5 million for Radio and TV Broadcasting.¹⁵²

The “Trade” industry category includes Merchant Wholesalers, Nondurable Goods (NAICS 424) and Durable Goods (NAICS 423); Retail Trade (NAICS 44–45); Retail Bakeries (NAICS 311811); and Food Services and Drinking Places (NAICS 722). The associated SBA size standards are: Merchant Wholesalers, Nondurable Goods and Durable Goods—less than or equal to 100 employees, Retail Trade—revenue less than or equal to \$7.5 million, Retail Bakeries—less than or equal to 1,000 employees and Food Services and Drinking Places—revenue less than or equal to \$7.5 million.

SBA small business size standards are based on a comprehensive survey of industries, and are specific to each industry. Because each industry category covers multiple sectors, each category includes several criteria that can be used to identify small entities.¹⁵³ To determine the average number of employees by small entity, the revenue per employee for a small entity, and the percent of entities that qualify as a small entity, the Department retrieved data on number of employees and annual revenue from ReferenceUSA, a business information provider, for approximately 1,600 randomly selected companies. Using the SBA small business definitions and through this categorization process, we determined that approximately 91 percent (or 1,459) of the sample are small entities.¹⁵⁴

2. Impact on Small Entities

The Department has estimated the incremental costs for small entities from

¹⁵² Utilities are categorized as small when their total electric output does not exceed 4 million megawatt hours. Because we did not have readily available data on megawatt output, we set aside the Utilities subsector.

¹⁵³ The SBA classifies small entities at the industry level but, because our analysis considers affected sectors, we incorporate the most common industry standard for each sector or subsector.

¹⁵⁴ 91% represents an average of the five sectors. For construction, 91.6% of the sample is classified as small. For manufacturing, 87.1% of the sample is classified as small. For trade, 88.1% of the sample is classified as small. For services, 91.0% is classified as small. For transportation, 96.2% of the sample is classified as small.

the baseline of the 1978 Final Rule.¹⁵⁵ This analysis reflects the incremental cost of the Final Rule, as it adds to the requirements of the 1978 Final Rule. Using available data, we have estimated the costs of the following provisions: posting of the equal opportunity pledge, disseminating information about apprenticeship opportunities through universal outreach and recruitment, selected sponsors disseminating information about apprenticeship opportunities through targeted outreach, the time required to read and review the new regulatory requirements, offering periodic orientation and information sessions, developing a form for individuals to self-identify a disability, conducting utilization and workforce analyses, and reviewing affirmative action plans.

To examine the impact of this rule on small entities, we evaluated the impact of the incremental costs on a hypothetical small entity of average size. The total number of workers for the average small entity in the different sectors is as follows, based on ReferenceUSA sample data: Construction, 15.0; Manufacturing, 132.7; Service, 31.4; Transportation and Communication, 49.6; and Trade, 31.0.¹⁵⁶

Using 2015 data from ReferenceUSA we received revenue estimates for the sample of firms within each sector. The data showed that small entities within each sector had the following average revenue: Construction, \$3.10 million; Manufacturing, \$92.74 million; Service, \$1.58 million; Transportation and Communication, \$39.14 million; and Trade, \$11.48 million.

A significant economic burden results when the total incremental annual cost as a percentage of total average annual revenue is equal to or exceeds 3 percent.¹⁵⁷ Because the estimated annual burden of the Final Rule is less than 1 percent of the average annual revenue of each industry category, the Final Rule is not expected to cause a significant economic impact to small entities. These entities include individual employers, groups of

employers, labor management organizations, or industry associations that sponsor apprenticeships.

A provision-by-provision analysis of the estimated small entity impacts of the Final Rule is provided below.

3. Impacts of Final Rule Provisions

The following sections present the impacts that the Final Rule is estimated to have on small entities that sponsor apprentices.¹⁵⁸ These include: posting of the equal opportunity pledge, disseminating information about apprenticeship opportunities through universal outreach and recruitment to individuals with disabilities, disseminating information about apprenticeship opportunities through targeted outreach and recruitment, reading and reviewing the new regulatory requirements, offering periodic orientation and information sessions, providing a form for individuals to self-identify a disability, conducting utilization and workforce analyses, and reviewing affirmative action plans.

The Department estimated the per-entity cost for each one of these changes from the baseline, that is, the 1978 Final Rule. Because all the Final Rule provisions will have a similar impact on entities across economic sectors, we calculated impacts to a representative single entity.¹⁵⁹ As explained in detail below, the total impact amounts to approximately \$1,658.15 per affected small entity in the first year. Average annual cost per affected small entity in years 2 through 10 is \$2,098.23.¹⁶⁰ The analysis covers a 10-year period (2017 through 2026) to ensure it captures costs that accrue over time.

¹⁵⁸ The Department used ReferenceUSA data on number of employees per entity and annual revenue per entity to determine whether each entity in the sample was classified as small based on SBA definitions. The Department's previous treatment of sponsors with at least 5 apprentices or fewer than 5 apprentices is not directly relevant to this RFA analysis. Some sponsors with at least 5 apprentices may have been classified as small entities based on SBA standards if the number of employees or revenue did not exceed SBA standards for the corresponding NAICS code; similarly, some sponsors with fewer than 5 apprentices may have been classified as large if revenue exceeded SBA standards for the corresponding NAICS code.

¹⁵⁹ A large entity could have a single apprentice or a small entity could have multiple apprentices.

¹⁶⁰ Because the number of apprentices does not directly correlate with the size of the sponsor, we are unable to account for this difference. To avoid under-estimating the impacts, the Department assumed that the time to complete the review process is independent of the size of the entity and applied the same cost of this provision to entities regardless of their size.

a. Posting of the Equal Opportunity Pledge

The Final Rule requires sponsors to post their equal opportunity pledge at each individual sponsor location, including on bulletin boards and through electronic media (§ 30.3(b)(2)). The 1978 Final Rule did not contain a requirement for posting the pledge. This provision represents a cost to sponsors, and reflects the time needed to put up a physical copy of the pledge and post it on their Web site as well as the cost of the materials.

To estimate the labor cost of this provision, we assumed that it would take a sponsor 5 minutes (0.08 hours) to put up a physical copy of the pledge, and that this task would be performed by an administrative assistant at an average hourly compensation rate of \$23.10. We multiplied the time estimate for this provision by the average hourly compensation rate to obtain a total labor cost per sponsor of \$1.85 ($\23.10×0.08).

To estimate the materials cost, we assumed that the pledge is one page, and that the cost per page for photocopying is \$0.08, resulting in a materials cost of \$0.08 ($\0.08×1) per sponsor.

The Department also assumes it will take a sponsor 10 minutes (0.17 hours) to post the pledge on its Web site and that this task will be performed by a web developer at an hourly compensation rate of \$45.24. The cost of posting the pledge on the sponsor's Web site is \$7.69 ($\45.24×0.17). Summing the labor and materials costs results in an annual per-entity cost of \$9.62 ($\$1.85 + \$0.08 + \7.69) due to this provision.

b. Disseminate Information About Apprenticeship Opportunities Through Universal Outreach and Recruitment, Including to Individuals With Disabilities

Under the 1978 Final Rule, sponsors with five or more apprentices are required to develop and maintain an affirmative action program, which requires, among other things, outreach and recruitment of women and minorities. The Final Rule requires that sponsors, in addition to contacting organizations that reach women and minorities, also contact organizations that serve individuals with disabilities. Sponsors are required to develop a list of recruitment sources that generate referrals from all demographic groups, women, minorities, and individuals with disabilities, with contact information for each source. Further, sponsors are required to notify these sources of any apprenticeship

¹⁵⁵ 43 FR 20760 (May 12, 1978) (requiring the inclusion of female apprentices in AAPs).

¹⁵⁶ Source: ReferenceUSA sample data, 2015. These figures originate from the average number of employees and average revenue by employee size for a business that qualifies as a small business based on the sector-specific size standard.

¹⁵⁷ See Small Business Association, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, 17–19 (June 2010), available at <http://www.sba.gov/content/guide-government-agencies-how-comply-with-regulatory-flexibility-act-0> (last accessed Apr. 7, 2011). The Department has used the 3 percent threshold in previous regulations.

opportunities, preferably with 30 days advance notice.

We assumed that the cost to sponsors to distribute the information about apprenticeship opportunities to organizations serving individuals with disabilities will be the labor cost. We also assumed that the labor for this provision will be performed by a human resource manager and an administrative assistant with average hourly compensation rates of \$73.90 and \$23.10, respectively.

The Department estimated that this dissemination task will take 0.5 hours of a human resource manager's time and 0.5 hours of an administrative assistant's time per targeted source. The cost of this provision per affected sponsor is, therefore, the time each staff member devotes to this task (0.5 hours for a human resource manager and 0.5 hours for an administrative assistant) multiplied by their associated average hourly compensation rates. This calculation resulted in a total labor cost of \$48.50 $((\$73.90 \times 0.5) + (\$23.10 \times 0.5))$ per source. This total labor cost is then multiplied by the number of outreach sources (5). The annual per-entity cost for this provision is \$242.50 $(\$48.50 \times 5)$ for each entity.

c. Disseminate Information About Apprenticeship Opportunities Through Targeted Outreach and Recruitment, Including to Individuals With Disabilities

In addition to the normal outreach, recruitment, and retention activities required of all sponsors under § 30.3(b), the Final Rule requires sponsors of apprenticeship programs, whose utilization analyses revealed underutilization of Hispanics or Latinos, women, or a particular racial minority group(s) and/or who have determined pursuant to § 30.7(f) that there are problem areas with respect to its outreach, recruitment, and retention activities of individuals with disabilities, to engage in targeted outreach, as discussed in § 30.8. We assume that this additional outreach will happen in the same manner as the universal outreach discussed above.

This additional outreach, recruitment, and retention will be required for sponsors who employ five or more apprentices and who are not effectively recruiting and retaining a particular underutilized group. We assume that 25 percent of all sponsors currently employ five or more apprentices, and are thus required to develop and maintain an

affirmative action program.¹⁶¹ However, the Department recognizes that some sponsors may already be employing persons with disabilities as registered apprentices and, therefore, this analysis overestimates those who need to set goals. Unfortunately, there are no available data on the number of sponsors who are employing persons with disabilities as registered apprentices.

For this analysis, we assumed that the 25 percent of all sponsors employing five or more apprentices remains constant throughout the 10-year analysis period. In reality, this percentage will fluctuate as sponsors take on new apprentices and as apprentices complete their programs. We also expect that, over time, successful outreach will lead to more hiring of persons with disabilities and that sponsors will meet their recruitment goals and not be required to complete this additional outreach.

We assumed that the cost to sponsors to distribute information about apprenticeship opportunities to organizations serving individuals with disabilities will be the labor cost. We also assumed that the labor for this provision will be performed by a human resource manager and an administrative assistant with average hourly compensation rates of \$73.90 and \$23.10, respectively.

The Department estimated that this dissemination task will take 0.5 hour of a human resource manager's time and 0.5 hour of an administrative assistant's time per targeted source. A sensitivity analysis for a range of time spent conducting targeted outreach to organizations that serve individuals with disabilities is presented below. The cost of this provision per affected sponsor is, therefore, the time each staff member devotes to this task (0.5 hour for a human resource manager and 0.5 hour for an administrative assistant) multiplied by their associated average hourly compensation rates. This calculation results in a total labor cost of \$48.50 $((\$73.90 \times 0.5) + (\$23.10 \times 0.5))$ per source. This total labor cost is then multiplied by the number of outreach sources (5), yielding a cost per small entity of \$242.50 $(\$48.50 \times 5)$ beginning in 2019. The total number of estimated sponsors is 26,606 in 2019. We assume that this additional outreach will occur 2 years after the Final Rule goes into effect.

¹⁶¹ The 25 percent of sponsors who employ five or more apprenticeships was estimated from the RAPIDS database maintained by the Department.

d. Reading and Reviewing the New Regulatory Requirements

During the first year after implementation of the Final Rule, sponsors will need to learn about the new regulatory requirements. We estimate this cost for a hypothetical small entity by multiplying the time required to read the new rule (4 hours) by the average hourly compensation rate of a human resources manager (\$73.90, as calculated above). Thus, the resulting cost per small entity is \$295.60 $(\$73.90 \times 4)$. This cost occurs only in the year after the Final Rule is published.

e. Orientation and Periodic Information Sessions

Section § 30.3(b)(2) requires each sponsor to conduct orientation and periodic information sessions for apprentices and journeyworkers who directly supervise apprentices, and other individuals connected with the administration or operation of the sponsor's apprenticeship program to inform and remind such individuals of the sponsor's equal employment opportunity policy with regard to apprenticeship and anti-harassment.

The Department estimated that in the first year a sponsor will hold one 45 minute regular orientation and information session with on average 24 apprentices (\$18.72 per hour) and 24 journeyworkers (\$31.68 per hour) in 2017.¹⁶² The Department estimated that a human resource manager (\$73.90 per hour) would need to spend 2 hours to develop and prepare written materials for the session in the first year. The first-year cost per small entity is \$1,110.43 $((24 \times 0.75 \times \$18.72) + (24 \times 0.75 \times \$31.68) + (1 \times (2.75) \times \$73.90))$. The average annual cost in year 2 through 10 per a small entity for this provision is \$1197.83¹⁶³

f. Invitation to Self-Identify as an Individual With a Disability

Section § 30.11 requires sponsors to invite applicants for apprenticeship to voluntarily self-identify as an individual with a disability protected by this part

¹⁶² Using 2015 data from the Registered Apprenticeship Partners Information Data System (RAPIDS) and the apprentice and sponsor growth model in the analysis, the Department calculated that there are on average 24 apprentices per sponsor in the program in 2017. While many small entity sponsors may employ fewer than 24 apprentices, the Department conservatively assumed that 24 apprentices and 24 journeyworkers would attend orientation and periodic information sessions for small entities.

¹⁶³ The Department estimated that there are on average 24 apprentices per sponsor in 2017; 26 in 2018; 27 in 2019; 28 in 2020; 29 in 2021; 31 in 2022; 32 in 2023; 32 in 2023; 32 in 2024; 33 in 2025; and 34 in 2026.

at two stages: (1) At the time they apply or are considered for apprenticeship and (2) after they are accepted into the apprenticeship program but before they begin their apprenticeship

Within the first two years of this program, sponsors with 5 or more apprentices will need to survey their current workforce with the invitation to self-identify. The Department calculated that in 2018 the sponsor will survey an average of 26 apprentices (\$18.72) with an invitation to self-identify provided by the Department. Each apprentice will spend 5 minutes (0.08 hour) filling out the form. The Department estimated an administrative assistant (\$23.10 per hour) would need to spend 0.5 hour annually to record and keep the forms. The cost to the sponsor for this requirement in 2018 is $50.49 (26 \text{ apprentices} \times \$18.72 \times 0.08 \text{ hour}) + (0.5 \text{ hour} \times \$23.10)$. In addition, the sponsor is required to remind apprentices yearly beginning in 2019 that they can update their invitation to self-identify. The Department assumed that the sponsor would send out a reminder email yearly at the cost of \$1.85 (0.08 hour \times \$23.10). The total cost of this provision to the sponsor in 2019 is \$53.83 ($\$43.00 + \1.85). The average annual cost in year 2 through 10 per a small entity for this provision is \$58.45.¹⁶⁴

g. Utilization Analysis and Goal Setting and Workforce Analysis

The Final Rule requires the Department to develop a tool for utilization analyses and provides one hour for sponsors to train a human resource manager (\$73.90 per hour) on how to use the tool. This results in a one-time cost of \$73.90 per small entity sponsor in 2018.

The Final Rule also requires sponsors with five or more apprentices to conduct the utilization analysis every

five years and the workforce analysis every two and a half years. The resulting cost per small entity is \$7.39 for the utilization analysis (0.5 hour \times \$73.90/5) in 2019. There will be a slight cost-saving for sponsors for conducting the workforce analysis. For sponsors with five or more apprentices, this process is expected to take 2 hours of an HR manager's time (\$73.90 per hour) every 2.5 years compared to a baseline of 1 hour of an HR manager's time annually, for a net saving of 0.2 hours or \$14.78 ($\$73.90 \times 0.2 \text{ hours}$) per small entity per year. However, this cost saving accruing only to sponsors with 5 or more apprentices was not accounted for in this analysis to conservatively estimate the costs to small entities.

h. Affirmative Action Plan Reviews

All sponsors are currently required to review their affirmative action plans annually. The Department estimates this process to take 8 hours of a human resource manager's (\$73.90 per hour) time for a baseline cost of \$591.20. Under the Final Rule, with a two-year phase-in, an HR manager would spend 8 hours annually conducting a personnel review, canceling out the baseline cost from 2018 forward. The Department also added the costs of conducting a written affirmative action plan update at the time of the compliance review every 5 years at 12 hours of an HR manager's time ($12 \times \$73.90/5$) and conducting a written affirmative action plan update within three years of the compliance review every 5 years at 6 hours of an HR manager's time ($6 \times \$73.90/5$) for a net cost of \$266.04 ($\$177.36 + \88.68).

4. Total Cost Burden for Small Entities

For a hypothetical small entity in the top five industry categories, the first year cost of this rule is \$1658.15 (\$9.62

+ \$242.50 + \$295.60 + \$1110.43).

Average annual cost in years 2 through 10 is \$2,098.23 ($\$9.62 + \$242.50 + \$242.50 + \$1197.83 + \$58.45 + \$7.39 + \$73.90 + \266.04).

The total cost impacts, as a percent of revenue, are all well below the 3 percent threshold for determining a significant economic impact. The estimated cost impacts to apprenticeship sponsors for the first year, as a percent of revenue, are as follows: Construction, 0.053 percent; Manufacturing, 0.002 percent; Trade, 0.014 percent; Service, 0.105 percent; and Transportation and Communication, 0.004 percent. None of these impacts for the first year are close to 3 percent of revenues, even if considering only the high cost estimates. The estimated annual cost impacts to apprenticeship sponsors are as follows: Construction, 0.068 percent; Manufacturing, 0.002 percent; Trade, 0.018 percent; Service, 0.133 percent; and Transportation and Communication, 0.005 percent. None of these impacts are close to 3 percent of revenues. Exhibit 7 shows the estimated first year and annual cost impacts to apprenticeship sponsors by industry.

The Department estimates the Final Rule would have a significant economic impact on ten out of the 1,459 small entities in the sample from the top five industries. However, this accounts for 0.7 percent of the total number of small entities in the sample, which is less than the 15 percent threshold set to be considered as substantial number of small entities. As a result of this analysis, the Final Rule is not expected to have a significant impact on a substantial number of small entities.

Exhibit 7: Summary of the Impacts on Small Entities

Category	Average revenue per small entity	First year cost as a percentage of revenue	Annualized annual cost as a percentage of revenue	Affected small entities in the Sample
Construction	\$3,100,572	0.053%	0.068%	283
Manufacturing	\$92,740,319	0.002%	0.002%	270
Trade	\$11,478,805	0.014%	0.018%	325
Services	\$1,575,143	0.105%	0.133%	252
Transportation and communication	\$39,138,842	0.004%	0.005%	329
Total				1,459

¹⁶⁴ The cost estimates for this provision excludes the costs incurred by applicants given that they are not borne by the small businesses themselves.

Paperwork Reduction Act (PRA)

The purpose of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, includes minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. See 44 U.S.C. 3506(c)(2)(A). This activity helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

In accordance with the PRA, the Department submitted the identified information collections associated with the NPRM to OMB when the NPRM was published. The NPRM provided an opportunity for the public to comment on the information collections directly to the Department; commenters also were advised that comments under the PRA could be submitted directly to OMB. OMB issued a notice of action for each request asking the Department to resubmit the ICRs at the final rule stage and after considering public comments. The Department has submitted the related ICRs to OMB for approval; the reviews remain pending, and the Department will publish notices in the **Federal Register** to announce the results of those reviews once they are complete. The Department discusses the public

comments in this section of the preamble.

The Department received three comments concerning the paperwork requirements of this Final Rule. One commenter questioned the overall need for the rule, claiming that organization was already required to comply with other equal employment opportunity rules and adding recordkeeping requirements would increase paperwork and result in fewer potential sponsors of registered apprenticeship programs. The other two commenters also associated an increase in paperwork associated with the rule. No commenter, however, quantified the claims.

One of the commenters offered suggestions for the substantive provisions. These are addressed in the analysis for sections 30.3, 30.5, 30.7, 30.10, 30.11, and 30.12 in this preamble.

The Department acknowledges the final rule adds recordkeeping and paperwork requirements that may slightly increase paperwork burden. However, this final rule reduces paperwork burden in other ways. More specifically the final rule, streamlines the workforce and utilization analysis required of sponsors with five or more apprentices and clarifies when and how utilization goals are to be established for women and minorities (§§ 30.5 through 30.7); reduces the frequency with which the workforce and utilization analyses must be conducted—from annually under the existing rule to at the time of the compliance review for the utilization analysis (every five years on average) and within three years of the compliance review for the workforce analysis (§ 30.12). The Department has reconsidered the paperwork burden estimates and determined the increased recordkeeping burdens are substantially offset by the reductions.

The information collections in this Final Rule are summarized as follows.

Agency: DOL–ETA.

Title of Collection: Labor Standards for the Registration of Apprenticeship Programs.

Type of Review: Revision.

OMB Control Number: 1205–0223.

Affected Public: State, Local, and Tribal Governments, Individuals or Households and Private Sector.

Obligation to Respond: Required to obtain or retain a benefit.

Total Estimated Number of Respondents Annually: 138,229.

Total Estimated Number of Annual Responses: 138,229.

Frequency of Responses: Annually.

Total Estimated Annual Time Burden: 14,724.

Total Estimated Annual Other Costs Burden: \$0.

Regulations sections: § 29.3, § 29.7, § 29.5, § 29.13, § 29.14, § 29.6.

Overview and Response to Comments Received

Overview: Title 29 CFR 29.5 requires sponsors to meet apprenticeship standards to have a registered apprenticeship program. This information collection package contains the ETA Form 671, Apprenticeship Agreement Form. The form has been modified to provide voluntary self-identification of an individual with a disability. Such information is collected on a separate tear-off sheet that is maintained separately from the Apprenticeship Agreement Form and treated as confidential.

The Department received no comments on this information collection.

Agency: DOL–ETA.

Title of Collection: Equal Employment Opportunity in Apprenticeship.

Type of Review: Revision.

OMB Control Number: 1205–0224.

Affected Public: State, Local, and Tribal Governments; Individuals or Households.

Obligation to Respond: Required to Obtain or Retain Benefits.

Total Estimated Number of Respondents Annually: 19,277.

Total Estimated Number of Annual Responses: 34,490.

Total Estimated Annual Time Burden: 3,219 hours.

Total Estimated Annual Other Costs Burden: \$0.

Regulations sections: § 30.3, § 30.4, § 30.5, § 30.6, § 30.8, § 30.11, § 30.16, § 30.19.

Overview and Response to Comments Received

Overview: This information collection contains the requirements for SAAs to prepare State EEO plans conforming to the regulations, to maintain adequate records pertinent to compliance with the regulations, and to notify the Department of exemptions from the regulations granted to program sponsors.

The Department received no comments concerning this information collection.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This Final Rule does not impose any Federal mandates on any State, local, or tribal governments, or the

private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132: Federalism

As with the NPRM, the Department reviewed the Final Rule in accordance with Executive Order 13132. The revisions to part 30 may have substantial direct effects on States and on the relationship between the Federal government and the States. Although matters of Federalism in the National Registered Apprenticeship System are primarily established through part 29, Labor Standards for Registration of Apprenticeship Programs, which establishes the requirements for the recognition of SAAs as Registration Agencies, the proposed revisions to part 30 also have direct effect on a State's method of administering registered apprenticeship for Federal purposes. In particular, the Final Rule requires an SAA that seeks to obtain or maintain recognition as the Registration Agency for Federal purposes, submit, at a minimum, draft State apprenticeship legislation corresponding to the requirements of part 30, and requires all program sponsors registered with the State for Federal purposes to comply with the State EEO plan. This NPRM also requires OA's Administrator to provide written concurrence on any subsequent modifications to the State EEO plan, as provided in paragraph 29.13(b)(9) of this title. The Department has determined that these requirements are essential to ensure that SAAs conform to the new requirements of part 30, as a precondition for recognition.

In the development of this Rule, the Department included several mechanisms for consultation with State officials. In 2010, OA conducted two listening sessions with members of the National Association of State and Territorial Apprenticeship Directors (NASTAD), the organization representing apprenticeship officials from the District of Columbia, 26 States, and three Territories, to request the members' recommendations for updating part 30. Additionally, as discussed earlier in the preamble, OA gave consideration to recommendations from the ACA, whose membership includes representatives from NASTAD and the National Association of State Government Labor Officials (NAGLO). OA invited State officials to participate in a series of "town hall" meetings and a webinar conducted in spring 2010 to elicit the agency's stakeholders' recommendations for updating part 30. The Department considered all of the issues raised in these fora, and incorporated many of them into the

NPRM and this Final Rule. Finally, the Department specifically solicited comments from State and local government officials on the NPRM.

In response, the Department received several comments raising questions as to whether the provisions of the proposed rule, hereby adopted into the Final Rule, were in conflict with other State or Federal laws, including principally ERISA and state disability laws regarding self-identification inquiries. This Final Rule has addressed these comments in the Section-by-Section analysis, specifying that no such conflict exists as to ERISA and no ascertainable conflict exists as to State law. To the extent any such conflict exists, preemption shall be restricted to the minimum level necessary to achieve the objectives of the National Apprenticeship Act.

Assessment of Federal Regulations and Policies on Families

The Department certifies that this Final Rule has been assessed according to § 654 of Pub. L. 105-277, 112 Stat. 2681, for its effect on family well-being. The Department concludes that this Final Rule will not adversely affect the well-being of the Nation's families. Rather, it should have a positive effect by safeguarding the welfare of registered apprentices.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The Department has reviewed this proposed rule in accordance with Executive Order 13175 and has determined that it does not have "tribal implications." This Final Rule does 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."

Executive Order 12988: Civil Justice

This Final Rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. This Final Rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

List of Subjects

29 CFR Part 29

Apprentice agreement and complaints, Apprenticeship criteria, Program standards, registration and

deregistration, Sponsor eligibility, State Apprenticeship Agency recognition and derecognition.

29 CFR Part 30

Administrative practice and procedure, Apprenticeship, Employment, Equal employment opportunity, Reporting and recordkeeping requirements, Training.

Signed in Washington, DC.

Portia Wu,

Assistant Secretary, Employment and Training Administration.

For the reasons stated in the preamble, the Employment and Training Administration amends 29 CFR parts 29 and 30 as follows:

PART 29—LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

■ 1. The authority citation for part 29 continues to read as follows:

Authority: Section 1, 50 Stat. 664, as amended (29 U.S.C. 50; 40 U.S.C. 276c; 5 U.S.C. 301) Reorganization Plan No. 14 of 1950, 64 Stat. 1267 (5 U.S.C. App. P. 534).

■ 2. Amend § 29.5 by revising paragraph (b)(21) to read as follows:

§ 29.5 Standards of apprenticeship.

* * * * *

(b) * * *

(21) Compliance with 29 CFR part 30, including the equal opportunity pledge prescribed in 29 CFR 30.3(c); an affirmative action program complying with 29 CFR 30.4; and a method for the selection of apprentices complying with 29 CFR 30.10, or compliance with parallel requirements contained in a State plan for equal opportunity in apprenticeship adopted under 29 CFR part 30 and approved by the Department. The apprenticeship standards must also include a statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR part 30, as amended, or if applicable, an approved State plan for equal opportunity in apprenticeship.

* * * * *

■ 3. In § 29.7, revise paragraph (j) and add paragraph (l) to read as follows:

§ 29.7 Apprenticeship agreement.

* * * * *

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, sex, sexual

orientation, age (40 or older), genetic information, or disability.

* * * * *

(l) A request for demographic data, including the apprentice's race, sex, and ethnicity, and disability status.

■ 4. Amend § 29.8 by revising paragraph (b)(1)(i) to read as follows:

§ 29.8 Reinstatement of program registration.

* * * * *

(b) * * *

(1)(i) Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, or administered in accordance with the program's registered provisions or with the requirements of this part, including but not limited to: failure to provide on-the-job learning; failure to provide related instruction; failure to pay the apprentice a progressively increasing schedule of wages consistent with the apprentices skills acquired; or persistent and significant failure to perform successfully.

* * * * *

■ 5. Amend § 29.14 by revising paragraph (a) to read as to read as follows:

§ 29.14 Derecognition of State Apprenticeship Agencies.

* * * * *

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship must be processed in accordance with the procedures prescribed in this part.

* * * * *

■ 6. Revise part 30 to read as follows:

PART 30—EQUAL EMPLOYMENT OPPORTUNITY IN APPRENTICESHIP

Sec.

- 30.1 Purpose, applicability, and relationship to other laws.
- 30.2 Definitions.
- 30.3 Equal opportunity standards applicable to all sponsors.
- 30.4 Affirmative action programs.
- 30.5 Utilization analysis for race, sex, and ethnicity.
- 30.6 Establishment of utilization goals for race, sex, and ethnicity.
- 30.7 Utilization goals for individuals with disabilities.
- 30.8 Targeted outreach, recruitment, and retention.
- 30.9 Review of personnel processes.
- 30.10 Selection of apprentices.
- 30.11 Invitation to self-identify as an individual with a disability.
- 30.12 Recordkeeping.
- 30.13 Equal employment opportunity compliance reviews.
- 30.14 Complaints.
- 30.15 Enforcement actions.
- 30.16 Reinstatement of program registration.

30.17 Intimidation and retaliation prohibited.

30.18 State apprenticeship agencies.

30.19 Exemptions.

Authority: Sec. 1, 50 Stat. 664, as amended (29 U.S.C. 50; 40 U.S.C. 276c; 5 U.S.C. 301); Reorganization Plan No. 14 of 1950, 64 Stat. 1267, 3 CFR 1949–53 Comp. p. 1007.

§ 30.1 Purpose, applicability, and relationship to other laws.

(a) *Purpose.* The purpose of this part is to promote equal opportunity for apprentices and applicants for apprenticeship in registered apprenticeship programs by prohibiting discrimination based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability. This part also prescribes affirmative action efforts sponsors must take to ensure equal opportunity for apprentices and applicants for apprenticeship. The regulations set forth the equal opportunity obligations of sponsors, the contents of affirmative action programs, procedures for the filing and processing of complaints, and enforcement procedures. These regulations also establish procedures for deregistration of an apprenticeship program in the event of noncompliance with this part and prescribe the equal opportunity requirements for recognition of State Apprenticeship Agencies (SAA) under part 29.

(b) *Applicability.* This part applies to all sponsors of apprenticeship programs registered with either the U.S. Department of Labor or a recognized SAA.

(c) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability than are afforded by this part. It may be a defense to a charge of a violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action that would otherwise be required by this part.

§ 30.2 Definitions.

For the purpose of this part:

Administrator means the Administrator of the Office of Apprenticeship, or any person specifically designated by the Administrator.

Apprentice means a worker at least 16 years of age, except where a higher

minimum age standard is otherwise fixed by law, who is employed to learn an apprenticeable occupation as provided in § 29.4 of this chapter under standards of apprenticeship fulfilling the requirements of § 29.5 of this chapter.

Apprenticeship Committee

(*Committee*) means those persons designated by the sponsor to administer the program. A committee may be either joint or non-joint, as follows:

(1) A joint committee is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s).

(2) A non-joint committee, which may also be known as a unilateral or group non-joint (which may include employees) committee, has employer representatives but does not have a bona fide collective bargaining agent as a participant.

Apprenticeship program means a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, as required under 29 CFR parts 29 and 30, including such matters as the requirement for a written apprenticeship agreement.

Department means the U.S. Department of Labor.

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

*Disability*¹ means, with respect to an individual:

¹ The definitions for the term "disability" and other terms relevant to defining disability and disability discrimination standards, including "direct threat", "major life activities", "physical or mental impairment", "qualified applicant or apprentice", "reasonable accommodation", and "undue hardship, are taken directly from title I of the Americans with Disabilities Act (ADA), as

(1) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(2) A record of such an impairment;

or

(3) Being regarded as having such an impairment.

EEO means equal employment opportunity.

Electronic media means media that utilize electronics or electromechanical energy for the end user (audience) to access the content; and includes, but is not limited to, electronic storage media, transmission media, the Internet, extranet, lease lines, dial-up lines, private networks, and the physical movement of removable/transportable electronic media and/or interactive distance learning.

Employer means any person or organization employing an apprentice whether or not such person or organization is a party to an Apprenticeship Agreement with the apprentice.

Ethnicity, for purposes of recordkeeping and affirmative action, has the same meaning as under the Office of Management and Budget's Standards for the Classification of Federal Data on Race and Ethnicity, or any successor standards. Ethnicity thus refers to the following designations:

(1) Hispanic or Latino—A person of Cuban, Mexican, Puerto Rican, Cuban, South or Central American, or other Spanish culture or origin, regardless of race.

(2) Not Hispanic or Latino

Genetic information means:

- (1) Information about—
- (i) An individual's genetic tests;
 - (ii) The genetic tests of that individual's family members;
 - (iii) The manifestation of disease or disorder in family members of the individual (family medical history);
 - (iv) An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or
 - (v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

(2) Genetic information does not include information about the sex or age

of the individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test.²

Journeyworker means a worker who has attained a level of skill, abilities and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. (Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training).

Major life activities include, but are not limited to: Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

Office of Apprenticeship (OA) means the office designated by the Employment and Training Administration of the U.S. Department of Labor to administer the National Registered Apprenticeship System or its successor organization.

Physical or mental impairment means:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or

mental illness, and specific learning disabilities.

Pre-apprenticeship program means a training model designed to assist individuals who do not currently possess the minimum requirements for selection into an apprenticeship program to meet the minimum selection criteria established in a program sponsor's apprenticeship standards required under part 29 of this chapter and which maintains at least one documented partnership with a Registered Apprenticeship program. It involves a form of structured workplace education and training in which an employer, employer group, industry association, labor union, community-based organization, or educational institution collaborates to provide formal instruction that will introduce participants to the competencies, skills, and materials used in one or more apprenticeable occupations.

Qualified applicant or apprentice is an individual who, with or without reasonable accommodation, can perform the essential functions of the apprenticeship program for which the individual applied or is enrolled.

Race, for purposes of recordkeeping and affirmative action, has the same meaning as under the Office of Management and Budget's Standards for the Classification of Federal Data on Race and Ethnicity, or any successor standards. Race thus refers to the following designations:

(1) White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

(2) Black or African American—A person having origins in any of the black racial groups of Africa.

(3) Native Hawaiian or Other Pacific Islander—A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

(4) Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

(5) American Indian or Alaska Native—A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

Reasonable accommodation—(1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

amended, and from the Equal Employment Opportunity Commission's regulations implementing the ADA at 29 CFR part 1630, to the extent that the ADA, as amended, did not provide a definition.

² The definition of the term "genetic information" is taken directly from the Genetic Information Nondiscrimination Act of 2008 (GINA) at 42 U.S.C. 2000ff(4) and the EEOC's implementing regulations at 29 CFR 1635.3(c).

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a sponsor's apprentice with a disability to enjoy equal benefits and privileges of apprenticeship as are enjoyed by its other similarly situated apprentices without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by apprentices readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the sponsor to initiate an informal, interactive process with the qualified individual in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Registration Agency means the Office of Apprenticeship or a recognized SAA that has responsibility for registering apprenticeship programs and apprentices; providing technical assistance; conducting quality assurance assessments and reviews of registered apprenticeship programs for compliance with the requirements of part 29 and this part.

Selection procedure means any measure, combination of measures, or procedure used as a basis for any decision in apprenticeship. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

Sponsor means any person, association, committee or organization operating an apprenticeship program, and in whose name the program is (or is to be) registered or approved.

State Apprenticeship Agency (SAA) means an agency of a State government

that has responsibility and accountability for apprenticeship within the State. Only an SAA may seek recognition from OA as an agency which has been properly constituted under an acceptable law or Executive Order (E.O.), and authorized by OA to register and oversee apprenticeship programs and agreements for Federal purposes.

Undue hardship—(1) *In general.* Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a sponsor, when considered in light of the factors set forth in paragraph (b) of this definition.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a sponsor, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the sponsor, the overall size of the registered apprenticeship program with respect to the number of apprentices, and the number, type and location of its facilities;

(iv) The type of operation or operations of the sponsor, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the sponsor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other apprentices to perform their duties and the impact on the facility's ability to conduct business.

§ 30.3 Equal opportunity standards applicable to all sponsors.

(a)(1) *Discrimination prohibited.* It is unlawful for a sponsor of a registered apprenticeship program to discriminate against an apprentice or applicant for apprenticeship on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability with regard to:

(i) Recruitment, outreach, and selection procedures;

(ii) Hiring and/or placement, upgrading, periodic advancement,

promotion, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(iii) Rotation among work processes;

(iv) Imposition of penalties or other disciplinary action;

(v) Rates of pay or any other form of compensation and changes in compensation;

(vi) Conditions of work;

(vii) Hours of work and hours of training provided;

(viii) Job assignments;

(ix) Leaves of absence, sick leave, or any other leave; and

(x) Any other benefit, term, condition, or privilege associated with apprenticeship.

(2) *Discrimination standards and defenses.* (i) *Race, color, religion, national origin, sex, or sexual orientation.* In implementing this section, the Registration Agency will look to the legal standards and defenses applied under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* and Executive Order 11246, as applicable, in determining whether a sponsor has engaged in a practice unlawful under paragraph (a)(1) of this section.

(ii) *Disability.* With respect to discrimination based on a disability, the Registration Agency will apply the same standards, defenses, and exceptions to the definition of disability as those set forth in title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12112 and 12113, as amended, and the implementing regulations promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 CFR part 1630, which include, among other things, the standards governing reasonable accommodation, medical examinations and disability-related inquiries, qualification standards, and direct threat defense. The Interpretive Guidance on title I of the ADA set out as an appendix to part 1630 issued pursuant to title I may be relied upon for guidance in complying with the nondiscrimination requirements of this part with respect to the treatment of individuals with disabilities.

(iii) *Age.* The Registration Agency will apply the same standards and defenses for age discrimination as those set forth in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623, and the implementing regulations promulgated by the EEOC at 29 CFR part 1625.

(iv) *Genetic information.* The Registration Agency will apply the same standards and defenses for discrimination based on genetic information as those set forth in the Genetic Information Nondiscrimination

Act (GINA), 29 U.S.C. 2000ff *et seq.*, and the implementing regulations promulgated by the EEOC at 29 CFR part 1635.

(b) *General duty to engage in affirmative action.* For each registered apprenticeship program, a sponsor is required to take affirmative steps to provide equal opportunity in apprenticeship. These steps must include:

(1) *Assignment of responsibility.* The sponsor will designate an individual or individuals with appropriate authority under the program, such as an apprenticeship coordinator, to be responsible and accountable for overseeing its commitment to equal opportunity in registered apprenticeship, including the development and implementation of an affirmative action program as required by § 30.4. The individual(s) must have the resources, support of, and access to the sponsor leadership to ensure effective implementation. The individual(s) will be responsible for:

(i) Monitoring all registered apprenticeship activity to ensure compliance with the nondiscrimination and affirmative action obligations required by this part;

(ii) Maintaining records required under this part; and

(iii) Generating and submitting reports as may be required by the Registration Agency.

(2) *Internal dissemination of equal opportunity policy.* The sponsor must inform all applicants for apprenticeship, apprentices, and individuals connected with the administration or operation of the registered apprenticeship program of its commitment to equal opportunity and its affirmative action obligations. In addition, the sponsor must require that individuals connected with the administration or operation of the apprenticeship program take the necessary action to aid the sponsor in meeting its nondiscrimination and affirmative action obligations under this part. A sponsor, at a minimum, is required to:

(i) Publish its equal opportunity pledge—set forth in paragraph (c) of this section—in the apprenticeship standards required under § 29.5(c) of this title, and in appropriate publications, such as apprentice and employee handbooks, policy manuals, newsletters, or other documents disseminated by the sponsor or that otherwise describe the nature of the sponsorship;

(ii) Post its equal opportunity pledge from paragraph (c) of this section on bulletin boards, including through electronic media, such that it is

accessible to all apprentices and applicants for apprenticeship;

(iii) Conduct orientation and periodic information sessions for individuals connected with the administration or operation of the apprenticeship program, including all apprentices and journeyworkers who regularly work with apprentices, to inform and remind such individuals of the sponsor's equal employment opportunity policy with regard to apprenticeship, and to provide the training required by paragraph (b)(4)(i) of this section; and

(iv) Maintain records necessary to demonstrate compliance with these requirements and make them available to the Registration Agency upon request.

(3) *Universal outreach and recruitment.* The sponsor will implement measures to ensure that its outreach and recruitment efforts for apprentices extend to all persons available for apprenticeship within the sponsor's relevant recruitment area without regard to race, sex, ethnicity, or disability. In furtherance of this requirement, the sponsor must:

(i) Develop and update annually a list of current recruitment sources that will generate referrals from all demographic groups within the relevant recruitment area. Examples of relevant recruitment sources include: The public workforce system's One-Stop Career Centers and local workforce investment boards; community-based organizations; community colleges; vocational, career and technical schools; pre-apprenticeship programs; and Federally-funded, youth job-training programs such as YouthBuild and Job Corps or their successors;

(ii) Identify a contact person, mailing address, telephone number, and email address for each recruitment source; and

(iii) Provide recruitment sources advance notice, preferably 30 days, of apprenticeship openings so that the recruitment sources can notify and refer candidates. Such notification must also include documentation of the sponsor's equal opportunity pledge specified in paragraph (c) of this section.

(4) *Maintaining apprenticeship programs free from harassment, intimidation, and retaliation.* The sponsor must develop and implement procedures to ensure that its apprentices are not harassed because of their race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability and to ensure that its apprenticeship program is free from intimidation and retaliation as prohibited by § 30.17. To promote an environment in which all apprentices feel safe, welcomed, and treated fairly,

the sponsor must ensure the following steps are taken:

(i) Providing anti-harassment training to all individuals connected with the administration or operation of the apprenticeship program, including all apprentices and journeyworkers who regularly work with apprentices. This training must not be a mere transmittal of information, but must include participation by trainees, such as attending a training session in person or completing an interactive training online. The training content must include, at a minimum, communication of the following:

(A) That harassing conduct will not be tolerated;

(B) The definition of harassment and the types of conduct that constitute unlawful harassment on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability; and

(C) The right to file a harassment complaint under § 30.14 of this part.

(ii) Making all facilities and apprenticeship activities available without regard to race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability except that if the sponsor provides restrooms or changing facilities, the sponsor must provide separate or single-user restrooms and changing facilities to assure privacy between the sexes;

(iii) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability, as well as complaints about retaliation for engaging in protected activity described in § 30.17 of this part.

(5) *Compliance with Federal and State equal employment opportunity laws.* The sponsor must comply with all other applicable Federal and State laws and regulations that require equal employment opportunity without regard to race, color, religion, national origin, sex (including pregnancy and gender identity, as applicable), sexual orientation, age (40 or older), genetic information, or disability. Failure to comply with such laws if such noncompliance is related to the equal employment opportunity of apprentices and/or graduates of such an apprenticeship program under this part is grounds for deregistration or the imposition of other enforcement actions in accordance with § 30.15.

(c) *Equal opportunity pledge.* (1) Each sponsor of an apprenticeship program must include in its Standards of

Apprenticeship and apprenticeship opportunity announcements the following equal opportunity pledge:

[Name of sponsor] will not discriminate against apprenticeship applicants or apprentices based on race, color, religion, national origin, sex (including pregnancy and gender identity), sexual orientation, genetic information, or because they are an individual with a disability or a person 40 years old or older. [Name of sponsor] will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required under Title 29 of the Code of Federal Regulations, part 30.

(2) The nondiscrimination bases listed in this pledge may be broadened to conform to consistent State and local requirements. Sponsors may include additional protected bases but may not exclude any of the bases protected by this part.

(d) *Compliance.*

(1) Current sponsors: A sponsor that has a registered apprenticeship program as of the effective date of this regulation must comply with all obligations of this section within 180 days of the effective date of this rule.

(2) New sponsors: A sponsor registering with a Registration Agency after the effective date of this regulation shall comply with all obligations of this section upon registration or 180 days after the effective date of this regulation, whichever is later.

§ 30.4 Affirmative action programs.

(a) *Definition and purpose.* As used in this part:

(1) An affirmative action program is designed to ensure equal opportunity and prevent discrimination in apprenticeship programs. An affirmative action program is more than mere passive nondiscrimination. Such a program requires the sponsor to take affirmative steps to encourage and promote equal opportunity, to create an environment free from discrimination, and to address any barriers to equal opportunity in apprenticeship. An affirmative action program is more than a paperwork exercise. It includes those policies, practices, and procedures, including self-analyses, that the sponsor implements to ensure that all qualified applicants and apprentices are receiving an equal opportunity for recruitment, selection, advancement, retention and every other term and privilege associated with apprenticeship. An affirmative action program should be a part of the way the sponsor regularly conducts its apprenticeship program.

(2) A central premise underlying affirmative action is that, absent discrimination, over time a sponsor's

apprenticeship program, generally, will reflect the sex, race, ethnicity, and disability profile of the labor pools from which the sponsor recruits and selects. Consistent with this premise, affirmative action programs contain a diagnostic component which includes quantitative analyses designed to evaluate the composition of the sponsor's apprenticeship program and compare it to the composition of the relevant labor pools. If women, individuals with disabilities, or individuals from a particular minority group, for example, are not being admitted into apprenticeship at a rate to be expected given their availability in the relevant labor pool, the sponsor's affirmative action program must include specific, practical steps designed to address any barriers to equal opportunity that may be contributing to this underutilization.

(3) Effective affirmative action programs include internal auditing and reporting systems as a means of measuring the sponsor's progress toward achieving an apprenticeship program that would be expected absent discrimination.

(4) An affirmative action program also ensures equal opportunity in apprenticeship by incorporating the sponsor's commitment to equality in every aspect of the apprenticeship program. Therefore, as part of its affirmative action program, a sponsor must monitor and examine its employment practices, policies and decisions and evaluate the impact such practices, policies and decisions have on the recruitment, selection and advancement of apprentices. It must evaluate the impact of its employment and personnel policies on minorities, women, and persons with disabilities, and revise such policies accordingly where such policies or practices are found to create a barrier to equal opportunity.

(5) The commitments contained in an affirmative action program are not intended and must not be used to discriminate against any qualified applicant or apprentice on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability.

(b) *Adoption of affirmative action programs.* Sponsors other than those identified in paragraph (d) of this section must develop and maintain an affirmative action program, setting forth that program in a written plan. The components of the written plan, as detailed in §§ 30.5 through 30.9, must be developed in accordance with the respective compliance dates and made

available to the Registration Agency any time thereafter upon request.

(c) *Contents of affirmative action programs.* An affirmative action program must include the following components in addition to those required of all sponsors by § 30.3(a):

(1) Utilization analysis for race, sex, and ethnicity, as described in § 30.5;

(2) Establishment of utilization goals for race, sex, and ethnicity, as described in § 30.6;

(3) Utilization goals for individuals with disabilities, as described in § 30.7;

(4) Targeted outreach, recruitment, and retention, as described in § 30.8;

(5) Review of personnel processes, as described in § 30.9; and

(6) Invitations to self-identify, as described in § 30.11

(d) *Exemptions—(1) Programs with fewer than five apprentices.* A sponsor is exempt from the requirements of paragraphs (b) and (c) of this section if the sponsor's apprenticeship program has fewer than five apprentices registered, unless such program was adopted to circumvent the requirements of this section.

(2) *Programs subject to approved equal employment opportunity programs.* A sponsor is exempt from the requirements of paragraphs (b) and (c) of this section if the sponsor both submits to the Registration Agency satisfactory evidence that it is in compliance with an equal employment opportunity program providing for affirmative action in apprenticeship, including the use of goals for any underrepresented group or groups of individuals, which has been approved as meeting the requirements of either title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*) and agrees to extend such program to include individuals with disabilities, or if the sponsor submits to the Registration Agency satisfactory evidence that it is in compliance with an equal employment opportunity program providing for affirmative action in apprenticeship, including the use of goals for any underrepresented group or groups of individuals, which has been approved as meeting the requirements of both Executive Order 11246, as amended, and section 503 of the Rehabilitation Act, as amended (29 U.S.C. 793), and their implementing regulations at title 41 of the Code of Federal Regulations, Chapter 60: *Provided*, That programs approved, modified or renewed subsequent to the effective date of this amendment will qualify for this exception only if the goals for any underrepresented group for the selection of apprentices provided for in such programs are likely to be

equal to or greater than the goals required under this part.

(e) *Written affirmative action plans.* Sponsors required to undertake an affirmative action program must create and update a written document memorializing and discussing the contents of the program set forth in paragraph (c) of this section.

(1) *Compliance*—(i) *Apprenticeship programs existing as of January 18, 2017.* The initial written affirmative action plan for such programs must be completed within two years of January 18, 2017. The written affirmative action plan for such programs must be updated every time the sponsor completes workforce analyses required by §§ 30.5(b) and 30.7(d)(2).

(ii) *Apprenticeship programs registered after January 18, 2017.* The initial written affirmative action plan for such programs must be completed within two years of registration. The written affirmative action plan for such programs must be updated every time the sponsor completes workforce analyses required by §§ 30.5(b) and 30.7(d)(2).

§ 30.5 Utilization analysis for race, sex, and ethnicity.

(a) *Purpose.* The purpose of the utilization analysis is to provide sponsors with a method for assessing whether possible barriers to apprenticeship exist for particular groups of individuals by determining whether the race, sex, and ethnicity of apprentices in a sponsor's apprenticeship program is reflective of persons available for apprenticeship by race, sex, and ethnicity in the relevant recruitment area. Where significant disparity exists between availability and representation, the sponsor will be required to establish a utilization goal pursuant to § 30.6.

(b) *Analysis of apprenticeship program workforce*—(1) *Process.* Sponsors must analyze the race, sex, and ethnic composition of their apprentice workforce. This is a two-step process. First, each sponsor must group all apprentices in its registered apprenticeship program by occupational title. Next, for each occupation represented, the sponsor must identify the race, sex, and ethnicity of its apprentices within that occupation.

(2) *Schedule of analyses.* Each sponsor is required to conduct an apprenticeship program workforce analysis at each compliance review, and again if and when three years have passed without a compliance review. This updated workforce analysis should be compared to the utilization goal established at the sponsor's most recent

compliance review to determine if the sponsor is underutilized, according to the process in paragraph (d) of this section.

(3) *Compliance date.* (i) Sponsors registered with a Registration Agency as of January 18, 2017: A sponsor must conduct its first workforce analysis, pursuant to this section, no later than two years after January 18, 2017.

(ii) *New sponsors:* A sponsor registering with a Registration Agency after the effective date of the Final Rule must conduct its initial workforce analysis pursuant to this section no later than two years after the date of registration.

(c) *Availability analysis*—(1) The purpose of the availability analysis is to establish a benchmark against which the demographic composition of the sponsor's apprenticeship program can be compared in order to determine whether barriers to equal opportunity may exist with regard to the sponsor's apprenticeship program.

(2) *Availability* is an estimate of the number of qualified individuals available for apprenticeship by race, sex, and ethnicity expressed as a percentage of all qualified persons available for apprenticeship in the sponsor's relevant recruitment area.

(3) In determining availability, the following factors must be considered for each major occupation group represented in the sponsor's registered apprenticeship program standards:

(i) The percentage of individuals who are eligible for enrollment in the apprenticeship program, within the sponsor's relevant recruitment area broken down by race, sex, and ethnicity; and

(ii) The percentage of the sponsor's employees who are eligible for enrollment in the apprenticeship program broken down by race, sex, and ethnicity.

(4) In determining availability, the relevant recruitment area is defined as the geographical area from which the sponsor usually seeks or reasonably could seek apprentices. The sponsor must identify the relevant recruitment area in its written affirmative action plan. The sponsor may not draw its relevant recruitment area in such a way as to have the effect of excluding individuals based on race, sex, or ethnicity from consideration, and must develop a brief rationale for selection of that recruitment area.

(5) *Availability* will be derived from the most current and discrete statistical information available. Examples of such information include census data, data from local job service offices, and data

from colleges or other training institutions.

(6) Sponsors, working with the Registration Agency, will conduct availability analyses at each compliance review.

(d) *Rate of utilization.* To determine the rate of utilization, the sponsor, working with the Registration Agency, must group each occupational title in its apprenticeship workforce by major occupation group and compare the racial, sex, and ethnic representation within each major occupation group to the racial, sex, and ethnic representation available in the relevant recruitment area, as determined in paragraph (c) of this section. When the sponsor's utilization of women, Hispanics or Latinos, or a particular racial minority group is significantly less than would be reasonably expected given the availability of such individuals for apprenticeship, the sponsor must establish a utilization goal for the affected group in accordance with the procedures set forth in § 30.6. Sponsors are not required or expected to establish goals where no significant disparity in utilization rates has been found.

§ 30.6 Establishment of utilization goals for race, sex, and ethnicity.

(a) Where, pursuant to § 30.5, a sponsor is required to establish a utilization goal for a particular racial, sex, or ethnic group in a major occupation group in its apprenticeship program, the sponsor, working with the Registration Agency, must establish a percentage goal at least equal to the availability figure derived under § 30.5(c) for that major occupation group.

(b) A sponsor's determination under § 30.5 that a utilization goal is required constitutes neither a finding nor an admission of discrimination.

(c) Utilization goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Utilization goals are used to measure the effectiveness of the sponsor's outreach, recruitment, and retention efforts.

(d) In establishing utilization goals, the following principles apply:

(1) Utilization goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered either a ceiling or a floor for the selection of particular groups as apprentices. Quotas are expressly forbidden.

(2) Utilization goals may not provide a sponsor with a justification to extend a preference to any individual, select an individual, or adversely affect an

individual's status as an apprentice, on the basis of that person's race, sex, or ethnicity.

(3) Utilization goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

(4) Utilization goals may not be used to supersede eligibility requirements for apprenticeship. Affirmative action programs prescribed by the regulations of this part do not require sponsors to select a person who lacks qualifications to participate in the apprenticeship program successfully, or select a less-qualified person in preference to a more qualified one.

§ 30.7 Utilization goals for individuals with disabilities.

(a) *Utilization goal.* The Administrator of OA has established a utilization goal of 7 percent for employment of qualified individuals with disabilities as apprentices for each major occupation group within which the sponsor has an apprenticeship program.

(b) *Purpose.* The purpose of the utilization goal established in paragraph (a) of this section is to establish a benchmark against which the sponsor must measure the representation of individuals with disabilities in the sponsor's apprentice workforce by major occupation group. The goal serves as an equal opportunity objective that should be attainable by complying with all of the affirmative action requirements of this part.

(c) *Periodic review of goal.* The Administrator of OA will periodically review and update, as appropriate, the utilization goal established in paragraph (a) of this section.

(d) *Utilization analysis*—(1) *Purpose.* The utilization analysis is designed to evaluate the representation of individuals with disabilities in the sponsor's apprentice workforce grouped by major occupation group. If individuals with disabilities are represented in the sponsor's apprentice workforce in any given major occupation group at a rate less than the utilization goal, the sponsor must take specific measures outlined in paragraphs (e) and (f) of this section.

(2) *Apprentice workforce analysis*—(i) *Process.* Sponsors are required to analyze the representation of individuals with disabilities within their apprentice workforce by occupation. This is a two-step process. First, as required in § 30.5, each sponsor must group all apprentices in its registered apprenticeship program according to the occupational titles represented in its registered apprenticeship program. Next, for each

occupation represented, the sponsor must identify the number of apprentices with disabilities.

(ii) *Schedule of evaluation.* The sponsor must conduct its apprentice workforce analysis at each compliance review, and again if and when three years have passed without a compliance review. This updated workforce analysis, grouped according to major occupation group, should then be compared to the utilization goal established under paragraph (a) of this section.

(iii) *Compliance date.* (A) Sponsors currently registered with a Registration Agency: A sponsor must conduct its first workforce analysis, pursuant to this section, no later than two years after January 18, 2017.

(B) New sponsors: A sponsor registering with a Registration Agency after January 18, 2017 must conduct its initial workforce analysis pursuant to this section no later than two years after the date of registration.

(e) *Identification of problem areas.* When the sponsor, working with the Registration Agency, determines that the percentage of individuals with disabilities in one or more major occupation groups within which a sponsor has apprentices is less than the utilization goal established in paragraph (a) of this section, the sponsor must take steps to determine whether and/or where impediments to equal opportunity exist. When making this determination, the sponsor must look at the results of its assessment of personnel processes required by § 30.9 and the effectiveness of its outreach and recruitment efforts required by § 30.8 of this part, if applicable.

(f) *Action-oriented programs.* The sponsor must undertake action-oriented programs, including targeted outreach, recruitment, and retention activities identified in § 30.8, designed to correct any problem areas that the sponsor identified pursuant to its review of personnel processes and outreach and recruitment efforts.

(g) *Utilization goal relation to discrimination.* A determination that the sponsor has not attained the utilization goal established in paragraph (a) of this section in one or more major occupation groups does not constitute either a finding or admission of discrimination in violation of this part.

(h) *Utilization goal not a quota or ceiling.* The utilization goal established in paragraph (a) of this section must not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities as apprentices.

§ 30.8 Targeted outreach, recruitment, and retention.

(a) *Minimum activities required.* Where a sponsor has found underutilization and established a utilization goal for a specific group or groups pursuant to § 30.6 and/or where a sponsor has determined pursuant to § 30.7(f) that there are problem areas resulting in impediments to equal employment opportunity, the sponsor must undertake targeted outreach, recruitment, and retention activities that are likely to generate an increase in applications for apprenticeship and improve retention of apprentices from the targeted group or groups and/or from individuals with disabilities, as appropriate. In furtherance of this requirement, the sponsor must:

(1) Set forth in its written affirmative action plan the specific targeted outreach, recruitment, and retention activities it plans to take for the upcoming program year. Such activities must include at a minimum:

(i) Dissemination of information to organizations serving the underutilized group regarding the nature of apprenticeship, requirements for selection for apprenticeship, availability of apprenticeship opportunities, and the equal opportunity pledge of the sponsor. These organizations may include: Community-based organizations; local high schools; local community colleges; local vocational, career and technical schools; and local workforce system partners including One Stop Career Centers;

(ii) Advertising openings for apprenticeship opportunities by publishing advertisements in appropriate media which have wide circulation in the relevant recruitment areas;

(iii) Cooperation with local school boards and vocational education systems to develop and/or establish relationships with pre-apprenticeship programs targeting students from the underutilized group to prepare them to meet the standards and criteria required to qualify for entry into apprenticeship programs; and

(iv) Establishment of linkage agreements or partnerships enlisting the assistance and support of pre-apprenticeship programs, community-based organizations, advocacy organizations, or other appropriate organizations, in recruiting qualified individuals for apprenticeship;

(2) Evaluate and document after every selection cycle for registering apprentices the overall effectiveness of such activities;

(3) Refine its targeted outreach, recruitment, and retention activities as needed; and

(4) Maintain records of its targeted outreach, recruitment, and retention activities and records related to its evaluation of these activities.

(b) *Other activities.* In addition to the activities set forth in paragraph (a) of this section, as a matter of best practice, sponsors are encouraged but not required to consider other outreach, recruitment, and retention activities that may assist sponsors in addressing any barriers to equal opportunity in apprenticeship. Such activities include but are not limited to:

(1) Enlisting the use of journeyworkers from the underutilized group or groups to assist in the implementation of the sponsor's affirmative action program;

(2) Enlisting the use of journeyworkers from the underutilized group or groups to mentor apprentices and to assist with the sponsor's targeted outreach and recruitment activities; and

(3) Conducting exit interviews of each apprentice who leaves the sponsor's apprenticeship program prior to receiving a certificate of completion to understand better why the apprentice is leaving the program and to help shape the sponsor's retention activities.

§ 30.9 Review of personnel processes.

(a) As part of its affirmative action program, the sponsor must, for each registered apprenticeship program, engage in an annual review of its personnel processes related to the administration of the apprenticeship program to ensure that the sponsor is operating an apprenticeship program free from discrimination based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability. This annual review is required regardless of whether the sponsor is underutilized as described in § 30.5(d). The review must be a careful, thorough, and systematic one and include review of all aspects of the apprenticeship program at the program, industry and occupation level, including, but not limited to, the qualifications for apprenticeship, application and selection procedures, wages, outreach and recruitment activities, advancement opportunities, promotions, work assignments, job performance, rotations among all work processes of the occupation, disciplinary actions, handling of requests for reasonable accommodations, and the program's accessibility to individuals with disabilities (including to the use of information and communication

technology). The sponsor must make any necessary modifications to its program to ensure that its obligations under this part are met.

(1) *Compliance date.* (i) Current sponsors: A sponsor that has a registered apprenticeship program as of the effective date of this regulation must comply with the obligations of paragraph (a) of this section within two years of the effective date of this rule.

(ii) New sponsors: A sponsor registering with a Registration Agency after the effective date of this regulation shall comply with the obligations of paragraph (a) of this section within two years after the date of registration.

(2) *[Reserved]*

(b) The sponsor must include a description of its review in its written affirmative action plan and identify in the written plan any modifications made or to be made to the program as a result of its review.

§ 30.10 Selection of apprentices.

(a) A sponsor's procedures for selection of apprentices must be included in the written plan for Standards of Apprenticeship submitted to and approved by the Registration Agency, as required under § 29.5 of this title.

(b) Sponsors may utilize any method or combination of methods for selection of apprentices, provided that the selection method(s) used meets the following requirements:

(1) The use of the selection procedure(s) must comply with the Uniform Guidelines on Employee Selection Procedures (UGESP) (41 CFR part 60–3), including the requirements to evaluate the impact of the selection procedure on race, sex, and ethnic groups (Hispanic or Latino/non-Hispanic or Latino) and to demonstrate job-relatedness and business necessity for those procedures that result in adverse impact in accordance with the requirements of UGESP.

(2) The selection procedure(s) must be uniformly and consistently applied to all applicants and apprentices within each selection procedure utilized.

(3) The selection procedure(s) must comply with title I of the ADA and EEOC's implementing regulations at part 1630. This procedure(s) must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the program sponsor, is shown to be job-related for the position in question and is consistent with business necessity.

(4) The selection procedure(s) must be facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability.

§ 30.11 Invitation to self-identify as an individual with a disability.

(a) *Pre-offer.* (1) A sponsor adopting an affirmative action program pursuant to § 30.4 must invite applicants for apprenticeship to inform the sponsor whether the applicant believes that that he or she is an individual with a disability as defined in § 30.2. This invitation must be provided to each applicant when the applicant applies or is considered for apprenticeship. The invitation may be included with the application materials for apprenticeship, but must be separate from the application.

(2) The sponsor must invite an applicant to self-identify as required in paragraph (a) of this section using the language and manner prescribed by the Administrator and published on the OA Web site.

(b) *Post offer.* (1) At any time after acceptance into the apprenticeship program, but before the applicant begins his or her apprenticeship, the sponsor must invite the applicant to inform the sponsor whether the applicant believes that he or she is an individual with a disability as defined in § 30.2.

(2) The sponsor must invite an applicant to self-identify as required in paragraph (b) of this section using the language and manner prescribed by the Administrator and published on the OA Web site.

(c) *Apprentices.* (1) Within the timeframe specified in paragraph (h) below, the sponsor must make a one-time invitation to each current apprentice to inform the sponsor whether he or she is an individual with a disability as defined in § 30.2. The sponsor must make this invitation using the language and manner prescribed by the Administrator and published on the OA Web site.

(2) Thereafter, the sponsor must remind apprentices yearly that they may voluntarily update their disability status.

(d) *Voluntary self-identification for apprentices.* The sponsor may not compel or coerce an individual to self-identify as an individual with a disability.

(e) *Confidentiality.* The sponsor must keep all information on self-identification confidential, and must maintain it in a data analysis file (rather than the medical files of individual apprentices) as required under § 30.12(e). The sponsor must provide

self-identification information to the Registration Agency upon request. Self-identification information may be used only in accordance with this part.

(f) *Affirmative action obligations.* Nothing in this section may relieve the sponsor of its obligation to take affirmative action with respect to those applicants and apprentices of whose disability the sponsor has knowledge.

(g) *Nondiscrimination obligations.* Nothing in this section may relieve the sponsor from liability for discrimination in violation of this part.

(h) *Compliance dates.* (1) Sponsors currently registered with a Registration Agency: A sponsor must begin inviting applicants and apprentices to identify as individuals with disabilities, pursuant to this section, no later than two years after the January 18, 2017. A sponsor must also invite each of its current apprentices to voluntarily inform the sponsor whether the apprentice believes that he or she is an individual with a disability, as defined in § 30.2, no later than two years after January 18, 2017.

(2) New sponsors: A sponsor registering with a Registration Agency after the effective date of this Final Rule must begin inviting applicants and apprentices to identify as individuals with disabilities, pursuant to this section, no later than two years after the date of registration. A sponsor covered by this subparagraph must also invite each of its current apprentices to voluntarily inform the sponsor whether the apprentice believes that he or she is an individual with a disability, as defined in § 30.2, no later than two years after the date of registration.

§ 30.12 Recordkeeping.

(a) *General obligation.* Each sponsor must collect such data and maintain such records as the Registration Agency finds necessary to determine whether the sponsor has complied or is complying with the requirements of this part. Such records must include, but are not limited to records relating to:

(1) Selection for apprenticeship, including applications, tests and test results, interview notes, bases for selection or rejection, and any other records required to be maintained under UGESP;

(2) The invitation to self-identify as an individual with a disability;

(3) Information relative to the operation of the apprenticeship program, including but not limited to job assignments in all components of the occupation as required under § 29.5(b)(3) of this title, promotion, demotion, transfer, layoff, termination, rates of pay, other forms of compensation, conditions of work,

hours of work, hours of training provided, and any other personnel records relevant to EEO complaints filed with the Registration Agency under § 30.14 or with other enforcement agencies;

(4) Compliance with the requirements of § 30.3;

(5) Requests for reasonable accommodation; and

(6) Any other records pertinent to a determination of compliance with these regulations, as may be required by the Registration Agency.

(b) *Sponsor identification of record.* For any record the sponsor maintains pursuant to this part, the sponsor must be able to identify the race, sex, ethnicity (Hispanic or Latino/non-Hispanic or Latino), and when known, disability status of each apprentice, and where possible, the race, sex, ethnicity, and disability status of each applicant to apprenticeship and supply this information upon request to the Registration Agency.

(c) *Affirmative action programs.* Each sponsor required under § 30.4 to develop and maintain an affirmative action program must retain both the written affirmative action plan and documentation of its component elements set forth in §§ 30.5, 30.6, 30.7, 30.8, 30.9, and 30.11.

(d) *Maintenance of records.* The records required by this part and any other information relevant to compliance with these regulations must be maintained for 5 years from the date of the making of the record or the personnel action involved, whichever occurs later, and must be made available upon request to the Registration Agency or other authorized representative in such form as the Registration Agency may determine is necessary to enable it to ascertain whether the sponsor has complied or is complying with this part. Failure to preserve complete and accurate records as required by paragraphs (a), (b), and (c) of this section constitutes noncompliance with this part.

(e) *Confidentiality and use of medical information.* (1) Any information obtained pursuant to this part regarding the medical condition or history of an applicant or apprentice must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or apprentice and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the

disability might require emergency treatment; and

(iii) Government officials engaged in enforcing this part, the laws administered by OFCCP, or the ADA, must be provided relevant information on request.

(2) Information obtained under this part regarding the medical condition or history of any applicant or apprentice may not be used for any purpose inconsistent with this part.

(f) *Access to records.* Each sponsor must permit access during normal business hours to its places of business for the purpose of conducting on-site EEO compliance reviews and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material the Registration Agency deems relevant to the matter under investigation and pertinent to compliance with this part. The sponsor must also provide the Registration Agency access to these materials, including electronic records, off-site for purposes of conducting EEO compliance reviews and complaint investigations. Upon request, the sponsor must provide the Registration Agency information about all format(s), including specific electronic formats, in which its records and other information are available. Information obtained in this manner will be used only in connection with the administration of this part or other applicable EEO laws.

§ 30.13 Equal employment opportunity compliance reviews.

(a) *Conduct of compliance reviews.* The Registration Agency will regularly conduct EEO compliance reviews to determine if the sponsor maintains compliance with this part, and will also conduct EEO compliance reviews when circumstances so warrant. An EEO compliance review may consist of, but is not limited to, comprehensive analyses and evaluations of each aspect of the apprenticeship program through off-site reviews, such as desk audits of records submitted to the Registration Agency, and on-site reviews conducted at the sponsor's establishment that may involve examination of records required under this part; inspection and copying of documents related to recordkeeping requirements of this part; and interviews with employees, apprentices, journeyworkers, supervisors, managers, and hiring officials.

(b) *Notification of compliance review findings.* Within 45 business days of completing an EEO compliance review, the Registration Agency must present a written Notice of Compliance Review Findings to the sponsor's contact person

through registered or certified mail, with return receipt requested. If the compliance review indicates a failure to comply with this part, the registration agency will so inform the sponsor in the Notice and will set forth in the Notice the following:

- (1) The deficiency(ies) identified;
- (2) How to remedy the deficiency(ies);
- (3) The timeframe within which the deficiency(ies) must be corrected; and
- (4) Enforcement actions may be undertaken if compliance is not achieved within the required timeframe.

(c) *Compliance.* (1) When a sponsor receives a Notice of Compliance Review Findings that indicates a failure to comply with this part, the sponsor must, within 30 business days of notification, either implement a compliance action plan and notify the Registration Agency of that plan or submit a written rebuttal to the Findings. Sponsors may also seek to extend this deadline one time by up to 30 days for good cause shown. If the Registration Agency upholds the Notice after receiving a written response, the sponsor must implement a compliance action plan within 30 days of receiving the notice from the Registration Agency upholding its Findings. The compliance action plan must include, but is not limited to, the following provisions:

- (i) A specific commitment, in writing, to correct or remediate identified deficiency(ies) and area(s) of noncompliance;
- (ii) The precise actions to be taken for each deficiency identified;
- (iii) The time period within which the cited deficiency(ies) will be remedied and any corrective program changes implemented; and
- (iv) The name of the individual(s) responsible for correcting each deficiency identified.

(2) Upon the Registration Agency's approval of the compliance action plan, the sponsor may be considered in compliance with this part provided that the compliance action plan is implemented.

(d) *Enforcement actions.* Any sponsor that fails to implement its compliance action plan within the specified timeframes may be subject to an enforcement action under § 30.15.

§ 30.14 Complaints.

(a) *Requirements for individuals filing complaints—(1) Who may file.* Any individual who believes that he or she has been or is being discriminated against on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability with regard to apprenticeship, or who believes he or she has been retaliated against as

described in § 30.17, may, personally or through an authorized representative, file a written complaint with the Registration Agency with whom the apprenticeship program is registered.

(2) *Time period for filing a complaint.* Generally, a complaint must be filed within 300 days of the alleged discrimination or specified failure to follow the equal opportunity standards. However, for good cause shown, the Registration Agency may extend the filing time. The time period for filing is for the administrative convenience of the Registration Agency and does not create a defense for the respondent.

(3) *Contents of the complaint.* Each complaint must be made in writing and must contain the following information:

- (i) The complainant's name, address and telephone number, or other means for contacting the complainant;
- (ii) The identity of the respondent (the individual or entity that the complainant alleges is responsible for the discrimination);
- (iii) A short description of the events that the complainant believes were discriminatory, including but not limited to when the events took place, what occurred, and why complainant believes the actions were discriminatory (for example, because of his or her race, color, religion, sex, sexual orientation, national origin, age (40 or older), genetic information, or disability).
- (iv) The complainant's signature or the signature of the complainant's authorized representative.

(b) *Requirements of sponsors.* Sponsors must provide written notice to all applicants for apprenticeship and all apprentices of their right to file a discrimination complaint and the procedures for doing so. The notice must include the address, phone number, and other contact information for the Registration Agency that will receive and investigate complaints filed under this part. The notice must be provided in the application for apprenticeship and must also be displayed in a prominent, publicly available location where all apprentices will see the notice. The notice must contain the following specific wording:

Your Right to Equal Opportunity

It is against the law for a sponsor of an apprenticeship program registered for Federal purposes to discriminate against an apprenticeship applicant or apprentice based on race, color, religion, national origin, sex, sexual orientation, age (40 years or older), genetic information, or disability. The sponsor must ensure equal opportunity with regard to all terms, conditions, and privileges associated with apprenticeship. If you think that you have been subjected to discrimination, you may file a complaint

within 300 days from the date of the alleged discrimination or failure to follow the equal opportunity standards with [INSERT NAME OF REGISTRATION AGENCY, ADDRESS, PHONE NUMBER, EMAIL ADDRESS, AND CONTACT NAME OF INDIVIDUAL AT THE REGISTRATION AGENCY WHO IS RESPONSIBLE FOR RECEIVING COMPLAINTS]. You may also be able to file complaints directly with the EEOC, or State fair employment practices agency. If those offices have jurisdiction over the sponsor/ employer, their contact information is listed below. [INSERT CONTACT INFORMATION FOR EEOC AS PROVIDED ON "EEO IS THE LAW POSTER," AND CONTACT INFORMATION FOR STATE FEPA AS PROVIDED ON STATE FEPA POSTER, AS APPLICABLE]

Each complaint filed must be made in writing and include the following information:

1. Complainant's name, address and telephone number, or other means for contacting the complainant;
2. The identity of the respondent (*i.e.* the name, address, and telephone number of the individual or entity that the complainant alleges is responsible for the discrimination);
3. A short description of the events that the complainant believes were discriminatory, including but not limited to when the events took place, what occurred, and why the complainant believes the actions were discriminatory (for example, because of his/her race, color, religion, sex, sexual orientation, national origin, age (40 or older), genetic information, or disability);
4. The complainant's signature or the signature of the complainant's authorized representative.

(c) *Requirements of the Registration Agency—(1) Conduct investigations.*

The investigation of a complaint filed under this part will be undertaken by the Registration Agency, and will proceed as expeditiously as possible. In conducting complaint investigations, the Registration Agency must:

- (i) Provide written notice to the complainant acknowledging receipt of the complaint;
- (ii) Contact the complainant, if the complaint form is incomplete, to obtain full information necessary to initiate an investigation;
- (iii) Initiate an investigation upon receiving a complete complaint;

(iv) Complete a thorough investigation of the allegations of the complaint and develop a complete case record that must contain, but is not limited to, the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations; and

(v) Provide written notification of the Registration Agency's findings to both the respondent and the complainant.

(2) *Seek compliance.* Where a report of findings from a complaint investigation indicates a violation of the nondiscrimination requirements of this part, the Registration Agency should attempt to resolve the matter quickly at the Registration Agency level whenever appropriate. Where a complaint of discrimination cannot be resolved at the Registration Agency level to the satisfaction of the complainant, the Registration Agency must refer the complaint to other Federal, State or local EEO agencies, as appropriate.

(3) *Referrals to other EEO agencies.* The Registration Agency, at its discretion, may choose to refer a complaint immediately upon its receipt or any time thereafter to:

- (i) The EEOC;
- (ii) The United States Attorney General;
- (iii) The Department's OFCCP; or
- (iv) For an SAA, to its Fair Employment Practices Agency.

(4) *Alternative complaint procedures.* An SAA may adopt a complaint review procedure differing in detail from that given in this section provided it is submitted for review to and receives approval by the Administrator.

§ 30.15 Enforcement actions.

Where the Registration Agency, as a result of a compliance review, complaint investigation, or other reason, determines that the sponsor is not operating its apprenticeship program in accordance with this part, the Registration Agency must notify the sponsor in writing of the specific violation(s) identified and may:

- (a) Offer the sponsor technical assistance to promote compliance with this part.
- (b) Suspend the sponsor's right to register new apprentices if the sponsor fails to implement a compliance action plan to correct the specific violation(s) identified within 30 business days from the date the sponsor is so notified of the violation(s), or, if the sponsor submits a written response to the findings of noncompliance, fails to implement a compliance action plan within 30 days of receiving the Registration Agency's notice upholding its initial noncompliance findings. If the sponsor has not implemented a compliance action plan within 30 business days of notification of suspension, the Registration Agency may institute proceedings to deregister the program in accordance with the deregistration proceedings set forth in part 29 of this chapter, or if the Registration Agency

does not institute such proceedings within 45 days of the start of the suspension, the suspension is lifted.

(c) Take any other action authorized by law. These other actions may include, but are not limited to:

- (1) Referral to the EEOC;
- (2) Referral to an appropriate State fair employment practice agency; or
- (3) Referral to the Department's OFCCP.

§ 30.16 Reinstatement of program registration.

An apprenticeship program that has been deregistered pursuant to this part may be reinstated by the Registration Agency upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part.

§ 30.17 Intimidation and retaliation prohibited.

(a) A participant in an apprenticeship program may not be intimidated, threatened, coerced, retaliated against, or discriminated against because the individual has:

- (1) Filed a complaint alleging a violation of this part;
 - (2) Opposed a practice prohibited by the provisions of this part or any other Federal or State equal opportunity law;
 - (3) Furnished information to, or assisted or participated in any manner, in any investigation, compliance review, proceeding, or hearing under this part or any Federal or State equal opportunity law; or
 - (4) Otherwise exercised any rights and privileges under the provisions of this part.
- (b) Any sponsor that permits such intimidation or retaliation in its apprenticeship program, including by participating employers, and fails to take appropriate steps to prevent such activity will be subject to enforcement action under § 30.15.

§ 30.18 State apprenticeship agencies.

(a) *State plan.* (1) Within 1 year of January 18, 2017, unless an extension for good cause is sought and granted by the Administrator, an SAA that seeks to obtain or maintain recognition under § 29.13 of this title must submit to OA a State EEO plan that:

- (i) Includes, at a minimum, draft State apprenticeship authorizing language corresponding to the requirements of this part; and
- (ii) Requires all apprenticeship programs registered with the State for Federal purposes to comply with the requirements of the State's EEO plan within 180 days from the date that OA provides written approval of the State

EEO plan submitted under this paragraph (a)(1).

(2) Upon receipt of the State's EEO plan, OA will review the plan to determine if the plan conforms to this part. OA will:

- (i) Grant the SAA continued recognition during this review period;
- (ii) Provide technical assistance to facilitate conformity, and provide written notification of the areas of nonconformity, if any; and
- (iii) Upon successful completion of the review process, notify the SAA of OA's determination that the State's EEO plan conforms to this part.

(3) If the State does not submit a revised State EEO plan that addresses identified non-conformities within 90 days from the date that OA provides the SAA with written notification of the areas of nonconformity, OA will begin the process set forth in § 29.14 of this title to rescind recognition of the SAA.

(4) An SAA that seeks to obtain or maintain recognition must obtain the Administrator's written concurrence in any proposed State EEO plan, as well as any subsequent modification to that plan, as provided in § 29.13(b)(9) of this title.

(b) *Recordkeeping requirements.* A recognized SAA must keep all records pertaining to program compliance reviews, complaint investigations, and any other records pertinent to a determination of compliance with this part. These records must be maintained for five years from the date of their creation.

(c) *Retention of authority.* As provided in § 29.13 of this chapter, OA retains the full authority to:

- (1) Conduct compliance reviews of all registered apprenticeship programs;
- (2) Conduct complaint investigations of any program sponsor to determine whether an apprenticeship program registered for Federal purposes is operating in accordance with this part;
- (3) Deregister for Federal purposes an apprenticeship program registered with a recognized SAA as provided in §§ 29.8(b) and 29.10 of this chapter; and
- (4) Refer any matter pertaining to paragraph (c)(1) or (2) of this section to the following:

- (i) The EEOC or the U.S. Attorney General with a recommendation for the institution of an enforcement action under title VII of the Civil Rights Act of 1964, as amended; the ADEA; GINA, or title I of the ADA;

- (ii) The Department's OFCCP with a recommendation for the institution of agency action under Executive Order 11246; or section 503 of the Rehabilitation Act of 1973, as amended; or

(iii) The U.S. Attorney General for other action as authorized by law.

(d) *Derecognition.* A recognized SAA that fails to comply with the requirements of this section will be subject to derecognition proceedings, as provided in § 29.14 of this chapter.

§ 30.19 Exemptions.

Requests for exemption from these regulations, or any part thereof, must be made in writing to the Registration Agency and must contain a statement of reasons supporting the request. Exemptions may be granted for good

cause by the Registration Agency. State Apprenticeship Agencies must receive approval to grant an exemption from the Administrator, prior to granting an exemption from these regulations.

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Part III

Department of the Interior

Bureau of Land Management

43 CFR Parts 2800 and 2880

Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections; Final Rule

DEPARTMENT OF THE INTERIOR**Bureau of Land Management****43 CFR Parts 2800 and 2880**

[LLWO301000.L13400000]

RIN 1004-AE24

Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections**AGENCY:** Bureau of Land Management, Department of the Interior.**ACTION:** Final rule.

SUMMARY: Through this final rule the Bureau of Land Management (BLM) is amending its regulations governing rights-of-way issued under the Federal Land Policy and Management Act (FLPMA) and the Mineral Leasing Act (MLA). The principal purposes of these amendments are to facilitate responsible solar and wind energy development on BLM-managed public lands and to ensure that the American taxpayer receives fair market value for such development. This final rule includes provisions to promote the use of preferred areas for solar and wind energy development, called “designated leasing areas” (DLAs). It builds upon existing regulations and policies to expand BLM’s ability to utilize competitive processes to offer authorizations for development inside or outside of DLAs. It also addresses the appropriate terms and conditions (including payment and bonding requirements) for solar and wind energy development rights-of-way issued under the regulations. Finally, the rule makes technical changes, corrections, and clarifications to the existing rights-of-way regulations. Some of these changes affect all rights-of-way, while some provisions affect only specific rights-of-way, such as those for transmission lines with a capacity of 100 kilovolts (kV) or more.

DATES: *Effective Date:* This final rule is effective January 18, 2017.**FOR FURTHER INFORMATION CONTACT:** John Kalish, Bureau of Land Management, at 202-912-7312, for information relating to the BLM’s solar and wind renewable energy programs, or the substance of the final rule. For information pertaining to the changes made for any transmission line with a capacity of 100 kV or more you may contact Stephen Fusilier at 202-912-7426. For information on procedural matters or the rulemaking process you may contact Charles Yudson at 202-912-7437. Persons who

use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, to contact the above individuals.

SUPPLEMENTARY INFORMATION:

- I. Executive Summary
- II. Background
- III. Final Rule as Adopted and Responses to Comments
- IV. Section-by-Section Analysis for Part 2800
- V. Section-by-Section Analysis for Part 2880
- VI. Procedural Matters

I. Executive Summary

The BLM initiated this rulemaking in 2011 through publication of an Advance Notice of Proposed Rulemaking (ANPR) seeking public comment on a potential regulatory framework for competitive solar and wind energy rights-of-way. A proposed rule was published in the **Federal Register** on September 30, 2014, summarizing and discussing the comments that the BLM received on the ANPR. The proposed rule set forth a framework for the competitive leasing of solar and wind energy rights-of-way both inside and outside of designated leasing areas. It also proposed codifying existing solar and wind energy policies in 43 CFR part 2800, establishing a new acreage rent for wind energy projects, and updating the methods used to set acreage rents and megawatt (MW) capacity fees for existing and future solar and wind energy projects. In addition to the changes related to solar and wind energy development, the rule also proposed related updates to other provisions of the rights-of-way regulations, including those applicable to transmission lines with a capacity of 100 kV or more and pipelines 10 inches or more in diameter. Based on comments on the proposed rule and consideration of other factors, the BLM prepared this final rule.

Statutory and Regulatory Authority

Facilities for the generation, transmission, and distribution of electric energy are authorized under Title V of the FLPMA (43 U.S.C. 1761-1771) and its implementing regulations at 43 CFR part 2800. Section 504(g) requires that the BLM generally receive fair market value for a right-of-way. Under Title V, the BLM can issue easements, leases, licenses, and permits to occupy, use or traverse public lands for particular purposes. The BLM generally refers to all such rights-of-way as “grants.” The final rule continues to refer to solar and wind energy development rights-of-way issued noncompetitively or outside a DLA as “grants,” but designates solar and wind energy development rights-of-way

issued competitively and within a DLA under revised subpart 2809 as “leases,” to which specific requirements and benefits are attached, as explained below.

Rights-of-way for oil and gas pipelines are authorized under Section 28 of the MLA (30 U.S.C. 185), Sections 302, 303, and 310 of FLPMA (43 U.S.C. 1732, 1733, and 1740), and the applicable implementing regulations at 43 CFR part 2880. The BLM processes applications for these categories of rights-of-way in accordance with section 2884.11.

Policies

The BLM released a Draft Solar Energy Programmatic Environmental Impact Statement (EIS) on December 17, 2010 and released a Supplement to the Draft EIS on October 28, 2011. The Supplement to the Draft EIS contemplated a process to identify and offer public lands in solar energy zones (SEZs) through a competitive leasing process. The Supplement to the Draft EIS described how the BLM intended to pursue a rulemaking process to implement a competitive leasing program within SEZs. The BLM released the Final Solar EIS on July 27, 2012, and the Secretary of the Interior (Secretary) signed the Record of Decision (ROD) on October 12, 2012. The Solar Programmatic EIS ROD, or Western Solar Plan, likewise described the BLM’s intent to establish a competitive leasing program within the SEZs.

The Western Solar Plan provides the foundation for a Bureau-initiated competitive process for offering lands for solar energy development within the SEZs. Similar comprehensive or regional land use planning efforts could be initiated by the BLM in the future to designate additional renewable energy development areas, such as for wind development. For example, the recently completed Desert Renewable Energy Conservation Plan (DRECP) identified Development Focus Areas (DFAs) in Southern California that were designed to support wind, solar, and geothermal development. As explained elsewhere in this preamble, in the Western Solar Plan and in the DRECP Record of Decision (ROD), SEZs and DFAs, like all DLAs, represent areas that have been prescreened by the BLM and identified as having high energy generation potential, access to transmission (either existing or proposed), and low potential for conflicts with other resources. The rule supports the establishment of these areas through procedures to inform their identification and establishment.

Competitive Leasing Process

Existing regulations authorize the BLM to determine whether competition exists among right-of-way applications filed for the same facility or system; however, they do not allow the BLM to offer such lands competitively absent such a finding. The existing regulations allow the BLM to resolve any such competition using competitive bidding procedures. All such grants are issued subject to valid existing rights in accordance with 43 CFR 2805.14.

Building on recommendations and analysis in the Western Solar Plan, this final rule expands the existing regulations to allow the BLM to offer lands competitively on its own initiative, both inside and outside DLAs, even in the absence of identified competition. Within DLAs, the rule will require competitive leasing procedures except in certain circumstances, when applications could be considered outside the competitive process. Outside DLAs, the BLM will have discretion whether to utilize competitive leasing procedures. This rule identifies what constitutes a DLA, and outlines the competitive process for solar and wind energy leasing inside DLAs, including the nomination process for areas inside DLAs, the process for reviewing nominations, the competitive bidding procedures to be deployed, and the rules governing administration of solar or wind energy leases issued through the competitive process.

Incentives

This rule includes various provisions to incentivize development inside rather than outside of DLAs. For example, the rule establishes a new \$15 per acre application filing fee for right-of-way applications outside of DLAs to discourage speculative applications and encourage development in DLAs. In addition, a winning bidder outside a DLA will be deemed the “preferred applicant” and eligible to apply for a grant, while a winning bidder within a DLA will be offered a lease. A primary reason for this distinction is that the prescreening done by the BLM as part of the identification of DLAs enables it to issue a lease prior to the conclusion of the project-specific reviews (such project-specific reviews would, however, have to be completed prior to the commencement of construction).

Further, this final rule establishes a mechanism whereby bidders inside DLAs may qualify for variable offsets (a form of bidding credit) that will give them a financial advantage in the competitive bidding process. Specifically, a bidder that meets the

qualifications set forth in the Notice of Competitive Offer for a particular offset will have an opportunity to pre-qualify for a reduction to their bid amount, up to 20 percent of the bid. Suppose, for example, a bidder pre-qualified for a 20 percent offset and then won the auction with a high bid of \$100. The bidder would only be obligated to pay the BLM \$80 for the lease. These reductions would be sale-specific and would be based on factors identified in the initial sale notice. The final rule gives the BLM the flexibility to vary the factors that could enable a bidder to obtain a variable offset from one competitive offer to another, but possible factors include having an approved Power Purchase Agreement (PPA) or Interconnect Agreement, or employing a less water-intensive technology. Each of the factors will be identified in the Notice of Competitive Offer, which will also specify the pre-determined reduction (*e.g.*, 5 percent) associated with any individual factor. The total aggregate reduction across all factors cannot exceed 20 percent.

Additional provisions that incentivize development within DLAs include a reduced nomination fee of \$5 per acre, which is electively paid by a potential bidder, compared to \$15 per acre non-elective application filing fee for competitive parcels outside of DLAs; a 10-year phase-in of the MW capacity fee inside a DLA as opposed to a 3-year phase-in of the fee outside of a DLA; and more favorable bonding requirements inside DLAs. Specifically, outside DLAs, bonding must be determined based on reclamation cost estimates, whereas inside DLAs, the final rule requires a standard bond in the amount of \$10,000 per acre for solar energy development and either \$10,000 or \$20,000 per wind energy turbine for wind energy development, depending on the nameplate capacity of the turbine.

Finally, successful competitive processes within DLAs will result in the issuance of a 30-year fixed-term lease, whereas a successful competitive process outside of a DLA will result in a preferred applicant status for the winner. The 30-year fixed term lease issued to the high bidder for a parcel offered competitively within a DLA will increase the certainty for developers and, in turn, make it easier to secure financing or reach terms on other agreements. Specifically, the lease will provide developers with evidence of site control, and they will obtain it much earlier in the review process than they would under existing regulations (notably, before project-specific NEPA reviews have been concluded).

Rents and Fees

The rule updates the payments currently established by BLM policies to ensure that the BLM obtains fair market value for the use of the public lands. Specifically, it updates and codifies the acreage rent for both solar and wind energy authorizations. The acreage rent will be based on the acreage of the authorization, using a 10 percent encumbrance value for wind energy authorizations and a 100 percent encumbrance value for solar energy authorizations. This compares to the 50 percent encumbrance value that is used for determining rent for linear rights-of-way on the public lands.

The acreage rent for linear rights-of-way and solar and wind energy rights-of-way will vary by individual counties and is based on agricultural land values determined from data published by the National Agricultural Statistics Service (NASS). The BLM may also determine on a project-specific or regional basis that a different rate should be utilized. The “acreage rent” component captures the value of unimproved rural land encumbered by a project.

In addition to acreage rent, the rule also updates and codifies the MW capacity fee that the BLM already charges under existing policies. As under existing policy, that fee is designed to capture the difference between a particular project area’s unimproved land value and the higher value associated with the area’s solar or wind energy development potential. The BLM uses a MW capacity fee as a proxy for the area’s electrical generation development potential. That fee is calculated using a formula that includes the nameplate capacity of the approved project, a capacity factor or efficiency factor that varies based on the average potential electric generation of different solar and wind technologies, the average wholesale prices of electricity, and a Federal rate of return based on a 20-year Treasury bond. In this final rule, the capacity factors used for calculating the MW capacity fee are 20 percent for solar photovoltaic (PV), 25 percent for concentrated solar power (CSP), 30 percent for CSP with storage capacity of 3 hours or more, and 35 percent for wind. Additionally, the final rule allows the BLM to determine, on a project-specific or regional basis, that a different net capacity factor is more appropriate, such as if a project takes advantage of a new technology (*e.g.*, energy storage) or project design considerations (*e.g.*, solar array layout).

The final rule increases the MW capacity fee currently established by BLM policy from \$4,155 per MW to

\$5,010 per MW for wind energy authorizations, and reduces the MW capacity fee from \$5,256 to \$2,863 per MW for PV solar, from \$6,570 to \$3,578 per MW for concentrated photovoltaic (CPV) or CSP solar, and from \$7,884 to \$4,294 per MW for CSP with storage capacity of 3 hours or more. The rule provides for a three-year phase-in of the MW capacity fee for right-of-way grants outside DLAs (25 percent in year one, 50 percent in year two, and 100 percent for subsequent years) and for a longer, ten-year phase-in for right-of-way leases inside DLAs (50 percent for the first 10 years and 100 percent for subsequent years).

As explained elsewhere in this preamble, both the acreage rent and MW capacity fees adjust periodically based on identified factors, including changes in NASS survey values and wholesale power prices. In addition, based on comments received on the proposed rule, this final rule includes provisions that allow grant or lease holders the option to select fixed, scheduled rate adjustments to the applicable per acre zone rate (or rent) and MW rate over the term of the right-of-way grant or lease. This scheduled rate adjustment method would be used in lieu of the rule's standard rate adjustment method, under which those rates could increase or decrease by irregular amounts depending on changes to NASS survey values or wholesale power prices.

The rule includes requirements to hold preliminary application review meetings after the submission of an application for a solar or wind energy project, including authorizing the BLM to collect cost recovery fees for those meetings. Through this final rule the BLM is also extending the preliminary application review meeting requirement to any transmission line having a capacity of 100 kV or more. This change is appropriate because both solar or wind energy projects and transmission lines with a capacity greater than 100 kV are generally large-scale facilities with greater potential for impacts and resource conflicts. Based on experience with existing solar and wind energy projects, the BLM has found that those preliminary application meetings provide both the applicant and the BLM with an opportunity to identify and discuss resource conflicts early on in the process. In addition, the rule provides for additional cost reimbursement measures, consistent with Sections 304(b) and 504(g) of FLPMA.

Changes to 43 CFR Part 2880

In addition to the changes to 43 CFR part 2800, this final rule also revises

several subparts of part 2880. These revisions are necessary to ensure consistency of policies, processes, and procedures, where possible, between rights-of-way applied for and administered under part 2800 and rights-of-way applied for and administered under part 2880. These changes are discussed in more detail in Section II of this preamble. However, a proposal to require preliminary application review meetings for right-of-way applications for pipelines exceeding 10 inches in diameter was dropped from this final rule in response to comments.

II. Background

A. Rule Overview

The BLM published the proposed rule in the **Federal Register** on September 30, 2014 (79 FR 59022) for a 60-day comment period ending on December 1, 2014. In response to public requests for extensions of the public comment period the BLM extended the period for an additional 15 days on November 29, 2014, through December 16, 2014. We received 36 comment letters on the proposed rule. We also received similar feedback through stakeholder engagement meetings held as part of BLM's regular course of business. This final rule addresses the comments received during the comment period and during stakeholder engagement meetings in the section-by-section discussion in section III. of this preamble.

As explained above, the primary purpose of this rule is to facilitate the responsible development of solar and wind energy development on the public lands, with a specific focus on incentivizing development on lands identified as DLAs. To that end, this rule, in an amendment of section 2801.5, defines the term "designated leasing area" as a parcel of land with specific boundaries identified by the BLM land use planning process as being a preferred location for solar or wind energy that can be leased competitively for energy development. In this rule, the BLM amends its regulations implementing FLPMA to provide for two competitive processes for solar and wind energy rights-of-way on public lands. One of the processes is for lands inside DLAs. The other process is for lands outside of DLAs.

For lands outside DLAs, the BLM amends section 2804.23 to provide for a competitive bidding process designed specifically for solar or wind energy development. Prior to this final rule, section 2804.23 authorized a competitive process to resolve

competing right-of-way applications for the same facility or system. Under amended section 2804.23, the BLM can now competitively offer lands on its own initiative. The competitive process for solar and wind energy development on lands outside of DLAs is outlined in new section 2804.30.

The competitive process for lands inside DLAs is outlined in revised 43 CFR subpart 2809, which provides for a parcel nomination and competitive offer, instead of an application process.

This rule includes not only these competitive processes, but also a number of amendments to other provisions of the right-of-way regulations found at 43 CFR parts 2800 and 2880. The BLM determined that it is necessary to first articulate the general requirements for rights-of-way in order to set the solar and wind requirements apart.

For example, the final rule has mandatory bonding requirements for solar and wind energy, including a minimum bond amount. The BLM determined that bonding is necessary for all solar and wind energy rights-of-way because of the intensity and duration of the impacts of such authorizations. For other right-of-way authorizations, the BLM will continue to require bonding at its discretion under this final rule.

Other amendments to the regulations include changes in right-of-way application submission and processing requirements, rents and fees, and alternative requirement requests. In addition, this final rule makes several technical corrections as explained in the section-by-section analysis below.

B. Statutory and Regulatory Background

FLPMA provides comprehensive authority for the administration and protection of the public lands and their resources and directs that the public lands be managed "on the basis of multiple use and sustained yield" (43 U.S.C. 1701(a)(7) and 1732(a)). As defined by FLPMA, the term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse public lands (43 U.S.C. 1702(f)). Title V of FLPMA (43 U.S.C. 1761–1771) authorizes the BLM to issue rights-of-way on the public lands for electric generation systems, including solar and wind energy generation systems. FLPMA also mandates that "the United States receive fair market value for the use of the public lands and their resources unless otherwise provided for by statute" (43 U.S.C. 1701(a)(9) and 1764(g)). Section 28 of the MLA (30 U.S.C. 185) and FLPMA provide similar authority for authorizing rights-of-way

for oil and gas pipelines. The BLM has authority to issue regulations under both FLPMA (43 U.S.C. 1732, 1733, and 1740) and the MLA (30 U.S.C. 185 and 189).

The Energy Policy Act of 2005 (codified at 42 U.S.C. 15801 *et seq.*) (EPAAct) includes provisions authorizing and encouraging the Federal Government to develop energy producing facilities. Title II of the EPAAct includes a provision encouraging the Secretary to approve non-hydropower renewable energy projects (solar, wind, and geothermal) on public lands with a total combined generation capacity of at least 10,000 MWs of electricity by 2015. See Section 211, Public Law 109–58, 119 Stat. 660 (2005).

Since passage of the EPAAct, the Secretary has issued several orders that emphasize the importance of renewable energy development on public lands and the Department of the Interior's (Department's) efforts to achieve the goal that Congress established in Section 211 of the EPAAct. Secretarial Order No. 3283, "Enhancing Renewable Energy Development on the Public Lands," signed by Secretary Kempthorne on January 16, 2009, facilitates the Department's efforts to achieve the goal established by Congress in Section 211 of the EPAAct. On March 11, 2009, Secretary Salazar signed Secretarial Order No. 3285, "Renewable Energy Development by the Department of the Interior," which describes the need for strategic planning and a balanced approach to domestic resource development. This order was amended by Secretarial Order 3285A1 in February 2010. Amended Order 3285A1 establishes the development of renewable energy on public lands as one of the Department's highest priorities.

While the BLM has already met the goal established by Congress by approving over 12,000 MWs of renewable energy by the end of 2012, the development of renewable energy resources on the public lands remains a national priority. To advance that goal, President Obama included in the administration's Climate Action Plan to reduce carbon pollution, released on June 25, 2013, a new goal for the Department to approve at least 20,000 MWs of new renewable energy capacity on federal lands by 2020. As of the end of fiscal year 2015, the BLM has reviewed and approved 60 projects capable of generating over 15,000 MWs of power.

The BLM has issued several instruction memoranda (IMs) that identify policies and procedures related to processing solar and wind energy right-of-way applications. The BLM is

incorporating some of these existing policies and procedures into its right-of-way regulations. The IMs can be found at: http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

Briefly, the IMs are as follows:

1. IM 2009–043, Wind Energy Development Policy. This IM provides guidance on processing right-of-way applications for wind energy projects on public lands;

2. IM 2011–003, Solar Energy Development Policy. This IM provides guidance on the processing of right-of-way applications and the administration of authorized solar energy projects on public lands;

3. IM 2011–059, National Environmental Policy Act (NEPA) Compliance by Utility-Scale Renewable Energy Right-of-Way Authorizations. This IM clarifies NEPA policy for evaluating solar and wind energy project right-of-way applications;

4. IM 2011–060, Solar and Wind Energy Applications—Due Diligence. This IM provides guidance on the due diligence requirements for solar and wind energy development right-of-way applications; and

5. IM 2011–061, Solar and Wind Energy Applications—Pre-Application and Screening. This IM provides guidance on the review of right-of-way applications for solar and wind energy development projects on public lands; and

6. IM 2016–122, *Policy Guidance for Federal Land Policy and Management Act Right-of-Way Rent Exemptions for Electric or Telephone Facilities Financed or Eligible for Financing under the Rural Electrification Act of 1936, as amended (IM 2016–122)*. This IM provides guidance for processing requests for FLPMA right-of-way rent exemptions for electric and telephone facilities financed or eligible for financing by the United States Department of Agriculture, Rural Utilities Service (RUS) under the Rural Electrification Act of 1936, as amended (Rural Electrification Act), 7 U.S.C. 901 *et seq.* In particular, this IM makes clear that wind and solar entities that qualify under the Rural Electrification Act pay the MW capacity fees but not acreage rent.

In addition, in 2005 and 2012 the BLM issued landscape-level land use plan amendment decisions supported by programmatic EISs to facilitate wind and solar energy development. These land use plan amendments guide future BLM management actions by identifying desired outcomes and allowable uses on public lands.

On June 24, 2005, the BLM published the Final Programmatic Environmental

Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States (Wind Programmatic EIS) (70 FR 36651), which analyzed the environmental impact of the development of wind energy projects on public lands in the West and identified approximately 20.6 million acres of public lands with wind energy development potential (<http://windeis.anl.gov>). Following the publication of the Wind Programmatic EIS, the BLM issued the ROD for Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments (Wind Programmatic EIS ROD) (71 FR 1768), which amended 48 BLM land use plans. The Wind Programmatic EIS ROD did not identify specific wind energy development leasing areas, but rather identified areas that have potential for the development of wind energy production facilities, along with areas excluded from consideration for wind energy facility development because of other resource values that are incompatible with that use.

On July 27, 2012, the BLM and the Department of Energy published the Notice of Availability of the Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Solar Programmatic EIS) (77 FR 44267). The Solar Programmatic EIS assessed the environmental, social, and economic impacts associated with utility-scale solar energy development on public lands in Arizona, California, Colorado, Nevada, New Mexico, and Utah (<http://solareis.anl.gov>). On October 12, 2012, the Department and the BLM issued the Western Solar Plan, which amended 89 BLM land use plans to identify 17 solar energy zones (SEZs) and identify mandatory design features applicable to utility-scale solar development on BLM managed lands. The Western Solar Plan also described the BLM's intent to use a competitive offer process to facilitate solar energy development projects in SEZs. SEZs, including those identified in the Western Solar plan, will be considered DLAs under this final rule.

This final rule is one of the steps being taken by the Department and the BLM to promote renewable energy development on the public lands. It implements one of the Western Solar Plan's key recommendations, namely that the BLM institute a process whereby it can competitively offer lands within DLAs. In addition to addressing recommendations in the Western Solar Plan, the final rule also implements suggestions for improving the renewable energy program made by the Department of the Interior's Office of

Inspector General for the Department, initially in a draft report and carried over to the final report (Report No. CR–EV–BLM–0004–2010), and by the Government Accountability Office (GAO) (Audit No. 361373), both of which address the use of competitive leasing for solar and wind development authorizations. The Inspector General (OIG) reviewed the BLM’s renewable energy activities to assess the effectiveness of the BLM’s development and management of its renewable energy program. The IG also made recommendations on other aspects of the BLM’s right-of-way program.

The OIG report discusses only wind energy projects, as the solar energy program was not at a stage where it had been fully implemented. However, based on experience gained from its authorization of solar projects, the BLM believes that recommendations made for the wind energy program would also benefit the solar energy program. Other OIG recommendations pertained to the amounts and collection procedures for bonds for wind energy projects. These recommendations included:

1. Requiring a bond for all wind energy projects and reassessing the minimum bond requirements;
2. Tracking and managing bond information;
3. Developing and implementing procedures to ensure that when a project is transferred from one entity to another, the BLM would return the first bond to the company that obtained it and request a new bond from the newly assigned company; and

4. Developing and implementing Bureau-wide guidance for using competitive bidding on wind and solar energy rights-of-way.

The BLM concurred with all of the OIG’s recommendations. The last recommendation is one of the principal reasons for developing this rule. The other recommendations form the basis for other changes being made as part of the BLM’s operating procedures that are also addressed through this rulemaking.

Through this rulemaking, the BLM amends regulations in 43 CFR parts 2800 and 2880, and in particular:

1. Section 2804.12, to establish preliminary application review requirements for solar and wind energy development, and for development of any transmission line with a capacity of 100 kV or more;
2. Section 2804.25, to establish application processing and evaluation requirements for solar and wind energy development;
3. Section 2804.30, to establish a competitive process for public lands outside of DLAs for solar and wind energy development;
4. Section 2804.31, to establish a two-step process for solar or wind energy testing and conversion of testing areas to DLAs;
5. Section 2804.35, to establish screening criteria to prioritize applications for solar or wind energy development;
6. Section 2804.40, to establish a requirement to propose alternative requirements with a showing of good cause;

7. Section 2805.11(b), to establish a term for granting rights-of-way for solar or wind energy development;

8. Section 2805.12(c), to establish terms and conditions for a solar or wind energy development grant or lease;

9. Section 2805.20, to provide more detail on bonding requirements;

10. Sections 2806.50, 2806.52, 2806.54, 2806.56, and 2806.58, to provide information on rents for solar energy development rights-of-way;

11. Sections 2806.60, 2806.62, 2806.64, 2806.66, and 2806.68, to provide information on rents for wind energy development rights-of-way;

12. Subpart 2809, to establish a competitive process for leasing public lands inside DLAs for solar and wind energy development; and

13. Provisions in 43 CFR part 2800 pertaining to transmission lines with a capacity of 100 kV or more.

In addition to these amendments, this rule also makes several technical changes, corrections, and clarifications to the regulations at 43 CFR parts 2800 and 2880. The following table provides a summary of the principal changes made in this final rulemaking. The table shows: A description and CFR reference to the existing rule, a description of the changes in the proposed rule, and a description of the changes made in this final rule. The BLM made minor revisions throughout the final rule to improve its readability, which are not noted in this table but are discussed in the section- by- section analysis of this preamble.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2801.5(b)—Acronyms and terms.	Adds definitions for 10 items and revises definitions for 3 items, mostly pertaining to solar and wind energy development.	This final rule adopts the definitions in the proposed rule, except that under the final rule the definitions allow the BLM to determine a more appropriate Net Capacity Factor for rights-of-way with storage on a case-by-case basis. No other substantive changes were made from the proposed to the final rule.	Changes made in this section were based on comments received from the public to account for the application filing fee, energy storage, and MW rate.
2801.6—Scope	Clarifies that the regulations in this part apply to all systems and facilities identified under section 2801.9(a).	No changes were made from the proposed to the final rule for this section.	
2801.9—When do I need a grant?.	Revises language in paragraph (a)(7) to include solar and wind development facilities. Adds paragraph (d) that references solar and wind energy projects.	The testing provisions at new paragraphs (d)(1) and (2) are revised to include both solar and wind facilities, as opposed to just wind.	Changes made in this section were based on comments received from the public requesting that the testing provisions account for solar facilities as well as wind facilities.
2802.11—Designation of right-of-way corridors and leasing areas.	Adds a process for designating leasing areas for solar and wind energy projects.	No changes were made from the proposed to the final rule.	

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2804.10—Actions to be taken before filing a right-of-way application.	Discusses pre-application requirements and specifically addresses solar and wind filing requirements.	Removes all discussion or requirements for pre-application meetings. Now the only change from the existing regulation is to include designated leasing areas in paragraph (a)(2).	Requirements of this section are also applicable to transmission lines with a capacity of 100 kV or more. Based on comments received, the final rule removes the provision in the proposed rule that would have applied certain application requirements to pipelines greater than 10 inches in diameter.
2804.12—Right-of-way application requirements.	Discusses additional filing fees required for solar and wind energy applications.	This section has been retitled to improve clarity. This section also removes requirements for pre-application meetings and substitutes preliminary application review meetings that will occur after rather than before an application is filed. This section is also revised to clarify how the BLM will use the IPD–GDP to update fees.	Changes made in this section were based on comments received from the public. The paragraphs formerly located in section 2804.10(b) and (c) are now found in section 2804.12(b) and (c).
2804.14—Processing fees for grant applications.	Gives the BLM discretion to collect the estimated reasonable costs incurred by other Federal agencies.	No changes were made from the proposed to the final rule for this section.	
2804.18 and 2804.19—Master agreements and major projects.	Adds information on cost reimbursement requirements for work performed by other Federal agencies.	No changes were made from the proposed to the final rule.	
2804.20—Determining reasonable costs for work on major (Category 6) rights-of-ways.	Section title revised for clarity. Adds discussions on right-of-way work performed by other Federal agencies and pre-application requirements for major rights-of-way.	Any reference to “pre-application” requirements was removed to be consistent with other changes made to this final rule to reference preliminary application meetings.	Changes made in this section were based on comments received from the public in regards to collecting cost recovery with the submission of an application.
2804.23—Competitive process for applications.	Adds provisions for competition for solar and wind energy rights-of-way, both inside and outside of designated leasing areas.	Minor changes were made from the proposed to the final rule. The latter clarifies that the BLM will not competitively offer lands where a plan of development (POD) has been accepted and cost recovery established. The requirement to publish in a newspaper is now optional instead of required.	Changes made in this section were based on comments received from the public requesting that the BLM provide assurance that it will not competitively offer lands if a developer has committed considerable time and resources to a project, as evidenced by the existence of a complete POD and executed cost recovery agreement.
2804.24—Use of Standard Form 299 for submitting a right-of-way application.	Updates the circumstances when an application is not required to account for competitive offers under both section 2804.23(c) and subpart 2809.	No changes were made from the proposed to the final rule for this section.	
2804.25—BLM actions in processing a right-of-way application.	Describes POD requirements and adds additional other requirements for solar and wind energy applications. Covers instances where a right-of-way is authorized to resolve a trespass.	Changes were made from the proposed to the final rule to reflect the shift from “pre-application meetings” to “preliminary application review meetings” as described in section 2804.12. The requirement to publish in a newspaper is now optional instead of required.	Changes were made in the final rule for clarity, especially a description of what constitutes “unpaid debts.” Other changes were made to accommodate new requirements for solar and wind rights-of-way and to clarify when the time clock begins for a due diligence request.
2804.26—Circumstances when the BLM may deny your application.	Adds additional situations where the BLM may deny your application, including specific examples for solar and wind energy applications.	Adds language to correspond to the due diligence requirements found in sections 2804.12 and 2804.25. Additional language added to provide consideration when the BLM may deny an application when circumstances are outside of an applicant’s control.	This change was made to be consistent with other changes in this final rule.
2804.27—What fees are owed if an application is not completed?.	Revises this section to include any pre-application costs that must be paid if an application is withdrawn or rejected.	Removes the term pre-application costs and substitutes preliminary application review costs.	This change was made to be consistent with other changes in this final rule with respect to the pre-application meeting identified in the proposed rule.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2804.30—Description of the competitive process for solar or wind energy development.	Adds section 2804.30, which describes the competitive process for solar or wind energy development outside of DLAs.	Several minor changes were made from the proposed to the final rule, including removing a reference to mitigation costs, a statement that filing fees will be refunded to unsuccessful bidders, and that a successful bidder will have site control over applications from other developers (by virtue of being identified as the preferred applicant following completion of the sale process). Additionally, the requirement to publish in a newspaper is now optional instead of required.	The final rule changes were made principally for clarification. The change in notification requirements is consistent with other changes in this final rule.
2804.31—Site testing for solar and wind energy.	No section 2804.31 in proposed rule ...	Adds section 2804.31. This new section describes how the BLM will inform the public that site-testing applications will be accepted for lands within a DLA.	This new section is a result of public comments on the proposed rule requesting clarification on site testing procedures. This new section does not make any changes to existing policies or procedures.
2804.35—Prioritizing solar and wind energy applications.	Adds section 2804.35 which describes a process for prioritizing solar and wind energy applications.	The rule clarifies that the BLM will generally prioritize the processing of solar and wind energy leases issued under subpart 2809 over applications for solar and wind energy grants issued under subpart 2804. Other minor revisions were made in response to comments and discussed further in the section-by-section analysis.	The changes were made to clarify how the BLM will prioritize leases and applications.
2804.40—Alternative requirements.	No section 2804.40 in proposed rule ...	Adds a provision that allows an applicant to submit an alternate requirement if it is believed that the original requirements cannot be met.	This section was added in response to comments about the BLM need for a process for applicants to demonstrate, based on a showing of good cause, the reasons for its failure to meet the rule requirements and demonstrate why alternative requirements should be put in place in their stead.
2805.10—Approving or denying a grant.	Includes right-of-way leases in addition to grants, and adds specific items to be included within a solar or wind energy grant or lease.	No changes were made from the proposed to the final rule.	
2805.11—What does a grant contain?	Adds specific terms for solar and wind energy grants and leases.	Removed specific references to “wind” so that section would apply to project testing for either solar or wind.	This change was made to be consistent with other changes in this final rule.
2805.12—Terms and conditions in a right-of-way authorization.	Revises this section in its entirety and adds specific terms and conditions for solar and wind energy grants and leases.	Adds new section 2805.12(e) stating that good cause must be shown for extension of time requests. This section now includes solar in addition to wind energy development processes. Other revisions in this section are discussed in the section-by-section analysis.	Changes made in this section were based on comments received from the public, concerning a holder’s inability to meet BLM requirements in some circumstances.
2805.14—Rights conveyed by a right-of-way grant.	Adds section 2805.14(g) allowing for renewal applications for wind projects and section 2805.14(h) allowing renewal for site testing grants.	Removed specific references to “wind” so that section would apply to project testing for either solar or wind.	This change was made to be consistent with other changes in this final rule.
2805.15—Rights retained by the United States.	Adds a provision requiring common use of your right-of-way for compatible uses.	No changes were made from the proposed to the final rule.	
2805.16—Payment of monitoring fees.	Adds a provision to allow the BLM to collect monitoring fees for expenses incurred by other Federal agencies.	Adds the word “inspecting” in addition to the existing word “monitoring.”.	This change was made to be consistent with other changes in this final rule.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2805.20—Bonding requirements.	Adds new section 2805.20 describing bonding requirements.	The final rule adds a requirement to have periodic reviews of project bonds for adequacy. Also, the bond amounts for wind turbines are changed to be based on the nameplate capacity. The final rule also explains that the BLM may consider factors in addition to the reclamation cost estimate (RCE), such as the salvage value of project components, when determining bond amounts.	Changes made in this section were based on comments received from the public.
2806.12—Payment of rents.	Adds provisions for the payment of rents for non-linear rights-of-way, including solar and wind grants and leases.	No changes were made from the proposed to the final rule for this section.	
2806.13—Late payment of rents.	Adds penalties for non-payment of rents and removes the \$500 limit for late payment fees.	No changes were made from the proposed to the final rule.	
2806.20—Rents for linear right-of-way grants.	Describes where you may obtain a copy of the current rent schedule.	No changes were made from the proposed to the final rule.	
2806.22—Changes in the Per Acre Rent Schedule.	Corrects a reference to the IPD—GDP	No changes were made from the proposed to the final rule.	
2806.24—Making payment for a linear grant.	Requires making a payment for the initial partial year, along with the first year's rent. Also, provides for multiple year payments.	No changes were made from the proposed to the final rule.	
2806.30—Communication site rents.	The communication site rent schedule is removed. Several other minor changes made for clarification.	No changes were made from the proposed to the final rule.	
2806.34—Calculation of rent for a multiple-use communication facility.	Corrects an existing citation to read section 2806.14(a)(4).	No changes were made from the proposed to the final rule.	
2806.43—Calculation of rents for passive reflectors and local exchange networks.	Changes a former reference to new section 2806.70.	No changes were made from the proposed to the final rule.	
2806.44—Calculation of rents for a facility owners that authorizes communication uses.	Changes a former reference to new section 2806.70.	No changes were made from the proposed to the final rule.	
2806.50—Rents and fees for solar energy rights-of-way.	Existing section 2806.50 (provisions for determining rents where the linear right-of-way schedule or the communication rent schedule do not apply) is redesignated as section 2806.70. New section 2806.50 introduces rents and fees for solar energy rights-of-way.	No substantive changes were made to the final rule.	
2806.51—Scheduled Rate Adjustment.	Not in the proposed rule; added to the final rule in response to comments received.	This section gives solar project proponents the option of selecting scheduled rate adjustments to the per acre zone rate and MW rate for an individual grant or lease, instead of following the process in the rule for periodic adjustments in response to changes in NASS values and wholesale market prices. Parallel revisions were made to section 2806.52 for grants and section 2806.54 for leases.	These changes were made in response to comments received from the public and were designed to provide project proponents with the option to choose greater payment certainty over the life of a right-of-way grant or lease.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2806.52 through 2806.58 Provide data for rents and fees for solar energy projects.	Sections 2806.50, 2806.52, 2806.54, 2806.56, and 2806.58 describe rents and fees for solar energy authorizations.	The rule now allows for solar energy site testing. The calculation of the acreage rent has been expanded to explain the process more thoroughly. Acreage rent reductions are now adjusted to show greater rent reductions in certain States for solar energy rights-of-way.	The methodology of determining rents and fees for wind is the same as solar, except where noted in the preamble. Changes made in this section were based on comments received from the public and to be consistent with other changes in this final rule.
2806.60 through 2806.68 Provide data for rents and fees for wind energy projects.	Sections 2806.60, 2806.62, 2806.64, 2806.66 and 2806.68 describe rents and fees for wind energy authorizations.	The changes to these sections parallel the changes in sections 2806.50 through 2806.58.	Changes made in this section were made to be consistent with other changes in this final rule.
2806.61—Scheduled Rate Adjustment.	Not in the proposed rule; added to the final rule in response to comments received.	Similar to the provisions of section 2806.51. This section gives wind project proponents the option of selecting scheduled rate adjustments to the per acre zone rate and MW rate for an individual grant or lease, instead of following the process in the rule for periodic adjustments in response to changes in NASS values and wholesale market prices. Parallel revisions were made to section 2806.62 for grants and section 2806.64 for leases.	These changes were made in response to comments received from the public and were designed to provide project proponents with an option to choose greater payment certainty over the life of a right-of-way grant or lease.
2806.70—Rent determinations for other rights-of-way.	Adds redesignated section 2806.70, which contains the text formerly found at section 2806.50, with minor modifications.	No changes were made from the proposed to the final rule.	This section is applicable to all rights-of-way that are not subject to rent schedules.
2807.11—Contacting the BLM during operations.	Specifies requirements when a change in a right-of-way grant is warranted.	No changes were made from the proposed to the final rule.	
2807.17—Grant suspensions or terminations.	This provision contains the regulation formerly located at section 2809.10.	No changes were made from the proposed to the final rule.	
2807.21—Assigning a grant or lease.	Revises the title to include leases and clarifies when an assignment is or is not required.	Adds two events that may require an assignment. Clarifies that changing only a holder's name does not constitute an assignment and explains how the BLM will process a change only to a holder's name for a grant or lease. It also clarifies that ownership changes within the same corporate family do not constitute an assignment.	Changes made in this section were based on comments received from the public requesting clarity on assignments and name changes
2807.22—Renewing a grant.	Revises the title to include leases and clarifies that if you apply for a renewal before it expires, your grant will not expire until a decision has been made on your renewal request.	No changes were made from the proposed to the final rule.	
Subpart 2809—Grants for Federal agencies.	Existing language in this subpart redesignated as new paragraph (d) of section 2807.17. The title is changed to reflect that it now pertains to competitive leasing for solar or wind energy rights-of-way. This subpart is divided into several added sections as described below.	No changes were made from the proposed to the final rule.	
2809.10—Competitive process for leasing public lands for solar and wind energy projects.	Section 2809.10 provides for solar and wind energy leasing inside designated leasing areas.	Clarifies that leases under this section generally have processing priority over grant applications to the extent they require the same BLM resources. No other changes were made from the proposed to the final rule.	Changes made in this section were made to be consistent with other changes in this final rule.
2809.11—Solicitation of nominations.	Section 2809.11 describes how the BLM will solicit nominations for solar or wind energy development.	The requirement to publish in a newspaper is now optional instead of required.	This change is consistent with other notification requirements in the final rule.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2809.12—Parcel selection.	Section 2809.12 describes how the BLM will select and prepare parcels.	No changes were made from the proposed to the final rule.	
2809.13—Competitive offers for solar and wind energy development.	Section 2809.13 describes how the BLM will conduct a competitive offer for solar or wind energy development.	A reference to lease mitigation requirements is added. The requirement to publish in a newspaper is now optional instead of required.	The reference to mitigation was added in response to comments received from the public. The notification change is consistent with other notification requirements in the final rule.
2809.14—Acceptable bids.	Section 2809.14 describes the types of bids that the BLM will accept.	The words “and mitigation costs” were removed to be consistent with section 2804.30.	Changes made in this section were made to be consistent with other changes in this final rule.
2809.15—How will BLM select the successful bidder?	Section 2809.15 describes how the BLM will select a successful bidder.	No changes were made from the proposed to the final rule.	
2809.16—Variable offsets.	Section 2809.16 identifies when variable offsets will be applied.	Added a new offset factor for preparing draft biological strategies and plans.	Changes made in this section were based on comments received from the public on variable offset factors.
2809.17—Rejection of bids.	Section 2809.17 describes conditions when the BLM may reject bids or re-conduct a competitive offer.	No changes were made from the proposed to the final rule.	
2809.18—Lease terms and conditions.	Section 2809.18 identifies terms and conditions that will apply to leases.	Paragraph (e)(2) of this section is changed so bond amounts for wind turbines reflect their nameplate capacity. Paragraph (e)(3) is added to this section to account for testing.	These changes are consistent with changes to section 2805.20.
2809.19—Applications made inside designated leasing areas.	Section 2809.19 describes situations when an application may be accepted inside a DLA.	This section is revised to clarify how the BLM will handle applications submitted inside DLAs.	The changes made in the final rule were made in response to comments and are intended to clarify the final rule.
2884.10—What needs to be done before filing an application for an oil or gas pipeline right-of-way?	Adds a provision to this section that describes several additional steps, including pre-application meetings, to be taken if an application is for a pipeline 10 inches or more in diameter.	The reference to pre-application meetings and additional requirements for pipelines greater than 10 inches were removed, resulting in no changes being made from the existing regulation.	See the discussion in section 2804.10 of this preamble for additional information on changes made in response to comment.
2884.11—Information submitted with application.	Adds provision to be consistent with POD template development schedule and other requirements.	No changes were made from the proposed to the final rule.	
2884.12—Processing fees for an application or permit.	Adds information on cost reimbursement requirements for work performed by other Federal agencies.	No changes were made from the proposed to the final rule.	
2884.16—Master Agreements.	Adds information on cost reimbursement requirements for work performed by other Federal agencies.	No changes were made from the proposed to the final rule.	
2884.17—Processing Category 6 right-of-way applications.	Adds discussions on right-of-way costs for work performed by other Federal agencies to this section.	No changes were made from the proposed to the final rule.	
2884.18—Competing applications for the same pipeline.	Adds discussions on right-of-way costs for work performed by other Federal agencies to this section.	The requirement to publish in a newspaper is now optional instead of required.	This change is consistent with other notification requirements of this final rule.
2884.20—Public notification requirements for an application.	Adds a provision to this section that we may put a notice on the Internet or use other forms of notification as deemed appropriate.	The requirements to publish in a newspaper are now optional instead of required.	This change is consistent with other notification requirements of this final rule.
2884.21—Application processing by the BLM.	The BLM will not process your application if you are in trespass. Several other minor changes were made to be consistent with other changes made in these regulations.	Changes are made to section 2884.21 consistent with those made to section 2807.21.	Changes made in this section were made to be consistent with other changes in this final rule.
2884.22—Additional information requirements.	No change was proposed for this section.	This section was revised by changing the reference found in paragraph (a) from section 2804.25(b) to section 2804.25(c).	This change was not proposed, but is made to be consistent with other changes in this final rule. No other changes were made to this section.

TABLE 1—ABBREVIATED DESCRIPTIONS OF THE MAJOR CHANGES MADE TO 43 CFR PARTS 2800 AND 2880 BY THIS RULE—Continued

43 CFR reference and description	Changes between proposed rule and existing regulations	Changes between final rule and proposed rule	Additional comments
2884.23—When can my application be denied?.	To be consistent with section 2804.27, section 2884.23 was changed to state that the BLM may deny an application if the required POD fails to meet the development schedule and other requirements for oil and gas pipelines.	No changes were made from the proposed to the final rule.	
2884.24—Fees owed if application is withdrawn or denied.	Changes made to be consistent with section 2804.27, would require an applicant to pay any pre-application costs submitted under section 2884.10(b)(4).	Since pre-application meetings are no longer required in this final rule and additional requirements for pipelines greater than 10 inches were removed, the final rule does not make any changes to this existing provision.	The revisions to this section suggested by the proposed rule are not included in the final rule based on comments received from the public on BLM's criteria for large-scale pipeline projects.
2884.30—Showing of good cause.	There was no section 2884.30 in proposed rule.	This section was added to be consistent with section 2804.40.	This section was added to be consistent with other changes in this final rule.
2885.11—Terms and conditions.	This section makes reference to section 2805.12(b) (bond requirements for FLPMA authorizations) and makes those bonding requirements applicable to MLA rights-of-way. Also, the regulation will be clarified by providing guidance on terms of MLA grants.	No changes were made from the proposed to the final rule.	
2885.15—Rental charges.	Clarifies that there is no reduction in rents for grants or TUPs, except as provided in section 2885.20(b).	No changes were made from the proposed to the final rule.	
2885.16—When is rent paid?.	Requires making a payment for the initial partial year, along with the first years rent. Also, provides for multiple year payments.	No changes were made from the proposed to the final rule.	
2885.17—Consequences for not paying or paying rent late.	New paragraph (e) explains the circumstances under which the BLM would retroactively collect rents or fees.	No changes were made from the proposed to the final rule.	
2885.19—Rents for linear right-of-way grants.	Provides information about where you may obtain a copy of the current rental schedule.	No changes were made from the proposed to the final rule.	
2885.20—Per Acre Rent Schedule calculations.	Would remove an obsolete provision (existing paragraph (b)(1)) that provided for a 25 percent reduction in rent for calendar year 2009.	No changes were made from the proposed to the final rule.	
2885.24—Monitoring fees.	Provides an updated table describing monitoring categories, but without the cost schedule. Paragraph (b) provides information about where to obtain a copy of the current monitoring cost schedule.	Minor revisions were made consistent with changes to section 2805.16.	Changes made in this section were made to be consistent with other changes in this final rule.
2886.12—When you must contact the BLM during operations.	Adds to this section, contact requirements for when there is a need for changes to a right-of-way grant and to correct discrepancies.	No changes were made from the proposed to the final rule.	
2887.11—Assigning a right-of-way grant or TUP.	Clarifies this section to show when an assignment is or is not required.	Adds two events that may require an assignment. Clarifies that a change in a holder's name only does not constitute an assignment.	These changes are made to be consistent with section 2807.21.
2887.12—Renewing a grant.	Clarifies that if you apply for a renewal before it expires, your grant will not expire until a decision has been made on your renewal request.	No changes were made from the proposed to the final rule.	

III. Final Rule as Adopted and Responses to Comments

General Comments by Topic

Competitive Process Comments

A number of comments agreed with the BLM's proposals to create a competitive process for solar and wind development.

One comment stated that the proposed rule, if made final, would be a positive first step in improving the existing processes for solar and wind energy development by incentivizing development in appropriate areas, helping developers estimate costs, and providing a fair return to the taxpayer for the use of public lands. The BLM did not make any changes in response to this comment.

Another comment, on the other hand, recommended that the BLM maintain its current pre-application and application processes rather than adding untested or unproven administrative processes to promote competition inside and outside of DLAs. The BLM notes that it has already successfully used competitive processes when authorizing renewable energy development and it continues to gain experience with competitive auctions. The BLM also intends to continue improving its solar and wind energy policies, including by building upon the provisions codified in this final rule, to reduce administrative timeframes and costs in order to support reasonable and responsible project development, such as those policies designed to further streamline application review and processing.

Several comments provided statements on the use of a competitive process for issuing grants.

One comment stated that we should clarify that the competitive bid process applies only to renewable energy authorizations. The BLM only agrees with this comment in part. In this final rule, the BLM has codified competitive processes inside of DLAs that relate only to solar and wind energy rights-of-way. However, the final rule modifies existing regulations so that those same competitive processes may also be used outside of DLAs and for other types of rights-of-way in the future, such as when they are necessary to resolve other situations where there are competing right-of-way and other land use authorization requests or when the BLM otherwise determines it is appropriate to initiate a competitive process for a particular use in a given area.

Specifically, the final rule expands the BLM's ability to initiate a competitive process for other rights-of-way relative to existing regulations. Should the BLM

hold a competitive offer for another type of right-of-way, it would be appropriate for the BLM to use processes similar to those developed for this rule because those policies were developed based on sound competitive principles. Therefore, utilizing them as a model in other areas would promote consistency across the agency.

One comment stated that competitive leasing would both lengthen and complicate project siting, using the recent Dry Lake competitive offering in Nevada as an example, noting that the preparations for competition took years. The BLM believes that much of the work required for competitive leasing has already been completed for solar energy in the SEZs identified in the Western Solar Plan and other DLAs established by other planning efforts. The upfront work done when identifying these areas provides a basis for them to be offered under the most favorable competitive process provisions of this rule. That analysis also increases the certainty that the BLM will approve a project in those areas, which ultimately reduces the overall project review timeframes. The work done in establishing a DLA through the land use planning process, including completion of a NEPA analysis, provides a framework from which future project-specific analyses can tier, which should save time and money for both the BLM and project developers. Additionally, by expanding the circumstances under which the BLM can utilize competitive procedures the final rules provides a more direct path than was available to the BLM when setting up the Dry Lake SEZ sale in Nevada.

To further support development in these areas, the BLM is also developing regional mitigation strategies for many of the identified SEZs. While the existence of a regional mitigation strategy is not a prerequisite for holding a competitive sale, the BLM believes that such strategies further clarify development requirements in a given area allowing auction participants to more carefully evaluate potential costs and requirements when formulating a project or a bid in advance of competitive sale.

Collectively, these efforts and the provisions of this rule are consistent with existing policies to encourage the timely and responsible development of renewable energy while protecting the public land and its resources.

One comment suggested that competition should be used only where there are multiple applications for use of the same land. While the BLM intends to use competition in those

circumstances, it does not believe that is the only circumstances where such processes are appropriate. The existence of competition is not only indicated by competing application; in some situations competition would be determined where other evidence of competitive interests becomes known through emails, letters, and other contact with the public. As a result, the BLM does not believe it is appropriate to limit the use of competitive leasing regulations to just instances of competing applications. Instead, the provisions of this rule have been designed to provide more flexibility. The BLM is able to hold competitive offers inside DLAs, outside DLA, in response to competing applications, and on its own initiative, in order to encourage development in areas where it determines those processes to be appropriate, such as when it determines that fewer resource conflicts are present. In total, the BLM believes that the competitive processes established by this final rule will enable the BLM to encourage solar and wind energy development on public lands, while also protecting the sensitive resources found on those lands.

Summary of Key Changes Between the Proposed and Final Rule

One comment suggested that we use a table to identify technical changes, corrections, and clarifications being made to the right-of-way regulations by this rule, similar to the table we included in the preamble of the proposed rule. We agree and have included a similar table in this preamble.

Pipeline and Transmission Line Comments

Some comments questioned the BLM's description of pipelines 10 inches or greater in diameter as a measure for large-scale pipeline projects and recommended the removal of additional processes such as mandatory pre-application meetings to facilitate Federal and State reviews of the project. Alternatives for the description of a large-scale project were suggested, such as using a total acreage of disturbance.

In light of these comments, the BLM has decided to remove the description of large-scale pipelines and additional processes required for such projects from the final rule. While some comments included recommendations for alternative ways of determining a threshold for large-scale pipelines, the BLM decided that it must further analyze how it will identify large-scale pipelines before including requirements for such projects in its regulations. If the

BLM were to take such action in the future it would coordinate with other Federal agencies, as appropriate, to identify an appropriate threshold for large-scale pipeline projects and establish consistent, non-duplicative requirements. The removal of the pipeline threshold from the final rule requires deletion of the requirements in the proposed rule that were specifically applicable to large-scale pipeline projects. A more detailed discussion of these revisions can be found in the relevant portions of the section-by-section analysis in this preamble (see sections 2804.10, 2884.10, and 2885.11 of this preamble).

Some comments also questioned the BLM's description of transmission lines with capacities of 100 kV or more as constituting large-scale transmission projects. Those commenters recommended the removal of that threshold and the associated requirements. Some comments suggested that there are no readily identifiable 100 kV transmission projects by which to determine if the proposed threshold is a fair representation of a large-scale project. The BLM does not agree with these comments and believes that the description is appropriate since there is a clear separation between lower voltage transmission lines, generally 69 kV or less, and high voltage transmission lines, beginning at 115 kV of capacity or more. For example, the North American Electric Reliability Corporation established the 100 kV threshold as a bright line criterion to determine which transmission lines are included in the Bulk Electric System, a system that is used by the Regional Reliability Organization for electric system reliability. The BLM is maintaining the description of transmission lines with capacity of 100 kV or the rule as a suitable description to determine large-scale transmission projects.

Megawatt Capacity Fee Comments

Some comments argued that the BLM lacks authority to collect a MW capacity fee because the Federal Government does not own the sunlight or the wind, which are inexhaustible resources. While the BLM agrees that sunlight and wind are renewable resources present on the public lands, it does not agree that it lacks the authority to collect a fee for the use of such resources.

Under FLPMA, the BLM is generally required to obtain fair market value for the use of the public lands and its resources, including for rights-of-way. In accordance with the BLM's FLPMA authority and existing policies, the BLM has determined that the most

appropriate way to obtain fair market value is through the collection of multi-component fee that comprises an acreage rent, a MW capacity fee, and, where applicable, a minimum and a bonus bid for lands offered competitively. The BLM determined that the collection of this multi-component fee will ensure that the BLM obtains fair market value for the BLM-authorized uses of the public lands, including for solar and wind energy generation.

The BLM notes that the MW capacity payments are best characterized as "fees" rather than "rent" because they reflect the commercial utilization value of the public's resource, above and beyond the rural or agricultural value of the land in its unimproved state. In the BLM's experience, and in accordance with generally accepted appraisal and valuation standards, the value of the public lands for solar or wind energy generation use depends on factors other than the acreage of the occupied land and that land's unimproved value. Other key elements that add value include the solar insolation level, wind speed and density, proximity to demand for electricity, proximity to transmission lines, and the relative degree of resource conflicts that could inhibit solar or wind energy development. To account for these elements of land use value that are not intrinsic to the rural value of the lands in their unimproved state, the solar and wind right-of-way payments in this final rule incorporate "MW capacity fees" in addition to "acreage rent."

The use of a multi-component fee that comprises both an acreage rent and a MW capacity fee, and in some cases also a minimum and a bonus bid, achieves four important BLM objectives. First, the approach allows BLM to ensure that it is capturing the full fair market value of the land being encumbered by these projects. Second, the approach is consistent with the approach employed by the BLM for other uses of the public land (*i.e.*, it ensures that our approach to acreage rent is consistent across various categories of public land uses, while mirroring the multi-component payments received from activities like oil and gas development where both rent and royalties are charged), ensuring consistency across users. Third, the approach encourages the efficient use of the public lands by reducing relative costs for comparable projects that take up less acreage. That is, for a project with a given MW capacity, the overall payments to the BLM will be lower if the project employs a more efficient technology that produces more MW per acre and thus encumbers fewer acres.

Fourth, the approach is consistent with existing policies governing the BLM's renewable energy program, which have been in place since 2008. As explained in the section-by-section analysis in Section IV of this preamble, this final rule refines the calculation of the fee components (*e.g.*, the MW capacity fee for solar is reduced relative to existing policies) but does not alter the basic multi-component fee structure for solar and wind projects on the public lands.

The BLM's multi-component fee structure also bears similarities to one of the more common structures for solar and wind energy development on private lands, where projects pay a rent for the use of an area of land at the outset and, and then a royalty on the power produced once generation commences. (The BLM recognizes that private-land projects use a variety of fee structures. For example, some projects rely solely on an acreage rent—but in those cases, the BLM believes that the increased value of the land due to project development is captured in other ways, such as by charging a higher base rent that reflects more than the land's unimproved value.)

The acreage rent charged by the BLM is analogous to the rent charged in most private land leases. With respect to the MW capacity fee, the BLM uses the approved electrical generation capacity as a component of the value of the use of the public lands for renewable energy development instead of relying on a royalty like private landowners do. On private lands, such royalties are typically assessed after-the-fact, as a percentage of the value of power actually produced, and the rate can range from 2 to 12 percent. The BLM has determined instead to charge a fee based on the installed nameplate MW capacity of an authorized wind or solar project. This approach is consistent with the BLM's legal authority, including the direction in FLPMA that right-of-way holders "pay in advance" the fair market value for the use of the lands. The BLM considered charging a royalty, assessed as a percentage of power generated, but the FLPMA directive that right-of-way holders must "pay in advance" would require the BLM to collect any such royalty payments in advance of the corresponding power generation and then "true up" at the end of each calendar year. The BLM determined that the MW capacity fee approach in the final rule presents fewer administrative burdens and costs for both the BLM and right-of-way holders than an approach based on in-advance royalty payments followed by annual "true-ups." The BLM worked with the Office of

Valuation Services to compare its combined acreage rent and MW capacity fee against the total stream of payments from a similarly situated private land project to ensure the total payments collected by the BLM are comparable to those collected on private land. Finally, the BLM notes that in retaining the multi-component payment structure for solar or wind developments as separate “rent” and “fee” components as established under existing policy, the BLM is retaining its existing interpretation of how that multi-component structure interfaces with the Rural Electrification Act (IM 2016–122). Under the final rule, consistent with existing policy, the acreage payment remains classified as “rent,” as it is directly tied to the area of public lands encumbered by the project and the constraints that the project imposes on other uses of the public lands. As noted, however, the MW capacity fee is more properly characterized as a “fee” because it reflects the commercial utilization value of the public’s resource, independent of the acreage encumbered. As specified under FLPMA, facilities that qualify for financing under the Rural Electrification Act may be exempt from paying “rental fees.” As explained in IM 2016–122, however, the BLM has determined that such facilities are *not* exempt from paying other components of the fair market value of the land, such as the MW capacity fee, minimum bid, bonus bid, or other administrative costs, as none of those costs are related to the rental value of the unimproved land.

Designated Leasing Areas Comments

Several comments requested clarification about the differences between the competitive processes for lands inside and outside of a DLA. Other comments expressed confusion over whether certain requirements of the proposed rule would apply to both “grants” (authorizations issued under subpart 2804 for solar and wind energy development) and “leases” (authorizations issued under subpart 2809). The BLM has expanded multiple provisions in the final rule to clarify the requirements for solar and wind energy development grants and leases, including those relating to competitive processes, rents and fees, bonding, and due diligence.

Comments Beyond the Scope of the Proposed Rule

In addition to the general comments discussed above and the more specific ones discussed in the section-by-section portion of this preamble below, the BLM received many other comments that

suggested revisions to the BLMs right-of-way regulations that were beyond the scope of the proposed rule and/or that are better suited for supplemental policy guidance of the type found in BLM manuals, handbooks, or IMs. The BLM did not make any changes to the proposed rule in light of these comments. However, they are discussed in the relevant portions of the section-by-section analysis of this preamble.

Additional Comments on the Rule

During the preparation of this final rule, the BLM received additional comments from various stakeholders and other interested parties following the close of the comment period and participated in additional stakeholder engagement meetings as part of the BLM’s regular course of business. During those meetings and in those comments, stakeholders provided additional information clarifying the concerns, comments, and questions they had previously raised through written comments on the proposed rule. The BLM considered this additional information during the drafting of this final rule. This additional information is addressed in the relevant section-by-section discussion of this preamble.

For example, industry stakeholders provided additional information that was previously unavailable regarding their uncertainty, under the proposed rule, about how both acreage rent and MW capacity fee payments would increase over the life of a lease or grant, and particularly their concern that such rents and fees could increase in an unpredictable manner. These comments and the BLM’s responses are discussed further in sections 2806.51 and 2806.61 of this preamble.

Industry stakeholders also raised concern over the factors that the BLM considers when determining a bond amount. This comment and the BLM’s response are discussed further under sections 2805.12(e)(1) and 2805.20(a)(3).

Environmental stakeholders also provided additional substantive discussion of their comments. Specifically, they requested additional detail in the final rule explaining the evaluation criteria that the BLM uses when establishing DLAs going forward. The environmental stakeholders’ comment and the BLM’s response are discussed further in section 2802.11 of this preamble.

IV. Section-by-Section Analysis for Part 2800

This rule makes the following changes in part 2800. The language found at section 2809.10 of the existing regulations is revised and redesignated

as section 2807.17(d), while revised subpart 2809 is now devoted to solar and wind energy development in DLAs. This rule also amends parts 2800 and 2880 to clarify the BLM’s administrative procedures used to process right-of-way grants and leases. These clarifications ensure uniform application of the BLM’s procedures and requirements. A more in-depth discussion of the comments and changes made is provided below.

Subpart 2801—General Information

Section 2801.5 What acronyms and terms are used in these regulations?

This section contains the acronyms and defines the terms that are used in these regulations. Several comments suggested changes to the proposed rule. These suggestions and comments are analyzed under the applicable definition contained in the final rule.

The following terms are added to the definitions in section 2801.5:

“Acreage rent” is a new term that means rent assessed for solar and wind energy development grants and leases that is determined by the number of acres authorized by the grant or lease. The acreage rent is calculated by multiplying the number of acres (rounded up to the nearest tenth of an acre) within the authorized area times the per acre zone rate in effect at the time the authorization is issued. Provisions addressing adjustments in the acreage rent are found in sections 2806.52, 2806.54, 2806.62, and 2806.64. An example of how to calculate acreage rent is discussed in this preamble in the section-by-section analysis of section 2806.52(a). No comments pertaining to this definition were received and no changes are made from the proposed to the final rule.

“Application filing fee” is a new term that means a filing fee specific to solar and wind energy right-of-way applications for the initial reasonable costs for processing, inspecting, and monitoring a right-of-way. The fee is \$15 per acre for solar and wind energy development applications and \$2 per acre for energy project-area testing applications. The BLM will adjust the application filing fee once every 10 years to account for inflation. Further discussion of application filing fees can be found in section 2804.12. This definition is revised for consistency with comments received on sections 2804.12 and 2804.30 on application filing fees. See those respective sections of this preamble for further discussion. No other comments were received and no other change is made from the proposed rule to the final rule concerning this definition.

“Assignment” means the transfer, in whole or in part, of any right or interest in a right-of-way grant or lease from the holder (assignor) to a subsequent party (assignee) with the BLM’s written approval. The rule adds this definition to section 2801.5 to help clarify regulations. A more detailed explanation of assignments and the changes made is found under section 2807.21. Although some comments were received pertaining to assignments, as discussed later in this preamble, none of them pertain to the definition. No change is made from the proposed to the final rule concerning this definition.

“Designated leasing area” (DLA) is a new term that means a parcel of land with specific boundaries identified by the BLM’s land use planning process as being a preferred location for the leasing of public lands for solar or wind energy development via a competitive offer. Examples of DLAs for solar energy include SEZs designated through the Western Solar Plan; Renewable Energy Development Areas (REDAs) designated through the BLM Arizona Restoration Design Energy Project (REDP) planning process; and Development Focus Areas (DFAs) designated through BLM’s California’s Desert Renewable Energy Conservation Plan (DRECP) planning process. The competitive offer process is discussed in subpart 2809 of this preamble. Further discussion of DLAs can be found under section 2802.11 of this preamble.

Comments: Some comments recommended that the definition of DLA should indicate criteria that must be met to designate a DLA, in particular, wind energy-specific DLAs. The comment also suggested the final rule include criteria to identify right-of-way exclusion and avoidance areas. Other comments stated a similar concern, and indicated that land use planning varies by BLM State or field office, so DLA standards should be developed.

Response: The BLM considered establishing standard criteria for DLAs as well as for exclusion and avoidance areas, but this approach is not carried forward in the final rule. Doing so could unintentionally limit the BLM’s management of such lands when considering the varied landscapes and resources that the BLM manages. However, the BLM intends to establish guidance, as part of the implementation of this rule, to assist the BLM in establishing DLAs, such as wind energy sites, through its land use planning processes. Further discussion on this issue is found under section 2804.31 of this preamble.

Comments: Some comments stated that identifying new DLAs through land

use planning was too time consuming, and therefore DLA designation should be a separate process.

Response: Many land use planning efforts take several years to complete and consider many resources and uses in addition to solar or wind energy development. These types of land use planning efforts would not consider a specific project, but instead the effect of such developments in the planning area, and inform the BLM if the lands should be an exclusion or avoidance area, or identified as a DLA for solar or wind energy development. Although the BLM’s land use planning process may be time consuming, it is necessary for the BLM in its orderly administration of the public lands to use this process to properly protect and manage the public lands. When amending a resource management plan, the BLM must be consistent with its planning regulations (see 43 CFR part 1600). Absent a larger planning effort underway for the same planning area, the BLM could use a targeted land use plan amendment to identify a designated leasing area. In such cases, the land use planning process may be less time consuming than suggested by commenters. For further discussion, please see section 2804.31 of this preamble. No specific changes were made in response to this comment.

In addition to the amendments to section 2804.31, the BLM has begun its Planning 2.0 initiative, which is aimed at improving the BLM’s planning process. This initiative includes targeted revisions to the planning regulations (see 43 CFR part 1600) and land use planning handbook, in order to improve the BLM’s use of Resource Management Plans, which guide the BLM’s administration of the public lands. The Planning 2.0 initiative will help the BLM to conduct effective planning across landscapes at multiple scales, create more dynamic and efficient planning processes that are responsive to change, and provide new and enhanced opportunities for collaboration with the public and partners. You can find further information on the BLM’s Planning 2.0 initiative at the following Web site http://www.blm.gov/wo/st/en/prog/planning/planning_overview/planning_2_0.html.

Comment: A comment recommended that the BLM use one consistent definition to ensure that DLAs represent areas of fewer resource conflicts for solar and wind energy development.

Response: Because of the many variables that the BLM must consider when designating a DLA, the definition provided is intentionally broad and

identifies a DLA as a preferred location for development that may be offered competitively. This definition allows the BLM to identify such areas in land use planning processes using plan-specific criteria to best identify the area. However, we are modifying the definition by removing the example of solar energy zones that was cited in the proposed rule in order to eliminate potential confusion about the future identification of additional DLAs, which may not be identified in the same manner as the solar energy zones. No other comments were received concerning this definition.

“Designated right-of-way corridor” is a term that is defined in existing regulations. The word “linear” has been added to this definition in the final rule to distinguish between these corridors and DLAs. No comments were received concerning this definition change and no changes are made from the proposed rule to the final rule.

“Management overhead costs” is defined in existing regulations as Federal expenditures associated with the BLM. This definition has been expanded in the final rule to include other Federal agencies. This revision is consistent with Secretarial Order 3327 and will help to promote effective cost reimbursement. Under Sections 304(b) and 504(g) of FLPMA, the Secretary may require payments intended to reimburse the United States for its reasonable costs with respect to applications and other documents relating to public lands. Secretarial Order 3327 delegated the Secretary’s authority under FLPMA to receive reimbursable payments to the bureaus and offices of the Department. No comments were received pertaining to this definition change, and no revisions were made from the proposed rule to the final rule.

“Megawatt capacity fee” is a new term meaning the fee paid in addition to the acreage rent for solar and wind development grants and leases based on the approved MW capacity of the solar or wind authorization. The MW capacity fee is calculated based on the MW capacity for an approved solar or wind energy project authorized by the BLM. Examples of how MW capacity fees are calculated may be found after the discussion of section 2806.56. While the acreage rent reflects the value of the land itself in its unimproved state, the MW capacity fee reflects the value of the industrial use of the property to generate electricity. Specifically, it captures the additional value of public land used for solar and wind energy generation that are not reflected in the NASS land values.

The BLM revised the definition of MW capacity fee from the proposed to final rule to clarify that the MW capacity fee is calculated for staged developments by multiplying the MW rate by the approved MW capacity for each stage of development. The proposed rule stated that the MW rate would be multiplied to the approved stage of development, but did not specify that it was the approved MW capacity for the stage of development. The BLM made this revision to help improve the public's understanding of the MW capacity fee calculation for staged developments.

Comment: One comment acknowledged that fair market value can be determined by using a competitive process and agreed with the proposed rule's approach of using a competitive process to authorize solar and wind energy development on public lands. The comment went on to express a preference for a system that includes the payment of a royalty fee for the use of commercial power facilities on public lands.

Response: As explained above, the BLM has established through existing policy, and now by this rule, a multi-component structure for obtaining fair market value from renewable energy development. Since FLPMA directs right-of-way holders "to pay *in advance* the fair market value" for the use of the public lands, subject to certain exceptions (43 U.S.C. 1764(g)), the BLM's existing regulations governing the use of public lands, under Title V of FLPMA, generally require the prepayment of annual rent and fees in amounts determined by the BLM. This requirement is carried forward in existing guidance governing acreage rent and MW capacity fees for wind and solar energy projects and was selected in lieu of other means of obtaining fair market value. Consistent with the BLM's authority under FLPMA, its existing policies, and the proposed rule, the BLM has determined that it will continue to charge in advance both an acreage rent and a MW capacity fee for solar and wind energy projects, as a means of obtaining fair market value for those projects. Given that FLPMA requires payment in advance, the BLM has determined it is appropriate to base that the MW capacity fee on rated MW capacity as opposed to actual generation. In instances where competitive processes are utilized, any minimum and bonus bids represent an additional component of fair market value on top of the annual acreage rent and MW capacity. No other comments were received on the proposed definition of MW capacity fee, and no

changes to the definition were made in this final rule.

"Megawatt rate" is a new term that means the price of each MW for various solar and wind energy technologies as determined by the MW rate schedule. The MW rate equals the (1) the net capacity factor multiplied by (2) the MW per hour (MWh) price multiplied by (3) the rate of return multiplied by (4) the total number of hours per year where:

1. The "net capacity factor" means the average operational time divided by the average potential operational time of a solar or wind energy development, multiplied by the current technology efficiency rates. This rule establishes net capacity factors for different technology types, but the BLM may determine a different net capacity factor to be more appropriate, on a case-by-case or regional basis, to reflect changes in technology, such as a solar or wind project that employs energy storage technologies, or if a grant or lease holder or applicant is able to demonstrate that a different net capacity factor is more appropriate for a particular project design, layout, or location.

The default net capacity factor for each technology type is:

- a. Photovoltaic (PV) = 20 percent;
- b. Concentrated photovoltaic (CVP) and concentrated solar power (CSP) = 25 percent;
- c. CSP with storage capacity of 3 hours or more = 30 percent; and
- d. Wind energy = 35 percent.

Comments: Several comments were received concerning the definition and description of net capacity factor. One comment stated that the net capacity factors should not be specified in the proposed rule for CSP projects, as they will undoubtedly increase over time with technology improvements and be updated on a regular basis, in a similar manner as rents. CSP can be designed to operate from a range of 10 to 50 percent efficiency depending on the intended use of the facility (e.g., base load or peaker plant). Another comment recommended using an estimate of the capacity factor identified in the POD and the plant's design as the basis for this calculation.

Response: The BLM recognizes that there may be technology improvements over time, and that there are variables which may affect a specific project's net capacity factor. For example, a CSP project may be designed to operate at lower or higher efficiency rate depending on its intended use. The BLM took this into account in determining the net capacity factor of the technologies for the final rule. Future rulemaking would be required to

change the established net capacity factors for each technology. The BLM will not incorporate the recommendation to use the project owner's estimate of the capacity factor in the POD to calculate its MW capacity fee. The estimated net capacity factor in a POD would be specific to a particular project, but would be a subjective value that could be inaccurate or misleading. Incorporating the methodology suggested by the comment could raise questions as to whether the BLM was truly collecting a reasonable return for use of the public lands.

However, the BLM has revised the final rule, consistent with this comment and those comments submitted regarding storage technologies, to allow the BLM to determine another net capacity factor to be more appropriate on a case-by-case basis. The BLM could determine another net capacity factor to be more appropriate when there is a change in technology, such as when a project employs energy storage technologies. Determining another net capacity factor may also be appropriate if a project uses a more current version of a technology.

Comment: Another comment agreed with the BLM's proposal to use an average net capacity factor for wind energy projects. However, the comment recommended using a net capacity factor of 26 percent as identified in the wind capacity factor for Western States (see the Department of Energy's 2013 Wind Technologies Report) instead of the national average wind capacity factor of 35 percent.

Response: While the BLM acknowledges that most solar and wind projects on public lands will be located in the western United States, it nevertheless elected to use the national averages in calculating the net capacity factors for both solar and wind projects, because the BLM believes those values are more representative of the technology that will be deployed on projects developed in the future. The net capacity factor for a given project is greatly influenced by project design, layout, and location. The national average reflects a larger set of projects than the regional average, and is therefore more representative of the full range of older and newer technologies currently sited on public lands.

With respect to the wind capacity factor in particular, the BLM reviewed data from the Department of Energy's 2014 and 2015 Wind Technology Reports (<https://emp.lbl.gov/sites/all/files/lbnl-188167.pdf> and <https://emp.lbl.gov/sites/all/files/2015-windtechreport.final.pdf>, respectively). Based on its review of that data, the

BLM determined that its selection of a 35 percent capacity factor for wind was appropriate for several reasons.

First, the geographic scope of the lands included in the “West Region” of the Department of Energy’s reports does not adequately capture the full extent of BLM lands. Using the geographic distribution classifications set by the Department of Energy, BLM lands are located in both the “West” and “Interior” regions, with 7 states in the West and 4 states in the Interior (Colorado, Montana, New Mexico, and Wyoming). It should also be noted that the four BLM states in the Interior region possess significant wind energy development potential. Accordingly, the BLM believes it is reasonable to select a wind capacity factor between the values for the West and Interior. In the Interior Region the Department of Energy reported capacity factors of 41.2 percent and 42.7 percent in 2014 and 2015, respectively. Data from the 2014 report shows that while the average capacity factor in the West was 27 percent, there was considerable spread in the factors by project, from just below 20 percent to over 37 percent. In the Interior, the spread in capacity factors was from 26 percent to 52 percent. Thirty-five percent represents a reasonable average of these very disparate, project-specific capacity factors.

In addition to looking at capacity factors regionally, the Department of Energy’s analysis also controlled for wind quality. Notably, the Department of Energy determined that even in low wind quality areas, which predominate in the West, new projects achieve 35 percent capacity factors. As explained in the reports, this analysis was based on wind turbine specific power, which is the ratio of a turbine’s nameplate capacity rating to its rotor-swept area. All else being equal, a decline in specific power leads to an increase in capacity factor according to the analysis presented in the report. In general, since the wind industry is shifting towards deploying lower specific power wind turbines at new wind energy projects across the United States, the BLM believes it is reasonable to select 35 percent as the default capacity factor for a wind project in the final rule.

It should also be noted that the BLM considered basing the net capacity factors for these technologies on an average of the annual capacity factors posted by the Energy Information Administration (EIA) on its Web site at: http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_6_07_b. However, the BLM is not carrying this approach forward in the final rule

because, as discussed earlier in the preamble regarding net capacity factors, we believe that the 35 percent capacity factor better represents the technologies that will be deployed on projects developed in the future. For this reason, the BLM determined that the EIA annual capacity factors are not appropriate for use in this rule.

Finally, the BLM notes that if an applicant or a grant or lease holder believes that the BLM’s net capacity factor is set too high for a particular project, the project proponent can request that the BLM use an alternative net capacity factor when setting the MW capacity rate for the project. Such a request would be made as described under section 2804.40 for applicants or section 2805.12(e) for grant or lease holders. See the section-by-section portion of this preamble for further discussion of requests for alternative requirements.

No other comments were received, and the definition of “net capacity factor” was not changed from the proposed to the final rule as result of this comment.

2. The “MWh price” equals the 5 calendar-year average of the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States (see sections 2806.52(b) and 2806.62(b)).

Comment: One comment believed that rent and fee calculations may be inaccurate based on inaccurate determinations of the capacity factor and the wholesale price of electricity used in the formula. In the proposed rule, the BLM specified the Intercontinental Exchange (ICE) as the source of data for the wholesale price data.

Response: As discussed under section 2806.52 for MW capacity fee, ICE was removed as the only vendor for the wholesale data. We revised this definition to account for appropriate wholesale data without limiting it by source. This will allow the BLM to use the best information available, should a company that tracks trading hubs fail to maintain accurate or reliable trade information. No other comments were received concerning this definition.

3. The “rate of return” is the relationship of income to the property owner (or, in this case, the United States) to the revenue generated from authorized solar and wind energy development facilities, based on the 10-year average of the 20-year U.S. Treasury bond yield, rounded to the nearest one-tenth percent.

Comment: One comment believed that the BLM should use a 5-year average,

not a 10-year average, eliminate the 4 percent minimum, and consider rounding down or not at all.

Response: The BLM disagrees with the suggestion to use a 5-year average. A 10-year average of the 20-year Treasury bond rate provides a more stable rate of return and will benefit the holder when interest rates rise. Under the same concept, this would benefit the BLM when interest rates decline, as is the case in the current cycle.

The BLM also disagrees that it should eliminate a 4 percent minimum rate of return, considering the risk of energy development projects and the fluctuation of energy commodity prices. It is not uncommon for private parties to insist on a minimum return. The 4 percent minimum rate of return recognizes a grant or lease holder’s risk of projects that have other financial safeguards in place, such as performance bonds. The minimum is at the lower end of similar rates in the private sector.

The 4 percent minimum rate of return is established for solar energy in section 2806.52(b)(3)(ii) and for wind energy in section 2806.62(b)(3)(ii). The minimum is not included in the definitions section of this final rule because setting the minimum is a substantive regulatory provision. This is not a change from the proposed rule. No changes are made in this final rule from the proposed rule regarding the rate of return in the definitions section (section 2801.5) or in the specific solar (section 2806.52(b)(3)(ii)) or wind (section 2806.62(b)(3)(ii)) provisions.

With respect to rounding, the BLM did agree that it should revisit the proposed rule’s approach. While it does not agree with the commenter’s suggestion that it should always round down, the BLM did determine upon further review that it should round bond yields to the nearest tenth of a percent to avoid a rounding-based surcharge.

4. The number of hours per year is a fixed number (*i.e.*, 8,760 hours, the total number of hours in a 365-day year). No comments were received on the definition of this term and no changes are made to this definition from the proposed rule to the final rule.

“Performance and reclamation bond” is a new term that means the document provided by the holder of a right-of-way grant or lease that provides the appropriate financial guarantees, including cash, to cover potential liabilities or specific requirements identified by the BLM. This term is defined here to clarify the expectations of what a bond accomplishes. The definition also explains which instruments are or are not acceptable.

Acceptable bond instruments include cash, cashier's or certified checks, certificate or book entry deposits, negotiable U.S. Treasury securities, surety bonds from the approved list of sureties, and irrevocable letters of credit. The BLM will not accept a corporate guarantee. These provisions codify the BLM's existing procedures and practices.

Comment: A comment suggested adding the words "certificate of insurance or other acceptable security" to each of these paragraphs in appropriate places.

Response: The BLM believes that adding the comment's suggestion to the text of the rule is unnecessary, as the definition of acceptable bond instruments includes insurance policies and does not need to be expanded to include a specific form of insurance. Furthermore, the list of bond instruments that are acceptable is not an all-inclusive list. There may be other forms of bond instruments, but they are not specified in the rule as they are not as common a form of bond as those identified. If we had intended the bond list to be an all-inclusive list we may have unintentionally excluded an acceptable bond instrument. No other comments were received and no changes to this definition were made from the proposed rule to the final rule.

"Reclamation cost estimate (RCE)" is a new term that means the report used by the BLM to estimate the costs to restore the intensive land uses on the right-of-way to a condition that would support pre-disturbance land uses.

The BLM revised this definition from the proposed to final rule to clarify that the reclamation work described must meet the BLM's requirements. This change is important because the BLM is required to protect the public lands and must determine if the reclamation work done by the holder is acceptable.

No comments were received on the definition of this term and no other changes are made from the proposed to the final rule.

"Right-of-way" is defined in existing regulations as the public lands the BLM authorizes a holder to use or occupy under a grant. The revised definition describes the authorizing instrument for use of the public lands as "a particular grant or lease." No comments were received on the definition of this term and no changes are made from the proposed to the final rule.

"Screening criteria for solar and wind energy development" is a term referring to the policies and procedures that the BLM uses to prioritize how it processes solar and wind energy development right-of-way applications outside of

DLAs. Some examples of screening criteria are:

1. Applications filed for areas specifically identified for solar or wind energy development, other than DLAs;
2. Previously disturbed areas or areas located adjacent to previously disturbed areas;
3. Lands currently designated as Visual Resource Management (VRM) Class IV; and
4. Lands identified for disposal in a BLM land use plan.

Screening criteria for solar and wind energy development were previously established by policy through IM 2011-61, and are further discussed in section 2804.25(d)(2) and section 2804.35 of this rule. The IM may be found at: http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html. No changes were made from the proposed rule to the final rule, nor were any comments received pertaining to this definition. However, there are several comments made on the specific screening criteria proposed that are addressed later in the section-by-section analysis of these criteria.

"Short term right-of-way grant" is a new term meaning any grant issued for a term of 3 years or less for such uses as storage sites, construction sites, and short-term site testing and monitoring activities. The holder may find the area unsuitable for development or the BLM may determine that a resource conflict exists in the area. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2801.6 Scope

The scope in 43 CFR part 2800 clarifies that the regulations in this part apply to all systems and facilities identified under section 2801.9(a). No comments were received and no changes are made from the proposed rule to the final rule on this provision.

Section 2801.9 When do I need a grant?

Section 2801.9 explains when a grant or lease is required for systems or facilities located on public lands. In section 2801.9(a)(4), the term "systems for generation, transmission, and distribution of electricity" is expanded to include solar and wind energy development facilities and associated short-term authorizations. Language is also added to section 2801.9(a)(7) to allow any temporary or short-term surface-disturbing activities associated with any of the systems described in this section. A new paragraph (d) is added to specifically describe the types of authorizations required for various

components of solar and wind energy development projects. These are:

1. Short term authorizations (term to not exceed 3 years);
2. Long term right-of-way grants (up to 30 years); and
3. Solar and wind energy development leases (30 years).

This paragraph also identifies the type of authorizations issued for solar and wind projects depending on whether they are located inside or outside of DLAs. Authorizations for solar or wind energy development outside a DLA, or authorizations issued non-competitively within a DLA, will be issued under subpart 2804 as right-of-way grants for a term of up to 30 years. Authorizations within a DLA will be issued under subpart 2809 as right-of-way leases for a term of 30 years.

Comments: Some comments were received requesting that the site-specific and project-area testing authorizations be made available for solar energy. A comment further suggested that section 2801.9 be revised so that the authorization types would be listed in the order in which actions are taken to develop a project.

Response: In response to the comment, by removing the specific references to "wind." As a result, the testing provisions apply to both solar and wind energy. The BLM also revised this section to reflect the order in which actions are taken to develop a project. The "other appropriate actions" listed under paragraph (d)(3) of this section in the proposed rule are moved to paragraph (d)(5) of this section in the final rule. Paragraphs (d)(4) and (5) of this section in the proposed rule are now paragraphs (d)(3) and (4) of this section, respectively.

Subpart 2802—Lands Available for FLPMA Grants

Section 2802.11 How does the BLM designate right-of-way corridors and designated leasing areas?

Section 2802.11, which explains how the BLM designates right-of-way corridors, is revised to include DLAs. Under this rule, the BLM will identify DLAs as preferred areas for solar or wind energy development, based on a high potential for energy development and lesser resource impacts. This section provides the factors the BLM considers when determining which lands may be suitable for right-of-way corridors or DLAs. These factors are unchanged from the existing regulations. This final rule amends paragraphs (a), (b) introductory text,

(b)(3), (4), (6), and (7) and (d) of section 2802.11 to include references to DLAs.

Comment: One recommendation was made suggesting that the BLM make it clear that we will not accept applications in areas that are closed to development by means of land use plans or other mechanisms.

Response: The comment's recommendation is addressed in the existing rule at section 2802.10(a). This section clarifies that some lands are not available for a right-of-way grant, which includes those lands that the BLM identifies through the land use planning process as inappropriate for rights-of-way, as well as public land orders, statutes, and regulations that exclude rights-of-way, and lands segregated from application.

Comment: One comment stated that DLAs are created through the BLM's resource management planning process, but that such plans are changed only every 15 to 20 years. Also, many plans are undergoing or have recently undergone such changes, especially in areas having sage-grouse habitat, but those plans do not designate any DLAs.

Response: Due to the timing of the comment submission and the BLM's response, the plans noted in this comment have been finalized and the BLM decisions are issued. The Greater Sage-Grouse Plan Amendments and Revisions did not designate any DLAs. These plans are focused on conservation of the Greater Sage-Grouse and its habitat. The decisions issued in these plans safeguard primary and general habitat from the impacts of development, including solar and wind energy.

However, the BLM may have an opportunity to designate some areas for wind energy development using recent analyses or information that identifies areas suitable for energy development on public lands. Examples of such areas may be those identified as not having significant resource and use siting concerns, as identified in the BLM's wind mapper. The wind mapper is a BLM web-based geographic data viewer, found at <http://wwmp.anl.gov>, that has up-to-date geographic information representing the BLM's land use planning decisions for administering public lands and other pertinent regulatory information, specific to wind energy resources. Using information on the wind mapper, a targeted land use plan amendment may be completed more expeditiously than the 15 to 20 years discussed in this comment.

Comment: Another comment suggested that we consider developing a generic EIS process suitable to all prospective solar and wind leases,

coupled with a specific discussion of variations between areas. Also, the comment suggested that we should automate the EIS process to leverage existing GIS and satellite data whenever possible.

Response: Although worth considering, this concept is outside the scope of this rule, which is focused on the administrative process of solar and wind energy rights-of-way and competitive processes. However, the BLM plans to evaluate its NEPA process and promote automation of the process where possible. Until that time, the BLM will designate such areas through its existing land use planning process.

Comment: Another comment states that the designation of DLAs will waste taxpayers' money and impede development. The cost to the public for the BLM to designate a DLA will not be fully recaptured and the DLA will not provide any additional value to the public through the competitive process.

Response: Costs for the preparation of DLAs will be recaptured at the competitive bidding stage as the administrative costs will be paid by the successful bidder. As demonstrated by the BLM's recent competitive actions for solar energy, there is a monetary return to the public for auctions of parcels within renewable energy development areas.

Comment: During stakeholder engagement meetings, environmental stakeholders expanded on their comment on the definition of "designated leasing area." The stakeholders suggested that the BLM should not only revise the definition of DLA to include additional specific criteria, but also make changes to section 2802.11 to specify that the BLM consider those criteria when designating DLAs. The stakeholders also recommended that the BLM consider sensitive environmental resources when evaluating potential DLAs.

Response: The BLM considered adding additional criteria to section 2802.11 that would be considered when the BLM evaluates an area for inclusion in a DLA, but it ultimately made no changes in the final rule. The existing regulations in section 2802.11(b) already explain in great detail what the BLM considers when making a DLA designation. Adding an undefined term, "sensitive environmental resources," could unintentionally limit the BLM's management of public lands when considering the varied landscapes and resources that are found there. Furthermore, consideration of sensitive resources is already addressed in section 2802.11(b)(2), which requires the BLM to consider "environmental

impacts on cultural resources and natural resources, including air, water, soil, fish, wildlife, and vegetation."

While the BLM did not make any changes to the final rule in response to this comment, it should be noted that the BLM intends to establish guidance, as part of the implementation of this rule, to assist the BLM in establishing DLAs through its land use planning processes. The implementing guidance will allow the BLM to be more specific for these areas without unintentionally limiting itself, and maintain the BLM's flexibility to make any necessary adjustments to the process for evaluating potential DLAs across the varied landscapes that it manages.

Subpart 2804—Applying for FLPMA Grants

Section 2804.10 What should I do before I file my application?

Existing section 2804.10 encourages prospective applicants for a right-of-way grant to schedule and hold a pre-application meeting. Under this final rule, section 2804.10 continues to encourage such meetings regarding some right-of-way grants, and under paragraph (a)(2), would now identify DLAs along with right-of-way corridors as a point of discussion for these meetings if held.

Under existing section 2804.10(a)(2), the BLM determines if your application is on BLM land within a right-of-way corridor. This revised paragraph now includes "or a designated leasing area." The BLM generally will not accept applications for grants on lands inside DLAs. The BLM will offer lands inside DLAs competitively through the process described in subpart 2809, which does not involve submitting an application. The BLM will only accept applications on lands inside DLAs in limited circumstances (see section 2809.19(c) and (d)).

The BLM proposed amending paragraphs (a) introductory text and (a)(2) and (4), and also adding two new paragraphs that would apply to any solar or wind energy project, transmission line with a capacity of 100 kV or more, or pipeline 10 inches or more in diameter. For these types of projects, the BLM proposed mandatory pre-application meetings. Proposed amendments for paragraphs (a) introductory text and (a)(4) are not included in the final rule, since pre-application meetings will not be required and specific requirements associated with them are no longer necessary. Paragraph (b) of the existing regulations will not be redesignated and there will be no new paragraphs (b) and

(c) in this final rule. The only changes to section 2804.10 in the final rule are found in paragraph (a)(2).

Under this final rule, pre-application meetings will not be required for solar and wind energy developments, or any transmission line with a capacity of 100 kV or more. Instead, the BLM will require what we term “preliminary application review meetings” that will be held after an application for a right-of-way has been filed with the BLM. These meetings will fall under the BLM’s cost recovery authority for processing applications and are discussed in greater detail under section 2804.12. Based on comments received, no requirements for pipelines 10 inches or more in diameter are carried forward into the final rule.

Section 2804.12 What must I do when submitting my application?

In this final rule, section 2804.12 has been retitled from “What information must I submit in my application?” to “What must I do when submitting my application?”. Relocation of the early coordination meeting requirements to this section has resulted in revisions to this section that would make the previous title misleading. As revised, section 2804.12 requires that an applicant must provide specific information, and in the case of solar or wind energy development projects and transmission line projects with a capacity of 100 kV or more, must also complete certain actions when initially submitting an application.

The last sentence in section 2804.12(a) is revised to show that a completed application must include all of the items identified in section 2804.12(a)(1) through (8). The text of paragraphs (a)(1) through (7) are republished without amendment, and new paragraph (a)(8) is added.

Comments: Several comments were submitted regarding the BLM’s proposed pre-application requirements for solar and wind energy development and transmission lines with a capacity of 100 kV or more. Comments suggested that the BLM could not place requirements on a developer prior to an application being submitted to the BLM. This general comment was focused on two aspects of the BLM’s proposed requirement for pre-application meetings. The first aspect was that the BLM was requiring that two pre-application meetings be completed prior to a developer submitting an application for a solar or wind energy development project or transmission line with a capacity of 100 kV or more. The second aspect of concern was that the BLM would require the developer to pay cost

recovery for the required pre-application meetings. Under the proposed rule, the BLM would have required both of these prior to submission of an application for use of the public lands.

Response: The intent of the pre-meeting requirements is to ensure early coordination with the developer and other Federal, State, and tribal governments to gather information to better inform the developer of different considerations to be made if pursuing their project on BLM-administered lands. Considerations would include existing uses, environmental resources, and cultural or tribal values in the area of the proposed project. Pre-application meetings are currently required by the BLM’s policy. Discussing a proposed project with a developer early on has demonstrated an improvement in project siting and design, avoiding and minimizing impacts the project would have to the public land, and reducing the BLM’s processing timeframes. This final rule has been revised and now requires early coordination, not through pre-application meetings, but through preliminary application review meetings, which are to be held after an application is submitted to the BLM. These requirements for early coordination with developer and other Federal, State, and tribal governments are found under section 2804.12(b). Additional discussion of the preliminary application review meetings is found under section 2804.12(b) of this preamble.

Section 2804.12(a)(8) states that if the BLM requires you to submit a POD, you must include a schedule for its submittal in your application. This requirement was in the proposed rule’s section 2804.10(c)(4), but is now moved to section 2804.12(a)(8) in the final rule. This provision was proposed in section 2804.10 because the early coordination with BLM was done under pre-application meetings. It is moved to section 2804.12 of this final rule to coincide with the timing of the preliminary application review meetings.

Section 2804.12(b) explains requirements for submitting an application for solar or wind energy development (outside of DLAs), or any transmission line with a capacity of 100 kV or more. Requirements under section 2804.12(b) were found at section 2804.10(b) in the proposed rule, but have been moved to this section instead as application processing requirements. This includes the BLM’s requirement for preliminary application review meetings. This provision provides clear instructions to the public about what

they should expect when filing an application for such developments.

The BLM commonly refers to the first filing of an application as an “initial” application due to the BLM’s experience with such projects. In most cases, a project POD goes through several iterations during the BLM’s application review process and may require additional submissions or revisions of the application to accompany the revised plans. Additional applications are not always necessary when revising a project POD, but could be required.

Section 2804.12(b) also contains provisions from section 2804.10(b) and (c) of the proposed rule. These provisions are moved in the final rule in response to comments. An additional provision is added to paragraph (b) of this section to reiterate that the requirements for submitting a solar or wind application are in addition to those described in paragraph (a) of this section for all rights-of-way.

Comments: Several comments questioned the requirement to hold pre-application meetings, as well as the BLM’s authority to require conditions for project processing, prior to the submission of an application to the BLM and collecting cost recovery fees for that time period.

Response: The early coordination that resulted from the pre-application meetings required by existing BLM policy has been essential to the timely review and approval of solar and wind energy projects on the public lands. However, this final rule moves these meetings and requirements so that they occur after the submission of an application in response to comments received. The changes retain BLM’s intent to ensure earlier coordination on such applications with other Federal, State, local, and tribal governments. Under the final rule, such meetings would be subject to cost recovery requirements.

Section 2804.12(b) also states that your application for a solar or wind energy project, or a transmission line project with a capacity of 100 kV or more, must include a general description of the proposed project and a schedule for submittal of a POD, address all known resource conflicts, and initiate early discussions with any grazing permittees that may be affected by the proposed project. Further, section 2804.12(b) requires that you hold two preliminary application review meetings, within 6 months from the date on which the BLM receives the cost recovery fee payment required under section 2804.14.

Section 2804.12(b)(4), as previously described, is relocated from section

2804.10(c) of the proposed rule. Under this paragraph, the BLM will process an application only if the application addresses the following items: (1) Known potential resource conflicts with sensitive resources; (2) Values that are the basis for special designations or protections; and (3) Applicant-proposed measures to avoid, minimize, and compensate for such resource conflicts. For example, some applicant-proposed measures could utilize a landscape-level approach as conceptualized by Secretarial Order 3330 and subsequent reports, and be consistent with the BLM's IM 2013–142, interim policy guidance. Due to the intense use of the land from the projects covered in this section, the BLM will require applicants to identify potential conflicts and how they may be avoided, minimized, or mitigated. The BLM will work with applicants throughout the application process to ensure the most efficient use of public land and to minimize possible resource conflicts. This provision will require an applicant to consider these concerns before submitting an application and, therefore, provide the BLM with potential plans to minimize and mitigate conflicts.

Comments: Some comments stated that the BLM should ensure that meetings are structured so that participants are provided all the project information necessary so they can meaningfully assist the BLM to make an appropriate determination about the proposed project.

Response: The BLM agrees with these comments and has modified the regulation to have meetings occur after an application is filed, rather than hold the meetings beforehand. The intent of these meetings will be to bring all Federal, State, local, and tribal governments together and provide them with the best available information to have an informed discussion on the right-of-way application. Authorizations for solar and wind energy projects, and transmission lines with a capacity of 100 kV or more, are generally larger and more complex than the average right-of-way authorization, and this extra step will help protect the public lands and make application processing more efficient.

Furthermore, the BLM will not proceed with an application until all appropriate meetings are held and the BLM has notified appropriate grazing permittees (see 43 CFR 4110.4–2(b)). Applicants must pay reasonable or actual costs associated with the requirements identified in section 2804.12(b). Payment for reasonable costs associated with an application must be received by the BLM after the initial

filing of the application and prior to the first meeting, consistent with section 2804.14.

After enactment of the Energy Policy Act of 2005, the BLM received an influx of solar and wind energy development applications. Many of these applications were unlikely to be approved due to issues such as siting, environmental impacts, and lack of involvement with other interested parties. As the BLM gained more experience with these applications, it developed policies and procedures to process applications more efficiently. These policies and procedures required pre-application meetings and use of application screening criteria (see section 2804.35 of this preamble) in order to help BLM and the proponent address siting concerns early on in the process.

Pre-application meetings have helped both the BLM and prospective applicants to identify necessary resource studies, and other interests and concerns associated with a project. Further, the meetings have provided an opportunity to direct development away from lands with high conflict or sensitive resource values. As a result of these meetings, the applications submitted were more appropriately sited and had fewer resource issues than those submitted where no pre-application meetings were held. Holding these meetings early in the application process made the applications more likely to be approved by the BLM. This saved the applicant the time and money spent on doing resource studies and developing projects that may not have been accepted or approved by the BLM.

Some prospective applicants chose not to pursue development after these meetings, once they had a better understanding of the potential issues and resource conflicts with the project as proposed. The BLM found that applicants who participated in these meetings saved money that would have been spent planning a project that the BLM would not have approved. This also saved the BLM time by reducing the number of applications it would need to process and the time spent reviewing resource studies and project plans.

A January 2013 Government Accountability Office report (GAO–13–189) found that the average BLM permitting timeframes have decreased since implementation of BLM's solar and wind energy policies, which include the early inter-agency coordination meeting requirements in this rule. The GAO concluded that applications submitted in 2006 averaged about 4 years to process, while

applications submitted in 2009 and later averaged about 1.5 years to process. At the time of the GAO review, these meetings were pre-application meetings. In the final rule, the timing of these early meetings has been changed until after the submission of an application to the BLM. Based on its experience, the BLM believes that holding inter-agency and government coordination meetings early in the review of a proposed large-scale development will continue to save both the BLM and applicant time and money during the BLM's review and processing of the application.

Based on a review of its records, the BLM identified a range of costs and time estimated associated with the processing of each type of application for a use of the public lands. These cost and time estimates varied between the solar and wind energy and transmission line projects. For solar and wind energy rights-of-way a range of costs was identified between \$40,000 and \$4 million, including up to approximately 40,000 BLM staff labor hours and other non-labor costs per project. For transmission lines 100 kV or larger a range of costs was identified between \$260,000 and \$2.1 million, including up to approximately 21,000 BLM staff labor hours and other non-labor costs per project. Based on this review, the BLM observed that projects with early coordination generally had lower costs relative to similarly situated projects.

Based on the BLM's experience, two meetings are usually sufficient to address all known potential concerns with a project, which is why the final rule calls for two meetings. However, the BLM understands that additional meetings may be beneficial to a project before an application is submitted. The BLM does not want to limit its ability to hold additional meetings should a project be particularly complex and, therefore, the final rule allows for additional preliminary application review meetings to be held when mutually agreed upon. For example, a project that crosses State lines could require additional coordination with local governments and other interested parties.

Comments: Some comments noted concern over the BLM's existing and proposed pre-application process and its open-ended timeframe. Comments were concerned that this would be a deterrent for pursuing development on the public land, even if the project itself was well sited and designed. A developer would need assurances that a project would proceed expeditiously. Suggested timeframes included 30 days between meetings and application submittal.

Response: New paragraph (b)(4) specifies that within 6 months from the time the BLM receives the cost recovery fee, you must hold at least two preliminary application review meetings. The first meeting will be held with the BLM to discuss the proposal, the right-of-way application process, the status of BLM land use planning for the lands involved, potential siting and environmental issues, and alternative site locations. The second meeting will be held with appropriate Federal and State agencies and tribal and local governments to discuss concerns as identified above. If you do not believe you need to schedule the first or second meeting described above, you can ask the BLM for an exemption. The process of requesting an exemption is discussed further in section 2804.12(i), under the newly added paragraph labeled “Inter-agency Coordination.”

Section 2804.12(c) contains requirements for submitting an application for solar and wind energy development. These requirements, located in section 2804.10(a)(8) and (c)(2) in the proposed rule, have been relocated to section 2804.12(c)(1) and (2) in this final rule. Under section 2804.12(c)(1), the BLM specifies that an application for solar or wind energy development must be submitted for lands outside of DLAs, except as provided for by section 2809.19. Lands inside DLAs will be offered competitively under subpart 2809. See section 2809.19 of this preamble for further discussion. No comments were received and the only changes made to this paragraph are those identified for relocating the requirement to this section and putting it in the context of a requirement for submitting an application.

Section 2804.12(c)(2) requires that an applicant submit an application filing fee with any initial solar or wind energy right-of-way application. Section 304 of FLPMA authorizes the BLM to establish filing and service fees. A per acre application filing fee may discourage applicants from applying for more land than is necessary for a proposed project. Under this final rule, application filing fees will be retained by the BLM as a cost recovery fee, instead of being sent to the General Fund of the Treasury as collected revenue as proposed. A similarly structured nomination fee is established following the same criteria and is described in section 2809.11(b)(1).

Paragraph (c)(2) of this section is revised to replace “by the average annual change in the Implicit Price Deflator, Gross Domestic Product (IPD–GDP)” to read as “using the change in

the Implicit Price Deflator, Gross Domestic Product (IPD–GDP)”. As proposed, this provision may have been interpreted as limiting how the BLM would use the IPD–GDP when updating this fee. It is appropriate for adjustments that occur annually, such as acreage rent, to refer to the average annual change in the IPD–GDP. However, the application filing fee may be adjusted once every ten years and this adjustment would be based on the cumulative change to the IPD–GDP over the 10-year period.

The application filing fee is the initial fee paid to the BLM for the reasonable costs of processing, inspecting, and monitoring a right-of-way. The BLM will use these funds towards processing your application. The balance of these funds, if any, will be allocated towards a cost reimbursement agreement that is later established between the BLM and the applicant or refunded if the application is denied or otherwise terminated. A cost reimbursement agreement is established under the authority of FLPMA section 304(b) and 504(g). This change is made in conformance with those changes made under section 2804.30(e)(4) in response to comments.

The application filing fee is based on the appraisal consultation report performed by the Department’s Office of Valuation Services. The appraisal consultation report compared similar costs on private lands, and provided a range between \$10 and \$25 per acre per year. The nominal range or median was reported as between \$15 and \$17 per acre per year. The appraisal consultation report is available for review by contacting individuals listed under the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The BLM is adopting a single filing fee at the time of filing an application, as opposed to a yearly payment. Based on the appraisal consultation report, fees are \$15 per acre for solar and wind energy applications and \$2 per acre for wind energy project-area and site-specific testing applications.

Comments: Several comments were made concerning the fees identified in the description of requirements for section 2804.12(c)(2). One comment suggested that the \$15 per acre filing fee should be made a part of a cost recovery fee and used to reimburse the BLM for its expenses. In addition, the comment suggested that the fee should be refundable if the lands are later made subject to competition.

Response: The BLM has revised this rule, including this section, to make application filing fees part of cost reimbursement paid to the BLM.

Payment of cost reimbursement to the BLM is under Sections 304(b) and 504(g) of FLPMA. Application filing fees and other costs associated with the BLM’s processing of applications can be recovered because the BLM’s application review and other work facilitates, and will generally be essential for, the BLM’s processing, inspecting, and monitoring of a right-of-way. Consistent with FLPMA, application filing fees are retained by the BLM as cost reimbursement and will not be sent to the General Fund of the U.S. Treasury as originally proposed. If lands are later subject to a competitive offer for the use for which application filing fees were provided, (e.g., competition for a site development when development application filing fees are paid), then these fees would be refunded to the unsuccessful bidders who had already paid them, except for the reasonable costs incurred.

Comment: One comment opposes the proposed \$15 per acre filing fee for wind energy applications and \$2 per acre fee for wind energy site-specific testing applications as this would increase processing costs. The comment suggested that fees should be as low as possible to encourage wind energy development on public lands.

Response: The BLM has removed the application filing fee from site-specific testing applications to address concerns of increasing costs for development on the public lands. Site-specific testing generally takes up less than an acre, so it would not be necessary to encourage a smaller area of use. Project area testing and developments can each encompass thousands of acres and a per acre filing fee is appropriate. This final rule retains a \$2 per acre filing fee for project area testing applications and a \$15 per acre filing fee for development applications to encourage thoughtful development on public lands. Fees for solar and wind energy development applications will be adjusted for inflation once every 10 years, using the Implicit Price Deflator for Gross Domestic Product (IPD–GDP).

Section 2804.12(d) references an applicant’s option to request an alternative requirement if the applicant is unable to meet one of the requirements outlined for submitting an application. Requests for an alternative requirement are submitted under section 2804.40. This provision applies to all right-of-way applications submitted to the BLM and is added to the final rule in response to comments submitted on the proposed rule. Further discussion on requesting an alternative requirement is found under section 2804.40.

Comments: Some comments stated that the mandatory pre-application meetings included in the proposed rule would discourage a developer from pursuing public lands for development, since the process and costs associated with development on BLM lands are greater than those on private lands. These comments expressed concern that these requirements are overly burdensome and duplicative of the NEPA process.

Response: Although costs to develop a project may end up being higher on public lands, the BLM has a different scope of authority and responsibility than agencies and offices that administer developments that occur on private land. The BLM is charged with managing the public lands under principles of multiple use and sustained yield. The BLM must take into account resources and use of the public land, and balance those with each additional proposed use and its impacts to resources for current and future generations.

Based on the BLM's experience, these early coordination meetings help reduce the overall time and costs associated with the BLM's application process. The pre-application meetings described in the proposed rule, which are existing policy, are changed in this final rule to "preliminary application review meetings," which take place after an application is submitted. The BLM believes these meetings will facilitate a more efficient application process and will not discourage development on public lands.

The BLM is required, under NEPA, to consider the environmental impacts of a significant action on the public lands. These early coordination meetings help the BLM and proponent determine the best possible approach for developing a proposed project that would avoid, minimize, reduce or otherwise compensate for its environmental impacts. Based on the BLM's experience, these meetings have reduced the overall time of the NEPA analysis necessary for projects on the public lands. The GAO's report (GAO-13-189) found that the average BLM permitting timeframes have decreased since implementation of BLM's solar and wind energy policies, which include the early inter-agency coordination meeting requirements in this rule.

The BLM added section 2804.12(i), "Inter-agency Coordination," in response to these comments. This paragraph provides that an applicant may request an exemption from some of the requirements of this section, should they participate in an inter-agency

coordination process with another Federal, State, local, or tribal authority. This final rule allows a developer to formally request an exemption to the requirements under section 2804.12, pertaining to application filings and other requirements that may be duplicative of other activities that a developer is completing. In order for a developer to qualify for an exemption from these requirements, the other activities must meet the same criteria as required by the BLM. An example of such a situation would be if a developer had already met with the Department of Energy for purposes similar to what is required under the BLM's first preliminary application review meeting.

No other comments were received and no additional changes made to this section.

Sections 2804.12(e) through (h) are redesignated in the final rule from paragraphs (b) through (e) of the existing regulations and no other changes were made to these paragraphs.

Section 2804.14 What is the processing fee for a grant application?

Under section 2804.14, applicants must pay for reasonable costs for processing an application as defined by FLPMA. Under section 2804.14(a), the BLM may collect the estimated reasonable costs incurred by other Federal agencies. Applicants may pay those costs to other affected agencies directly instead of paying them to the BLM.

Section 2804.14(b) includes a table of the application processing categories. The specific outdated values for cost recovery categories 1 through 4 have been removed from this table, while the explanations of the categories and the methodology of calculating the costs remain. These numbers are available in writing upon request or may be found on the BLM's Web site at <http://www.blm.gov/>. These cost figures were removed from the regulations because they are outdated after the first year, since the BLM updates these costs annually and has done so since this section of the regulations was originally published. The revision allows the BLM to update these numbers without modifying the CFR and prevents confusion to potential applicants who would see incorrect information. The explanation of how these costs are calculated, formerly found in section 2804.14(c), is moved up to paragraph (b) to provide better context for the amended table. Redundant language is removed from the Category 1 processing fee.

Comments: Some comments were received stating that the BLM does not

have authority to collect cost recovery on behalf of other Federal, State, and non-regulatory offices, such as tribal governments and interested public stakeholders. These comments stated that the authority delegated by the Secretarial Order was by the Secretary, and, therefore, delegation of the authority could not apply to any agency or office outside of the Department.

Response: Secretarial Order 3327 delegating cost recovery authority applies only to agencies and offices of the Department of the Interior. Sections 304(b) and 504(g) of FLPMA, however, give the Secretary authority to collect payments intended to reimburse the United States, not just the Department of the Interior. Under Section 304(b) of FLPMA, the Secretary may charge for reasonable costs of the United States concerning "applications and other documents relating to [the public] lands." Section 504(g) of FLPMA provides that the Secretary may charge for "all reasonable administrative and other costs incurred in processing" a right-of-way application and costs associated with the inspection and monitoring of right-of-way facilities.

The revision under section 2804.14 and other cost recovery provisions of this rule clarify that the BLM's cost recovery authority is consistent with FLPMA, in that it seeks reimbursement to the United States—*i.e.*, it can seek reimbursement of its own costs as well as those of other Federal agencies. This does not include reimbursement of costs for State and non-regulatory offices. The BLM intends that collecting such reasonable costs for other Federal agencies would primarily arise in situations where the BLM's decision to approve or deny a right-of-way application depends on another Federal agency's issuance of a decision or other determination before or in conjunction with the BLM's right-of-way decision. An example of this can be seen in the BLM's May 2013 Memorandum of Understanding with the Fish and Wildlife Service (FWS), where the BLM and FWS have established a protocol for the BLM to collect and then provide cost recovery funds to the FWS for Endangered Species Act and other work that the BLM determines is necessary for it to process right-of-way applications. A copy of the Secretarial Order and Memorandum of Understanding can be found at the following Web site: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_information/2013/IB_2013-074.html. No other comments were received, and no changes were made to this section of the final rule.

Section 2804.18 What provisions do Master Agreements contain and what are their limitations?

As defined in section 2804.18, a Master Agreement is a written agreement covering processing and monitoring fees negotiated between the BLM and a right-of-way applicant that involves multiple BLM rights-of-way for projects within a defined geographic area. New section 2804.18(a)(6) requires that a Master Agreement also describe existing agreements between the BLM and other Federal agencies for cost reimbursement. With the recent authority delegated by Secretarial Order 3327 to collect costs for other Federal agencies, it is important for the applicant, the BLM, and other Federal agencies to coordinate and maintain consistency for cost reimbursement. No additional comments were received, except for those discussed under section 2804.14, and no changes were made to this section in the final rule.

Section 2804.19 How will BLM process my processing Category 6 application?

Under section 2804.19(a), an applicant for a Category 6 application must enter into a written agreement with the BLM identifying how such applications will be processed. Under this final rule, the final agreement includes a description of any existing agreements the applicant has with other Federal agencies for cost reimbursement associated with the application. No comments were received for this section, and no changes were made from the proposed rule to this section of the final rule.

Under section 2804.19(e), the BLM may collect reimbursement to the United States for its reasonable costs for processing applications and preparation of other documents under this part relating to the public lands. Adding this language to these regulations clarifies the BLM's authority when collecting for other agencies. No additional comments were received, except for those discussed under section 2804.14 and no changes were made to this section of the final rule.

Section 2804.20 How does BLM determine reasonable costs for processing Category 6 or monitoring Category 6 applications?

Section 2804.20 is revised to clarify the scope of the BLM's cost recovery and how the BLM will determine reasonable costs of the United States when processing and monitoring Category 6 applications. In paragraph (a)(1) of this section, "BLM" is changed

to "the Federal Government," to make it clear that the BLM may collect cost recovery for other Federal agencies as well. Processing costs include reasonable costs for processing a right-of-way application, while monitoring costs include reasonable costs for those actions the Federal Government performs to ensure compliance with the terms, conditions, and stipulations of the right-of-way grant. As pre-application requirements are not included in this final rule, section 2804.20(a)(7) was deleted. No additional comments were received, except for those discussed under section 2804.14, and no other changes were made to this section of the final rule.

Section 2804.23 When will the BLM use a competitive process?

Section 2804.23 was previously titled "What if there are two or more competing applications for the same facility or system?" but is revised to read, "When will the BLM use a competitive process?" This change is necessary because, under the final rule, the BLM may use a competitive process even when there are not two competing applications.

Paragraph (a)(1) of this section now requires applicants to reimburse the Federal Government, as opposed to just the BLM, for processing costs, consistent with the cost recovery authority in Sections 304(b) and 504(g) of FLPMA. This means that the BLM could require applicants to reimburse the BLM for the costs incurred by other agencies, such as the U.S. Fish and Wildlife Service, in processing the application.

A new sentence in section 2804.23(c) gives the BLM authority to offer lands through a competitive process on its own initiative. Under the existing regulations, the BLM can use a competitive process only when there were two or more competing applications for a single right-of-way system. This change gives the BLM more flexibility to offer lands competitively, and applies to all potential rights-of-way, not just solar and wind energy development projects.

Throughout the proposed rule, the BLM required publication of a notice in the **Federal Register** as well as in a newspaper in general circulation in the area affected by the potential right-of-way. Publication in a newspaper is included in the final rule as one of the "other methods" of public notification that the BLM may use, but is no longer a requirement. The potential area affected by a proposed BLM action may not be covered by a single newspaper. As the BLM considers issues at a

broader scale, such as multi-state transmission lines, several communities may be affected by a single BLM action. The **Federal Register** is a national publication that is available to all interested parties. In addition, the BLM will make available a copy of all **Federal Register** notices on its Web site at www.blm.gov. The BLM may use a newspaper to notify the public on a case-by-case basis, as appropriate. The public notification methods throughout this final rule are revised consistent with this section.

Comments: Some comments expressed concern that the BLM may determine to hold a competitive offer after an applicant has substantially progressed in the processing of their non-competitive application for a right-of-way grant. These comments argued that this possibility would discourage developers from submitting a solar or wind energy right-of-way application.

Response: Proposed paragraph (c) of this section has been revised to state that a competitive process will not be held for public lands where a right-of-way application for solar or wind development has been accepted, including the POD and cost recovery agreement. Adding this criterion provides assurances to prospective applicants that the BLM will not competitively offer lands after considerable time and resources have been committed to processing a particular application.

Under section 2804.23(d), lands outside of DLAs are made available for solar or wind energy applications through the competitive process outlined in section 2804.30. This provision directs the reader to new section 2804.30, which explains the competitive process for solar and wind energy development outside of DLAs. This paragraph is necessary to differentiate between development inside and development outside of a DLA. No comments were received on this paragraph, and no changes are made from the proposed rule to the final rule.

Under section 2804.23(e), lands inside a DLA will now be offered competitively through the process described in subpart 2809. This new paragraph directs the reader to revised subpart 2809, which explains the competitive process for solar and wind energy development inside of DLAs. This paragraph is necessary to differentiate between development inside and outside of a DLA. No additional comments were received for this section, except for those discussed under paragraph (c), and no other

changes were made from the proposed to the final rule.

Section 2804.24 Do I always have to submit an application for a grant using Standard Form 299?

Section 2804.24, which is unchanged from the proposed rule, explains when you do not have to use Standard Form 299 (SF-299) to apply for a right-of-way. Under the existing rule, you do not have to use SF-299 if the BLM determines competition exists under section 2804.23(c). The BLM only determines competition exists when there are two or more competing applications for the same right-of-way facility or system.

Due to the changes made to section 2804.23, section 2804.24 specifies when

an SF-299 is required. Under both the existing regulations and this final rule, the BLM will implement a competitive process if there are two or more competing applications. Under section 2804.24(a), you do not have to submit a SF-299 if the BLM offers lands competitively and you have already submitted an application for that facility or system.

Under paragraph (a) of this section, if you have not submitted an application for that facility or system, you must submit an SF-299, as specified by the BLM. Under the competitive process for solar or wind energy in section 2804.30, for example, the successful bidder becomes the preferred applicant, and may apply for a grant. The preferred

applicant will be required to submit an SF-299, but unsuccessful bidders will not.

Paragraph (b) explains that an applicant does not have to use an SF-299 when the BLM is offering lands competitively under subpart 2809. Under subpart 2809, the BLM will offer lands competitively for solar and wind energy development inside DLAs. The successful bidder will be offered a lease if the requirements described in section 2809.15(d) are met. The successful bidder will not have to submit an application using SF-299. The following chart explains when the filing of an SF-299 is or is not required under this final rule:

WHEN A SF-299 IS REQUIRED

Type of solar or wind right-of-way	Would have to submit a SF 299?
Have two or more competing applications for the same area, outside of DLAs	Yes.
Lands are offered competitively outside of a DLA and you have already submitted an application for the parcel before the Notice of Competitive Offer.	No.
Lands are being offered competitively outside of a DLA and you have not submitted an application	Yes.
You are the successful bidder in a competitive offer outside of a DLA and have been declared the preferred applicant and may apply for a grant.	Yes.
Lands are being offered competitively within a DLA under subpart 2809	No.

No comments were received and, no other changes are made to this section of the final rule.

Section 2804.25 How will BLM process my application?

This section of the final rule has been modified from the proposed rule to reflect the shift of early BLM coordination from pre-application meetings, under section 2804.10, to preliminary application review meetings, under section 2804.12. These preliminary application review meetings are now required after the initial filing of a right-of-way application for solar or wind projects, or for electric transmission lines with a capacity of 100 kV or more.

Section 2804.25(a) of this final rule has been modified from the proposed rule to include a provision from current section 2804.25(b) that states the BLM will inform you of any other grant applications that involve any of the lands for which you have applied. This new provision has been added as paragraph (a)(2). Paragraph (a) has been reformatted providing an introductory statement and putting the existing requirement for identifying the processing fee as paragraph (a)(1). This is an existing provision of the regulations and is only added to this paragraph as part of formatting revisions

that are made in response to comments submitted concerning confusion with existing requirements of section 2804.25(b).

Comments: Some comments were received noting confusion over the proposed section 2804.25(b) and its requirements.

Response: This paragraph has been reformatted into two new separate paragraphs, (b) and (c).

New section 2804.25(b) contains existing regulatory requirements that were part of proposed section 2804.25(b). This paragraph helps explain the existing requirements found in section 2808.12 of the regulations. In paragraph (b), the BLM will not process your application if you have any trespass action pending for any activity on BLM-administered lands or have any unpaid debts owed to the Federal Government. If you have an outstanding trespass action, the BLM will only process your application, under part 2800 or part 2920, if it will resolve the underlying trespass. Similarly, if you have any debts outstanding, the BLM will only process your application after those outstanding debts are paid. The requirement in section 2808.12 is often overlooked by potential right-of-way applicants and this addition to the regulations would insert the requirement into the application process

and improve applicant understanding of the BLM's process under subpart 2804.

Comments: Some comments expressed concern with the clarity of this proposed section and were also unsure whether using an application for a right-of-way to resolve trespass was appropriate. Further, concern was raised over what constituted an unpaid debt to the Federal Government.

Response: In response to the comment about clarity, the BLM revised the language in paragraph (b) of this section, by adding paragraphs (b)(1) and (2), discussing when the BLM will not process an application.

Section 2804.25(b)(1) clarifies that the BLM will not process your application if you have an outstanding debt to the Federal Government and then describes what constitutes an outstanding debt to the government. An additional sentence was added to paragraph (b)(1) of this section, explaining that unpaid debts are what are owed to the Federal Government after all administrative collection actions have occurred, including administrative appeal proceedings under applicable Federal regulations and review under the Administrative Procedure Act (APA). Adding this provision to the regulations makes it clear to right-of-way holders and trespassers that the BLM will evaluate applications in this manner.

Paragraph (b)(2) of this section clarifies that if you are in trespass, the BLM will only process an application that would resolve that particular trespass. Reformatting this paragraph in this manner separates the concepts of unpaid debts and existing trespass situations as they pertain to new applications. Under this final rule, the BLM will not always issue a right-of-way to resolve a trespass. The BLM will consider the situation on a case-by-case basis and will evaluate whether the trespass was knowing and willful. The BLM will also consider whether issuing a right-of-way to resolve the trespass is appropriate. If a right-of-way is not an appropriate way to resolve a trespass, the BLM will consider other options for resolving a trespass, such as requiring its removal from public lands.

Section 2804.25(c) contains the requirements from section 2804.25(b) of the existing regulations, under which the BLM may require the submittal of a POD. The POD or other plans must be submitted to the BLM within the period specified by the BLM.

Under paragraph (c)(1) of this section, the BLM requires an applicant to commence resource surveys or studies within 1 year of receiving a request from the BLM. This requirement was identified in the preamble of the proposed rule and carried forward in this final rule. The requirement to begin the surveys or studies within 1 year of the request establishes a default period, which will apply if the BLM does not specify a different time period within which the survey or study must begin. The BLM may identify a different time period through written correspondence with applicants, or by other means, as appropriate. Generally, these surveys or studies will not require a permit from the BLM or any other agency.

Proponents need only coordinate the work with the applicable agencies as appropriate. However, for some surveys or studies, there may be a permit that is necessary, such as when performing pedestrian archaeological surveys. In those instances, the BLM will work with applicants to ensure that the applicable permitting requirements are understood by all parties.

Under paragraph (c)(2) of this section, an applicant could request an alternative requirement to one of the requirements of this section, such as the period of time described in paragraph (c)(1) of this section. However, the applicant must show good cause why it is unable to meet the requirement. This new paragraph directs the reader to new section 2804.40, consistent with revisions made from comments received as discussed under section 2804.40, if

the applicant is unable to meet the requirements of this section. Failure to meet the 1 year requirement for application due diligence may result in denial of the application, unless an alternative compliance period has been requested and agreed to by the BLM. Paragraph (c)(2) of this section gives applicants the ability to address circumstances outside of their control with respect to time periods.

Comments: Some comments were received regarding due diligence requirements for applicants to begin resource studies or provide other such survey work to the BLM. Comments recommended varying timeframes for application due diligence ranging from 1 to 3 years after the BLM's approval of survey protocols or other identified study requirements. Comments generally agreed with implementing such requirements for applications.

Response: In consideration of the comments received on application due diligence requirements, the BLM determined that a longer timeframe would not be appropriate. Under this final rule, an applicant would be required to begin surveys or inventories within a year of the BLM's request date, unless otherwise specified by the BLM. The BLM determined that a one year default timeframe was adequate to commence surveys and inventories. This rule does, however, leave the BLM with the discretion to establish a different timeframe where appropriate.

Section 2804.25(c) of the existing regulations is redesignated as paragraph (d) of this section. It remains unchanged and is relocated to make room for the reformatting of this section in response to comments submitted on the proposed rule.

The introductory text of section 2804.25(e), which is redesignated from existing paragraph (d), is revised by replacing the words "before issuing a grant" with "in processing an application." This change is made to account for the situation where the BLM would issue a grant without accepting applications. For example, lands leased inside DLAs will be offered through a competitive bidding process under subpart 2809 in situations where no applications for those lands are received. The provisions in section 2804.25 do not apply to the leases issued under subpart 2809. However, they will apply to all other rights-of-way, including solar and wind energy development grants outside of DLAs. The process for issuing leases inside DLAs is discussed in subpart 2809. This revision clarifies that the requirements of this section apply to applications.

Section 2804.25(e) is further revised to incorporate new provisions for all rights-of-way as well as specific provisions for solar and wind energy development. Existing section 2804.25(d)(5), which provides the requirement to hold a public meeting if there is sufficient public interest, is moved to section 2804.25(e)(1). Revisions are made in this final rule, consistent with those made in section 2804.23(c). Language is added specifying that a public notice may also be provided by other methods, such as publication in a newspaper in the area affected by the potential right-of-way or the Internet.

Section 2804.25(e)(2) contains three separate requirements for solar and wind energy development applications. Under section 2804.25(e)(2)(i), the BLM will hold a public meeting in the vicinity of the lands affected by the potential right-of-way for all solar or wind energy development applications. Based on the BLM's experience, most solar and wind energy development projects are large-scale projects that draw a high level of public interest. This requirement is added to provide an opportunity for public involvement early in the process. Under paragraph (e)(2)(ii), the BLM will apply screening criteria when processing an application outside of DLAs. These screening criteria are explained further in section 2804.35. The BLM removed the word "priority" from this requirement to improve reader understanding that the screening criteria are used to determine the priority of applications, not "resource priorities."

Under section 2804.25(e)(2)(iii), the BLM will evaluate an application, based on the input it has received from other government and tribal entities, as well as information received in the application, public meetings, and preliminary application review meetings. The BLM may consider information it has received outside of these meetings when evaluating an application. This paragraph is revised in the final rule to remove reference to pre-application meetings and add preliminary application review meeting requirements, consistent with other changes in this final rule. The BLM has also added more detail to this paragraph explaining why it may deny an application at this point in the process. For example, the BLM may deny an application if you fail to address known resource values raised during preliminary application review (see section 2804.12(c)(4)), or during public meetings (see section 2804.25(e)(2)(i)), or if you improperly site the project. The BLM made this revision to help

improve the public's understanding of this process.

Based on its evaluation of an application, the BLM will either deny or continue processing it. The BLM's denial of an application will be in writing and is an appealable decision under section 2801.10. The denial or approval of all grant applications is at the BLM's discretion.

As noted previously under section 2804.12, you must submit an application for a solar or wind energy development. Requirements for submitting this application are noted in section 2804.25(b) and (c), and these must be fulfilled before an application is ready to be evaluated by the BLM. Section 2804.25(e)(2)(iii) has been revised to explain what criteria must be met in order for the BLM to continue processing your application. These criteria are: Whether the development application is appropriately sited on the public lands (e.g. outside of DLAs—where leasing must proceed under Section 2809 rather than 2804—and outside of exclusion areas), and whether you address known resource values that were discussed in the preliminary application review meetings. Known resource values must also be addressed in general project descriptions and in further detail in a project's POD.

Under section 2804.25(e)(3), the BLM will determine whether the POD schedule submitted with an application meets the applicable development schedule and other requirements or whether an applicant must provide additional information. This is a necessary step that allows the BLM to evaluate the application requirements under section 2804.12. Those requirements can be found in section 2804.12(b) and (c). The BLM determines if the development schedule and other requirements of the POD templates have been met. The POD templates can be found at <http://www.blm.gov>.

Under the proposed rule, paragraph (e)(3) of this section applied to applications for solar and wind energy development, transmission lines with a capacity of 100 kV or more, and pipelines 10 inches or greater in diameter. Under this final rule, this paragraph would apply to all applications for which a POD is required. Although a POD is mandatory for some types of projects, the BLM may require an applicant to submit a POD with any type of right-of-way application under section 2804.25(c) of this final rule (section 2804.25(b) of the existing regulations). Should the BLM require an applicant to submit a POD, the application would be evaluated under this paragraph based on the POD

schedule submitted with the application.

Section 2804.25(e)(4) of this final rule is revised from the proposed rule to include a cross-reference to the Department's NEPA implementation regulations at 43 CFR part 46. The Departmental regulations reinforce the CEQ's regulations and the requirements to comply with NEPA. This cross-reference is made to increase the public's awareness of these requirements and where they may be found, but does not impose any additional requirements on the public.

Redesignated paragraphs (e)(5), (6), (7), and (8) of this section are existing provisions that were formerly found in paragraph (d) of this section. Former paragraph (e) is redesignated as new paragraph (f). No other comments were received or other changes made to the final rule, except that references to the "U.S." were changed to read "United States."

Section 2804.26 Under what circumstances may BLM deny my application?

Section 2804.26 explains the circumstances in which the BLM may deny an application. The BLM considers the criteria outlined in this section during its decision-making process, which for right-of-way authorizations ends with the issuance of a decision—either a ROD or a Decision Record (DR), or in the absence of a ROD or DR, the perfection of a right-of-way instrument or the issuance of a written decision denying the right-of-way application. Once the BLM issues a ROD or DR to approve a right-of-way, any subsequent BLM determination that is inconsistent with that ROD or DR, including any decision to suspend or terminate the right-of-way, is a separate action that requires the BLM to complete a separate decision-making process.

Section 2804.26(a)(5) explains one such circumstance. This provision of the existing regulations is revised to include "or operation of facilities" and now reads, "when an applicant does not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities in the proposed right-of-way." The rule adds text to clarify this requirement, which applies to all rights-of-way. The added paragraphs explain how an applicant could provide evidence of the financial and technical capability to be able to construct, operate, maintain, and decommission a solar or wind energy development project. The applicant may provide documented evidence showing prior successful experience in developing similar projects, provide

information of sufficient capitalization to carry out development, or provide documentation of loan guarantees, a confirmed PPA, or contracts for the manufacture and/or supply of key components for solar or wind energy project facilities.

Paragraphs (a)(6), (7), and (8) are added to section 2804.26 to reiterate the new requirements of the final rule and explain that the BLM may deny an application should an applicant not comply with these provisions.

Under section 2804.26(a)(6), the BLM may deny your application if you do not meet the POD submittal requirements under section 2804.12(a)(8) and (c)(1) and 2804.25(e)(3). The final rule is updated to ensure that the citations match the reformatted rule, after changes were made based upon comments received.

Paragraph (a)(7) of section 2804.26 is a new paragraph added to the final rule that corresponds to the provisions by which the BLM will require surveys under section 2804.25(c). Under section 2804.26(a)(7), the BLM may deny your application if you fail to meet its requirements to commence surveys and studies, or provide plans for permit processing as required by section 2804.25(c). This paragraph is new in the final rule and is added to be consistent with the new requirements in section 2804.25(c), which are added based upon public comment.

Section 2804.26(a)(8) references the possible application denial based on the screening criteria established in section 2804.25(e)(2)(iii).

Comments: Some comments expressed concern regarding the BLM exercising its authority to deny an application without accounting for the fact that some circumstances may be outside an applicant's control.

Response: In response to this generalized concern, the BLM added section 2804.40 to this final rule. Under this new section, an applicant may request an alternative requirement in place of a requirement that they are unable to meet. References are made to this new section in specific parts of the application processing requirements found under subpart 2804.

No other changes were made to this section and no other comments were received.

Section 2804.27 What fees must I pay if BLM denies my application or if I withdraw my application?

The heading of section 2804.27, "What fees do I owe if BLM denies my application or if I withdraw my application?" is revised to read, "What fees must I pay if BLM denies my

application or if I withdraw my application?”. With the addition of application filing fees, the revised title more clearly describes the requirements of the final rule. A new provision in this paragraph provides that if the BLM denies your application, or if you withdraw it, you must still pay any application filing fees submitted or due under section 2804.12(c)(2), and the processing fee set forth at section 2804.14. Sections 304(b) and 504(g) of FLPMA provide for the deposit of payments to reimburse the United States for reasonable costs with respect to right-of-way applications and other documents relating to the public lands. In the case of preliminary application review meetings, the expense could be considerable, depending on the complexity of the project. The BLM will refund any part of the application filing fees received that is not used for processing the application. This paragraph is revised by removing references to pre-application meetings that were originally proposed for the rule, but not carried forward in the final rule. These revisions are consistent with other changes made in the final rule under section 2804.12 regarding the change from pre-application to preliminary application review meetings. No other comments were received on this section, and no other changes were made to the final rule.

Section 2804.30 What is the competitive process for solar or wind development for lands outside of designated leasing areas?

Section 2804.30 explains the process for the BLM to competitively offer lands outside of DLAs. This bidding process is similar to that established in subpart 2809 (competitive offers inside DLAs), except that the end result of the bidding is different. Under paragraph (f) of this section, the successful bidder will become the preferred right-of-way applicant. Under this section, the high bidder is not guaranteed a grant, but is identified as the “preferred applicant.” As explained under paragraph (g) of this section, the preferred applicant is the only party that may submit an application for the parcel identified by the BLM, but the BLM must still review and accept the application. This is different from subpart 2809, which provides that the successful bidder for a lease inside a DLA may be offered a lease upon successfully meeting all requirements of section 2809.15.

Comments: Three general comments were received on this section. The first comment requested that language be added to encourage additional consultation with members of the

public, such as developers, non-governmental organizations, and stakeholders, during the competitive process outside of DLAs.

Response: Many opportunities for public engagement are provided throughout the competitive process for right-of-way applications filed on public lands outside of DLAs. As part of the competitive processes outside of DLAs, the BLM may engage the public through a notice seeking competitive interest in a particular area, which would provide the public and interested stakeholders with an opportunity to comment on the potential development of a particular parcel. If the BLM decides to move forward with a competitive offer for a parcel, a Notice will be published in the **Federal Register** and may also be announced through other means. Upon the completion of the competitive process, the BLM will process an application for the solar or wind energy development, following the requirements of this final rule, which include a mandatory public meeting before the BLM determines whether to deny the application or continue processing it. If the BLM continues to review an application, there may be additional opportunities for public involvement through the NEPA process, including during the notice and comment period. As a result of these measures, the BLM believes that there is adequate opportunity for the public to be fully engaged throughout the competitive process, application review, and NEPA processes for projects outside of DLAs.

Comments: The second comment on this section stated that only developers are capable of making a determination of whether development in a particular area will be economically sound and, therefore, a worthwhile pursuit for public land use. The comment contended that developers will not expend the effort necessary to determine the economic suitability for projects before a competitive process is held (either inside or outside areas such as DLAs).

Response: While the BLM agrees that only a developer can determine whether a particular project in a particular area makes sense for them, that determination does not necessarily apply to all developers, nor is it the only consideration relevant to the BLM. Each developer may follow a different business model and may consider different funding, financing, and procurement opportunities when assessing a potential project site. In identifying DLAs, the BLM has to consider the environmental and other resource impacts of a potential

development, in addition to the known solar or wind potential for the area. For these reasons, the BLM does not make an economic evaluation when identifying an area for a competitive process. The BLM will rely on developer interest, among other indications of competitive interest in an area, to determine whether utilization of a competitive process is appropriate. Recognizing that determining economic viability for a particular area may involve site-specific testing information, the final rule contains provisions allowing for such activities. For wind or solar energy projects outside of a DLA, interested developers can apply for testing authorizations as described in section 2804.31 of this rule, or apply for a testing authorization inside DLAs prior to a competitive action as described in section 2809.19(d) of this rule.

Comments: The third comment on this section suggested that the leasing process should be restructured from a local “electric-centric” focus to a macro-level objective to provide the greatest benefit to “We the People.” This comment suggests that the BLM should explicitly recognize that the available solar and wind resources could be used to provide most of, and potentially all of, the United States’ fuel, electricity, transportation, and natural resource needs.

Response: FLPMA directs the BLM to generally receive fair market value for the use of public lands and to utilize and protect public land resources while balancing the use of the public lands for current and future generations. The BLM intends for this rule to promote the development of solar and wind energy on public lands, while also ensuring a fair return to the Federal Government.

Paragraph (a) of section 2804.30 identifies lands available for competitive lease; paragraph (b) of this section explains the variety of competitive procedure options available; and paragraph (c) explains how the BLM identifies parcels for competitive offers. Under this final rule, the BLM may identify a parcel for competitive offer if competition exists or the BLM elects to offer a parcel on its own initiative. The BLM may include lands in a competitive offer in response to interest from the public or industry, or to facilitate an individual State’s renewable energy goals. This is a change from existing regulations, which only allow the BLM to use a competitive process when there are two competing applications; however, the changes made to section 2804.23(c) in this rule give the BLM more flexibility.

Paragraph (d) of this section, "Notice of competitive offer," establishes the content of the materials of a notice of competitive offer that include the date, time, and location (if any) of the competitive offer, bidding procedures, qualifications of potential bidders, and the minimum bid required. The notice also explains that the successful bidder becomes the preferred applicant, which can then apply for a grant under this subpart. This is different from the competitive offers held under subpart 2809, where the successful bidder is offered a lease.

Paragraph (d)(4) of this section requires that the notice identify the minimum bid amount, explain how the authorized officer determined the minimum bid amount, and describe the administrative costs borne by the Federal agencies involved. As indicated in the general discussion section of this preamble, administrative costs are not a component of fair market value, but instead are a cost reimbursement paid to the Federal Government for its expenses. The BLM will publish a notice containing all of the identified elements in the **Federal Register**, and may also use other notification methods, including newspapers in the affected area or the internet. Consistent with sections 2804.23(c), this section's public notice requirements were revised, establishing notice through a newspaper or internet as an additional optional form of notice. This change in the final rule is discussed further in section 2804.23(c) of this preamble. No comments were received on section 2804.30(a) through (d). However, a cross-reference has been updated in section 2804.30(d)(6) to include section 2804.12, due to revisions made to that section based upon comments received.

Under paragraph (e) of this section, the BLM requires that bid submissions include both the minimum bid amount and at least 20 percent of the bonus bid. The minimum bid consists of administrative costs and an amount determined by the authorized officer. Included in the administrative costs are those expenses pertaining to the development of environmental analyses and those costs to the Federal Government associated with holding the competitive offer.

The authorized officer may specifically identify a second component for the minimum bid(s) submitted for each competitive offer. This amount will be based on the known or potential values of the offered parcel. The authorized officer may consider values that include, but are not limited to, the acreage rent, the MW capacity fee, or other known or potential

values of the parcel. For example, the BLM may use a percentage of the acreage rent value for the parcel competitively offered. An explanation of the minimum bid amount and how the BLM derived it will be provided in the notice of competitive offer.

Comments: Several comments were received pertaining to bidding under section 2804.30(e). One comment suggested that the BLM: (1) Establish global objectives to evaluate bids based on the constitutional greater good for the "People" to meet many objectives of the renewable energy bidding process; (2) Ensure that successful bidders use energy to meet public objectives; (3) Ensure that appropriate values are received for the right to develop energy; (4) Ensure that evaluations of electrical supply include the full costs and benefits to the public; (5) Ensure that effects from manmade impacts on global warming shall be based on transient climate sensitivity; and (6) Focus on "We the People" instead of creating processes that incur higher costs for developments.

Response: The comments submitted are suggesting revisions to the final rule that are outside of the BLM's authority to consider. FLPMA directs the BLM to generally receive fair market value for the use of public lands and to utilize and protect public land resources while balancing the use of the public lands for current and future generations. The provisions of this final rule will ensure that the BLM is receiving fair market value for the uses of the public lands that it authorizes.

The second comment suggested that the BLM direct where or how renewable energy that is generated on public lands is deployed. The BLM could place a requirement on the use of the electricity generated, through a term or condition of a right-of-way, but the BLM expects that it would do so only in limited circumstances, if at all, as it is a land management agency charged with managing the public lands under principles of multiple use and sustained yield.

The BLM evaluates proposed projects before issuing a decision to approve, approve with modifications, or deny a project. In general, the BLM will analyze a project using reasonable scientific or other methods, to understand the impacts to the public lands and other lands, uses, resources and other systems outside of its authority to control. These other lands, uses, resources, and other systems outside of the BLM's authority to control could include electrical transmission systems that may be owned or controlled by an Independent System Operator, or the energy needs of

a State or local community as identified by the State government offices, or lands administered by a Federal, State, or private entity. When evaluating prospective projects, the BLM considers their reasonably foreseeable direct, indirect, and cumulative impact on climate change on a local, regional, and national scale, as appropriate.

Comment: Another comment suggested that administrative costs discussed under section 2804.30(e)(2)(i) should not be included as part of the minimum bid. The initial costs of preparing for and holding a competitive offer are completed at the volition of the BLM, not an applicant. The comment suggested that including administrative costs as part of the minimum bid will discourage development inside and outside of DLAs. The comment suggested that a successful bidder should essentially pay for the same administrative and NEPA costs as noncompetitive applicants for right-of-ways outside of DLAs.

Response: Under the final rule, reimbursement for the reasonable administrative and other costs is generally required from any successful bidder. Consistent with Sections 304(b) and 504(g) of FLPMA, the BLM may recover reasonable administrative and other costs incurred in processing an application for a right-of-way. Administrative and other costs associated with the use of a competitive process to identify a preferred applicant can be recovered because this work facilitates, and will generally be essential to, the BLM's review of a right-of-way application. These costs would be paid only by the preferred applicant. Bidders will be given notice of the administrative costs portion of the minimum bid prior to their bidding at a competitive offer. The BLM believes that it is preferable for a prospective bidder to know these costs, which are required to prepare and hold a competitive auction, before submitting a bid in a competitive offer. Prospective applicants would not otherwise be able to submit an application to the BLM for development of that area without first being the successful bidder. The BLM considers the competitive process described in subpart 2809 for lands inside a DLA to be even more preferable to prospective developers, as a successful bidder would be issued a lease immediately upon paying the full amount of their winning bid.

Comments: Comments stated that the mitigation costs identified in section 2804.30(e)(2)(ii) should not be factored into the minimum bid because the successful bidder should have to pay separately for mitigation if and when

construction commences and not at the time of bidding. A successful bidder cannot pay twice for the same mitigation. Several other comments also addressed what should or should not be included as acceptable factors.

Response: The BLM has removed the reference to mitigation costs found in proposed section 2804.30(e)(2)(ii), as this may be misleading and open to interpretation. However, the BLM has maintained the acreage rent and the megawatt capacity fee as considerations when determining a minimum bid amount. These factors which are used only to determine the amount above the administrative costs where bidding will start (see section 2804.30(e)(2)(ii)). Their inclusion as a potential consideration in the development of the minimum bid does not count towards other obligations. For example, if the BLM arrives at a minimum bid amount using the annual acreage rent for a lease area, a successful bidder will still be required to pay the first year's acreage rent, as identified in this rule, before being awarded a grant or lease. No offset or discount toward future acreage rent will be provided.

Comments: A number of comments expressed concern that requiring unsuccessful bidders to pay application filing fees would discourage prospective developers. They suggested that application filing fees should be refundable if a bidder is not successful.

Response: New section 2804.30(e)(4) has been revised based on these comments to refund application filing fees for unsuccessful bidders, except for the reasonable costs incurred by the United States. This change is consistent with the revisions under section 2804.12(c)(2) and discussed further under that section of this preamble.

Under section 2804.30(f), the successful bidder is determined by their submission of the highest total bid for a parcel at a competitive offer. The successful bidder must fulfill the payment requirements of the successful bid in order to become the preferred right-of-way applicant. The preferred applicant must submit the balance of the bid to the BLM within 15 calendar days after the end of the competitive offer. No comments were received pertaining to section 2804.30(f), and no other changes are made from the proposed rule to the final rule.

Under section 2804.30(g), a preferred applicant is the only party who may submit an application for the parcel that is offered. Unlike the process under subpart 2809, the approval of a grant under this paragraph is not guaranteed to a successful bidder. Approval of a grant is solely at the BLM's discretion.

The preferred applicant may also apply for an energy project-area or site-specific testing grant.

Comments: A comment suggested adding a new provision to the rule stating that upon making a winning bid, the preferred applicant also secures site control. Adding such a condition would provide more certainty to the process for prospective developers, further incentivizing the competitive bidding.

Response: The BLM agrees with this comment and has revised paragraph (g) to make it clear that the BLM will not accept applications on lands where a preferred applicant has been identified, unless submitted or allowed by the preferred applicant in order to provide additional certainty with respect to site control. If ancillary facilities for projects or facilities on adjacent parcels, such as roads or transmission lines, need to be constructed on the parcel where a preferred applicant's project would be sited, the companies constructing the ancillary facilities would need to apply to the BLM for a right-of-way, and the BLM would consult with the preferred applicant before processing any such application. This is intended to provide certainty to the preferred applicant when applying for renewable energy developments on the public lands that applications from other entities will not be accepted for the competitively gained application area unless they are allowed by the preferred applicant.

Section 2804.30(h) describes how the BLM will address certain situations that could arise from a competitive offer. Under paragraph (h)(1) of this section, the BLM retains discretion to reject bids, regardless of the amount offered. For example, the BLM may reject a bid if there is evidence of conflicts of interest or collusion among bidders or if there is new information regarding potential environmental conflicts. The BLM will notify the bidder of the reason for the rejection and what refunds are available. If the BLM rejects a bid, the bidder may administratively appeal that decision (see 43 CFR part 4 for details). Under paragraph (h)(2) of this section, the BLM may make the next highest bidder the preferred applicant if the first successful bidder does not satisfy the requirements under section 2804.30(f). This allows the BLM to determine a preferred applicant without reoffering the land and could save time and money for the BLM and potential applicants.

The BLM may reoffer lands competitively under section 2804.30(h)(3) if the BLM cannot identify a successful bidder. If there is a tie, this re-offer could either be limited to tied bidders or include all bidders. This provides the BLM with flexibility to

resolve ties and other issues that could arise during a competitive offer process.

Under section 2804.30(h)(4), if the BLM receives no bids, the BLM may reoffer the lands through the competitive process provided for in section 2804.30. The BLM may also make the lands available through the non-competitive process described in subparts 2803, 2804, and 2805, if doing so is determined to be in the public interest. No other comments were received, and no additional changes were made to final paragraph (h) of this section, except those discussed above.

Section 2804.31 How will the BLM call for site testing for solar or wind energy applications?

This section, which was not in the proposed rule, is added to this final rule to describe how the BLM will call for site testing for solar and wind energy. This section also explains how the BLM may create a new DLA, through the land use planning process described in new section 2802.11, in response to public interest.

Under new paragraph (a) of this section, the BLM may call for site testing in a DLA by publishing a notice in the **Federal Register** and may also use other notification methods, such as a local newspaper or the Internet. Paragraph (a) also specifies what information will be included in any public notice issued under the section, including the following information: (1) The date, time, and location where site testing applications may be sent; (2) The date by which applicants will be notified of the BLM's decision on timely submitted site testing applications; (3) The legal land description of the area for which site testing applications are being requested; and (4) Qualification requirements for applicants. The BLM is limiting the testing authorizations that would be offered under a call for site testing applications under this section to site-specific grants identified under section 2801.9(d)(1). This limitation is established to reduce the potential for multiple interested parties having overlapping applications. The BLM does not intend to use a competitive process for the site testing. Rather, the BLM intends to determine whether there is competitive interest for solar and wind energy development for these public lands. Should there be overlapping testing applications, the BLM will notify those applicants of the overlap and may hold a competitive offer for that site testing location to determine a preferred applicant.

Paragraph (b) of this section explains that any interested parties may request that the BLM hold a call for site testing

for certain public lands. However, how the BLM responds to those requests is at its sole discretion. The “call for site testing” may be used as a step in the process for lands either inside or outside of DLAs. A subsequent step would be the competitive offer for an application for a development grant under section 2804.30, or for a development lease under subpart 2809, if the area is designated as a leasing area, as described in section 2804.31(c).

Under paragraph (c) of this section, the BLM may determine that areas receiving interest from the public may be appropriate to establish as a DLA. The BLM may turn an area surrounding the site testing into a DLA as described under section 2802.11. Following the designation of an area for competitive leasing, the rules described under subpart 2809 would be used for any subsequent competitive processes in the area. Establishing such an area would be performed by following the land use planning process described in the revised section 2802.11. This process would be completed during the time that testing is being undertaken, which is typically a 3 year process. Designating such an area would allow interested developers to benefit from the incentives provided by development in a DLA. This approach also provides a mechanism for public interest to drive the establishment of DLAs.

Comments: Some comments suggested that the BLM retain the discretion to structure the DLA leasing process for wind in accordance with a two-phased development approach. The first phase of this approach would be a competitive process for site testing. The winner of this offer would receive exclusive rights to the parcel offered. The BLM would then create a DLA in the area where this competitive offer was held. The second phase would be a competitive offer for a lease in this newly established DLA.

Response: The BLM recognizes that potential developers should have a clear avenue for helping the BLM identify new DLAs. The BLM added the new section 2804.31 to this final rule in direct response to these comments. This new section provides another way for developers to identify and benefit from the competitive process and DLA incentives established in subpart 2809 of this final rule. Providing a mechanism for site testing while DLA designation is ongoing will allow developers to benefit from the specific data they obtain during testing as they evaluate whether a competitive offer or further development of the lands is in their interest.

Section 2804.35 How will the BLM prioritize my solar or wind energy application?

Section 2804.35 explains how the BLM will prioritize review of an application for a solar or wind energy development right-of-way based on the screening criteria for projects outside of DLAs. The BLM will evaluate such applications based on the screening criteria in that section and categorize the application as high, medium, or low priority.

Through existing guidance, the BLM has established screening criteria (see Instruction Memorandum (IM) 2011–061), which identify and prioritize land use for solar and wind energy development rights-of-way. In order to facilitate environmentally responsible development the IM directs BLM to consider resource conflicts, applicable land use plans, and other statutory and regulatory criteria pertinent to the applications and the lands in question. Applications with lesser resource conflicts are anticipated to be less costly and time-consuming for the BLM to process, and the IM directs that these applications be prioritized over those with greater resource conflicts. IM 2011–061 may be found at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

This rule includes criteria similar to those in the IM. The codification of these criteria gives certainty to applicants that such criteria will not change, and therefore provides more certainty as to how an application might be categorized. By specifying these criteria, applications could be tailored to fit them in order to streamline the processing of an application.

Comment: One comment indicated that the BLM should clarify the proposed rule’s application prioritization concept. This comment indicated that the proposed rule left several questions unanswered, including: (1) How the BLM’s staff time will be allocated within field staff among projects based on priority and time of submission; (2) Whether BLM staff working on a medium-conflict priority project will shift focus if a high-priority application is submitted; and (3) Whether BLM staff workload will be shifted across different field offices if certain field offices have a disproportionate number of high-priority applications as compared to others, which may have more medium- or low-priority applications.

Response: This final rule provides the criteria that the BLM will use to prioritize applications it receives. This allows potential applicants to

understand not only how these applications will be prioritized, but also how they can submit an application that is more likely to become a high priority for the BLM. The BLM’s internal management and workload processes are not addressed as that is not appropriate for a rulemaking. The criteria for determining how workload priorities are addressed are more appropriately handled by the policy guidance for implementing this final rule. Such guidance will elaborate on these points. It should be noted that the BLM will continue to process all applications received, but will prioritize staff workload based upon these priority categorizations.

Comments: Comments were received requesting clarity over whether leases awarded under subpart 2809 would be given priority over applications made outside of DLAs.

Response: New language has been added to the introductory paragraph of this section to clarify that the BLM generally prioritizes the processing of leases awarded under subpart 2809 over applications submitted under subpart 2804. There are some instances where the BLM may determine that it is in the public interest to prioritize the processing of an application over the processing of a lease. However, the BLM generally intends to prioritize the processing of leases first.

Comments: Comments were received requesting that the BLM expand on the criteria used in the rule and better define and describe the resource areas and potential conflicts. Some specific recommendations were made by the commenters. Each comment provided a greater level of specificity or detail than the proposed rule regarding how the BLM should prioritize resource conflicts.

Response: The descriptions of the resource conflicts in the final rule are mostly unchanged, except where noted in this section’s discussion. The BLM determined that the level of specificity and detail recommended by commenters is not appropriate for this final rule. Screening applications to prioritize them has only been done by the BLM recently. Based upon the BLM’s experience, it is better to establish broader criteria in this final rule that can then be further refined in its internal guidance. National priorities change and BLM continues to learn more about the resource conflicts associated with solar and wind energy projects. Therefore, the BLM believes that the specific internal guidance, rather than regulatory criteria, is more appropriate to provide a greater level of specificity and detail as recommended

by commenters. This approach gives the BLM flexibility to make changes as workload or conditions on the ground or in the wind and solar industry change. Guidance may need to be updated as national priorities change and the BLM better understands these resource conflicts with solar and wind energy projects. As part of the rule's implementation, the BLM will issue guidance aimed at better describing the BLM's considerations and prioritization of applications. This guidance is expected to be issued after this final rule is published.

Section 2804.35(a) identifies criteria for high-priority applications, which are given processing priority over medium- and low-priority applications. These criteria include:

1. Lands specifically identified as appropriate for solar or wind energy development outside DLAs;
2. Previously disturbed sites or areas adjacent to previously disturbed or developed sites;
3. Lands currently designated as Visual Resource Management (VRM) Class IV; and
4. Lands identified as suitable for disposal in the BLM's land use plans.

The BLM may have identified lands that are appropriate for solar or wind energy development, but are not inside DLAs. These lands may include areas approved for solar or wind area development for which a right-of-way was never issued or an existing right-of-way was relinquished.

The VRM inventory process is a means to determine visual resource values. The VRM inventory consists of a scenic quality evaluation, sensitivity level analysis, and a delineation of distance zones. Based on these three factors, BLM-administered lands are placed into one of four VRM classes, with Classes I and II being the most valued, Class III representing a moderate value, and Class IV being of least value. The BLM assigns VRM classes through the land use planning process, and these values can range from areas having few scenic qualities to areas with exceptional scenic quality.

Section 2804.35(b) identifies criteria for medium-priority applications, which will be considered before low-priority applications. These criteria include:

1. BLM special management areas that provide for limited development or where a project may adversely affect lands having value for conservation purposes, such as historical, cultural, or other similar values;
2. Areas where a project may adversely affect conservation lands to include lands with wilderness characteristics that have been identified

in an updated wilderness characteristics inventory;

3. Right-of-way avoidance areas;
4. Areas where a project may adversely affect resources listed nationally;
5. Sensitive plant or animal habitat areas;
6. Lands designated as VRM Class III;
7. Department of Defense (DOD) operating areas with land use or operational mission conflicts; and
8. Projects with proposed groundwater uses within groundwater basins that have been allocated by State water resource agencies.

Comment: One comment suggested for Criterion 5, that BLM's designated priority sage-grouse areas be a low priority and not a medium priority.

Response: The BLM removed the reference to sage-grouse habitat in this final rule. In September 2015, the BLM issued the Greater Sage-Grouse Plan Amendments and Revisions (80 FR 57633, 80 FR 57639). Those plans generally excluded priority habitat areas from major right-of-way developments, including wind energy. General sage-grouse habitat management areas generally fall into the medium-priority application category under Criterion 5.

With the removal of priority sage-grouse habitat from this final rule in criterion 5, the BLM also revised the specificity of "important eagle use areas" to read as "important species use areas." This revision makes the criterion more broad and applicable to all important species areas, and does not unintentionally exclude other identified important species areas that are not specifically identified for eagles.

Comments: Several comments were made concerning the above factors. For Criterion 2, a comment recommended revising the description of "conservation lands" and excluding Alaska from this requirement.

Response: The final rule does not revise the section 2804.35(b)(2) as recommended in the comment. This final rule does not define "conservation lands," which include areas of critical environmental concern and lands inventoried and managed for wilderness characteristics. These lands are often identified for their unique characteristics by the BLM to protect scenic, historic, cultural, and other natural values. The status of conservation lands is considered by the BLM when processing solar and wind energy applications. When the BLM considers such lands for wind or solar use, it evaluates the impacts and effects to the resources, including those resources for which conservation lands are designated. Depending on the

proposed development, the impacts to the resources for which the lands were designated for conservation purposes may be very small. Applications, such as those submitted for lands in Alaska, will be reviewed on a case-by-case basis.

Comment: Another comment suggested that Criterion 7 be moved to low priority and changed to read "Areas where the Department of Defense has testing, training, or operational mission impacts."

Response: The BLM considered the suggestion, but did not revise the rule as suggested. The BLM kept this requirement largely unchanged because the DOD has overlapping interest in some locations with the BLM lands—e.g., withdrawn lands that are transferred to the DOD or have an aerial easement—where solar and wind energy development does not pose significant adverse impacts to the DOD operations. However, we did revise criterion number 7 to read as follows

"Department of Defense operating areas with land use or operational mission conflicts." The BLM will coordinate with the DOD on solar and wind energy applications submitted to the BLM that may affect DOD operations.

Section 2804.35(c) identifies criteria for low priority applications, which may not be feasible to authorize due to a high potential for conflict. Examples of applications that may be assigned low priority would involve:

1. Lands near or adjacent to areas specifically designated by the Congress, the President, or the Secretary for the conservation of resource values;
2. Lands near or adjacent to wild, scenic, and recreational river and river segments determined as suitable for wild or scenic river status, if project development may have significant adverse effects on sensitive viewsheds, resources, and values;
3. Lands designated as critical habitat for federally designated threatened or endangered species under the ESA;
4. Lands currently designated as VRM Class I or II;
5. Right-of-way exclusion areas;
6. Lands currently designated as no surface occupancy areas; and

Comment: One comment recommended that applications within lands under Criterion 2 not be considered a low priority. This comment further suggested that an additional criterion be added that would read as "Nothing in this section creates a protective perimeter or buffer zone around the special status conservation lands specified in Sections 2804.35(c)(1) and 2804.35(c)(2). The fact that a proposed activity or use on BLM-administered lands outside such special

status conservation lands can be seen or heard within such special status conservation lands shall not accord an application low-priority status even if the use or activity is prohibited within the special status conservation lands.”

Response: Nothing in this criterion creates a protective perimeter or buffer zone around the areas described in this section and, therefore, precludes the BLM’s approval of an application that is near or adjacent to such areas. In the BLM’s experience, solar and wind energy development applications are complex and difficult to analyze. If a proposed right-of-way would affect such areas, the BLM will consider effects when processing the application. Potential impacts to these areas and their resources may prove unacceptable, even after mitigation.

The BLM also revised criterion 3 of this section from the proposed to final rule, from “is likely to” to “may” “. . . result in the destruction or adverse modification of that critical habitat.” This revision is necessary because it is difficult to determine based on an application what impacts are “likely.” However, it is the BLM’s responsibility to protect critical habitat. Therefore, any application that may destroy or adversely affect critical habitat will be a categorized as low priority under this final rule.

The low priority status of applications meeting these criteria relates only to the BLM’s management of its workload in processing applications; it is not a proxy for the BLM’s final decision. No other comments were received, nor were any changes made to section 2804.35.

Section 2804.40 Alternative Requirements

Section 2804.40 is added to this final rule in response to comments received on the proposed rule.

Comments: Several comments expressed concern that the BLM’s proposed requirements were too strict and would be difficult to meet, resulting in applications being denied or a holder’s authorization being terminated. They supported the BLM’s reference to a showing of good cause to support why a developer was unable to meet the BLM’s requirement.

Response: The BLM has added this section to the final rule due to the number of comments received discussing the BLM’s requirements that had no specific provision allowing a developer to show good cause why an alternative to a regulatory requirement should be approved.

Section 2804.40 expands on the BLM’s show of good cause provision that was in the proposed rule with

several different new requirements. This new provision replaces the specific provisions originally proposed and now applies to all rights-of-way and to all requirements the BLM has established under this subpart. An applicant may request an alternative requirement from the BLM by following the process outlined in this section. A similar provision is added in section 2805.12(e). That provision is discussed in that section’s preamble discussion.

Paragraph (a) of this section notes that the requester must show good cause for its inability to meet a particular requirement. An applicant may request an alternative requirement for any requirement in this subpart. Requirements include surveys or studies to be completed, timeframes in which to provide information, development and reclamation plans, fees, and other appropriate requirements.

Paragraph (b) of this section states that you must suggest an alternative requirement to the BLM and explain why the alternative requirement is appropriate. The BLM will not approve an alternative requirement without an explanation from the right-of-way holder as to why the current requirement is inappropriate. When implementing this final rule, the BLM intends to issue guidance on what constitutes an “appropriate” alternative requirement.

Paragraph (c) of this section states that a request for an alternative requirement must be in writing and be received by the BLM in a timely manner. In order for the request to be timely, the BLM must have received it prior to the deadline originally given for the relevant requirement. As explained in the final rule, any such request is not approved until you receive BLM approval in writing. The BLM may provide written approval through a letter, email or other written means.

Subpart 2805—Terms and Conditions of Grants

Section 2805.10 How will I know whether the BLM has approved or denied my application, or if my bid for a solar or wind energy development grant or lease is successful or unsuccessful?

The heading for section 2805.10 is revised to read as stated above. This section is updated to reflect the new competitive process for lands inside DLAs (see subpart 2809) by stating that a successful bidder for a solar or wind development lease on such lands will not have to submit a SF–299 application. Instead, in these circumstances, the successful bidder

will have the option to sign the lease offered by the BLM.

Paragraph (a) of this section contains the language from the existing regulations explaining how the BLM will notify you about your application. This paragraph is revised to add a new provision requiring that the BLM send the successful bidder a written response, including an unsigned lease for review and signature. The BLM will notify unsuccessful bidders, and any unused funds submitted with their bids will be returned. If an application is rejected, the applicant must pay any processing costs (see section 2804.14).

In paragraph (a) of this section of the final rule, the BLM changed “will send you an unsigned lease” to “may send you an unsigned lease,” for consistency with revisions to section 2809.15(a). See the preamble for that section for more discussion.

Paragraphs (b) introductory text and (b)(1) and (2) of this section parallel paragraphs (a)(1) and (2) of the existing regulations, and describe the unsigned grant or lease that the BLM will send to you for approval and signature.

Paragraph (b)(3) of this section specifies that in accordance with section 2805.15(e), the BLM may make changes to any grant or lease, including to leases issued under subpart 2809, as a result of the periodic review required by this section. This provision is necessary because it makes clear why the BLM would amend a lease issued under subpart 2809. The terms and conditions of a right-of-way grant or lease may be changed in accordance with section 2805.15(e) as a result of changes in legislation or regulation, or as otherwise necessary to protect public health or safety or the environment. Because any changes to the terms and conditions of a right-of-way grant or lease would occur after the completion of the agency action (the BLM’s decision to approve the right-of-way), the BLM generally anticipates making the change through a separate action, generally initiated at the BLM’s discretion and requiring its own decision-making process.

Sections 2805.10(c), (d) introductory text, and (d)(1) and (2) and 2805.20(d)(3) contain the language from existing sections 2805.10(b), (c) introductory text, and (c)(1) and (2) and 2805.20(c)(3). These provisions remain unchanged from existing regulations. No comments were received and no changes were made from the proposed rule to the final rule.

Section 2805.11 What does a grant contain?

Existing section 2805.11(b) explains how the duration of each potential right-

of-way is determined. This paragraph is revised to include specific terms for solar and wind energy authorizations, because they are unique and different from other right-of-way authorizations. Where the proposed rule discussed only wind energy testing in some portions, the final rule is changed to include both solar and wind for each type of authorization. This revision is made in connection with changes made under section 2801.9(d), where comments requested that site- and project-area testing authorizations include solar energy, and not be exclusive to wind.

Section 2805.11(b)(2)(i) limits the term for a site-specific grant for testing and monitoring of wind energy potential to 3 years. Under this rule, this type of grant will be issued only for a single meteorological tower or study facility and will include any access necessary to reach the site. This authorization cannot be renewed. If a holder of a grant wishes to keep its site for additional time, it must reapply. These authorizations are intended for testing, not energy generation, and are limited to an area large enough for only a single tower or study facility. If a developer wishes for a larger study area, it can apply for a project-area testing grant under paragraph (b)(2)(ii) of this section.

Section 2805.11(b)(2)(ii) provides for an initial term of 3 years for project-area energy testing. Such grants may include any number of meteorological towers or study facilities inside the right-of-way. Any renewal application must be submitted before the end of the third year if a proponent wishes to continue the grant. For the BLM to be able to renew such an authorization, the project-area testing grant holder must submit two applications, one for renewal of the project-area testing grant and one for a solar or wind energy development grant, plus a POD for the facility covered by the development application. Renewals for project-area testing grants may be authorized for one additional 3-year term.

Section 2805.11(b)(2)(iii) provides for a short-term grant for all other associated actions, such as geotechnical testing and other temporary land-disturbing activities, with a term of 3 years or less. A renewal of this grant may be issued for an additional 3-year term.

Section 2805.11(b)(2)(iv) provides for an initial grant term of up to 30 years for solar and wind energy grants outside of DLAs, with a possibility of renewal in accordance with section 2805.14(g). A holder must apply for renewal before the end of the authorization term.

Section 2805.11(b)(2)(v) provides for a 30-year term for solar and wind energy

development leases issued under subpart 2809. A holder may apply for renewal for this term and any subsequent terms of the lease before the end of the authorization.

Comment: A comment suggested that the standard term be 40 years for both solar and wind energy grants (outside of DLAs) and up to 100 years for leases (inside of DLAs), with a condition of the grant or lease providing for renegotiation every 10 years. Other comments suggested longer terms for grants and leases.

Response: The final rule remains as proposed. The comment did not provide any justification for adding the additional years to the term of the grant or lease or explain why the additional time is necessary. Generally, it takes 1 year to secure a PPA after a project is authorized and an additional 2 to 3 years to construct. Since the term of a PPA is generally 20 to 25 years, the BLM believes that a 30 year period is sufficient to cover the developer's needs for constructing and operating a facility, while protecting the public lands from unnecessary burdens. If a longer term is suitable or desired by a developer, an application to renew the grant or lease may be submitted to the BLM pursuant to the applicable requirements.

For all grants and leases under this section with terms greater than 3 years, the actual term will include the number of full years specified, plus the initial partial year, if any. This provision differs from the grant term for rights-of-way authorized under the MLA (see the discussion of section 2885.11 later in this preamble) as FLPMA rights-of-way may be issued for terms greater than 30 years, while an MLA right-of-way may be issued for a maximum term of 30 years and a partial year would count as the first year of a grant.

Section 2805.11(b)(3) contains the language from section 2805.11(b)(2) of the existing regulations, but further requires that grants and leases with terms greater than 3 years include the number of full years specified, plus the partial year, if any. A grant that is issued for a term of 3 years will expire on its anniversary date, 3 years after it was first issued. This change affects the duration of all FLPMA right-of-way grants that are issued or amended after the final rule becomes effective. This change provides specific direction for consistently calculating the term of a right-of-way grant or lease.

No other comments were received, nor were any changes made to this section.

Section 2805.12 What terms and conditions must I comply with?

Section 2805.12 lists terms and conditions with which all right-of-way holders must comply. This section is reorganized to better present a large amount of information. Paragraph (a) of this section carries forward, without adjustment, most of the requirements from the existing regulations found at section 2805.12. Paragraph (b) of this section refers the reader to new section 2805.20, which explains bonding requirements for right-of-way holders. Paragraph (c) of this section contains specific terms and conditions for solar or wind energy right-of-way authorizations. Paragraph (d) describes specific requirements for energy site or project testing grants. Paragraph (e) is a show of good cause condition that is added to the final rule consistent with the provisions added as new section 2804.40. All requirements of paragraph (a) are part of the existing regulations and are not discussed in this preamble unless we received a substantive comment.

Comments: Two general comments were received concerning this section. One comment stated that terms and conditions for leasing public lands for power generation should be the same regardless of the power source. The second comment suggested that the free market should drive success, not government policy on the terms and conditions of an authorization.

Response: The BLM processes each development proposal for use of public lands on a project-by-project basis. All of the terms and conditions in section 2805.12 would apply to power generation authorizations, regardless of the technology used. However, based on the BLM's experience with solar and wind energy developments, additional terms and conditions are required for such authorizations on public lands because the different types of technology may have varying impacts on the public lands and the resources they contain. For example, a string of wind turbines or an array of solar panels will have a different footprint, and accordingly will have a different impact on the lands and resources than other energy generation types.

Separately, the free market alone (a market without oversight), cannot determine the use of the public lands, as those lands are managed by the BLM on behalf of the American public. The terms and conditions of each BLM authorization address the protection of the public lands and resources, consistent with the BLM's responsibility to manage the public lands under

FLPMA's multiple use and sustained yield mandate. Without regulations that ensure the necessary terms and conditions are put in place, development of the public lands could result in the unacceptable loss of the public lands and the resources they contain.

The BLM regularly engages the public, including private businesses, to seek comments and input on the BLM's administration of the public lands. The BLM will continue to do so through this rulemaking and its other decision-making processes.

Section 2805.12(a)(5) contains language from existing section 2805.12(e) with two small changes. The word "phase" was changed to "stage" to prevent confusion with the use of "phase-in of the MW capacity fee" and similar phrases in this rule.

This paragraph also prohibits discrimination based on sexual orientation. Adding sexual orientation as a protected class in this regulation is consistent with the policy of the Department that no employee or applicant for employment be subjected to discrimination or harassment because of his or her sexual orientation. See 373 Departmental Manual 7 (June 5, 2013). Several comments were received either for or against modifying this paragraph.

Comments: One comment recommended that additional language be added to identify "pregnancy and gender relations" as protected classes, while another recommended deleting "sexual orientation" from the rule.

Response: We did not revise the rule as a result of these comments. This paragraph refers to existing Federal law prohibiting discrimination and does not add or expand upon requirements under existing law.

Comments: Some comments suggested that the BLM include greater connection between the rule and landscape-level mitigation as described in Secretarial Order 3330 and subsequent reports, and be consistent with the BLM's IM 2013-142, interim policy guidance for offsite mitigation.

Response: Developing landscape-level mitigation policy for use of the public lands is an ongoing BLM effort. Examples of landscape mitigation plans are the solar regional mitigation strategies. The BLM is currently developing regional mitigation strategies for many of the SEZs established as part of the Western Solar Plan. For an example of a complete mitigation plan, see the BLM's Dry Lake regional mitigation strategy known as Technical Note 444, which may be found on the BLM's Web site at: http://www.blm.gov/style/medialib/blm/wo/blm_library/

tech_notes.Par.29872.File.dat/TN_444.pdf. Since more detailed requirements and guidance will be addressed in the BLM's policies, handbooks, and other forms of guidance that are currently under development, the BLM did not make any changes in response to this comment.

Section 2805.12(a)(8)(iv) is added to the final rule based upon comments on the proposed rule to incorporate clear measures that are consistent with landscape-level mitigation and the BLM's IM 2013-142 for offsite mitigation. The added provision clarifies that the BLM can require offsite mitigation to address residual impacts associated with a right-of-way. Any compensatory mitigation requirements would be established through a land use planning decision or implementation decision, possibly relying on a previously developed strategy, such as a solar regional mitigation strategy.

Section 2805.12(a)(8)(vi) requires compliance with project-specific terms, conditions, and stipulations, including proper maintenance and repair of equipment during the operation of a grant. This is an existing policy requirement affecting all rights-of-way and in this rule is expanded to include leases offered under revised subpart 2809. In addition, this provision requires a holder to comply with the terms and conditions in the POD. This may include project-specific conditions to maintain the project in a manner that will not unnecessarily harm the public land by poor maintenance and operational practices. Any holder that does not comply with the POD approved by the BLM would be subject to remedial actions under section 2807.17, which may include the suspension or termination of the grant or lease.

Comment: Another comment suggested adding language that the BLM implement a condition to begin early coordination with State fish and wildlife offices.

Response: In the proposed rule, the BLM identified two pre-application meetings under section 2804.10. One meeting was focused on early coordination among the BLM, applicant, and other Federal, State, and tribal authorities. This early coordination requirement has been carried forward in the final rule under section 2804.12 as part of a preliminary application review meeting for proposed solar and wind energy projects and transmission lines with a capacity of 100 kV or more. No other change has been made in the final rule. Early coordination among Federal and State wildlife offices has been carried forward into the final rule.

Paragraph (a)(8)(vii) of this section discusses the use of State standards and requires the right-of-way holder to comply with such standards when they are more stringent than Federal standards.

Comment: A comment suggested that we add the word "environmental" so that the paragraph would now read, "When the State [environmental] standards are more stringent than Federal standards, comply with State standards for public health and safety, environmental protection, and siting, constructing, operating, and maintaining any facilities and improvements on the right-of-way."

Response: Under FLPMA, the BLM considers an array of State standards, including those relating to public health and safety. Under the existing regulations, the BLM may apply State standards when those standards do not conflict with Federal law or policy for the administration of the public lands. No revision was made to the text of this paragraph in response to this comment.

Paragraph (a)(8)(viii) of this section requires that a grantee or lessee grant the BLM an equivalent authorization for an access road across the applicant's land if the BLM determines that a reciprocal authorization is needed in the public interest and the authorization the BLM issues to you is also for road access.

Comment: One comment was concerned that the BLM was proposing to revise section 2804.25 rule to read, "If your application is for a road, BLM will determine if it is in the public interest to require you to grant the U.S. an equivalent authorization across land you own." The comment raised concern that section 2805.12(a)(8) appeared to be directed at landowners and not utility companies. The comment expressed concern about waiving rental payments and who would be responsible for maintenance and repair of damage caused to the road.

Response: The BLM did not propose to revise section 2804.25 to read as noted. The quoted text from the comment is from regulations that were formerly found at existing section 2804.25(d)(3) and are now identified as section 2804.25(e)(6) of this final rule. The paragraph was redesignated in this final rule after the rest of the section was revised. In section 2805.12, the requirement regarding reciprocal rights-of-way has also been redesignated as section 2805.12(a)(8)(viii).

This text in the final rule, which remains unchanged from the text in the existing regulation, is used by the BLM for administration of the public lands. Where there are inter-mixed or

adjoining private and public lands, the issuance of reciprocal right-of-way authorizations would allow the BLM to cross your land to inspect and administer the public lands as well as grant you access across the public lands for purposes of ingress and egress to your property. The reciprocal authorization may include use for the public to access your land, but does not require such an authorization as the intended use is for the BLM to utilize the right-of-way. A reciprocal right-of-way is not intended as a public use access, such as those issued by a State's Department of Transportation or the Federal Highway Administration. Each reciprocal authorization is evaluated on a case-by-case basis, and additional questions may be addressed at that time.

Comment: A comment raised further concerns about the proposed requirements of section 2805.12(a)(3), which read "Build and maintain suitable crossings for existing roads and significant trails that intersect the project," noting that this should only be applicable if the roads or trails are used by the grant holder. The comment also noted that the grant holder should not be responsible for repairing or maintaining these roads or trails if they have not caused or contributed to damages.

Response: The BLM did not propose to revise the terms and conditions found at section 2805.12 to read as noted in the comment. The quoted text is from section 2805.12(c) of the existing regulations, now identified as section 2805.12(a)(3) of this final rule. The paragraph is redesignated in the final rule for readability, and is not amended further.

This condition is retained from the existing regulations as the BLM must allow for multiple-use of the public lands. Should a right-of-way be granted, it does not displace other uses of the public land, including use of existing trails and other crossing that may intersect the project. The BLM will require that such trails and accesses are maintained by the right-of-way grant holder only to the extent that they have impacted it. If there is damage to the trail or access that is not the fault of the grant holder, then they will not be required to repair or fix it.

Comment: A comment raised concerns over the proposed requirements of section 2805.12(a)(4), "Do everything reasonable to prevent and suppress wildfires on or in the immediate vicinity of the right-of-way area." The comment noted that utilities frequently perform fire prevention activities as part of regular maintenance, which are frequently delayed by the

BLM. The comment further noted that the grant holder should not be responsible for performing activities outside of the right-of-way, and that the fighting of fires should be the responsibility of the BLM, not the grant holder.

Response: The BLM did not propose to revise the terms and conditions found at section 2805.12 to read as noted by the comment. The quoted text is from regulations that were formerly found at 2805.12(d) and are now identified as section 2805.12(a)(4) of this final rule. The paragraph is redesignated in the final rule for readability. This condition is retained from the existing regulations in this final rule without amendment. The condition requires the holder of an authorization to do everything that is reasonable to prevent or suppress wildfires. This condition is not intended to require a grant holder to perform actions outside of a right-of-way, unless the actions are related to the right-of-way, such as trimming trees as a component of BLM-authorized regular maintenance on an overhead transmission line. Other actions outside of the right-of-way, which are not related to the right-of-way, would not be the holder's responsibility.

Additionally, this condition does not delay actions that are already permitted in the right-of-way grant, which would be completed by a grant holder to prevent or suppress wildfires. However, actions proposed to be taken by a grant holder may be delayed if they are outside the permission granted by the BLM.

Comment: One comment raised concerns over the BLM proposing to revise the terms and conditions to read, "Assume full liability if third parties are injured or damages occur on or near the right-of-way." The comment raised concerns that this appeared to be an unreasonable requirement since a grant holder does not generally have authority to enforce laws. The comment also said that grant holders could be responsible for damages related to faulty equipment, but should not be responsible for actions outside of lands they are authorized to use, and for actions that are not their own, such as those by vandals or even the BLM.

Response: The BLM did not propose to revise the terms and conditions found at section 2805.12 to read as noted. The quoted text is from regulations that were formerly found at section 2805.12(h) and are now identified as section 2804.12(a)(7) of this final rule. The paragraph is redesignated in the final rule for readability.

The condition is retained from existing regulations in this final rule

without amendment. The condition does not require that a holder should enforce the laws and regulations on public lands. However, the condition provides notice that, when agreeing to be a right-of-way holder on the public lands, the grant holder assumes responsibility for the permitted use. A holder assumes the responsibility for any injury or damages caused that are associated with their right-of-way. Injury or damages could be those that are directly caused by the grant holder, such as by electrocution or collision with a permitted use, or indirectly, such as those from flood events which can carry objects outside of the permitted right-of-way, but are still the responsibility of the grant holder.

Section 2805.12(a)(15) requires that a grant holder or lessee provide, or make available upon the BLM's direction, any pertinent environmental, technical, and financial records for inspection and review. Any confidential or proprietary information will be kept confidential to the extent allowed by law. Review of the requested records facilitates the BLM's monitoring and inspection activities related to the development it authorizes. The records will also be used to determine if the holder is complying with the requirements for holding a grant under section 2803.10(b).

Comments: Several comments stated that: (1) The BLM does not have authority to make such requirements; (2) In the case of a PPA or other similar type agreements, the BLM has no need to see such documents; and (3) These documents relate to private party transactions and are subject to confidentiality provisions.

Response: The BLM does not need all of the documents described in this paragraph for every right-of-way. However, in some circumstances the BLM might need these documents when processing an application or where the BLM may need verification that such an agreement has been put in place, such as if a variable offset is to be awarded under the competitive leasing process inside a DLA. Information that is proprietary or confidential that is submitted to the BLM will be treated as such to the extent allowed by law. The BLM will require information under this provision, including PPAs, only if it is necessary for the BLM's administration of an authorization.

Section 2805.12(b) requires that grant holders and lessees comply with the bonding requirements of added section 2805.20. The former bonding requirements were lacking in detail and this new section will help clarify the requirements of a grant or lease. This paragraph is revised in this final rule to

state that the BLM will not issue a Notice to Proceed or give written approval until the grant holder complies with the bonding requirements of section 2805.20. This revision clarifies that when required by the BLM, a bond must be obtained before beginning ground-disturbing activities. No comments were received and no other changes made from the proposed rule to the final rule.

Section 2805.12(c) identifies specific terms and conditions for grants and leases issued for solar or wind energy development, including those issued under subpart 2809. Several comments were received on this paragraph and these are discussed at the end of section 2805.12(c)(6). Minor revisions are made from the proposed to the final rule to improve readability, but any significant changes are discussed in detail in this preamble.

Section 2805.12(c)(1) prohibits ground-disturbing activities until either a notice to proceed is issued under section 2807.10 or the BLM states in writing that all requirements have been met to allow construction to begin. Requirements may include the payment of rents, fees, or monitoring costs, and securing a performance and reclamation bond. The BLM will generally apply this requirement to all solar and wind rights-of-way due to the large scale of most of these projects.

Section 2805.12(c)(2) requires that construction be completed within the timeframes provided in the approved POD. Construction must begin within 24 months of the effective date of the grant authorization or within 12 months, if approved as a staged development. This section is revised from the proposed to final rule to include a "or as otherwise authorized by the BLM." This revision is consistent with other sections of this final rule where the BLM retains discretion to approve or authorize different timeframes or requirements. The BLM may approve a request for an alternative requirement (see section 2805.12(e)), but the BLM may also authorize a different timeframe in the approved POD. The BLM made similar revisions to the requirements described in section 2805.12(c)(3)(ii) and (iii). Further discussion of a staged development is found under section 2806.50.

Section 2805.12(c)(3) describes the requirements for projects that include staged development in the POD, unless other agreements have been made between the developer and the BLM. Minor revisions are made from the proposed to the final rule to improve readability, but any significant changes are discussed in detail in this preamble.

Under paragraph (c)(3)(i) of this section, a developer must begin construction of the initial phase of development within 12 months after issuance of the Notice to Proceed, but no later than 24 months after the effective date of the right-of-way authorization.

Paragraph (c)(3)(ii) of this section requires that each stage of construction after the first begin within 3 years after construction began for the previous stage of development. Construction must be completed no later than 24 months after the start of construction for that stage of development, unless otherwise authorized by the BLM.

These time periods were selected after evaluating the timing of other completed energy development projects. These timeframes will help ensure that the public land is not unreasonably encumbered by these large authorizations, which are exclusive to other rights during the construction period of the project.

Section 2805.12(c)(3)(iii) limits the number of development stages to three, unless the BLM specifically approves additional stages. The BLM will generally approve up to three stages for solar and wind energy development. An applicant may request approval of additional stages with a showing of good cause under section 2804.40. This request must be accompanied by a supporting discussion showing good cause for your inability to meet the conditions of the right-of-way. A grant holder may request alternative stipulations, terms, or conditions under section 2805.12(e). The BLM revised paragraph (c)(3)(iii) of this section, from the proposed to final rule by removing "in advance" when referring to the BLM's approval. The requirement in this section is unchanged from the proposed rule but is rephrased for consistency with other sections of the final rule. The addition of 2805.12(e) provides additional information about the requests for alternative requirements.

Paragraphs (c)(4), (5), and (6) of this section contain specific requirements for diligent development and the potential consequences of not complying with these requirements.

Section 2805.12(c)(4) requires the holder to maintain all onsite electrical generation equipment and facilities in accordance with the design standards of the approved POD. This paragraph reiterates the requirement to comply with the POD that must be submitted as scheduled under section 2804.12(c)(1).

Section 2805.12(c)(5) provides requirements for repairing or removing damaged or abandoned equipment and

facilities within 30 days of receipt of a notice from the BLM. The BLM will issue a notice of noncompliance under this provision only after identifying damaged or abandoned facilities that present an unnecessary hazard to the public health or safety or the environment for a continuous period of 3 months. Upon receipt of a notice of noncompliance under this provision, an operator must take appropriate remedial action within 30 days, or show good cause for any delays. Failure to comply with these requirements may result in suspension or termination of a grant or lease.

Under section 2805.12(c)(6), the BLM may suspend or terminate a grant if the holder does not comply with the diligent development requirements of the authorization. The citation in this section is revised in the final rule from section 2807.17 to sections 2807.17 through 2807.19. Sections 2807.18 and 2807.19 are existing sections of the regulations, which are not a part of this final rule, that describe the BLM's processes for suspending or terminating rights-of-way. This revision does not represent a change in meaning, but provides more information for the reader.

Comments: Comments disagreed with the proposed rule and suggested that it would require arbitrary and disparate terms and conditions between rights-of-way issued under subpart 2804 and those issued under subpart 2809. The comments stated that the authority granted by FLPMA does not authorize the BLM to penalize developers who submit an application for and obtain BLM approval for rights-of-way on other BLM managed lands (*i.e.*, non-DLAs).

Response: The BLM disagrees. A focus of the proposed and final rule is to encourage solar and wind energy development inside DLAs. Encouraging DLA developments is meant to locate large scale developments in areas with lesser impacts to resources and uses of the public lands. Incentivizing the use of DLAs is achieved by increasing certainty, longevity, and reducing some costs in a DLA relative to other areas. The proposed rule does not increase costs and uncertainty outside of the DLAs. In areas outside of DLAs, the BLM is simply incorporating its processes established by policy for solar and wind energy. The BLM believes that the final rule will reduce costs and increase certainty inside of DLAs and maintain the streamlined application process for lands outside of DLAs.

Comments: Some comments stated that a CFR reference cited in 2805.12(c)(6)(iii) was incorrect.

Response: The comment is correct and this reference is revised to paragraph (c)(7) of this section. Furthermore, another citation was updated in this paragraph, referring to submitting a written request for an extension for a timeline in a POD. The updated reference now cites paragraph (e) of this section where a right-of-way holder may request an alternative requirement.

Comment: Some comments opposed the requirement in section 2805.12(c)(7) that a bond include Indian cultural resource identification, protection, and mitigation. The comments assert this is in error because there are no distinguishing factors that can justify requiring cultural resource bonding for non-DLA authorizations, but not for DLA authorizations.

Response: Paragraph (c) applies to all solar and wind energy rights-of-way, both leases issued under subpart 2809 and grants issued under subpart 2804. This requirement does not distinguish between requirements for grants and leases.

However, the BLM recognizes that these costs are difficult to determine and revised this section to specifically include “the estimated costs of cultural resource and Indian cultural resource identification, protection, and mitigation for project impacts.” This revision helps tie the required costs to the impacts of the project.

Comment: One comment suggested that bonding for cultural, scenic, and wildlife impacts adds unnecessary risk to a project. The comment stated that bonding for such impacts is unnecessary for solar activities, as the majority of mitigation expenses are incurred during construction, and operation expenses are minimal and easily covered by fixed PPA revenues in excess of low operational costs.

Response: The bond instrument required by the BLM is necessary to protect public lands and their resources. A minimum bond and standard bond amount are provided in sections 2805.20 and 2809.18 of this final rule. Including these amounts in the rule provide the opportunity for a developer to incorporate these costs in their project plan, reducing unexpected and unnecessary risk to a project that may keep it from proceeding.

The bonding requirement for cultural, scenic, and wildlife impacts protects the public land resources when developing the land for various uses. For example, possible damages to the public land that would need to be covered by a bond could include surface disturbing activities, recontouring of soils to alter the flow of water, and the removal of

vegetation. Other damages could be those to resources outside the right-of-way that are diminished, such as water supply or biological resources. No revision to this paragraph is made as a result of this comment.

Comment: One comment suggested that the BLM’s timeframes are too restrictive and would be a disincentive to the development of solar and wind energy on public lands.

Response: No changes were made to this provision; however, the addition of section 2805.12(e) allows adjustments of the timeframes, provided that a good cause rationale is submitted by the project proponent and the BLM approves the request. No other comments were received or changes made to the paragraphs under section 2805.12(c).

Section 2805.12(d) describes specific requirements for energy site or project testing grants. Because these are short term grants, for three years or less, the BLM believes it is appropriate to require facilities to be installed within 12 months of the effective date of the grant. All equipment must be maintained and failure to comply with any terms may result in termination of the authorization.

No comments were received on this paragraph. However, two revisions have been made as follows. The word “wind” has been removed from the text of the paragraph describing the energy site- and project-area testing grants, to make it clear that these grants are not limited to wind project proponents, but are also available to solar project proponents. This change is consistent with other parts of the final rule where commenters requested that the BLM make the site- and project-area testing grants available for both solar and wind energy. Additionally, the language from the proposed rule that required a showing of good cause for an extension of project timelines has been revised to direct the reader to paragraph (e) of this section in the final rule, which governs reporting requirements for instances of noncompliance and requests for alternative stipulations, terms, or conditions. No other comments were received and no additional changes were made to this section.

Section 2805.12(e) addresses reporting requirements for instances of noncompliance, and requests by project proponents for alternative stipulations, terms, or conditions of the approved right-of-way grant or lease. This provision was added to the final rule based on comments received. This section is similar to section 2804.40 of the final rule, but that section applies to subpart 2804 of the final rule and the

application process for a grant, whereas this section applies to grant and lease holders and applies to the terms, conditions, and stipulations of all approved authorizations. Under this section, a holder must notify the BLM of noncompliance, and may request an alternative requirement during project operation.

Paragraph (e)(1) of this section provides that a holder of a right-of-way must notify the BLM as soon as the holder either anticipates noncompliance or learns of its noncompliance with any stipulation, term, or condition of the approved right-of-way grant or lease. Notification to the BLM must be in writing and show good cause for the noncompliance, including an explanation of the reasons for failure.

Comments: As noted previously in the preamble of this final rule, the BLM participated in stakeholder engagement meetings as part of the BLM’s regular course of business. During some such meetings, stakeholders clarified the concerns they had previously raised through written comments on the proposed rule. Specifically, industry representatives expressed concern that the rule did not include provisions giving the BLM flexibility to respond to project-specific or regional circumstances by, for example, adjusting capacity factors based on technical considerations or adjusting county zone assignments using land value assessments, which could be more accurate than NASS land values in a given area.

Industry also provided additional information regarding its concern that the proposed rule’s bonding requirements were too rigorous. Commenters suggested that the BLM add provisions to the rule that authorize it to consider other factors when determining a bond amount, instead of only the reclamation cost estimate.

Response: The BLM agrees that it may be reasonable to set alternative terms, conditions, and stipulations, and to consider other factors in setting bond amounts on a project-specific or regional basis. After considering this comment, the BLM included a new provision in the final rule, section 2805.12(e)(2), under which a grant or lease holder may request an alternative to the terms, conditions, and stipulations of their authorization, including requesting an alternative bonding requirement. The requested alternative requirement could include those identified in a project’s POD, the right-of-way’s terms and conditions, or other such requirements, such as a request for an extension of time. A request for an alternative payment

requirement may include a request for an alternative net capacity factor or per acre zone rate consideration. Requests may be submitted after notification has been provided as required in paragraph (e)(1) of this section or at the holder's request. However, this section specifically notes that any request for an alternative must comply with applicable law in order to be considered.

The BLM recognizes that some requests, such as those related to acreage rent, may be appropriately considered on a larger, regional scale. Under the authority in section 2806.70 of this final rule, therefore, the BLM may adjust the acreage rent schedule or MW capacity fee applicable to a particular project or in a given area, so long as the BLM determines such changes are based on reasonable methods for determining appropriate values for the use of public land resources.

With respect to bonding requirements, the BLM recognizes it may be appropriate to consider other factors in addition to the reclamation cost estimate, such as the salvage value of project components. The BLM amended both sections 2805.12(e)(2) and 2805.20(a)(3) to accommodate that possibility, as discussed further in the section of this preamble that discusses section 2805.20(a)(3). Any proposed alternative to bonding must provide the United States with adequate financial security for the potential liabilities associated with any particular grant or lease. For example, a request for an alternative bonding requirement may include a holder's request for consideration of project salvage values, but must also include the cost for processing and handling salvage actions.

No alternative requirements request is approved unless and until you receive BLM approval in writing.

Comments: As discussed in section 2804.40, several comments on various rule provisions expressed concern that a developer may not be able to meet BLM requirements. Comments said that failure to meet such requirements may be due to delays or environmental changes outside a developer's control, statutory or policy changes, or other unanticipated situations.

Response: The BLM believes that new paragraph (e) of this section addresses these concerns. The BLM intends to issue policies to address how it will implement these provisions following the issuance of this final rule. Consistent use of the final rule's requirements and clear expectations will be outlined in these policies, to

include the provisions of this paragraph and those of section 2804.40.

Section 2805.14 What rights does a grant convey?

The BLM has added two new paragraphs to section 2805.14, both addressing applications for renewal of existing grants or leases. Paragraph (g) states that a holder of a solar or wind energy development grant or lease may apply for renewal under section 2807.22. Paragraph (h) of this section states that a holder of an energy project-area testing grant may apply for a renewal of such a grant for up to an additional 3 years, provided that the renewal application also includes an energy development application. Paragraph (g) is added to this rule to explain how one may apply for a solar or wind energy development grant or lease renewal. The BLM added paragraph (h) to recognize that project-area testing may be necessary for longer than an initial 3-year term, even after an applicant believes that energy development at a proposed project site is feasible. Revisions in this final rule were made consistent with those made in section 2801.9 for project-area grants.

The proposed rule stated that specific project-area grants were for only wind energy, but based upon comments received, project-area grants have been expanded to include project-area testing grants for solar energy as well. No other comments were received or additional changes made to this section.

Section 2805.15 What rights does the United States retain?

In section 2805.15, the word "facilities" and a reference to section 2805.14(b) are added to the first sentence of paragraph (b) to clarify that the BLM may require common use of right-of-way facilities. The sentence now makes clear that the BLM retains the right to "require common use of your right-of-way, including facilities (see section 2805.14(b)), subsurface, and air space, and authorize use of the right-of-way for compatible uses." The term "facility" is defined in the BLM's existing regulations at section 2801.5 and means an improvement or structure owned and controlled by the grant holder or lessee. Common use of a right-of-way occurs when more than one entity uses the same area for their authorization. This revision facilitates the cooperation and coordination between users of the public lands managed by the BLM so that resources are not unnecessarily impacted. An example of common use of a facility is authorization for a roadway and an adjacent transmission line. In this case,

maintenance of the transmission line would include use of the adjacent roadway. Under existing section 2805.14(b), the BLM may authorize or require common use of a facility as a term of the grant and a grant holder may charge for the use of its facility. Section 2805.15(b) is revised to include a reference to section 2805.14(b).

Comment: Two comments were received on this proposed change. One comment suggested clarifying that the change in section 2805.15(b) is intended to harmonize this paragraph with section 2805.14(b). The comment made special note that they do not protest this amendment to include "facilities," so long as this was the only intent of the requirement.

Response: The BLM agrees with the comment, and believes that the proposed adjustments to this rule would make the regulations consistent and not open to interpretation. The intent of this revision is not to go beyond what is discussed in the preamble for this paragraph. No changes to the proposed rule are necessary in response to this comment.

Comment: The second comment stated that the rule deletes language from the existing section that prohibits charges for the common use of rights-of-way. The comment recommended modifying the section, but not deleting it, suggesting that the modification should prohibit charges except for pro-rata, fair-share cost allocations for the shared construction and/or operation and maintenance of facilities authorized under a grant or lease. The comment expressed concern that if this section is not modified, the first holder could intentionally charge a prohibitively expensive fee for common use.

Response: The proposed rule did not delete this requirement from the existing regulations. Instead, it added the two words "including facilities." Requiring a pro-rata, fair-share cost allocation agreement between private parties is outside BLM's role of administering the public lands. The BLM believes that two private parties should reach an agreement without the BLM dictating its conditions. The BLM did not make any change in response to this comment since dictating third party contracts is beyond the scope of this rule.

No other comments were received, nor were any additional changes made to this section.

Section 2805.16 If I hold a grant, what monitoring fees must I pay?

The table of monitoring categories in section 2805.16 no longer has the outdated dollar amounts for the category

fees. Paragraph (b) explains that the current year's monitoring cost schedule is available from any BLM State, district, or field office, or by writing, and is adjusted annually for inflation using the same methodology as the table in section 2804.14(b). The table now includes only the definition of the monitoring categories in terms of hours worked, instead of providing specific dollar amounts. Also, the word

“application” found in each category is changed to “inspecting and monitoring” to clarify that the inspecting and monitoring does not apply to right-of-way applications. This change was made to avoid either adjusting the table each year through a rulemaking or relying on outdated material. The current monitoring fee schedule may be found at <http://www.blm.gov>.

This paragraph also provides that you may pay directly to another Federal agency their incurred costs in monitoring your grant instead of paying the fee to the BLM. As the regulations will no longer identify the costs by category, the current cost information is provided in the following table. The monitoring fees and work hours for FY 2015 are as follows:

MONITORING CATEGORIES AND FEES FOR FY 2016

Monitoring category	Federal work hours	Fees for FY 2016
(1) Inspecting and monitoring of new grants, renewals, and amendments to existing grants.	Estimated Federal Work are >1 ≤8	\$122.
(2) Inspecting and monitoring of new grants, renewals, and amendments to existing grants.	Estimated Federal Work are >>8 ≤24.	428.
(3) Inspecting and monitoring of new grants, renewals, and amendments to existing grants.	Estimated Federal Work are ><24 ≤36.	806.
(4) Monitoring of new grants, renewals, and amendments to existing grants.	Estimated Federal Work are >36 ≤50.	1,156.
(5) Master Agreements	Varies	As specified in the agreement.
(6) Inspecting and monitoring of new grants, renewals, and amendments to existing grants.	Estimated Federal Work are >50 ..	As specified in the agreement.

Consistent with revisions made under monitoring fees table in 2805.16(a), the BLM is adding the words “inspecting and” to section 2805.16(a). This additional language is not a change from current BLM practice or policy and will allow the BLM to inspect and monitor the right-of-way to ensure project compliance with the terms and conditions of an authorization. Under this provision, if a project is out of compliance, the BLM could inspect the project to ensure that the required actions are completed to the satisfaction of the BLM, such as continued maintenance of the required activity or efficacy of the requirement.

The BLM added a new sentence to paragraph (a) of this section that directs the reader to section 2805.17(c), which is an existing section of the regulations that describes category 6 monitoring fees. The two sentences preceding this revision describe when the other monitoring categories are updated, but there was no reference for category 6 monitoring fees. This revision is made for consistency with how the other monitoring categories are described in this section. No comments were received and no other changes are made from the proposed rule to the final rule.

Section 2805.20 Bonding Requirements

Section 2805.20 provides bonding requirements for all grant holders or lessees. These provisions are moved from existing section 2805.12. Under the existing regulations, bonds are required only at the BLM's discretion. This

expanded section explains the details of when a bond is required and what the bond must cover. This is not a change from existing practice and is intended to provide clarity to the public. Specific bonding requirements for solar and wind energy development are outlined in paragraphs (b) and (c) of this section. This final rule explains requirements for the performance of the terms and conditions of a grant or lease and reclamation of a right-of-way grant or lease area.

Comments: One comment indicated that solar facilities should not be subject to the same bonding framework as surface mining. The proposed bonding imposes unnecessary costs on the solar industry without providing any additional land protection. Surface mining operations may be abandoned and there is often significant surface disturbance, which is not the case with solar developments. Some comments said that acceptable bonding instruments should include corporate guarantees backed by financial tests. Bonding costs could be expensive, even doubling annual operating costs. The use of letters of credit could significantly reduce the bond amounts. Also, the BLM could have an initial lower bond amount until decommissioning is near and at that time the bond could be increased.

Response: The framework used by surface mining development was a starting point for the solar and wind energy development process on what to consider when completing a RCE and determining the bond amount. However,

this framework has been adapted to address circumstances specific to solar and wind energy development as well as all other right-of-way developments on the public lands. The bond amounts, as determined by an RCE or those using a standard bond, are necessary to ensure the protection of the public lands.

Corporate guarantees are not an acceptable form of bond for the BLM. They are too risky to accept, even when financial tests are used, because they require continual confirmation of the quality of the corporate guarantee. However, irrevocable letters of credit are accepted by the BLM. Furthermore, the BLM cannot accept a lesser bond amount until the decommissioning of a grant or lease, because the BLM cannot be responsible for the financial stability of any company, nor can it bear the risk that a company may default or go bankrupt during the term of a grant, before decommissioning. To secure an increased bond at that time would be difficult if not impossible and having such a regulatory provision would place the public lands at unnecessary risk from the impacts of unreclaimed developments.

Section 2805.20(a) provides that, if required by the BLM, you must obtain or certify that you have obtained a performance and reclamation bond or other acceptable bond instrument to cover any losses, damages, or injury to human health or damages to property or the environment in connection with your use of an authorized right-of-way. This paragraph also includes the language from existing section

2805.12(g), which details bonding requirements.

Consistent with other revisions made in the final rule for better understanding of the rule, section 2805.20(a) is revised to add “costs associated with” when discussing what a bond will cover when terminating a grant. This added language makes it clear that the bond covers costs associated with terminating a grant.

Comments: Some comments suggested expanding the language of this and subsequent bonding paragraphs to include “certificate of insurance or other acceptable security” in appropriate places.

Response: Adding the language “certificate of insurance or other acceptable security” is unnecessary in the text of the regulation as the definition of acceptable bond instruments includes insurance policies, and therefore a specific form of insurance does not need to be included in the text of the regulation. Furthermore, the list of bond instruments that are acceptable is not an all-inclusive list. There are other forms of bond instruments, but they are not specified in the text of the rule because they are not as common as the ones identified. If the bond instrument list were to be considered as “all inclusive” it could unintentionally exclude acceptable bond instruments. As a result, the recommended addition to the rule text is not incorporated in the final rule.

Section 2805.20(a)(1) requires that bonds list the BLM as an additionally covered party if a State regulatory authority requires a bond to cover some portion of environmental liabilities. If the BLM were not named as an additionally covered party for such bonds, the BLM would not be covered by the instrument. This provision allows the BLM to accept a State bond to satisfy a portion of the BLM’s bonding requirement, thus, limiting double bonding.

Comment: One comment was received pertaining to this paragraph. The comment stated that bond requirements are unnecessary for “regulated entities” and that additional bonding requirements are duplicative and pose additional costs on a public utility’s customers.

Response: The BLM disagrees, because regulated utilities present the same risks as unregulated utilities. Under section 2805.20(a), a bond is not required for all authorizations. Requirement of a bond for an authorization is at the discretion of the BLM and is dependent on the scale of the development and potential for risk

to the public lands. Also, the BLM may accept a bonding instrument submitted to the State if it meets the criteria identified in paragraphs (i) through (iii) of section 2805.20(a)(1). The intent of the bonding provisions in section 2805.20(a)(1)(iii) is to mitigate the potential for duplicative costs to right-of-way holders using the public lands.

An additional requirement is added to paragraph (a) in this final rule that requires periodic review of bonds for adequacy. This provision is added to ensure consistency with the provisions added in response to comments on section 2805.20(c). This additional requirement includes bonds held by a State and accepted by the BLM and applies to all bonds held by the BLM, regardless of the size or complexity of an authorized project. The frequency of the bond adequacy reviews will be described in greater detail within BLM guidance issued as part of implementation of this rule. Review frequency, as described in the recently issued instruction memorandum 2015–138, will be no less than once every 5 years, giving review priority to those that pose a greater risk to the public lands.

Under section 2805.20(a)(1)(i), a State bond must be redeemable by the BLM. If such instrument is provided to the BLM and it is not redeemable, the BLM would be unable to use the bond for its intended purpose(s).

Under section 2805.20(a)(1)(ii), a State bond must be held or approved by a State agency for the same reclamation requirements as the BLM requires.

Under section 2805.20(a)(1)(iii), a State bond must provide the same or greater financial guarantee than the BLM requires for the portion of environmental liabilities covered by the State’s bond.

Comment: One comment concerning this paragraph stated that section 2805.20(a)(3) makes clear that a bond will not be required for solar energy projects developed inside DLAs, and bonds will be required for solar projects outside DLAs.

Response: This comment is not correct. Section 2809.18(e) requires a specific performance bond for leases authorized under subpart 2809, identified as a standard bond. Standard bonds are not determined by a RCE, but rather are set as specified in the regulations.

Under section 2805.20(a)(2) a bond must be approved by the BLM’s authorized officer. This approval ensures that the bond meets the BLM’s standards. Under section 2805.20(a)(3), the bond amount is determined by the BLM based on a RCE, and must also

include the BLM’s costs for administering a reclamation contract. As defined in section 2801.5, a RCE identifies an appropriate amount for financial guarantees for uses of the public lands. An additional requirement is included in paragraph (a)(3) requiring periodic review of bonds for adequacy. This requirement was added to ensure consistency with the provisions added to section 2805.20(c). Both paragraphs (c)(3) and (4) of this section contain a stipulation that they do not apply to leases issued under subpart 2809. Bonds issued under subpart 2809 for leases inside DLAs have standard amounts. Bond acceptance and amounts for solar and wind energy facilities outside of DLAs are discussed in paragraphs (b) and (c) of this section.

Paragraph (a)(3) of this section is revised from the proposed to final rule to improve readability. Specifically, the BLM removed the second sentence of the paragraph that stated the BLM may require you to prepare an acceptable RCE. The first sentence of this paragraph is revised to include “, which the BLM may require you to prepare and submit.” This revision is intended to improve the reader’s understanding of the final rule and its requirements by streamlining the text of the rule.

In addition to the changes made for readability, this paragraph is revised by adding, “The BLM may also consider other factors, such as salvage values, when determining the bond amount.” This revision responds to concerns raised in stakeholder engagement meetings and is consistent with section 2805.12(e)(2) of this final rule, which specifies that a developer may request an alternative requirement for bonding.

A request for an alternative bonding requirement may include a holder’s request for consideration of project component salvage values. Such a request may reduce the BLM’s bond determination amount, even to an amount below the minimum or standard bond amount. However, the request must be fully supported by documentation from the requestor that includes the costs for processing and handling salvage materials, such as information about distribution centers for such materials and other reasonable considerations. Further, as noted under paragraph 2805.12(e)(2), requests for an alternative bonding requirement must comply with applicable law in order to be considered, and must provide the United States with adequate financial security for potential liabilities.

Regardless of the nature of the request, any such request is not approved until you receive BLM approval in writing.

Section 2805.20(a)(4) requires that a bond be submitted on or before the deadline provided by the BLM. Current regulations have no such provision, and this revision makes it clear what the BLM expects when it requires a bond instrument. The BLM believes this provision will improve the timely collection of bonds. The timely submittal of a bond promotes efficient stewardship of the public lands and ensures that the bond amount provided is acceptable to the BLM and available prior to beginning ground-disturbing activities.

Section 2805.20(a)(5) outlines the components to be addressed when determining a RCE. They include environmental liabilities, maintenance of equipment and facilities, and reclamation of the right-of-way. This paragraph consolidates and presents what liabilities the bond must cover.

Under section 2805.20(a)(6), a holder of a grant or lease may ask the BLM to accept a replacement bond. The BLM must review and approve the replacement bond before accepting it. If a replacement bond is accepted, the surety company for the old bond is not released from obligations that accrued while the old bond was in effect, unless the new bond covers such obligations to the BLM's satisfaction. This gives the grant holder flexibility to find a new bond, potentially reducing their costs, while ensuring that the right-of-way is adequately bonded.

Under section 2805.20(a)(7), a holder of a grant or lease is required to notify the BLM that reclamation has occurred. If the BLM determines reclamation is complete, the BLM may release all or part of the bond that covers these liabilities. However, section 2805.20(a)(8) reiterates that a grant holder is still liable in certain circumstances under section 2807.12. Despite the bonding requirements of this section, grant holders are still liable for damage done during the term of the grant or lease even if: The BLM releases all or part of your bond, the bond amount does not cover the cost of reclamation, or no bond remains in place.

Section 2805.20(b) and (c) identify specific bond requirements for solar and wind energy development respectively outside of DLAs. A holder of a solar or wind energy grant outside of a DLA will be required to submit a RCE to help the BLM determine the bond amount. For solar energy development grants outside of DLAs, the bond amount will be no less than \$10,000 per acre. For wind energy development grants outside of DLAs, the bond amount will be no less than \$10,000 per authorized turbine

with a nameplate generating capacity of less than one MW, and no less than \$20,000 per authorized turbine with a nameplate generating capacity of one MW or greater.

Section 2805.20(d) is new to the final rule. This paragraph separates site- and project-area testing authorization bond requirements from section 2805.20(c). This change is consistent with other provisions that have been modified to expand the wind energy site- and project-area testing authorizations in the proposed rule to include solar energy. With this adjustment, meteorological and other instrumentation facilities are required to be bonded at no less than \$2,000 per location. These bond amounts are the same as standard bond amounts for leases required under section 2809.18(e)(3).

The BLM recently completed a review of bonded solar and wind energy projects and based the bond amounts provided in this final rule on the information found during the review. When determining these bond amounts, the BLM considered potential liabilities associated with the lands affected by the rights-of-way, such as potential impacts to cultural values, wildlife habitat, and scenic values. The range of costs included in the review represented the cost differences in performing reclamation activities for solar and wind energy developments throughout the various geographic regions the BLM manages. The BLM used the review to determine an appropriate bond amount to cover potential liabilities associated with solar and wind energy projects.

Minimum bond amounts are set for solar development for each acre of authorization because solar energy development encumbers 100 percent of the lands and excludes them from other uses. The recent review of bonds showed a range of bond amounts for solar energy development of approximately \$10,000 to \$18,000 per acre of the rights-of-way on public lands. Minimum bond amounts for wind energy development are set for each wind turbine authorized on public land, rather than per acre, because the encumbrance is factored at 10 percent and is not exclusive to other uses. The review showed that the bond amounts for recently authorized wind energy development ranged between \$22,000 and \$60,000 per wind turbine. Recently bonded wind energy projects use wind turbines that are one MW or larger in nameplate capacity, whereas older projects generally use turbines that are less than one MW.

Comment: Some comments suggested that bonds should not be required for solar facilities on the public lands

because they pose low environmental risk and that some solar energy generation technologies have less potential impacts than others and, therefore, less risk.

Response: The BLM agrees that generally, solar facilities do not pose the same environmental hazards as other energy development facilities. However, the BLM's requirement for bonding is not only for the potential environmental risks that a development poses on the public lands. Rather, a bond is required to cover direct impacts to the resources and their reclamation to a condition as near as possible to what they were before development occurred.

This comment is specific to solar energy, but raises the question of lesser risk for certain developments, which is an issue that arises with respect to wind energy as well. In the BLM's review of recently bonded solar and wind energy projects, for example, the range of bond amounts identified was for newer wind energy turbines, with a nameplate capacity of one MW or greater. These wind energy turbines are larger, have a greater footprint, and require larger and more equipment and materials to install and remove than wind turbines that have a smaller nameplate capacity. In order to accommodate developments that employ smaller wind turbines that pose lesser risk to resources, the BLM is including in the final rule the existing policy requirement of a \$10,000 minimum bond amount for projects utilizing smaller turbines. Turbines with a nameplate capacity of one MW or greater will have a minimum bond amount of \$20,000, consistent with the proposed rule. A reclamation cost estimate will still be required for each project on lands outside of designated leasing areas, as described in section 2805.20(a)(3) of this rule. The BLM's bond amount determination for wind energy projects using turbines with lesser nameplate capacities could exceed the minimum bond amount based upon site-specific risks.

Subpart 2806—Annual Rents and Payments

Existing subpart 2806, has been retitled to more clearly and consistently identify the content of and revisions to this subpart of the final rule. The content and revisions to this subpart of the final rule include those requiring a payment of an acreage rent and MW capacity fee for rights-of-way. Retitling this subpart makes it clear that the BLM may require payments that are not specifically a rent.

Section 2806.12 When and where do I pay rents?

The heading of section 2806.12 is revised by adding the words “and where.” This revision is not a change in the BLM’s practice or policy, but is intended to help clarify where rental payments should be made.

Section 2806.12(a) describes the proration of rent for the first year of a grant. Specific dates are used for proration to prevent any confusion to grant holders and promote consistent implementation by the BLM. Rent is prorated for the first partial year of a grant, since the use of public lands in such situations is for only a partial year. Paragraph (a)(2) of this section explains that if you have a short-term grant, you may request that the BLM bill you for the entire duration of the grant in the first payment. Some short term grant holders may wish to pay this amount up front. Consistent with other sections of the final rule, a revision to paragraph (a)(2) has been made to delete the reference to wind energy in connection with site-specific testing.

Paragraph (b) of this section is revised by removing the word “other” from the first sentence. This revision is intended to clarify that all rental payments must be made in accordance with the payment plan described in section 2806.24. This revision is made to improve readability, but does not constitute a change from existing requirements.

Section 2806.12(d) directs right-of-way grant holders to make rental payments as instructed by the BLM or as otherwise provided for by Secretarial Order or legislative authority. This provision acknowledges that either the Secretary or Congress may take action that could affect rents and fees. The BLM will provide payment instructions for grant holders that will include where payments may be made. The word “must” is added into the first sentence of this paragraph to improve readability and for consistency with the phrasing of other requirements in this final rule. This revision does not constitute a change from existing requirements. No comments were received on this section, and no other changes were made from the proposed rule to the final rule.

Section 2806.13 What happens if I do not pay rents and fees or if I pay the rents and fees late?

Section 2806.13 is revised from “What happens if I pay the rent late?” to read “What happens if I do not pay rents and fees or if I pay the rents and fees late?” This change addresses the addition of paragraph (e) to this section,

which specifies that the BLM may retroactively bill for uncollected or under-collected rents and fees. The BLM will collect rent retroactively if: (1) A clerical error is identified; (2) A rental schedule adjustment is not applied; or (3) An omission or error in complying with the terms and conditions of the authorized right-of-way is identified.

Paragraph (a) of this section is amended by removing language from the existing rule that stated a fee for a late rental payment may not exceed \$500 per authorization. The BLM determined that the current \$500 limit is not a sufficient financial incentive to ensure the timely payment of rent. Therefore, under this final rule, late fees will now be proportional to late rental amounts, to provide more incentive for the timely payment of rents to the BLM. The BLM also added the term “fees” so the MW capacity fees for solar and wind energy development grants and leases may be collected consistently with any rent due.

New paragraph (g) of this section allows the BLM to condition any further activities associated with the right-of-way on the payment of outstanding payments. The BLM believes that this consequence imposed for outstanding payments is further incentive to timely pay rents and fees to the BLM.

Comment: A comment suggested that the BLM should be responsible for clerical and other possible errors, and that the holder should not be responsible for payment of rents, fees, or late payments if such an error occurs due to the BLM. Further, the comment suggested a 6 month time limit for enforcing such corrections that would be retroactive, and that a late payment fee would be no more than 5 percent of the total rents and fees.

Response: The BLM considered the 6-month and 5 percent limits suggested by the comment and decided to not include these limits in the final rule. When entering into a right-of-way agreement with the BLM, a holder agrees to the terms and conditions for the use of the public lands. Included as part of these terms and conditions is the requirement that a holder pay, in advance, the appropriate amount for the use of the public lands. Generally, the BLM sends a bill or other notice to a holder that is a notice of payment due to the BLM, as agreed to in the right-of-way grant. Even if the BLM were to make a clerical or administrative error when transmitting a notice of payment obligations, such an error in a notice would not permanently relieve a right-of-way grant holder from its independent requirement to pay the appropriate amount for the use of the public lands as specified in the grant.

No other comments were received for this section, and no changes were made to the final rule.

Section 2806.20 What is the rent for a linear right-of-way grant?

In section 2806.20, the address to obtain a current rent schedule for linear rights-of-way is updated. Also, district offices are added to State and field offices as a location where you may request a rent schedule. These minor corrections are made to provide current information to the public. No comments were received on this provision, and no changes are made from the proposed rule to it in the final rule.

Section 2806.22 When and how does the per acre rent change?

A technical change in section 2806.22 corrects the acronym IPD–GDP, referring to the Implicit Price Deflator for Gross Domestic Product. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2806.23 How will the BLM calculate my rent for linear rights-of-way the Per Acre Rent Schedule covers?

In the existing regulations, paragraph (b) of this section provides for phasing in the initial implementation of the Per Acre Rent Schedule by allowing a one-time reduction of 25 percent of the 2009 acreage rent for grant holders. This paragraph was flagged for removal in the proposed rule and is being removed by this final rule because the phase-in for the updated rent schedule referenced in that provision ended in 2011 and thus is no longer applicable. No comments were received and no other changes are made from the proposed rule to the final rule.

Section 2806.24 How must I make payments for a linear grant?

Section 2806.24(c) explains how the BLM prorates the first year rental amount. The rule adds an option to pay rent for multiple year periods. The new language requires payment for the remaining partial year along with the first year, or multiples thereof, if proration applies. No comments were received and no other changes are made from the proposed rule to the final rule.

Section 2806.30 What are the rents for communication site rights-of-way?

Section 2806.30 is amended by removing paragraph (b), which contained the communications site rent schedule table. Paragraph (c) is redesignated as new paragraph (b). Section 2806.30(a) is revised to remove redundant language referring to the BLM communication site rights-of-way

rent schedule. Section 2806.30(a)(1) is revised to update the mailing address. Section 2806.30(a)(2) is revised by removing references to the table that has been removed. This paragraph still describes the methodology for updating the schedule, but directs the reader to the BLM's Web site or BLM offices instead. No comments were received, and no other changes are made inform the proposed rule to the final rule.

Section 2806.34 How will BLM calculate the rent for a grant or lease authorizing a multiple-use communication facility?

Section 2806.34(b)(4) is revised to fix a citation in the existing regulations that was incorrect. No comments were received, and no other changes are made from the proposed rule to the final rule.

Section 2806.43 How does BLM calculate rent for passive reflectors and local exchange networks? and **Section 2806.44** How will BLM calculate rent for a facility owner's or facility manager's grant or lease which authorizes communication uses?

Sections 2806.43(a) and 2806.44(a) are each revised by changing the cross-reference from section 2806.50 to section 2806.70. Section 2806.50 is redesignated as section 2806.70, and these citations are updated to reflect this change.

Section 2806.44 is retitled from "How will BLM calculate rent for a facility owner's or facility manager's grant or lease which authorizes communication uses subject to the communication use rent schedule and communication uses whose rent BLM determines by other means?" to read as above. This section has been retitled to more clearly identify the content and additions made. The addition is a new introductory paragraph describing that this section applies to grants or leases. Such authorizations may include a mixture of communication uses, some of which are subject to the BLM's communication rent schedule. Such rent determinations will be made under the provisions of this section. No comments were received, and no other changes are made from the proposed rule to the final rule.

Sections 2806.50 Through 2806.68 Rents and Fees for Solar Energy Rights-of-Way and Wind Energy Rights-of-Way

Sections 2806.50 through 2806.58 and sections 2806.60 through 2806.68 provide new rules for the rents and fees for solar and wind energy development, respectively. The rents and fees described in these sections, along with the bidding process, will help the BLM generally receive fair market value for

the use of public lands. There are similarities between the provisions governing solar and wind energy grants and leases. For example, each type of project and authorization instrument is subject to acreage rent and MW capacity fee obligations. However, there are differences in the final rule with respect to wind and solar projects (e.g., solar energy projects assume 100% encumbrance within the project footprint, whereas wind energy projects assume 10% encumbrance). There are also differences in the way acreage rent and MW capacity fees are applied to solar energy grants versus leases. These differences are discussed in sections 2806.52 and 2806.54; wind energy grants and leases are discussed in sections 2806.62 and 2806.64, respectively. Section 2806.50 is retitled "Rents and fees for solar energy rights-of-way." The former regulation at section 2806.50 has been redesignated as section 2806.70. Section 2806.51 is added to this final rule in response to comments received regarding potential payment uncertainty.

Revised section 2806.50 requires a holder of a solar energy right-of-way authorization to pay annual rents and fees for right-of-way authorizations issued under subparts 2804 and 2809. Those right-of-way holders with authorizations issued under subpart 2804 will pay rent for a grant and those right-of-way holders with authorizations issued under subpart 2809 will pay rent for a lease. Payment obligations for both types of right-of-way authorizations now consist of an acreage rent and MW capacity fee. The acreage rent must be paid in advance, prior to the issuance of an authorization, and the MW capacity fee will be phased-in after the start of energy generation. Both the acreage rent and MW capacity fee must be paid in advance annually during the term of the authorization. The initial acreage rent and MW capacity fee are calculated, charged, and prorated consistently with the requirements found in sections 2806.11 and 2806.12. Rent for solar authorizations vary depending on the number of acres, technology of the solar development, and whether the right-of-way authorization is a grant or lease.

The BLM received some comments that generally applied to its rental provisions of the final rule. The BLM also revised sections 2806.50 through 2806.68 to improve the readability of these sections.

Comment: One comment on the rental provisions stated that the proposed rule requires full payment immediately upon the award of an authorization. The comment suggested that payment should begin at the time infrastructure

is placed in service instead at the time of award.

Response: The BLM does not require full payment immediately upon award of an authorization. Both an acreage rent and MW capacity fee are charged for solar and wind energy authorizations, but only the acreage rent is paid at the time a right-of-way is authorized. Acreage rent is charged upon the authorization of such developments as the public lands are being encumbered. The MW capacity fee may be phased-in during the term of the right-of-way as approved in the POD. This meets the concerns of the comment because the rules do not require full payment of rents and fees immediately upon authorization of a right-of-way.

Comments: Some comments stated that the BLM does not have authority to levy a MW capacity fee. These comments argued that because the Federal Government lacks an ownership interest in sunlight or the wind, it cannot sell the rights to use them for profit (unlike the sale of Federal mineral interests at fair market value), charge a royalty against sale proceeds (unlike Federal oil and gas rights), or charge rent for the use of sunlight (unlike Federal land surface occupancy rights). Aside from the ownership issue, these commenters argued that the MW capacity fee is an inappropriate element of fair market value because it is based on the value of electricity generated and sold, rather than the value of the underlying land itself. For example, the comments pointed out, if two facilities occupy the same amount of land, but one has more efficient technology, the more efficient facility would pay more because of the additional electricity generated, not because of land rental values. The comments recommended that, for solar and wind energy generation rights-of-way, the BLM should exclusively charge rent, through a per acre rent schedule informed only by the NASS.

Response: FLPMA generally requires the BLM to obtain fair market value for the use of the public lands, including for rights-of-way. In accordance with the BLM's authority, and similar to valuation practices for solar and wind energy development on private lands, the BLM uses electrical generation capacity as a component of the value it assigns to the use of the lands by the projects. From information the BLM has been provided by industry or has otherwise collected, the BLM determined that private land owners customarily charge a "royalty," typically a percentage of the value of actual production, for the use of private land. As explained above, the BLM has

elected in this final rule to charge a fee based on installed MW capacity rather than a royalty. This fee, when added to the applicable acreage rent and any minimum and bonus bids received, ensures that the BLM will obtain an appropriate value for the use of the public lands by solar and wind energy projects.

The BLM classifies MW capacity payments as “fees” rather than “rent,” because they reflect the commercial utilization value of the public’s resource, above and beyond the rural or agricultural value of the land in its unimproved state. In the BLM’s experience and consistent with generally accepted valuation methods, the value of the public lands for solar or wind energy generation use depends on factors other than the acreage occupied and the underlying land’s unimproved value. Other key factors include the solar insolation value or wind speed and density, proximity to demand for electricity, proximity to transmission lines, and the relative absence of resource conflicts that tend to inhibit solar and wind energy development. To account for these elements of land use value that are not intrinsic to the rural value of the lands in their unimproved state, under this final rule, solar and wind right-of-way payments include “MW capacity fees” in addition to the “acreage rent” as a component of fair market value for these authorizations.

The acreage payment remains classified as “rent” under the final rule, as it is directly tied to the area of public lands encumbered by the project and the constraints the project imposes on other uses of the public lands. Electric or telephone facilities that qualify for financing under the Rural Electrification Act may be exempt from paying a “rental fee,” which includes the solar or wind energy acreage rents. However, as explained in IM 2016–122, and consistent with the BLM’s current practice, any such facilities must pay other costs associated with the fair market value of the land, such as the MW capacity fee, minimum bid, or bonus bid, because these other payments are independent of the land acreage and value of the unimproved land, and therefore are not appropriately termed “rental fees.”

The use of an acreage rent and MW capacity fee is also intended to encourage a developer to more efficiently use the public lands encumbered by a project. In the situation where two parcels with the same MW capacity for projects have differing technologies, the more efficient technology (and therefore the higher approved MW capacity) would be

paying more in fees, but less in acreage rent for the same generation capacity as the more efficient technology would allow a developer to pay less in acreage rent to achieve the same approved MW capacity.

The BLM intends to evaluate the adequacy and impact of the provisions of this final rule after it has had an opportunity to observe how the payment requirements and rate adjustment methods put in place affect the BLM’s ability to support renewable energy development and simultaneously collect fair market value from the projects it authorizes.

Section 2806.50 Rents and Fees for Solar Energy Rights-of-Way

The BLM revised section 2806.50 to include site- and project-area testing. In the proposed rule, rights-of-way for site-specific and project-area testing were allowed only for wind energy. The final rule deletes the word “wind”, to make the provision generally applicable to wind or solar energy testing. This change is made in response to a comment, which will be discussed under section 2806.58 of this preamble. No other comments were received, and no other changes made to the final rule.

Section 2806.51 Scheduled Rate Adjustment

Comments: After the comment period of the proposed rule closed, the BLM continued to hold general meetings with stakeholders about the BLM’s renewable energy program. In some of those meetings, stakeholders asked questions about the proposed rulemaking and clarified concerns they had raised through their written comments. Industry representatives shared additional information regarding their concerns with the proposed rule’s approach to calculating annual payment requirements, including uncertainty about potential future payment requirements over the life of the right-of-way authorization. Specifically, commenters expressed concerns about the potential for NASS values in certain areas to jump significantly between surveys, resulting in unexpected and unsustainable changes in the per acre zone rates for those lands.

The BLM understands that when financing a project, developers must predict project costs, including for the construction, operation, and maintenance phases of the project. Included with these costs are expenses for land use, such as annual payment requirements of a BLM grant or lease. The BLM also understands that in some areas there is the potential for NASS land values to change significantly from

one 5-year period to the next in a manner that is unpredictable, and that can result in significant acreage rent increases or decreases. For lands that experience those large changes in NASS land values, the standard rate adjustment method’s periodic update to rates may create financial uncertainty. This may, in turn, complicate project financing and require a developer to pay a higher cost of capital.

Response: The BLM agrees with these comments and recognizes that increasing payment certainty over the term of the grant or lease may help facilitate project financing and even reduce financing costs. To respond to these comments and concerns, the BLM added section 2806.51 to the final rule. This section allows a grant or lease holder to choose one of two rate adjustment methods, the “standard” rate adjustment method, or the scheduled rate adjustment method.

Under the standard rate adjustment method, which was described in the proposed rule and is now named in the final rule, the BLM will periodically reassess the rates it charges for use of the public lands and resources based on the latest NASS survey data and the applicable western hub energy prices, as well as other data discussed in greater detail in connection with section 2806.52 of this final rule.

By contrast, if the grant or lease holder chooses the scheduled rate adjustment method, the BLM will implement scheduled, predictable rate increases over the term of the grant. Under this approach, annual project costs are easily modeled, which increases the certainty as to future costs. By selecting the scheduled adjustment method a proponent would trade the potential upsides of rate adjustments pegged to a fluctuating national indicator (which may only increase slightly in a given period, or may even go down) for greater payment certainty.

Based on historical trends, the BLM expects that in some areas, the rates under the standard rate adjustment method will increase by more than they would under the scheduled rate adjustment method. However, the opposite is also true: in other areas, rates under the standard method may increase by very little, or even decrease, while rates under the scheduled rate adjustment method will increase by a fixed amount at fixed intervals. The BLM determined that it is appropriate to allow developers to choose between these rate adjustment methods, as some grant or lease holders may want to take advantage of the possibility that NASS values could stay nearly constant or

even go down, while other holders may want to increase payment certainty.

The adjustments contemplated under the scheduled rate increase are similar to the terms found in many power purchase agreements, which build in fixed annual increases. The BLM based the scheduled adjustment approach on an evaluation of market trends over the last 10 years. The trend over that period is consistent with a longer term trend showing power pricing has increased generally. The BLM believes that the scheduled rate adjustment method provides certainty for prospective developers while also ensuring that the BLM will obtain fair market value for the use of the public lands.

Paragraph (a) of this section provides that a holder may choose the standard rate adjustments for a right-of-way, which are detailed in section 2806.52(a)(5) and (b)(3) for grants, or section 2806.54(a)(4) and (c) for leases, or the scheduled rate adjustments for a right-of-way, which are detailed in section 2806.52(d) for grants, or section 2806.54(d) for leases. If a holder selects the standard adjustment method, the BLM will increase or decrease the per acre zone rate and MW rate for the authorization, as dictated by the specified calculation method, at fixed intervals over the term of a grant or lease. If a holder selects the scheduled rate adjustment method, the BLM will increase the per acre zone rate and MW rate by a fixed amount, described in section 2806.52(d) or 2806.54(d), respectively, at those same intervals. The BLM created the scheduled rate adjustment method using percentages and values that reflect current market conditions and trends; if, in the future, the BLM considers it necessary to revise the applicable rates in the scheduled rate adjustment provisions, it will do so via rulemaking.

Once a holder selects a rate adjustment method, the holder will not be able to change the rate adjustment method until the grant or lease is renewed. This rule clearly articulates the differences between these methods. As such, a holder will not be able to change its selection in the future, if one method proves more favorable than another during the term of the authorization. The rates paid by grant or lease holders that chose the standard adjustment approach may, in some cases, diverge from the rates paid by grant or lease holders that chose the scheduled adjustment approach. The BLM believes, however, that over the length of the grant or lease both methods will provide fair market value for the underlying authorization to use the public lands and resources.

Paragraph (b) of this section requires that a holder provide written notice to the BLM, before a grant or lease is issued, if the holder wishes to select the scheduled rate adjustment. In the absence of such a notice, the BLM will continue to use the standard rate adjustment method for the authorization.

The BLM will generally not consider a request for an alternative rate structure or terms from holders that select the scheduled rate adjustment method. The holder knows what their rates will be when selecting the scheduled rate adjustment method and is committing to those rates, understanding that they cannot change this selection. Paragraph (c) of this section explains how the final rule will affect existing grant holders. Like new grant holders, existing grant holders also have the option to choose between standard or scheduled rate adjustments. The holder of a solar or wind energy grant that is in effect prior to the effective date of this final rule may request that the BLM apply the scheduled rate adjustment to their grant, rather than the standard rate adjustment. Any such request must be received by the BLM in writing within 2 years of this rule's publication in the **Federal Register**. The BLM determined that 2 years was a reasonable amount of time for grant holders to consider the benefits of the different rate adjustment methods.

For existing grant holders that choose the scheduled rate adjustment method, the BLM will apply the scheduled rate adjustment in section 2806.52(d) to the rates in effect prior to the publication of this final rule.

For existing grant holders that choose the scheduled rate adjustment method, however, the BLM will first adjust the rates in existing grants and leases upward by 20%, to account for the fact that the BLM elected not to undertake the most recent adjustment under its existing guidance because of the pendency of this rulemaking process. The scheduled rate adjustment method will then apply, resulting in fixed rate increases at set intervals thereafter.

The BLM will continue to apply the standard rate adjustments to the rates for existing grant holders unless and until written notice is received requesting the scheduled rate adjustment method. As previously mentioned, the standard rate adjustment is BLM's default method and current practice, as outlined in existing policy.

Section 2806.52 Rents and Fees for Solar Energy Development Grants

Section 2806.52 requires a grant holder to make annual payments that

include the acreage rent and MW capacity fee.

Comments: Some comments expressed confusion over whether certain costs in the proposed rule were a "rent" or a "fee."

Response: The introductory paragraph for section 2806.52 in the final rule has been revised to clarify what is a "rent" and what is a "fee." "Rent" is now described as an "acreage rent," and "fee" has been clarified as a "MW capacity fee." Paragraph (a) of this section describes the acreage rent requirements and calculation methodology, and paragraph (b) of this section describes the MW capacity fee requirements and calculation methodology.

Section 2806.52(a), "Acreage rent," describes the acreage rent payment for solar energy grants. "Acreage rent," as defined in section 2801.5, means rents assessed for solar energy development grants and leases that are determined by the number of acres authorized for the grant or lease times the per acre zone rate. Under existing policy, entities that qualify for financing under the Rural Electrification Act may be exempted from paying solar acreage rent (IM 2016-122).

Comments: Several comments were concerned about using the values set for NASS and believed that they would not apply to vacant BLM land. Comments suggested that solar and wind energy development should be appraised or assessed differently than other authorization types, such as linear rights-of-way. To determine the acreage rent for such developments following the same criteria as linear facilities would make development cost prohibitive on the public lands due to unfairly applying a linear acreage rent.

Response: In response to these comments, both sections 2806.52 and 2806.62 are revised to incorporate State-specific reductions from the baseline NASS values in the calculation of acreage rents. The proposed rule used the linear rent schedule as the basis for determining acreage rent values by proposing solar and wind acreage rent as a percentage factor of the linear rent schedule. Using a percentage factor for acreage rent allows the BLM to adopt the linear rent calculation and effectively change the encumbrance factor to be specific for solar or wind energy.

For the final rule, the BLM has further modified the calculation used to determine acreage rent for solar and wind energy authorizations. The BLM recognizes that the NASS agricultural values may not always be a fair representation of public lands because

they include the agricultural improvements (e.g., buildings, ditches, irrigation) to the land. To account for this possibility, the final rule uses the NASS agricultural values as a baseline for the determination of acreage rent, then incorporates a 20 percent or greater State-specific reduction that accounts for the extent to which the NASS values reflect agricultural improvements to land in each State. By applying these State-specific reductions to the baseline NASS values when calculating acreage rent, the BLM more accurately identifies the value of unimproved land for a project site.

The proposed rule based the acreage rent calculation on the linear rent schedule, which uses a nationwide reduction of 20 percent. In the final rule, the State-specific factors will be no less than the 20 percent reduction initially proposed for the rule, but may be greater. A more detailed discussion on how these values are calculated and a table showing the specific values for each State is found under section 2806.52(a)(2) of this preamble.

Paragraph (a)(1) summarizes how the BLM identifies a per acre zone rate using the NASS land values. Paragraph (a)(2) describes how the BLM adjusts the per acre zone rate, by 20 percent or more, to account for agricultural improvements to the lands in each State. A State with a larger calculated reduction than the minimum 20 percent may lower a particular county's acreage rent. In the case of some States, such as Utah, the State-specific reduction that applies to unimproved agricultural land values is approximately 50 percent. This is discussed in greater detail under section 2806.52(a)(2).

Using this methodology, the BLM is able to establish a method for calculating acreage rents for solar and wind energy developments that are appropriate for the location of the

development. New section 2806.52(c) is added to this final rule providing the BLM's implementation of the acreage rent and MW capacity fee for solar energy developments.

Under section 2806.52(a)(1), the acreage rent for solar energy rights-of-way is calculated by multiplying the number of acres (rounded up to the nearest tenth of an acre) within the authorized area times the per acre zone rate in effect at the time the authorization is issued. Under section 2806.52(a)(1), the initial per acre zone rate for solar energy authorizations is now established by considering four factors; the per acre zone value multiplied by the encumbrance factor multiplied by the rate of return multiplied by the annual adjustment factor. This calculation is reflected in the following formula — $A \times B \times C \times D = E$, where:

“A” is the per acre zone value, as described in the linear rent schedule in section 2806.20(c);

“B” is the encumbrance, equaling 100 percent;

“C” is the rate of return, equaling 5.27 percent;

“D” is the annual adjustment factor, equaling the average annual change in the IPD–GDP for the 10-year period immediately preceding the year that the NASS census data becomes available; and

“E” is the annual per acre zone rate.

The BLM will adjust the per acre zone rates each year, based on the average annual change in the IPD–GDP, consistent with section 2806.22(a). Adjusted rates are effective each year on January first.

Under new section 2806.52(a)(2), counties (or other geographical areas) are assigned to a Per Acre Zone Value on the solar energy acreage rent schedule, based on the State-specific

percent of the average land and building value published in the NASS Census.

The BLM currently uses an acreage rent schedule for linear rights-of-way to determine annual payments. The rent schedule separates land values into 15 different zones and establishes values for each zone ranging from \$0 to \$1,000,000 per acre. These values are based on the published agricultural values of the land, as determined by the NASS. Solar and wind energy acreage rents will be determined using the same zone values as linear rights-of-way. However, the BLM will use a state specific reduction when assigning lands to a zone.

The Per Acre Zone Value is a component of calculating the Per Acre Zone Rate under paragraph (a)(1) of this section. The calculation in this paragraph establishes a State-specific percent factor that represents the difference between the improved agricultural land values provided by NASS and the unimproved rangeland values that represent BLM land. This calculation is reflected in the following formula— $(A/B) - (C/D) = E$, where:

“A” is the NASS Census statewide average per acre value of non-irrigated acres;

“B” is the NASS Census statewide average per acre land and building value;

“C” is the NASS Census total statewide acres in farmsteads, homes, buildings, livestock facilities, ponds, roads, wasteland, etc.;

“D” is the total statewide acres in farms; and

“E” is the State-specific percent factor or 20 percent, whichever is greater.

The county average per acre land and building values that exceed the 20 percent threshold for solar and wind energy development are as follows for BLM managed lands.

TABLE OF STATE-SPECIFIC FACTORS AND OTHER DATA FOR APPLICABLE STATES

State	Existing regulations and proposed rule: Nationwide 20 percent factor (%)	Final rule state-by-state calculated factor (%)	Final rule state-specific factor (%)
Alaska	20	12	20
Arizona	20	49	49
California	20	51	51
Colorado	20	24	24
Idaho	20	29	29
Montana	20	12	20
Nevada	20	16	20
New Mexico	20	24	24
North Dakota	20	5	20
South Dakota	20	5	20
Oregon	20	2	20
Texas	20	-1	20

TABLE OF STATE-SPECIFIC FACTORS AND OTHER DATA FOR APPLICABLE STATES—Continued

State	Existing regulations and proposed rule: Nationwide 20 percent factor (%)	Final rule state-by-state calculated factor (%)	Final rule state-specific factor (%)
Utah	20	54	54
Washington	20	21	21
Wyoming	20	16	20
Average	20	21	27

Assignment of counties example: This example uses the zone numbers and values of the acreage rent schedule to assign Clark County, Nevada, to the appropriate zone. Current NASS land values for Clark County are \$5,611 per acre. The state-specific factor for Nevada is 16 percent, which is less than the 20 percent minimum established in this rule. Therefore, the BLM applied a 20 percent reduction to the NASS land values, which results in a per acre value of \$4,489. Based on this, Clark County is assigned to zone 7 (counties with zone values between \$3,394.01 and \$4,746 per acre). For the purposes of calculating the acreage rent, the BLM will use the value for zone 7, which is \$4,746 per acre.

The following paragraph is an acreage rent example describing the acreage rent for solar energy development.

Acreage rent example: The 2016 acreage rent for a 4,000 acre solar energy development in Clark County, Nevada (zone 7) would be \$1,021,480 (4,000 acres \times \$255.37 per acre). Please note that the acreage rent calculation rounds the per acre dollar amount for the county to the nearest cent. In this example ($\$4,746/\text{acre} \times 100\% \times 5.27\% \times 1.021\%$) is rounded to \$255.37 per acre.

As specified in new section 2806.52(a)(3), the initial assignment of counties to the zones on the solar energy acreage rent schedule is based upon the NASS Census data from 2012 and is established for year 2016 through 2020. Subsequent reassignments of counties will occur every 5 years following the publication of the NASS Census as is described in section 2806.21.

Comment: The BLM received comments expressing concern that the assignment of some counties or regions to zones on the solar acreage rent schedule may not accurately reflect the value of those lands.

Response: The BLM recognizes that it may be necessary to adjust the initial assignment of counties to zones on the solar energy acreage rent schedule. Section 2806.52(a)(3) of the final rule is revised to clarify that the BLM may, on

its own initiative or in response to requests, adjust initial NASS survey data-based county assignments on a regional basis if it determines that assignments based solely on NASS data do not accurately reflect the values of the BLM lands in question. A similar clarification was made to section 2806.62(a)(3).

Section 2806.52(a)(4) requires acreage rent payments each year, regardless of the stage of development or status of operations of a grant. Acreage rent must be paid for the public land acreage described in the right-of-way grant prior to issuance of the grant and prior to the start of each subsequent year of the authorized term. There is no phase-in period for acreage rent, which must be paid annually and in full upon issuance of the grant. In the event of undue hardship, a rent payment plan may be requested and approved by a BLM State director, consistent with section 2806.15(c), so long as such a plan is in the public interest.

Section 2806.52(a)(5) states that the BLM will adjust the per acre zone rates each year based on the average annual change in the IPD-GDP as determined under section 2806.22(a). The acreage rent also will adjust each year for solar energy development grants issued under subpart 2804. The BLM will use the most current per acre zone rates to calculate the acreage rent for each year of the grant term, unless the holder selects the scheduled rate adjustment method under section 2806.52(d). The acreage rent for a solar energy development lease is adjusted under section 2806.54(a)(4).

This paragraph is revised in the final rule by removing “for authorizations outside of designated leasing areas, the BLM . . .” from the first sentence and replacing it with “We.” This edit is consistent with the acreage rent adjustment provision for wind energy (see section 2806.62(b)(5)). It is necessary because the BLM may issue a grant inside a DLA in some situations (see section 2809.19) and the proposed section would have been inaccurate. This paragraph is also revised in the

final rule by including the reference to the scheduled rate adjustment option, as described in section 2806.51 of this preamble.

Section 2806.52(a)(6) explains where you may obtain a copy of the current per acre zone rates for solar energy development (solar energy acreage rent schedule) from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M St SE., Room 2134LM, Attention: Renewable Energy Coordination Office, Washington, DC 20003. This paragraph is added so the public is aware of where to obtain a copy of the solar energy acreage rent schedule described under this section. The BLM also posts the solar energy acreage rent schedule online at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

Section 2806.52(b), “MW capacity fee,” describes the components used to calculate this fee. Paragraphs (b)(1), (2), (3), and (4) explain the MW rate, MW rate schedule, adjustments to the MW rate, and the phase-in of the MW rate. As explained in IM 2016-122, electric and telephone facilities that qualify for financing under the Rural Electrification Act must pay the MW capacity fee and other payments required under this rule, except the acreage rent.

Comments: Some comments noted uncertainty regarding the meaning or definition of words in the proposed rule, such as “MW capacity fee” and its component parts of the MW rate, MW hour price, net capacity factor, and rate of return.

Response: The BLM acknowledges that this rule introduces a number of new terms and concepts. The BLM attempted to clearly define these terms in section 2801.5(b). Some of the terminology is similar as some terms relate to the same general subject matter (e.g., MW capacity fee and MW rate). The BLM has revised the regulations and provided additional discussion in the preamble to help facilitate a better understanding of the rule and its requirements. For example, a more specific citation is provided in section

2806.52(b)(1) and other locations in the final rule to help readers better locate and understand the terms of the final rule. These revisions and terms are discussed in greater detail throughout the preamble for sections 2806.50 through 2806.68.

The MW capacity fee, as defined in section 2801.5(b), refers to payment, in addition to the acreage rent, for solar energy development grants and leases based on the approved MW capacity of the solar energy authorization. The MW capacity fee is the total authorized MW capacity approved by the BLM for a project, or an approved stage of development, multiplied by the appropriate MW rate. The MW capacity fee is prorated and must be paid for the first partial calendar year in which generation of electricity starts or when identified within an approved POD. This fee captures the increased value of the right-of-way for the particular solar or wind-project use, above the limited rural or agricultural land value captured by the acreage rent. The MW capacity fee will vary, depending on the size and type of solar project and technology and whether the solar energy right-of-way authorization is a grant (issued under subpart 2804) or a lease (issued under subpart 2809). The MW capacity fee is paid annually either when electricity generation begins, or as otherwise stated in the approved POD, whichever comes first. If electricity generation does not begin on or before the time approved in the POD, the BLM will begin charging a MW capacity fee at the time identified in the POD.

The POD submitted to the BLM by the right-of-way applicant must identify the stages of development for the solar or wind energy project's energy generation, including the time by which energy generation is projected to begin. The BLM will generally allow up to three development stages for a solar energy project. As the facility becomes operational, the approved MW capacity will increase as described in the POD. These stages are part of the approved POD and allow the BLM to enforce the diligence requirements associated with the grant.

Comments: Other comments suggested that a bid could include an alternative payment structure to the BLM over the life of the project. This alternative payment structure would replace the acreage rent and MW capacity fee described in this final rule. The comments further suggested that the BLM reduce costs to developers by eliminating the MW capacity fee, conducting regional mitigation planning for DLAs, and performing a majority of the work necessary for the NEPA and

Section 7 (endangered species) reviews early in the process inside DLAs.

Response: As explained elsewhere in this preamble, the BLM has determined that the rule's multi-component payment structure, involving both an "acreage rent" and "MW capacity fee" constitute the full fair market value for the use of the public lands by a wind and solar energy project. An alternative payment structure may not provide a fair return for the use of the public lands, and therefore, would be inconsistent with the BLM's obligations under FLPMA. The rule's structure is consistent with existing policy. That said, the final rule does allow the BLM to establish alternate fiscal terms for an individual project or region upon sufficient showing by an applicant that such alternative terms are justified. These alternative terms, if approved by the BLM, would be used in lieu of the default terms established by the rule inside and outside of designated leasing areas.

Under the rule's multi-component structure, the "acreage rent" represents the value of the raw undeveloped land, while the MW capacity fee represents the value for this particular commercial use of the public lands above and beyond the rural or agricultural value of the land in its unimproved state. Both are necessary components of obtaining the fair market value for the use of the public lands for wind and solar energy development. As explained above, this multi-component structure bears similarities to private land leases, which typically involve a land rent and royalty rate.

As suggested by the comments, the BLM does perform a majority of the work up front for the NEPA and Section 7 compliance processes for right-of-way leases inside DLAs. Mitigation work and costs may be identified in some cases before a competitive process occurs, such as in Dry Lake Valley solar energy zone in Nevada. The BLM held a competitive process in 2014 and reached a decision within 10 months of the auction. This was less than half the time it generally takes to process the project applications.

The BLM had great success in the Dry Lake Valley solar auction, at least in part, because there was a regional mitigation strategy in place. However, there may be instances in the future where a mitigation strategy is not appropriate or necessary. The BLM will not include a requirement for mitigation strategies in this final rule, but will be consistent with its interim policy guidance for offsite mitigation (IM 2013–142).

Comments: Some comments argue that the value of land for purposes of renewable energy development should be determined exclusively by MW capacity fees or by fees based on the number of MWs actually produced and delivered, not by the right-of-way's acreage value.

Response: Under the final rule, the BLM does not calculate annual charges for solar and wind energy development by using only a MW capacity fee, as suggested by the comments. The BLM has determined that requiring an acreage rent and MW capacity fee is the best method, consistent with applicable legal authorities, for determining the appropriate value of a solar or wind energy development right-of-way. The BLM also notes that the MW capacity fee and acreage rent in the final rule have been discounted from comparable costs that are typically charged in the private sector to account for the cost to comply with the terms and conditions of the BLM's authorization (bonding, due diligence, etc.).

Comments: A comment suggested that the BLM treat solar and wind energy technologies the same when setting acreage rents and MW capacity fees. Another comment suggested that the BLM give additional consideration to the use of energy storage technologies when setting acreage rents and MW capacity fees.

Response: In the BLM's examination of the different energy generation technologies it was determined that some technologies, such as CSP, are generally more efficient (*i.e.*, generate more energy using the same amount of sunlight) than other technology types and often require that the site selected for development include certain specific characteristics, such as limited grade. This is evidenced by the average efficiencies of the various solar technologies as reflected in the capacity factors on the EIA's Web site. Since the efficiencies of PV and CSP technologies are inherent to the technologies and are, in part, related to the particular conditions of the land to be used, the BLM maintained this distinction in the final rule and did not implement the comment's suggestion on limiting the various solar technology MW capacity fees to a single non-distinct fee.

The BLM did reconsider how it considers storage when charging a MW capacity fee. The BLM will maintain the proposed net capacity factor for CSP with storage capacity of 3 hours or more. CSP is a technology which is generally engineered with storage, which increases the efficiency, but decreases overall net capacity. The BLM is confident, based on its experience,

that this is the appropriate net capacity factor for this technology based on the technology currently deployed and available information.

However, the BLM does recognize that storage could have implications for other technology types as well. Based upon the premise that storage increases the efficiency of a project, the BLM requested that the National Renewable Energy Laboratory (NREL) provide a report on the status of energy storage in the United States. The BLM hoped to use this report to establish in the regulations an appropriate methodology for determining the value of storage for solar and wind projects on public lands. However, NREL's report noted that energy storage is an emerging and rapidly growing market, so there is not enough empirical data and commercial experience on storage to support an accurate calculation for valuing storage. Therefore, the BLM determined that it would be premature to add energy storage values to the regulations at this time beyond the one provided for CSP with 3 hours of storage.

In this final rule, the BLM adds a new sentence under the definition of MW rate to explain that in the future, the BLM may establish a different net capacity factor on a case-by-case basis, such as when a project uses storage, and the BLM determines that the efficiency rating varies from the established net capacity factors in this final rule. For example, if a wind energy project includes storage in its design, the BLM may determine an appropriate net capacity factor for that project.

Section 2806.52(b)(1) identifies the "MW rate" as a formula that is the product of four components: The hours per year, multiplied by the net capacity factor, multiplied by the MWh price, multiplied by the rate of return. This can be represented by the following equation: $MW\ Rate = H (8,760\ hrs.) \times N$ (net capacity factor) \times MWh (Megawatt Hour price) \times R (rate of return). The components of this formula are discussed here at greater length.

Hours per year. This component of the MW rate formula is the fixed number of hours in a year (8,760). The BLM uses this number of hours per year for both standard and leap years.

Net capacity factor. The net capacity factor is the average operational time divided by the average potential operational time of a solar or wind energy development, multiplied by the current technology efficiency rates. A net capacity factor is used to identify the efficiency at which a project operates. The net capacity factor is influenced by several common factors such as geographic location and

topography and the technology employed. Other factors can influence a project's net capacity factor. For example, placement of a solar panel in the direction that captures the most sun may increase the efficiency at which a project operates. These other factors tend to be specifically related to a project and its design and layout. An increase in the net capacity factor is most readily seen when a developer sites a project geographically for the energy source they are seeking and utilizes the best technology for harnessing the power. An example of this is placing wind turbines in a steady wind speed location using a wind turbine designed for optimal performance at those wind speeds.

The efficiency rates may vary by location for each specific project, but the BLM will use the national average for each technology. Efficiency rates for solar and wind energy technology can be found in the market reports provided by the Department of Energy through its Lawrence Berkeley National Laboratory. For solar energy see "Utility-Scale Solar 2012" at http://emp.lbl.gov/sites/all/files/lbnl-6408e_0.pdf and for wind energy, please see "2012 Wind Technologies Market Report" at <http://emp.lbl.gov/sites/all/files/lbnl-6356e.pdf>. This rule establishes the net capacity factor for each technology as follows:

Technology type	Net capacity factor (%)
Photovoltaic (PV)	20
Concentrated Photovoltaic (CPV) or Concentrated Solar Power (CSP)	25
CSP w/Storage Capacity of 3 Hours or More	30
Wind Energy	35

As previously discussed in this preamble, the BLM has revised the proposed description of net capacity factor in this final rule. This final rule maintains the proposed net capacity factor for CSP with storage capacity of 3 hours or more at 30 percent. The BLM adds in this final rule a description of the net capacity factor in the definition recognizing that as technology evolves, the BLM may determine a net capacity factor for a specific project on a case-by-case basis in the future, as appropriate. This will better allow the BLM to receive fair market value payment for use of the public lands in the rapidly changing storage market.

The BLM intends to periodically review the efficiency factors for the various solar and wind technologies.

In the proposed rule, the BLM considered basing the net capacity factors for these technologies on an average of the annual capacity factors listed by the EIA. The EIA posts an average of the capacity factors on its Web site at http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_6_07_b. However, the BLM decided not to go forward with this provision and removed it from the final rule because those annual capacity factors are not reviewed or confirmed by technical experts, such as those at the National Laboratories, and therefore, they are not a sufficiently reliable source of information on which to base the net capacity factor. Further, EIA may not continue to maintain and update this information in the future, and therefore, it may not be a viable source of information in the future.

MWh price. This component of the MW rate formula is the full 5 calendar-year average of the annual weighted average wholesale prices of electricity per MWh for the major trading hubs serving the 11 Western States of the continental United States. This wholesale price of the trading hubs is the price paid for energy on the open market between power purchasers and is an indication of current pricing for the purchase of power. Several comments were submitted concerning the MWh price.

Comment: One comment suggested that this component not be rounded to the nearest half cent.

Response: The BLM proposed to round the MWh price to the nearest 5-dollar increment. In other portions of the regulations the BLM rounds to the nearest cent. The proposed rule was explicit that the MWh price would be rounded to the nearest 5-dollar increment, but the final rule has been adjusted to round the MWh price to the nearest dollar increment. Rounding to the nearest dollar increment is consistent with current BLM practices for calculating annual payments. The BLM declined, however, to adopt the commenter's suggestion and round to the nearest half cent, because the MWh price is an estimated 5-year average of wholesale prices. Providing a more specific calculated MWh price could give a false precision to the actual rates provided by the BLM.

Comment: Another comment stated that we should not rely on the ICE trading hub as our source for data. Relying on a single vendor for determining the MWh price may lead to inaccurate fees if the vendor's data is inaccurate. There are other vendors that have current data available for the major trading hubs in the West as well.

Response: The proposed rule identified the ICE as the source of data to be used in calculating the MWh price. However, the final rule is revised to remove ICE as the only source of the major trading hub data in section 2806.52(b)(3)(i). Removing the specific source of data from the final rule is consistent with the proposed rule, in that the BLM has indicated that other sources may be used in the future should ICE stop providing such data. Furthermore, since publication of the proposed rule, the BLM became aware that the ICE no longer provides such market data for free to the public, but now offers these data under a paid subscription. Future updates to the MWh price may use ICE or other similar purveyors of market data to determine the major trading hubs and the wholesale market prices of electricity. Under this final rule, the BLM is using market data from SNL Financial to calculate the 5-year average of the annual weighted average wholesale price per MWh.

Comments: Several comments requested an update of the MWh price and stated that any update being made should include language to identify the most recent full calendar year data and to remove the uncertainty of how the BLM will determine the most recent 5-year data with future updates. Commenters further indicated that the data used in calculating the MWh price were skewed to numbers higher than the

true recent market average since market pricing for the year 2008 were much higher than the years preceding or following it.

Response: The BLM understands the concern regarding the intent to establish the MWh price using current market data. In the proposed rule, market data from calendar years 2008 through 2012 were used to determine the MWh price. In the final rule section 2806.52(b)(3)(i), the BLM updated the MWh price to reflect the most recent full 5 calendar-year data (that is, data from 2010–2014) from the major trading hubs located in the West.

In addition, the BLM adjusted provisions governing revisions to the MWh price to account for the fact that under section 2806.50, the BLM bills customers in advance for the following year. Specifically, the BLM revised the final rule so that the next update to the MWh price will occur for 2021, not 2020. This will allow the BLM to set the new price during 2020 using the most current market data for the previous five full years (2015–2019) without using the 2014 data twice. Market data for 2019 are not expected to be available until early 2020. Once data are available, the BLM will calculate the new, 2021–2025 MW capacity fee using the full five calendar-year average of the market data for 2015–2019, and notify existing right-of-way holders of the new fee.

In addition to using years 2010 through 2014 in calculating the MWh price, and adjusting the provisions

governing revisions to that price, the BLM also revised the final rule to require that the MWh price be rounded to the nearest dollar increment, as opposed to the proposed rule's approach of rounding up to the nearest five-dollar increment. The BLM made this change to avoid imposing a surcharge due solely to rounding. The BLM found that at the current MWh price, rounding to the nearest five-dollar increment could impose a surcharge of up to 5 percent, or \$158 per MW of project capacity. Rounding to the nearest dollar increment will limit the surcharge without implying false precision.

Note that the current MW rate is \$38 per MWh as calculated using wholesale market data from SNL Financial for the major trading hubs in the west. The calculation for the MWh price is described in more detail in following paragraphs with a table provided showing the averages for the trading hubs used in the calculation.

When calculating the MWh price, the BLM used the yearly average value for each of the major trading hubs that cover the BLM public lands in the West. The BLM then calculated the overall annual average yearly hub value for each of the years 2010–2014, and then averaged these five annual values to establish the MWh price. The average of the five annual average values for 2010 through 2014 is \$38.07, so the BLM set the MWh price at \$38.00.

Year	Mid-Columbia Hub	Palo-Verde Hub	Four Corners Hub	Mead Hub	SP15-EZ CA Hub*	NP15 Hub	CA-OR Border Hub	West US	Avg.
2010	\$35.86	\$38.79	\$40.13	\$40.07	\$39.86	\$39.81	\$38.80	\$39.05	\$39.05
2011	29.48	36.43	36.66	37.02	36.78	36.00	32.93	35.04	35.04
2012	22.90	29.68	30.59	30.87	34.86	32.03	27.09	29.72	29.72
2013	37.59	37.66	.....	39.84	48.34	43.97	40.19	41.27	41.27
2014	38.67	42.42	.....	44.84	51.13	51.06	43.48	45.27	45.27
2010–2015 Avg.	.....	.....	.....	.....	.....	.....	.....	38.07	.....

Rate of return. The rate of return component used in the MW rate schedule reflects the relationship of income (to the property owner) to revenue generated from authorized solar or wind energy development facilities on the encumbered property. A rate of return for the developed land can range from 2 to 12 percent, but is typically around 5 percent, as identified in the appraisal consultation report completed by the Office of Valuation Services. These rates take into account certain risk considerations, *i.e.*, the possibility of not receiving or losing future income benefits, and do not normally include an allowance for inflation.

An applicant seeking a right-of-way from the BLM must show that it is financially able to construct and operate the facility. In addition, the BLM may require surety or performance bonds from the holder to facilitate compliance with the terms and conditions of the authorization, including any payment obligations. This reduces the BLM's risk and should allow the BLM to use a "safe rate" of return, *i.e.*, the prevailing rate on guaranteed government securities that includes an allowance for inflation. The BLM has established a rate of return that adjusts every 5 years to reflect the preceding 10-year average of the 20-year U.S. Treasury bond yield, rounded to the nearest one-tenth percent, with a

minimum rate of 4 percent. Applying this criterion, the initial rate of return is 4 and 3 tenths percent (the 10-year average of the 20-year U.S. Treasury bond yield (4.32 percent), rounded to the nearest one-tenth percent).

This final rule is revised to round the rate of return to the nearest one-tenth percent to address a commenter's concern that BLM's usual rounding convention (rounding to the nearest one half percent) could result in rate jumps due only to rounding; rounding to the nearest one-tenth percent will limit the change in BLM's rates without giving a false impression of precision.

As provided under paragraph (b)(2) of this section, the MW rate schedule is

made available to the public in the MW rate schedule for Solar and Wind Energy Development. The current MW rate

schedule is available to the public at any BLM office, via mail by request, or

at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

MW RATE SCHEDULE FOR SOLAR AND WIND ENERGY DEVELOPMENT
[2016–2020]

Type of energy technology	Hours per year	Net capacity factor	MWh price	Rate of return	MW rate 2016–2020
Solar—Photovoltaic (PV)	8,760	0.20	\$38	0.043	\$2,863
Solar—Concentrated photovoltaic (CPV) and concentrated solar power (CSP)	8,760	0.25	38	0.043	3,578
CSP with storage capacity of 3 hours or more	8,760	0.30	38	0.043	4,294
Wind—All technologies	8,760	0.35	38	0.043	5,010

For lease holders that choose the standard rate adjustment method, the periodic adjustments in the MW rate are discussed in connection with section 2806.52(b)(3). Under that section, adjustments to the MW rate will occur every 5 years, beginning with the 2021 rate, by recalculating the MWh price and rate of return, as provided in section 2806.52(b)(3)(i) and (ii), respectively.

Section 2806.52(b)(3)(i) requires that the MW rate be adjusted using the full 5 calendar-year average of the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States. The next update for the MW rate will use years 2015 through 2019, rounded to the nearest dollar increment. Following this methodology, the resulting MWh price will be used to determine the MW rate for each subsequent 5-year interval. The availability of data to establish the MWh price is described in this preamble in the discussion of the definition of MWh price, a component of the MW rate in section 2801.5(b).

As noted above, section 2806.52(b)(3)(ii) provides that when adjusting the rate of return, the BLM will use the 10-year average of the 20-year U.S. Treasury bond yield for the full 10 calendar-year period preceding the rate of return adjustment. The rate of return is rounded to the nearest one-tenth percent, and must be no less than 4 percent. In the final rule, the rate of return was calculated using years 2003 through 2012 of the 20-year U.S. Treasury bond yield (4.32 percent), rounded to the nearest one-tenth percent (4.3 percent). The rate of 4.3 percent will be used for calendar years 2016 through 2020. The rate of return will be recalculated every 5 years beginning in 2020, by determining the 10-year average of the 20-year U.S. Treasury bond yield for the previous ten calendar years (2010 through 2019, for

2020) rounded to the nearest one-tenth percent. The resulting rate of return, if not less than 4 percent, will be used to determine the MW rate for calendar years 2020 through 2024, and so forth. The 20-year U.S. Treasury bond yields are tracked daily and are accessible at <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=longtermrateAll>.

To allow for a reasonable and diligent testing and operational period, under section 2806.52(b)(4)(i), the BLM will provide for a 3-year phase-in of the MW capacity fee for solar energy development grants issued under subpart 2804 of 25 percent for the first year, 50 percent the second year, and 100 percent the third and subsequent years of operations. The first year is the first partial calendar year of operations and the second year is the first full year. For example, if a facility begins producing electricity in June 2016, 25 percent of the capacity fee would be assessed for July through December of 2016 and 50 percent of the capacity fee would be assessed for January through December of 2017. One hundred percent would be assessed thereafter.

This BLM will apply the phase-in after electricity generation begins, or is scheduled to begin in the approved POD, whichever comes first. The proposed rule stated that the BLM would apply the phase-in “. . . after the generation of electricity starts.” The BLM revised section 2806.52(b)(4)(i), from the proposed to final rule, for consistency with other sections, including section 2806.52(b). The BLM made a corresponding revision to section 2806.62(b)(4)(i).

Under section 2806.52(b)(4)(ii), this rule explains the staged development of a right-of-way. Such staged development, consistent with the rule in section 2805.12(c)(3)(iii), can have no more than three development stages, unless the BLM approves in advance

additional development stages. The 3-year phase-in of the MW rate applies individually to each stage of the solar development. The MW capacity fee is calculated using the authorized MW capacity approved for that stage multiplied by the MW rate for that year of the phase-in, plus any previously approved stages multiplied by the MW rate.

Section 2806.52(b)(5) is added to this final rule to explain that the general payment provisions of subpart 2806, except for section 2804.14(a)(4), apply to the MW capacity fee. For example, section 2806.12 explains when and where a grant holder must pay rent. These requirements would also apply to the MW capacity fee. Although the MW capacity fee is charged to reflect the commercial utilization value of the public's resource, it is an annual payment required to the BLM and these general payment provisions will apply.

The final rule specifies that section 2804.14(a)(4) does not apply to the MW capacity fee. As explained in IM 2016–122, the MW capacity fee is not a rental fee, and therefore must be paid by electric and telephone facilities that qualify for financing under the Rural Electrification Act. A new section (see section 2806.62(b)(4)) that parallels this requirement is added into the wind energy provisions for consistency.

Section 2806.52(c) is included in the final rule in support of revisions the BLM has made to charge fairly for the use of solar and wind energy authorizations. See the comment discussion under section 2806.52(a) for further information.

Section 2806.52(c) describes how the BLM will reduce the acreage rent and the MW capacity fee. The BLM will compare the total annual payment of the acreage rent and MW capacity fee for 2017 to the base rent and MW capacity fee currently established by policy for the 2016 billing year. Any net increase in costs to a right-of-way holder will be

reduced by 50 percent for the 2017 billing year. This one-year reduction is intended to ease the transition for grant holders from the current policies to this final rule. If 2017 is the first year for which you make an annual payment, the phase-in described under section 2806.52(b)(4) will apply without the BLM implementation reduction of 50 percent. The rates established by policy will remain in effect until 2017 for rights-of-way that are not issued under subpart 2809 of this final rule in order to provide notice of the adjusted rent and fees to existing holders.

Section 2806.52(d) is added to this final rule to establish the method by which the BLM will perform scheduled rate adjustments for solar and wind energy grants. In order for scheduled rate adjustments to be applied to a grant, a grant holder must have selected the scheduled rate adjustment method and notified the BLM, as provided in section 2806.51 of the final rule.

Paragraph 2806.52(d)(1) specifies which rates will be used initially for the scheduled rate adjustments. For new grants, the BLM will use the per acre zone rate (see section 2806.52(a)(1)) and MW rate (see section 2806.52(b)(1)) in place when your grant is issued. For existing grants that are in place prior to the publication of this final rule, the BLM will use the per acre zone rate and MW rate in place prior to this rule's publication, as adjusted in paragraph (d)(6) of this section and discussed further in corresponding section 2806.52(d)(6) of this preamble.

Section 2806.52(d)(2) specifies that the per acre zone rate will be adjusted in two ways: Annually, the rate will adjust upward by the current average change in the IPD-GDP, as described in section 2806.22(b); and every five years, the rate will adjust upward by an additional 20 percent. In other words, under the scheduled rate adjustment method, per acre zone rates will be adjusted in years 1 through 5 by the IPD-GDP; in year 6, the BLM will apply a 20 percent increase to the year-5 rate. The same two-part adjustment process will then repeat itself in years 6-10 (IPD-GDP) and year 11 (20%); years 11-15 (IPD-GDP) and year 16 (20%); years 16-20 (IPD-GDP) and year 21 (20%); years 21-25 (IPD-GDP) and year 26 (20%); and finally, years 26-30 (IPD-GDP). If the grant is renewed, the rates in place at the time of renewal, as identified in section 2806.52(d)(1), will be used to establish the initial rates for the term of the renewed right-of-way.

As explained previously in connection with section 2806.51, the BLM developed the scheduled rate adjustment method in response to

concerns that NASS values in certain areas have the potential to jump significantly. To address this concern while ensuring the BLM obtains fair market value for these uses of the public lands, the BLM reviewed changes in national per acre land values in NASS and determined that making fixed rate adjustments of 20 percent every 5 years would reflect historical trends.

The BLM reached this conclusion as follows. The NASS values are released every 5 years, reflecting the increases and decreases in land values. Over a period of 10 years, land values could change drastically in some counties, but the national and western state average changes in land values over the 10-year period from 2003 and ending 2012 were an 80 percent and a 65 percent increase, respectively. For the BLM lands in the west, the range in land value changes were increases of 33 to 253 percent. The BLM determined from these findings that the scheduled rate adjustment method, including both the annual IPD-GDP adjustment and the every-five-year scheduled adjustment, should target an upwards adjustment of about 60 percent for every 10 year period.

To achieve this outcome, over the term of a grant, the BLM will make five 20-percent adjustments to the per acre zone rates, in years 6, 11, 16, 21, and 26. Compounded, these five 20-percent adjustments will result in a 150 percent increase in the per acre zone rate over the 30-year life of the grant (on top of whatever increases are dictated by the annual change in IPD-GDP). This adjustment is within the identified historic range of changes in land values from NASS, which reflect a change between 99 and 759 percent over a 30-year period, and is also in line with industry's recommended rate increase of 4 percent per year (which amounts to 324 percent over a 30 year period, if compounded annually).

Section 2806.52(d)(3) specifies that the MW rate will also increase by 20 percent every 5 years. The BLM reviewed national changes in power pricing since 1960 and determined that adjusting the MW rate by 20 percent every 5 years is appropriate. Since 1960, power pricing has increased by over 450 percent, but over the last 30 years, it has increased approximately 90 percent. Pricing trends show that power pricing seldom drops on an annual basis. The BLM will make 5 20-percent adjustments to the MW rate, which amounts to a 150 percent increase when compounded over the 30-year life of the grant. This 150 percent adjustment is in line with the 4 percent annual rate increase indicated by industry

representatives. It is also in line with historical changes in power prices.

Section 2806.52(d)(4) makes it clear that the scheduled rate adjustment option will enter into effect in year 1 of the rule, for both the acreage rent and MW capacity fee. The phase-in (see section 2806.52(b)(4)) and initial implementation (see section 2806.52(c)) sections apply only for grants to which the standard rate adjustment applies. Grant holders that select the scheduled rate adjustment method choose a defined payment stream over the variable rates that may be applied with the standard rate adjustment method. As such, phase-ins are not included with the scheduled rate adjustment method.

Section 2806.52(d)(5) explains that if the approved POD provides for staged development of the project, the BLM will calculate the MW capacity fee in each year using the MW capacity approved for that stage.

Section 2806.52(d)(6) specifies that the existing rates for grant holders that select the scheduled rate adjustment method will be adjusted for year 1. The adjustment reflects the fact that, due to this rulemaking process, the BLM did not make the rate adjustments called for under existing policy in either 2008 (for wind energy) or 2010 (for solar energy). If the BLM does not update the rates for existing grant holders as specified in this section, it could be as long as 12 years between rate updates.

Accordingly, in year 1 of this rule, the BLM will increase the per acre zone rate for these grant holders by 20 percent plus the annual change in the IPD-GDP, as described in section 2806.22(b), and increase the MW rate by 20 percent. The scheduled rate adjustments will then be based off of these adjusted, year-1 rates.

No additional comments were received, nor were other changes made to this section of the final rule, except for minor changes to improve readability.

Section 2806.54 Rents and Fees for Solar Energy Development Leases

The title of this section is revised by removing "inside designated leasing areas." In conjunction with a previous comment, the BLM has made various edits to the final rule to improve readability. The difference between grants and leases is explained earlier in this preamble, so this language is unnecessary and potentially confusing.

The introductory paragraph to section 2806.54 requires a holder of a solar energy lease obtained through the competitive process under subpart 2809 to pay an annual acreage rent and MW capacity fee. The first-year of acreage rent must be paid in advance, prior to

BLM's issuance of a lease, and the MW capacity fee will be phased-in and calculated based on the total authorized MW capacity of the solar energy development. Rents or fees for solar authorizations will vary depending on the number of acres, technology employed by the solar development, and whether the right-of-way authorization is a grant or lease.

There are many similarities in the rent and MW capacity fee for leases and grants for solar development. This section references the rent and MW capacity fee of grants under subpart 2804, as appropriate, and provides further discussion on how the rent MW capacity fee for a lease differs from that of a grant. Unlike grants, leases issued under subpart 2809 will be charged the full amount of the acreage rent and MW capacity fee schedules once this final rule is effective as there are no existing solar energy development leases. Although the BLM held a competitive offer relating to solar energy development in the Dry Lake SEZ, the successful bidders submitted applications and received right-of-way grants.

Paragraph (a) of this section identifies the acreage rent for a solar lease, which will be calculated in the same way as acreage rent for solar grants outside a DLA (see section 2806.52(a)). The acreage rent for the first year of a lease must be calculated and paid prior to BLM's issuance of a lease. Zone rates and payment of the acreage rent are the same for leases as they are for grants. For the per acre zone rates, see section 2806.52(a)(1). For the assignment of counties, see section 2806.52(a)(2) and (3). For the acreage rent payment, see section 2806.52(a)(4).

Consistent with other revisions in this final rule, the BLM added "This acreage rent will be based on the following:" at the end of section 2806.54(a). This revision makes it clear that the following paragraphs will be the basis for BLM's acreage rent for leases in DLAs.

Section 2806.54(a)(4) describes the adjustments to the acreage rent that may be made for a lease. Once an acreage rent is determined for a lease under paragraph (a) of this section, any adjustments in the annual acreage rent will be made at 10-year intervals thereafter—the first adjustment would be made in year 11 of the lease term and the next in year 21. During the 10-year periods, the acreage rent for a lease will remain constant and not be adjusted.

The BLM will, however, adjust the per acre zone rates of the acreage rent schedule each year based on the average annual change in the IPD-GDP, as

described in section 2806.22(a). This annual adjustment will not be applied to the acreage rent payments for a lease until the next 10-year interval, where the payment will be recalculated using the current acreage rent schedule. The BLM will use the most current per acre zone rates to calculate the acreage rent when first determining a new lease's acreage rent or when recalculating the acreage rent for the next 10-year period of a lease, unless the holder selected the scheduled rate adjustment method under section 2806.54(d).

Section 2806.54(b) identifies the MW capacity fee for solar development leases, which will be calculated in the same way as the MW capacity fee for solar grants outside of a DLA. The phase-in of the MW capacity fee is different from grants. For an explanation of when the BLM requires payment of the MW capacity fee, see section 2806.52(b). For the MW rate, see section 2806.52(b)(1). For the MW rate schedule, see section 2806.52(b)(2). For periodic adjustments in the MW rate, see section 2806.52(b)(3).

Reference to section 2806.52(b) has been added to the final rule. In conjunction with a previous comment, the BLM has made various edits to the final rule to improve readability. The BLM has explained when and how it will require payment and adding this specific citation will make this section more understandable.

Section 2806.54(c) describes the MW rate phase-in for solar energy development leases. Unless the holder selected the scheduled rate adjustment method under section 2806.54(d), the MW rate in effect at the time the lease is issued will be used for the first 20 years of the lease. The MW rate in effect in year 21 of the lease will be used for years 21–30 of the lease.

In order to improve readability in this section, the BLM provided a more specific citation to section 2806.52(b)(2). This should help direct the reader to the appropriate section of this final rule.

Section 2806.54(c)(1) provides for a 10-year phase-in of the MW capacity fee, plus the initial partial year, if any. For the first ten years of a lease, the MW capacity fee is calculated by multiplying the authorized MW capacity by 50 percent of the MW rate for the applicable type of solar technology employed by the project. The MW rate schedule is provided for under section 2806.52(b)(2). The phase-in applies to the MW rate for either solar or wind energy leases (see section 2806.64(c)).

Section 2806.54(c)(2) applies to the MW rate phase-in for years 11 through 20 of a lease. The MW capacity fee for years 11 through 20 will be calculated

by multiplying the MW capacity by 100 percent of the MW rate.

Section 2806.54(c)(3) applies to the MW rate for years 21 through 30 of a lease. The MW capacity fee for years 21 through 30 will be calculated by multiplying the MW capacity by 100 percent of the MW rate. If the POD requires that electricity generation will begin after year 10 of the lease, the MW capacity fee will be calculated using section 2806.54(c)(2) or (3), as appropriate.

Comments: Some comments suggested establishing a low cost payment structure, which is different from that proposed. The suggested payment structure would include a phase-in during the first half of a project's life and then raise fees to regular (full) rates for all solar and wind leases. The payment structure could require an upfront cost payment, and then full costs only when financial costs are being incurred by the developer. An example would be to reduce payments to 10 percent of the gross lease rate for the first 15 years for a lease within a designated solar energy development leasing area.

Response: The BLM did not change the payment structure as suggested by the commenter. FLPMA requires that the BLM generally receive fair market value for the use of the public lands. The suggested low cost payment structure may not provide fair market value.

Comments: Some comments suggested removing the distinction between solar or wind technologies and their respective base rent or fees (*i.e.*, wind is 30 percent and solar is 25 percent without differentiation between technologies). The comment also suggested that the BLM incentivize storage for solar facilities, to promote grid stability, by offering a reduced rate.

Response: The BLM's methodology for collecting fair market value through rents and fees is similar to market comparable practices from non-Federal lands. Use of a technology-specific net capacity factor is appropriate for determining the MW rate for solar and wind energy development. Further, the BLM is not responsible for directing a technology's costs or its success in the energy market. Intentionally setting rates below market values or without market support, such as by establishing a net capacity factor, is not appropriate for this final rule. These suggestions have not been incorporated into the final rule, and the language in the proposed rule is carried forward to the final rule, with some revision as noted in the discussion of section 2806.52(b).

Comment: Another comment recommends that if a MW capacity fee is adopted in the final rule for leases (issued under subpart 2809), the MW rate should be phased-in at 50 percent for the life of the lease; for grants (issued under subpart 2804), the MW rate should be phased-in over a 5-year period. The comment also recommends using the MW rate in effect when the lease or grant is issued without adjustment. PPAs are generally fixed for a term, usually 20 years. A developer places a higher premium on certainty and stability of the MW capacity fee over the potential for reduced rates in the future in case of a long-term downward trend in prices.

Response: The BLM is aware that certainty and stability are factors to consider when developing and establishing its rules. However, based on the BLM's experience, most solar and wind energy developments break even with the costs of constructing and operating a facility within 15 to 20 years after the start of generation of electricity. The BLM has taken this into account as part of its formulation of the MW rate updates and phase-in.

The MW rate is set when a lease is issued, and not updated until year 21 of the lease. The MW rate is phased-in for the first 10 years at 50 percent of the full rate, after which the MW rate is no longer phased-in. Any updates to the MW rate schedule will not result in an adjustment to leases during the 10-year phase-in or the first 20 years of the lease. Only at year 21 and each following 10-year interval will the MW rate adjust, using the currently established MW rate schedule.

A grant's MW rate, however, is set each year, beginning when a project starts generating electricity. The MW rate is phased-in for the first 3 years at 25/50/100 percent of the MW rate, respectively. The BLM will recalculate the MW rate schedule once every 5 years, at which time the next year's payment by a developer will adjust consistent with the updated MW rate schedule.

Section 2806.54(c)(4) describes the MW capacity fee of the lease if it were to be renewed. The MW capacity fee is calculated using the then-current MW rates at the beginning of the new lease period and remain at that rate through the initial 10-year period of the renewal term. The MW capacity fee will be adjusted using the then-current MW rate at the beginning of each subsequent 10-year period of the renewed lease term.

Under section 2806.54(c)(5), the rule provides for the staged development of leases. Such staged development, consistent with section

2805.12(c)(3)(iii), will have no more than three development stages, unless the BLM approved more development stages in advance. The MW capacity fee is calculated using the authorized MW capacity approved for that stage multiplied by the MW rate for that year of the phase-in, plus any previously approved stages multiplied by the MW rate as described in section 2806.54(c).

Section 2806.54(d) is added to this final rule to establish the method by which the BLM will perform scheduled rate adjustments for leases, similar to the scheduled rate adjustments for grants in section 2806.52(d). In order for scheduled rate adjustments to be applied to a lease, a lease holder must have selected the scheduled rate adjustment method, as required in section 2806.51.

Section 2806.54(d)(1) specifies which rates will be used initially for the scheduled rate adjustments. The BLM will use the per acre zone rate (see section 2806.52(a)(1)) and MW rate (see § 2806.52(b)(1)) that are in place when your lease is issued.

Section 2806.54(d)(2) specifies that the per acre zone rate will be increased every 10 years by the change in the IPD-GDP for the preceding 10-year period. (In contrast, the per acre zone rate for grants is adjusted every 5 years.) The 10-year average IPD-GDP change used for this increase is the same that is used to adjust the per acre rent schedule annually for linear rights-of-way under section 2806.22(b), except that it will be adjusted once cumulatively every ten years, rather than annually. For example, the current annual change in IPD-GDP is 2.1 percent, which would result in a roughly 21 percent change in year ten. In addition to the IPD-GDP change, a 40 percent increase every 10 years will be applied as part of the scheduled rate adjustment (in contrast to a 20 percent increase every 5 years for grants). The BLM will continue to apply this adjustment every 10 years (that is, in years 11 and 21 for the 30-year lease).

Similar to the approach taken for grants, the BLM reviewed changes in national per acre land values in NASS when establishing the 40 percent adjustment. Over the term of a lease, the BLM would make two adjustments to the per acre zone rates. These two adjustments would compound on each other, for a cumulative increase of 96% over the 30-year life of the lease. This adjustment is within the identified change in land values from NASS and is also in line with industry's recommendation of an annual change in rates limited to no more than 4 percent. (A 4 percent annual increase, compounded annually over 30 years,

amounts to a 324 percent increase over the life of the lease.) For further discussion on this, see the preamble discussion of section 2806.52(d)(2).

Section 2806.52(d)(3) specifies that likewise, the MW rate will increase by 40 percent every 10 years. The BLM reviewed national changes in power pricing since 1960 and determined that 40 percent adjustments to the MW rate every 10 years are appropriate. Over the term of the lease, the BLM would make 2 adjustments to the MW rate (in years 11 and 21). These 2 adjustments would compound on each other for a cumulative increase of 96% over the 30-year life of the lease. This adjustment is within the identified range of power pricing changes and is also in line with industry's recommendation of an annual change in rates limited to no more than 4 percent. (A 4 percent annual increase, compounded annually over 30 years, amounts to a 324 percent increase over the life of the lease.) For further discussion on this, see the preamble discussion of section 2806.52(d)(3).

Section 2806.54(d)(4) specifies that the phase in of the MW rate for standard rate adjustments in section 2806.54(c) does not apply to authorizations that are using the scheduled rate adjustments. Instead, for years 1 through 5 of a lease, plus any initial partial year, the MW capacity fee is 50 percent of the otherwise applicable solar rate. This reduction is applied only to new leases and only during the initial term; the phase-in will not be applied to leases when renewed.

Like the phase-in period under the standard rate adjustment method, the initial MW capacity is also subject to a phase-in; however, it is shorter (a 5-year period instead of a 10-year period). Again, the purpose of the phase-in period is to provide a financial incentive to developers to use the public lands within their grant earlier (since the clock on the phase-in starts running at lease issuance, even though the obligation to pay the MW capacity fee does not attach until power generation commences). The BLM selected a 5-year phase-in under the scheduled rate adjustment method instead of the 10-year phase-in from section 2806.54(c) because of the difference in rate structures. Under the standard rate adjustment, the MW capacity fee will not adjust for the first 20 years of a lease term, and that initial rate is phased-in for the first half of that period (10 years). Under the scheduled rate adjustments, the rate adjusts every 10 years and the phase-in is provided for half of the initial rate period (5 years). Both the 10-year and 5-year phase-in are consistent with market practices.

Section 2806.54(d)(5) explains that if the approved POD provides for staged development of the project, the BLM will calculate the MW capacity fee using the MW capacity approved for that stage. Only development stages in operation during the first 5 years of a lease will be phased-in.

MW capacity fee-example 1: The MW capacity fee for a 400-MW photovoltaic solar energy right-of-way grant would be \$1,145,200 per year (400 MWs \times \$2,863 per MW), implemented over a 3-year period after the start of electricity generation. In the first partial year after start of generation in July for a solar energy right-of-way, the MW capacity fee would be \$143,150 (400 MWs \times \$2,863 per MW \times 25 percent \times 0.5 year); in the second year after the start of electricity generation, the MW capacity fee would be \$572,600 (400 MWs \times \$2,863 per MW \times 50 percent \times 1 year); and in the third year after the start of electricity generation, and each year thereafter, the MW capacity fee would be \$1,145,200 per year (400 MWs \times \$2,863 per MW \times 1 year).

MW capacity fee-example 2: The MW capacity fee for a 400 MW concentrated PV or concentrated solar power right-of-way grant would be \$1,431,200 per year (400 MWs \times \$3,578 per MW), implemented over a 3-year period after the start of electricity generation. In the first partial year assuming the start of electricity generation in January for a solar energy right-of-way, the MW capacity fee would be \$357,800 (400 MWs \times \$3,578 per MW \times 25 percent \times 1 year); in the second year after the start of electricity generation, the MW capacity fee would be \$715,600 (400 MWs \times \$3,578 per MW \times 50 percent \times 1 year); and in the third year after start of generation and each year thereafter, the MW capacity fee would be \$1,431,200 per year (400 MWs \times \$3,578 per MW \times 1 year).

MW capacity fee-example 3: The MW capacity fee for a 400 MW solar power right-of-way grant with a storage capacity of 3 hours or more would be \$1,717,600 per year (400 MWs \times \$4,294 per MW), implemented over a 3-year period after the start of electricity generation. Assuming generation began in January, in the first partial year after the start of electricity generation, the MW capacity fee would be \$429,400 for a solar energy right-of-way (400 MWs \times \$4,294 per MW \times 25 percent \times 1 year); in the second year after the start of electricity generation, the MW capacity fee would be \$858,800 (400 MW \times \$4,294 per MWs \times 50 percent \times 1 year); and in the third year after the start of electricity generation, and each year thereafter, the MW capacity fee would

be \$1,717,600 per year (400 MW \times \$4,294 per MWs \times 1 year).

Acreage rent and MW capacity fee example for a solar energy development grant: The annual acreage rent and MW capacity fee for 2016 for a 400 MW photovoltaic solar energy development grant located on 4,000 acres in Clark County, NV after the phase-in period would be approximately \$2,231,480. (The acreage rent of \$1,021,480 (4,000 acres \times \$255.37 per acre) plus the MW capacity fee of \$1,261,600 (400 MWs \times \$3,154 per MW) equals \$2,283,080).

No comments were received and no changes are made from the proposed rule to the final rule.

Section 2806.56 Rent for Support Facilities Authorized Under Separate Grant(s)

Under this section, support facilities for solar development will be authorized under a grant. Support facilities may include administration buildings, groundwater wells, and construction laydown and staging areas. Rent for support facilities authorized under separate grants is determined using the Per Acre Rent Schedule for linear facilities under existing section 2806.20(c). No comments were received and no changes are made from the proposed rule to the final rule.

Section 2806.58 Rent for Energy Development Testing Grant(s)

Comments: Several comments suggested that site- and project-area testing should be allowed for both solar and wind energy.

Response: The final rule now includes site- and project-area testing authorizations for both solar energy and wind energy. New section 2806.58 has been added in this final rule to incorporate this change. Changes in this section are consistent with section 2806.68, which did not receive any comments, but was modified to remove the word “wind” from the naming of the type of grants to remain consistent with the types of authorizations that the BLM will issue.

Section 2806.58(a) describes the rent for any energy site-specific testing grant. A minimum rent is established as \$100 per year for each grant issued. Under this paragraph rent is set by incorporating into the final rule the site-specific rent amount found in the BLM’s IM No. 2009–043, as follows: Site-specific grants are authorized only for one site and do not allow multiple sites to be authorized under a single grant; however, a single entity may hold more than one site-area testing grant. If a BLM office has an approved small site rental schedule, that office may use the rents,

so long as the rent exceeds the \$100 minimum. Small site rental schedules are provided to the BLM from the Department’s Office of Valuation Services and reflect accurate determination of market value. In lieu of annual payments for a site-specific testing grant, a grant holder may pay for the entire 3-year term of the grant. See sections 2801.9(d)(1) and 2805.11(b)(2)(i) of this preamble for further discussion of site-specific energy testing grants.

Section 2806.58(b) describes the rent for any energy project-area testing grant. A per-year minimum rent is established at \$2,000 per authorization or \$2 per acre for the lands authorized by the grant, whichever is greater. The appraisal consultation report by the Office of Valuation Services supports the rent established in this final rule. Project-area grants may authorize multiple meteorological or instrumentation testing sites. There is no additional charge or rent for an increased number of sites authorized under such grants. See sections 2801.9(d)(2) and 2805.11(b)(2)(ii) of this preamble for further discussion of project-area energy testing grants.

Section 2806.60 Rents and Fees for Wind Energy Rights-of-Way

Section 2806.60 requires a holder of a wind energy right-of-way authorization to pay annual rent and MW capacity fees for right-of-way grants issued under subpart 2804 and leases issued under subpart 2809.

As noted earlier in this preamble, there are similarities between rents and MW capacity fees for solar and wind energy, as well as between rents and MW capacity fees for authorizations issued under subparts 2804 and 2809. The BLM intentionally designed the rents and fees for solar and wind energy development projects to match as closely as possible in order to reduce the potential for confusion and misunderstanding of the requirements. The methodology for calculating rents, fees, phase-ins, adjustments, and rate proration is the same for wind as for solar. Many of the terms and conditions of a lease issued under this subpart will also be the same. No comments were received on this section, and no changes were made between the proposed and final versions of this section, other than those discussed in connection with section 2806.50 of this preamble.

Section 2806.61 Scheduled Rate Adjustment

Section 2806.61 is added to the final rule, consistent with section 2806.51 of this final rule. This section parallels

2806.51 with no substantive differences, except that this section applies to wind energy grants and leases instead of solar energy grants and leases. See section 2806.51 of this preamble for further discussion. Parallel changes are also made in sections 2806.62(d) and 2806.64(d) of this preamble. See sections 2806.52(d) and 2806.54(d) of this preamble for further discussion of those sections.

Section 2806.62 Rents and Fees for Wind Energy Development Grants

Section 2806.62 parallels section 2806.52, which discusses rents and MW capacity fees for solar energy development grants. The discussion on all components of the wind energy development grants duplicates the provisions for solar rents and fees, except for paragraph (a)(1) of this section which discusses the per acre zone rates and paragraphs (a)(6) and (7) and (b)(4)(iii) of this section, which discuss the BLM implementation of the new acreage rent and MW capacity fee. Revisions have been made to the requirements of this section consistent with comments on the proposed rule. See comments discussed under section 2806.52 for further information and details regarding the revisions made to the final rule.

Section 2806.62(a) addresses the acreage rent for wind energy development. See section 2806.52(a) for a discussion of acreage rent. The acreage rent is calculated by multiplying the number of acres (rounded up to the nearest tenth of an acre) within the authorized area times the per acre zone rate in effect at the time the authorization is issued. The annual zone rate is derived from the wind energy acreage rent schedule in effect at the time the authorization is issued.

Section 2806.62(a)(1) addresses per acre zone rates for wind energy

development grants. The methodology for calculating the acreage rent is the same for wind as it is for solar, but wind and solar energy have different encumbrance factors. Solar energy projects encumber approximately 100 percent of the land, while wind energy projects encumber approximately 10 percent of the land. Therefore, for wind, the per acre zone rate is calculated using a 10 percent encumbrance factor instead of 100 percent encumbrance factor.

Under section 2806.62(a)(1), the initial per acre zone rate for wind energy projects is now established by considering four factors: the per acre zone value multiplied by the encumbrance factor multiplied by the rate of return multiplied by the annual adjustment factor. This calculation is reflected in the following formula – $A \times B \times C \times D = E$, where:

“A” is the per acre zone value are the same per acre zone values described in the linear rent schedule in section 2806.20(c);

“B” is the encumbrance equaling 10 percent;

“C” is the rate of return equaling 5.27 percent;

“D” is the annual adjustment factor equaling the average annual change in the IPD–GDP for the 10-year period immediately preceding the year that the NASS census data becomes available; and

“E” is the annual per acre zone rate. The BLM will adjust the per acre zone rates each year, based on the average annual change in the IPD–GDP, as described in section 2806.22(a). Adjusted rates are effective each year on January first.

Under section 2806.62(a)(2), counties (or other geographical areas) are assigned a Per Acre Zone Value on the wind energy acreage rent schedule, based on the State-specific percent of the average land and building value

published in the NASS Census. The Per Acre Zone Value is a component of calculating the Per Acre Zone Rate under paragraph (a)(1) of this section. As specified in new section 2806.62(a)(3), the initial assignment of counties to the zones on the wind energy acreage rent schedule will be based upon the NASS Census data from 2012 and be established for calendar years 2016 through 2020. Subsequent reassignments of counties will occur every 5 years following the publication of the NASS Census, as described in section 2806.21. State-specific percentage factors will be recalculated once every 10 years at the same time the linear rent schedule is updated, as described in section 2806.22(b).

Section 2806.62(a)(2) provides the calculation to establish a State-specific percent factor that represents the difference between the improved agricultural land values provided by NASS and the unimproved rangeland values that represent BLM land. The calculation for determining the State-specific percent factor is $(A/B) - (C/D) = E$, where:

“A” is the NASS Census statewide average per acre value of non-irrigated acres;

“B” is the NASS Census statewide average per acre land and building value;

“C” is the NASS Census total statewide acres in farmsteads, homes, buildings, livestock facilities, ponds, roads, wasteland, etc.;

“D” is the total statewide acres in farms; and

“E” is the State-specific percent factor or 20 percent, whichever is greater.

The county average per acre land and building values that exceed the 20 percent threshold for solar and wind energy development are as follows for the BLM managed lands:

TABLE OF STATE-SPECIFIC FACTORS AND OTHER DATA FOR APPLICABLE STATES

State	Existing regulations and proposed rule: nationwide 20 percent factors (%)	Final rule state-by-state calculated factors (%)	Final rule state-specific factors (%)
Alaska	20	12	20
Arizona	20	49	49
California	20	51	51
Colorado	20	24	24
Idaho	20	29	29
Montana	20	12	20
Nevada	20	16	20
New Mexico	20	24	24
North Dakota	20	5	20
South Dakota	20	5	20
Oregon	20	2	20
Texas	20	-1	20
Utah	20	54	54

TABLE OF STATE-SPECIFIC FACTORS AND OTHER DATA FOR APPLICABLE STATES—Continued

State	Existing regulations and proposed rule: nationwide 20 percent factors (%)	Final rule state-by-state calculated factors (%)	Final rule state-specific factors (%)
Washington	20	21	21
Wyoming	20	16	20
Average	20	21	27

The following table lists the paragraphs where the wind energy grant provision parallels the solar energy

provision for the same topic. The discussion for each relevant wind energy provision is found in this

preamble under the associated solar energy provision.

Topic	Wind	Solar
Acreage Rent	43 CFR 2806.62(a)	43 CFR 2806.52(a).
Per acre Zone Rate	43 CFR 2806.62(a)(1)	43 CFR 2806.52(a)(1).
Assignment of Counties	43 CFR 2806.62(a)(2)	43 CFR 2806.52(a)(2).
Initial Assignment of Counties	43 CFR 2806.62(a)(3)	43 CFR 2806.52(a)(3).
Acreage Rent Payment	43 CFR 2806.62(a)(4)	43 CFR 2806.52(a)(4).
Acreage Rent Adjustments	43 CFR 2806.62(a)(5)	43 CFR 2806.52(a)(5).
Obtain a Copy of Rent Schedule	43 CFR 2806.62(a)(7)	43 CFR 2806.52(a)(6).
MW Capacity Fee	43 CFR 2806.62(b)	43 CFR 2806.52(b).
MW Rate	43 CFR 2806.62(b)(1)	43 CFR 2806.52(b)(1).
MW Rate Schedule	43 CFR 2806.62(b)(2)	43 CFR 2806.52(b)(2).
MW Rate Adjustments	43 CFR 2806.62(b)(3)	43 CFR 2806.52(b)(3).
MW Rate Formula	43 CFR 2806.62(b)(3)(i)	43 CFR 2806.52(b)(3)(i).
Rate of Return	43 CFR 2806.62(b)(3)(ii)	43 CFR 2806.52(b)(3)(ii).
MW Rate Phase-in	43 CFR 2806.62(b)(4)	43 CFR 2806.52(b)(4).
Scheduled Rate Adjustment	43 CFR 2806.62(d)	43 CFR 2806.52(d).
Initial Rates Used	43 CFR 2806.62(d)(1)	43 CFR 2806.52(d)(1).
Acreage Rate Adjustment	43 CFR 2806.62(d)(2)	43 CFR 2806.52(d)(2).
MW Rate Adjustment	43 CFR 2806.62(d)(3)	43 CFR 2806.52(d)(3).
MW Rate Phase-in	43 CFR 2806.62(d)(4)	43 CFR 2806.52(d)(4).
Stage of Development	43 CFR 2806.62(d)(5)	43 CFR 2806.52(d)(5).
Existing Grants	43 CFR 2806.62(d)(6)	43 CFR 2806.52(d)(6).

Section 2806.62(a)(6) is added to this final rule to explain that holders of wind energy development grants must pay acreage rent as described in section 2806.62(a), except that for holders of wind energy development grants, the acreage rent will be phased in as described in section 2806.62(c).

Section 2806.62(b)(4)(i) addresses the term of the MW rate phase-in. Paragraphs (b)(4)(i)(A), (B), and (C) of this section address the percentages of the phase-in. See section 2806.52(b)(4)(i) for a discussion of the term of the MW rate phase-in and paragraphs (b)(4)(i)(A), (B), and (C) for the percentages of the phase-in. No change is made to the final rule, other than the change made for consistency with section 2806.52(b)(4)(i).

New section 2806.62(b)(4)(ii) addresses the MW rate phase-in for a staged development. Paragraph (b)(4)(ii)(A) of this section addresses the percentages of the phase-in and paragraph (b)(4)(ii)(B) addresses the calculation of the rent for the phase-in of a staged development. See section 2806.52(b)(4)(ii) for a discussion of the

MW rate phase-in for a staged development, paragraph (b)(4)(ii)(A) for the percentages of the phase-in, and paragraph (b)(4)(ii)(B) for the calculation of the rent for the phase-in of a staged development.

New section 2806.62(b)(4)(iii) states that the MW rate will be implemented as described in section 2806.62(c).

Comment: A comment noted that the BLM has not yet designated any wind energy zones or other preferred wind energy development areas that would become a DLA. Without any such areas designated for wind energy, the BLM's rule would put wind energy at a disadvantage in comparison to solar energy since wind energy would not be able to benefit from the incentives available for development in such areas.

Response: The BLM agrees that there are currently no wind energy development areas and that wind energy developers cannot yet benefit from the incentives provide for DLAs in subpart 2809 of this final rule. The BLM intends to establish wind energy DLAs in the future. However, this would be done through amending or revising a land use

plan, which can take several years. Therefore, the BLM has added section 2806.62(c) to this final rule to explain how the BLM will implement the acreage rent and MW capacity fee for wind energy grants.

Developers that submitted an application prior to the publication of the proposed rule would not have known the potential incentives for developing inside a DLA. This final rule provides a payment reduction to developers that had committed to a project on the public lands before this rule was proposed. However, developers that submitted applications after the publication of the proposed rule were aware of the BLM's proposed rule and incentives and knew that they did not qualify for these incentives.

Section 2806.62(c) implements this payment reduction. Specifically, section 2806.62(c) applies to all wind energy development grants that have made a payment for billing year 2016, or for which an application to the BLM was filed before September 30, 2014. This is explained in the following paragraphs.

Under paragraph 2806.62(c)(1) of this section, the BLM will reduce the acreage rent and the MW capacity fee. The BLM will compare the total annual payment of the acreage rent and MW capacity fee for 2017 to the total annual payment currently required by policy for the 2016 billing year. Any net increase in costs to a right-of-way holder will be reduced by 50 percent for 2017 billing year. This one-year reduction is intended to ease the transition for grant holders from the current policies to this final rule. If 2017 is the first year for which you make an annual payment, the phase-in described under section 2806.52(b)(4) will apply without an implementation reduction of 50 percent. The rates established by policy will remain in effect until 2017 for rights-of-way that are not issued under subpart 2809 of this final rule in order to provide notice to existing holders of the adjusted rent and fees.

Section 2806.62(c)(2) explains how the BLM will implement the acreage rent and MW capacity fee for wind energy grants for which an application to the BLM was filed before September 30, 2014. In addition to the timely filing requirement, a grant holder must also have an accepted POD and cost recovery agreement established before September 30, 2014.

The BLM intends for this section to apply to applications that were filed before the BLM issued the proposed rule on September 30, 2014. Anyone who submitted an application before this

date would not have known about the proposed requirements of the final rule, including updates to the payment requirements and the incentives for developing inside a DLA.

Under paragraph (c)(2)(i) of this section, the BLM will reduce the acreage rent of the grant for the first year by 50 percent. This reduction applies only to the first year's annual payment, even if it is for a partial year. If the BLM requires an upfront payment for the first partial year and next full calendar year, only the partial year will be reduced by 50 percent. The BLM may require such payment for the year in advance for rights-of-way authorized consistent with section 2806.12 of this final rule. No reduction will be applied to the acreage rent for the subsequent years of the grant.

Under paragraph (c)(2)(ii) of this section when the project has reached a point where the BLM requires a MW capacity fee payment, the MW capacity fee will be reduced by 75 percent for the first and second year and 50 percent for the third and fourth year of the grant. The first year is the initial partial year, if any, after electricity generation begins. The fifth and subsequent years will be charged at 100 percent of the MW capacity fee. This reduction applies to each approved stage of development.

No further comments were received and no other changes were made to this section, beyond those that were already discussed in this preamble in connection with section 2806.52.

Section 2806.64 Rents and Fees for Wind Energy Development Leases

The title of this section was revised by adding “and fees” and removing “inside designated leasing areas.” This was done to be consistent with the title of section 2806.54.

See section 2806.54 for a discussion of all components of rent for a wind energy development lease, except for section 2806.54(a)(1), which discusses the per acre zone rates. Section 2806.54(a)(1) does not apply to wind energy development grants and leases because solar and wind energy acreage rents are calculated using different encumbrance factors. Section 2806.64(a)(1) addresses the per acre zone rate for wind energy leases. See section 2806.54(a)(1) for a discussion of acreage rent.

Section 2806.64(a)(1) addresses per acre zone rates for wind energy leases. See section 2806.62(a)(1) for a discussion of acreage rent, which differs from solar energy development. The per acre rents are calculated using the methodology discussed in section 2806.62(a)(1), which reflects the 10 percent encumbrance factor for wind energy development.

The following chart lists the paragraphs where the wind energy lease provisions parallel the solar energy provisions for the same topic. The discussions for each relevant wind energy provision are found in the preamble under the associated solar energy provision.

Topic	Wind	Solar
Acreage Rent	43 CFR 2806.64(a)	43 CFR 2806.54(a)
Per acre Zone Rate	43 CFR 2806.64(a)(1)	43 CFR 2806.54(a)(1)
Assignment of Counties	43 CFR 2806.64(a)(2)	43 CFR 2806.54(a)(2)
Acreage Rent Payments	43 CFR 2806.64(a)(3)	43 CFR 2806.54(a)(3)
Acreage Rent Adjustments	43 CFR 2806.64(a)(4)	43 CFR 2806.54(a)(4)
MW Capacity Fee	43 CFR 2806.64(b)	43 CFR 2806.54(b)
MW Rate	43 CFR 2806.64(b)(1)	43 CFR 2806.54(b)(1)
MW Rate Schedule	43 CFR 2806.64(b)(2)	43 CFR 2806.54(b)(2)
MW Rate Adjustments	43 CFR 2806.64(b)(3)	43 CFR 2806.54(b)(3)
MW Rate Phase-in	43 CFR 2806.64(c)	43 CFR 2806.54(c)
Years 1–10	43 CFR 2806.64(c)(1)	43 CFR 2806.54(c)(1)
Years 11–20	43 CFR 2806.64(c)(2)	43 CFR 2806.54(c)(2)
Years 21–30	43 CFR 2806.64(c)(3)	43 CFR 2806.54(c)(3)
MW Capacity Fee if Renewed	43 CFR 2806.64(c)(4)	43 CFR 2806.54(c)(4)
Scheduled Rate Adjustment	43 CFR 2806.64(d)	43 CFR 2806.54(d)
Initial Rates Used	43 CFR 2806.64(d)(1)	43 CFR 2806.54(d)(1)
Acreage Rate Adjustment	43 CFR 2806.64(d)(2)	43 CFR 2806.54(d)(2)
MW Rate Adjustment	43 CFR 2806.64(d)(3)	43 CFR 2806.54(d)(3)
MW Rate Phase-in	43 CFR 2806.64(d)(4)	43 CFR 2806.54(d)(4)
Stage of Development	43 CFR 2806.64(d)(5)	43 CFR 2806.54(d)(5)
MW Capacity for a Staged Development	43 CFR 2806.64(c)(5)	43 CFR 2806.54(c)(5)
Rent for Support Facilities	43 CFR 2806.66	43 CFR 2806.56

No comments were received on this section, and no changes were made from the proposed to the final version of this section, beyond those discussed in connection with section 2806.54.

Section 2806.66 Rent for Support Facilities Authorized Under Separate Grants

This section states that if a wind energy development project includes separate right-of-way authorizations for support facilities such as wells, control structures, staging areas, or linear rights-of-way (e.g., roads, pipelines, transmission lines, etc.), then the rent schedule will be determined using the Per Acre Rent Schedule for linear facilities found at section 2806.20(c). No comments were received on this section, and no changes were made from the proposed to the final version of this section, beyond those discussed in connection with section 2806.56.

Section 2806.68 Rent for Energy Development Testing Grant(s)

Section 2806.68(a) describes the rent for any energy site-specific testing grant. A minimum rent is established as \$100 per year for each grant issued. Under this section, rent is set by incorporating in this final rule the site-specific rent amount from IM 2009–043, Wind Energy Development Policy. Site-specific grants are authorized only for one site and do not allow multiple sites to be authorized under a single grant; however, a single entity may hold more than one grant. If a BLM office has an approved small site rental schedule, that office may use the rent amount established in the small site rental schedule, so long as the rent schedule charges more than the \$100 minimum rent per year found in the regulations. Since small site rental schedules are provided to the BLM by the Department's Office of Valuation Services, they represent a third party determination of market value. In lieu of annual payments for a site-specific testing grant, a grant holder may pay for the entire 3-year term of the grant. See sections 2801.9(d)(1) and 2805.11(b)(2)(i) of this preamble for further discussion of site-specific energy testing grants.

Consistent with comments received and discussed under section 2801.9 of this preamble, the title of this section is changed from the proposed rule to read as shown above. A similar change was made for the title of paragraphs (a) and (b) of this section. These changes are made in order to ensure the headings of the rule are consistent with revisions to the final rule that will allow site-specific and project-area testing to be

available for both solar and wind energy testing.

Section 2806.68(b) describes the rent for a wind energy project-area testing grant. A per-year minimum rent is established at \$2,000 per authorization or \$2 per acre for the lands authorized by the grant, whichever is greater. The appraisal consultation report by the Office of Valuation Services supports the rent amounts established in this final rule. Project-area grants may authorize multiple meteorological or instrumentation testing sites. There is no additional charge or rent for an increased number of sites authorized under such grants. See sections 2801.9(d)(2) and 2805.11(b)(2)(ii) of this preamble for further discussion of project-area energy testing grants.

No further comments were received on this section and no additional changes were made in the final rule.

Section 2806.70 How will the BLM determine the payment for a grant or lease when the linear, communication use, solar energy, or wind energy payment schedules do not apply?

Section 2806.70 is redesignated from existing section 2806.50 and is retitled as shown above. This section provides guidance on how the BLM determines the payment for a grant or lease when the linear rent schedule, the communication use rent schedule, the solar acreage rent and MW capacity fee provisions, or the wind acreage rent and MW capacity fee provisions are not applicable.

The title of this section is amended by replacing "rent" with "payment" in two places. This final rule introduces the concept of MW capacity fees, which are a payment to the BLM for the commercial utilization value of the public lands, above the rural land values. The term "payment" includes both rents and fees, which is why it was selected. No other change is intended by this revision.

The only other change to this redesignated section is that solar and wind energy rights-of-way are now included in the listed rent schedules. No comments were received and no other changes are made from the proposed rule to the final rule.

Subpart 2807—Grant Administration and Operation

Section 2807.11 When must I contact BLM during operations?

This section is revised to make it clear that you must notify the BLM when your use requires a substantial deviation from the issued grant. Under the changes made to section 2807.11(b),

"substantial deviations" from the right-of-way grant now require an amendment to the grant. "Substantial deviations" include changing the boundaries of the right-of-way, major improvements not previously approved by the BLM, or a change in use for the right-of-way. Substantial deviations to a grant may require adjustment to a grant or lease rent and fees under subpart 2806, or bonding requirements under subparts 2805 and 2809.

Consistent with other revisions to the final rule intended to improve readability, the BLM revised paragraph (b) of this section to read as "the BLM's" instead of "our." This revision is intended to improve understanding of who the BLM is referring to in the final rule.

Comment: One comment asked the BLM to narrow the circumstances under which a right-of-way holder must notify the BLM, suggesting that these reporting requirements be limited to changes that necessitate an assignment under the standards identified in section 2807.21(h).

Response: The requirement to report changes in partners, financial conditions, or business or corporate status is a requirement of the existing regulations found under section 2807.11(c). Section 2807.11(c) was not proposed for revision and is not revised or redesignated by this final rule. In addition, the BLM must have accurate and up-to-date information about right-of-way holders in order to facilitate its management of the public lands.

Paragraph (d) of this section requires you to contact the BLM when site-specific circumstances or conditions result in the need for you to propose changes to an approved right-of-way grant, POD, site plan, or other procedures that are not substantial deviations in location or use. Examples of proposed "minor deviations" include changes in location of improvements in the POD or design of facilities that are all within the existing boundaries of an approved right-of-way. Other such proposed non-substantial deviations might include the modification of mitigation measures or project materials. For purposes of this provision, project materials include the POD, site plan, and other documents that are created or provided by a grant holder. These project materials are a basis for the BLM's inspection and monitoring activities and are often appended to a right-of-way grant, which is why the BLM needs to understand any changes to those materials. The requested changes may be considered as grant or lease modification requests. Proposals for non-substantial deviations

will require review and approval by the authorized officer or other appropriate personnel. The preliminary application review meetings found under section 2804.12 and public meetings found under section 2804.25 are not required for an assignment.

Paragraph (e) requires that right-of-way holders contact the BLM to correct discrepancies or inconsistencies.

Section 2807.17 Under what conditions may the BLM suspend or terminate my grant?

Section 2807.17(d) contains the provisions formerly located at section 2809.10. This section was redesignated in order to make room for the renewable energy right-of-way leasing provisions. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2807.21 May I assign or make other changes to my grant or lease?

Some revisions were made to this section in response to comments, which are discussed in the following paragraphs. A summary of other revisions to this section is included after these comments and responses.

Comments: Some comments noted confusion over the BLM's requirements for name changes and assignments, specifically, what constitutes a name change or assignment. Additionally, comments noted that mergers and acquisitions are not assignments and that a name change or assignment should not be the basis for or occasion on which the BLM redrafts the terms and conditions of right-of-way agreements.

Response: Section 2807.21 is revised to provide clarity on the BLM's requirements for assignments and name changes. Section 2807.21(b) and (c) of the proposed rule have been combined into section 2807.21(b) in this final rule. As a result of these changes, several paragraphs are also redesignated in the final rule. The BLM agrees with commenters that name changes should not necessitate the rewriting of the terms and conditions of a right-of-way agreement.

The BLM disagrees with the commenter equating mergers and acquisitions with name changes. A merger or acquisition is different in character as they can result in material changes to the corporate structure under which a right-of-way grantee or leaseholder operators. Such changes can affect financial positions or the technical capability of a parent company. As a result, the BLM determined that it was appropriate to expand the definition of assignment in

both the final and proposed rules to include changes in ownership and other related change in control transactions, including "mergers or acquisitions." However, recognizing that there are changes in corporate structure within the same corporate family that may technically constitute change in control transactions, but that do not implicate BLM's concern about technical and financial capability of a grant- or leaseholder's parent, the BLM has revised section 2807.21(a)(2) and (b)(2) to clarify that change in control transaction within the scope of that provision do not include transactions or restructurings within the same corporate family.

When a right or interest in a right-of-way grant or lease is assigned from one party to another, the involved parties are identified as the assignor and assignee. The BLM generally evaluates the assignee, the party that is intended to receive the right or interest, as if they were a new applicant. The BLM may determine that additional terms and conditions are required when assigning the right or interest and would include them as a term or condition of the grant at the time of assignment. New terms and conditions could include the requirement to bond the authorized facility, such as in the case when a potential assignee of a grant has a poor history of meeting the terms and conditions of a BLM grant, that may have not applied to the assignor. The evaluation and determination of whether new terms and conditions should be applied would occur when the BLM considers the proposed conveyance of a right-of-way.

Other revisions to the terms and conditions that may occur with assignments are those which the BLM retains authority to revise, such as rents, fees, bonding, and other revisions identified under section 2805.15(e). Section 2805.15(e) allows the BLM to amend the terms and conditions of a right-of-way grant or lease as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment. Because any changes to the terms and conditions of a right-of-way grant or lease would occur after the completion of the agency action (the BLM's decision to approve the right-of-way), the BLM anticipates doing so through a separate action, generally initiated at the BLM's discretion and requiring its own decision-making process.

Updating corporate or individual filings within a State where only a name is changed, but the filing does not transfer a right or interest to another party, qualifies as a name change. Name

changes for a right-of-way grantee or lessee do not require a NEPA analysis and the right-of-way would not be subject to revision. When changing a name, the BLM does not issue a new right-of-way grant or lease, but would re-issue the same right-of-way grant or lease with the new name on it. This is because the BLM would be dealing with the same entity to which it had originally authorized the right-of-way. Name changes are an administrative action taken by the BLM to update its records showing the proper name of the entity it has authorized. In the case of a name change, there is no assignment, in whole or part, of any right or interest in a grant or lease.

A name change would occur if an entity had filed paperwork with a State for a name change. Re-issuing a grant or lease with the new name would only provide the BLM an opportunity to notify the right-of-way holder of updated rent, bonding, or other such revised provisions made under section 2805.15(e).

Section 2807.21 is amended by revising the section heading and existing paragraphs (a), (d), and (f); adding paragraphs (b), (g), and (h); and making other appropriate redesignations of the remaining paragraphs. We are further revising this section with a few changes made in the final rule in response to comments, which will be explained in greater detail in the discussion of each specific paragraph. The heading for this section is changed from "May I assign my grant?" to read as "May I assign or make other changes to my grant or lease?" The existing regulations do not cover all instances where an assignment is necessary and the section is revised to address situations where assignments may not be required. The changes are necessary to: (1) Add and describe additional changes to a grant other than assignments; (2) Clarify what changes require an assignment; and (3) Specify that right-of-way leases issued under part 2809 are subject to the regulations in this section.

Without the BLM's approval of a right-of-way assignment, a private party's business transaction would not be recognized by the BLM and this lack of recognition could hinder a new holder's management and administration of the right-of-way. This rule also clarifies the responsibilities of a grant holder should such private party transactions occur.

Paragraph (a) of this section is revised to describe two events that may necessitate an assignment: (1) A transfer by the holder of any right or interest in the right-of-way grant or lease to a third

party (e.g., a change in ownership); and (2) A change in control involving the right-of-way grant or lease holder such as a corporate merger or acquisition.

Paragraph (a)(1) in this final rule is revised by removing the word “voluntary” when describing a transfer. There are some situations, such as bankruptcy, when a transfer may be involuntary. The BLM did not intend to exclude those circumstances from this section.

Paragraph (a)(2) is revised to remove reference to changes in status as a “wholly owned subsidiary.” That provision created confusion and was removed. No additional comments were received and no further changes were made to this paragraph.

New paragraph (b) of this section is revised to clarify and remove ambiguities in this section of the rule that explains the circumstances that do not constitute an assignment, but may necessitate filing new or revised information. A change in the holder's name only does not require an assignment nor do changes in a holder's articles of incorporation. However, sometimes a change in a holder's name or articles of incorporation may indicate that an assignment occurred. The BLM will review the documentation filed with it in order to determine if a transfer in part or whole of the right-of-way has occurred or a change in control transaction of the grant-holder or lease holder has occurred.

This section is revised from the proposed to the final rule to help further explain these situations more clearly to the public. The introductory text of paragraph (b) of this section is revised to clarify that even though an assignment may not be necessary, some circumstances may necessitate filing new or revised information. Paragraphs (b)(1), (2) and (3) of this section provide examples for when this filing may be necessary. Paragraph (b)(1) of this section is added to this final rule to explain that transactions within the same corporate family do not constitute an assignment. Paragraphs (b)(2) and (3) of this section contain the provisions of proposed paragraphs (b) and (c) of this section with some minor revisions.

Existing paragraph (b) of this section is revised and redesignated as paragraph (c). As revised, this paragraph requires the payment of application filing fees in addition to processing fees. This revision promotes consistency between applications for assignments and other applications for rights-of-way. For example, the rule (at section 2804.12(c)(2)) now requires an application filing fee for solar and wind energy applications. As revised, new

paragraph (c) also provides that the BLM will not approve any assignment until the assignor makes any outstanding payments that are due. This paragraph is revised from the proposed to final rule by adding a provision stating that preliminary application review meetings are not required for an assignment.

Comments: Some comments stated that the pre-application requirements for would be burdensome for an assignments, name changes or even renewals and suggested excluding those requirements for assignments, name changes and renewals.

Response: Section 2807.21(c) and (h)(1) are revised to make clear that the pre-application (now known as preliminary application review) meetings are not required for assignments and name changes. No other revisions have been made to these paragraphs in response to this comment.

Existing paragraph (c) of this section is redesignated, unchanged, as paragraph (d) and is included in the final rule. Existing paragraph (d) of this section is revised and redesignated as paragraph (e). As revised, new paragraph (e) will except leases issued under revised 43 CFR subpart 2809 (i.e., right-of-way authorizations inside a DLA) from the BLM's authority to modify terms and conditions when it recognizes an assignment. This provision provides incentives for potential right-of-way lessee to develop lands inside DLAs.

The BLM revised the first sentence in paragraph (e) of this section from the proposed to final rule to clarify how an assignment is recognized. The BLM will approve an assignment in writing.

Comment: A comment requested clarification of the BLM's right to modify terms of a lease issued under subpart 2809. As written, the proposed rule would have prohibited the BLM from modifying a lease issued under subpart 2809 when approving an assignment. In addition, the comment requested clarification of the relationship between section 2805.15(e) and sections 2807.21 and 2887.11.

Response: The BLM agrees with this suggestion and in the final rule further clarification has been provided to show the relationship between section 2805.15(e) and this provision for leases issued under subpart 2809. Revised section 2807.21(e) now includes an additional statement to make clear that a lease will not be modified to include additional terms and conditions when approving an assignment, unless a modification is required under section 2805.15(e).

The BLM may, however, “require that you obtain, or certify that you have obtained, a performance and reclamation bond or other acceptable bond instrument” (see section 2805.20(a)) when approving an assignment. A bond is required for a right-of-way at the BLM's discretion and is always required for a solar or wind energy grant or lease. If a bond is required, the BLM must be certain that a bond is in place to ensure the protection of the public lands before approving an assignment.

In addition, section 2809.18(f) has been modified to be consistent with this provision. The statement that a lease will not be modified to include additional terms and conditions is specific to when the BLM completes an assignment. Under a separate action which may occur at the same time an assignment is completed, the terms and conditions may be modified if requested by a lessee pursuant to section 2805.12(e).

No revision has been made under section 2887.11 on this matter since leases issued under subpart 2809 cannot be assigned under section 2887.11.

Redesignated section 2807.21(f) provides that the BLM will process assignment applications according to the same time and conditions as in section 2804.25(d). This provision was formerly identified in the regulations as paragraph (e) of this same section. This provision applies the BLM's customer service standard to processing assignment applications. This paragraph has been revised to update the referenced citation, consistent with the revisions made to the final rule under section 2804.25.

Section 2807.21(g) explains that only interests in right-of-way grants or leases are assignable. A pending right-of-way application cannot be assigned. A revision is made to the second sentence of this paragraph, to be consistent with changes made under section 2804.30(g), that clarifies that competitively gained applications held by a preferred applicant do provide a right and interest in the public lands. This revision is made here to be consistent with similar changes made under section 2804.30(g).

Section 2807.21(h) addresses how a holder informs the BLM of a name change when the name change is not the result of an underlying change in control of a grant. These procedures are necessary to ensure that the BLM can send rent bills or other correspondence to the appropriate party. This new provision addresses several specific circumstances. For example, it requires any corporation requesting a name change to supply: (1) A copy of the

corporate resolution(s) proposing and approving the name change; (2) A copy of the acceptance of the change in name by the State or Territory in which it is incorporated; and (3) A copy of the appropriate resolution(s), order(s), or other documentation that shows the name change. Under this provision, the BLM could also modify a grant, or add bonding and other requirements, including additional terms and conditions when recognizing such changes. However, the only way that the BLM may modify a lease issued under subpart 2809 would be in accordance with section 2805.15(e), or as otherwise described in the regulations. Such modifications under section 2805.15(e) would be a result of changes in legislation, regulation, or to protect public health, safety, or the environment. Any such name change would be recognized in writing by the BLM.

Section 2807.21(h)(1) was modified from the proposed to final rule to improve readability. The first and second sentences were combined and “preliminary application review and public meetings” were added to the list of exempted requirements during a name change only. This change was made to remain consistent with revisions made under section 2807.21(b), which excludes applications for assignments from preliminary application review meetings and public meetings for solar or wind energy development projects and transmission lines with a capacity of 100 kV or more.

The BLM revised paragraph (h)(2) of this section from the proposed to final rule in order to clarify the differences in how a grant and lease may be modified during a name change. The BLM added new paragraphs (h)(2)(i) and (ii) in order to more clearly separate these situations. Paragraph (h)(2)(i) of this section explains that the BLM may modify a grant to add bonding and other requirements when processing a name change only. However, under paragraph (h)(2)(ii) of this section, the BLM may modify a lease issued under subpart 2809 in accordance with section 2805.15(e). This is not a change from the requirements proposed rule, but it may not have been clear from the way it was phrased. The final rule is intended to prevent any possible confusion.

Generally, the BLM intends to make changes to a grant or lease during a name change only to reflect relevant changes consistent with section 2805.15(e). This existing section explains the BLM’s right to “[c]hange the terms and conditions of your grant as a result of changes in legislation, regulation, or as otherwise necessary to protect public

health or safety or the environment.” The BLM will not make any other changes to lease issued under subpart 2809 as part of a name change only.

However, the BLM may take this opportunity to update other aspects of a grant, as appropriate. For example, under section 2805.20(a), the BLM will periodically review your bond for adequacy and may require a new bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant or lease. The BLM may determine that additional actions are necessary, such as updates to the bond (see section 2805.20(a)) or the 10-year updates to the payment provisions (see sections 2806.54 or 2806.64). If the BLM determines that these actions are necessary, they will be taken separate from the name change only as appropriate.

Paragraph (h)(3) of this section is revised in this final rule to read: “Your name change is not recognized until the BLM approves it in writing.” As proposed, the rule was not clear whether a name change would be recognized if submitted in writing to the BLM, or if approved in writing by the BLM. This revision makes it clear to readers of the final rule that it must be the BLM’s approval in writing to recognize a name change.

Comments: Some comments recommend that the financial information of the original owner or its subsidiary may be used to meet financial qualification requirements of the grantee when assigning or changing the name on a grant or lease.

Response: The BLM will only accept the financial or technical information of the holder of the authorization. The holder is the legally responsible party for the right-of-way and will be held as such under the regulations and any subsequent authorization. However, substitution of one entity’s financial and technical capabilities may be acceptable, provided that documentation showing the two entities are linked, such as in the case of a subsidiary company where the parent company asserts the technical or financial responsibilities of the subsidiary. No revision to the rule was made in response to this comment. No other comments were received or changes made to the final rule.

Section 2807.22 How do I renew my grant or lease?

The title for section 2807.22 is revised by adding “or lease” to the end of the sentence so that leases issued under subpart 2809 are covered by this section. Likewise, paragraphs (a), (b),

and (d) of this section are revised to include leases. Paragraphs (c) and (e) remain unchanged. A new paragraph (f) is also added to this section.

Paragraph (f) of this section explains how the BLM would ensure continued operations of a right-of-way during the renewal process. If a holder makes a timely and sufficient application for renewal, the grant or lease does not expire until the BLM acts upon the application for renewal.

The second part of this paragraph describes the circumstances in which the BLM would “reissue” a grant or lease instead of “renew” it. Most of the authorizations managed by the BLM are issued under FLPMA’s authority, but some remaining authorizations were issued before FLPMA was enacted. In this situation, the BLM would reissue the grant under FLPMA’s authority. Minor revisions are made to paragraph (f) to improve readability of this new paragraph.

This paragraph protects the interests of holders of rights-of-way who have timely and sufficiently made an application for the continued use of an authorization (see 5 U.S.C. 558(c)(1)), and is consistent with policy. In this situation, the authorized activity will not expire until the BLM evaluates the application and issues a decision. No comments were received and no other changes are made to the final rule.

Subpart 2809 Competitive Process for Leasing Public Lands for Solar and Wind Energy Development Inside Designated Leasing Areas

Existing subpart 2809, which formerly consisted of a single regulation (section 2809.10) pertaining to Federal agency right-of-way grants, is revised and redesignated as new paragraph (d) of section 2807.17. Existing section 2809.10(b) explains that Federal agencies are generally not required to pay rent for a grant. This paragraph is removed, not redesignated, since existing section 2806.14(a)(2) already addresses rental exemptions for Federal agencies and, therefore, section 2809.10(b) is no longer necessary.

Revised subpart 2809 is now dedicated to the competitive process for leasing public lands for solar and wind energy development.

Comment: Several comments raised concerns that the priority for handling solar or wind energy leases was unclear when compared to solar and wind grant applications under part 2804.

Response: Application prioritization is discussed under section 2804.35 of this rule, which specifically states that leases issued under this subpart having priority over grant applications. A new

section 2809.10(d) is added to the final rule, consistent with comments received and revisions made in section 2804.35, that clearly identifies the handling of leases issued under subpart 2809 have the highest priority with respect to solar and wind energy on the public lands.

Comment: Several comments suggest that regional mitigation strategies should be used for every designated leasing area and should be part of the land use planning process.

Response: BLM development of a regional mitigation strategy is not necessary prior to holding a competitive auction inside a DLA or otherwise authorizing solar or wind energy development. However, regional mitigation strategies further increase certainty to developers and stakeholders when considering a solar or wind energy development. The BLM believes that the regional mitigation strategies are a good tool to use when making decisions that would affect resources in certain areas, such as a DLA. Regional mitigation strategies provide a durable basis to evaluate mitigation for the impacted lands and the BLM may use such strategies when making land use planning decisions. The BLM is in the process of developing regional mitigation strategies for many SEZs, which qualify as DLAs under this final rule.

The BLM is currently in the process of establishing its mitigation policies and guidance, which include guidance for regional mitigation strategies. Consistent with this guidance, the BLM generally intends to prepare regional mitigation strategies, with opportunities for public review and engagement, before authorizing wind or solar energy development in DLAs, potentially including when the BLM designates DLAs in the future through land use planning.

Comment: One comment suggested that the BLM incorporate the FWS's Wind Energy Guidelines (WEG), which can be found on the Internet at http://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf, into the rule for pre-construction due diligence.

Response: The BLM did not revise the rule as a result of this comment. The BLM has a different scope of authority and responsibility in administering the public lands than the FWS and must take into account biological resources, cultural resources, and land uses consistent with FLPMA's mandate that public lands be used for multiple use and sustained yield for current and future generations. This is different than the FWS's authority and objectives which do not have a multiple use mandate and generally require limited

review for cultural resources. However, the BLM uses processes similar to the WEGs in the review and analysis of resources on the public lands. For wind energy site testing actions similar to steps 2 and 3 of the WEGs are completed prior to a BLM decision. Actions similar to steps 1 through 3 are incorporated into the BLM's processing of a development grant, as well as monitoring protocols that address similar issues as those in the steps of the WEGs.

Comments: Some comments suggest that all final granted right-of-way instrument terms and conditions, regardless of location, should be substantially the same, unless sufficiently justified.

Response: The BLM believes that it has adequate reason for differences in terms and conditions of the energy development projects issued as leases under subpart 2809, as compared to those issued as grants under subpart 2804. There are limited differences in leases and grants, which have been explained in great detail in this preamble. These differences are intended to incentivize development in DLAs, which the BLM has identified as preferred areas for solar or wind energy development, based on a high potential for energy development and lesser resource impacts. Consistent with SO 3285, which describes the need for strategic planning and a balanced approach to domestic resource development, the BLM believes that focusing solar and wind energy development in preferred areas would provide a benefit to the public by reducing potential resource conflicts.

The BLM identifies DLAs through its land use planning process, which requires the BLM to consider the effects of solar or wind energy developments in the area. Due to this prior planning process, the BLM is able to issue a lease almost immediately after holding an auction, because that type of use has already been approved for the area. Subsequent tiered NEPA analysis will generally be necessary for the BLM to evaluate the lease-holder's POD to ensure that it fits within the BLM's decisions before allowing development of the land.

Additionally, the rent and fee payment for leases issued under subpart 2809 are phased in over a longer period of time or updated less frequently than those issued under subpart 2804. The rent and fee payment structure is explained in more detail in sections 2806.50 through 2806.68 of this preamble. This difference in payment of the rent and fee allows the BLM to collect the determined fair market value

of the public lands while incentivizing solar and wind energy development in DLAs over other public lands.

No other comments were received or changes made to the final rule for this section.

Section 2809.10 General

Under section 2809.10, only lands inside DLAs will be available for solar and wind competitive leasing using the procedures under this subpart. Lands outside of DLAs may be offered competitively using the procedures under section 2804.35 of this rule. Under section 2809.10, the BLM may either include lands in a competitive offer on its own initiative or solicit nominations through a call for nominations (see section 2809.11).

A new paragraph (d) is added to this section in the final rule in response to comments on the proposed rule. Paragraph (d) states that the processing of leases awarded under this part will generally be prioritized ahead of grant applications, consistent with revisions made to section 2804.35, clarifying that leases generally have priority over grant applications. This revision is to show how the BLM will prioritize its handling of solar and wind energy development on the public lands. The BLM will generally prioritize leases because they are issued inside DLAs, which are the BLM's preferred areas for solar and wind energy development. The BLM recognizes that only a few wind energy DLAs have been identified to date, and therefore there are only limited opportunities for project proponents to obtain wind energy leases as opposed to grants. The BLM intends to consider this when prioritizing wind energy applications during this transition period, as the BLM develops additional wind energy DLAs. No other changes are made to the final rule for this section and no other comments were received.

Section 2809.11 How will BLM solicit nominations?

This section explains the process by which the BLM will request nominations for parcels of lands inside DLAs to be offered competitively for solar or wind energy development.

Under paragraph (a) of this section, "Call for nominations," the BLM requests expressions of interest and nominations for parcels of land located in a DLA. The BLM will publish a notice in the **Federal Register** for solar and wind energy development and may use other notification methods, such as a newspaper of general circulation in the area affected by a potential offer or the Internet. This final rule is revised to make notice in a newspaper an optional

form of public notice. This section's public notice requirements are consistent with revisions to other sections of this final rule and are described more fully in section 2804.23(c) of this preamble.

Paragraph (b) of this section, "Nomination submission," outlines the requirements for nominating a parcel of land for a competitive offer.

Paragraph (b)(1) of this section requires a payment of \$5 per acre for the parcel(s) nominated. This payment is nonrefundable, except when submitted by an individual or company that does not meet the qualifications identified in section 2809.11(d). The average area of solar and wind grant or lease ranges between 4,000 and 6,000 acres. The \$5 per acre fee is derived from an appraisal consultation report prepared by the Department's Office of Valuation Services and will be adjusted for inflation once every 10 years, using the change in the IPD-GDP for the preceding 10-year period. The appraisal consultation report provided a range of \$10-\$27 per acre per year with the nominal range being \$15-\$17 per acre as the fair market value for these uses of the public lands. The BLM is establishing the nomination fee below the indicated range in the analysis since the submission of a nomination does not ensure that the nominator would be the successful bidder.

The average annual change in the IPD-GDP from 2004-2013 is about 2.1 percent, which will be applied through 2025. The fee will be required only with a nomination and not on a yearly basis and this is noted under section 2809.11(b)(1). The nomination fee is lower than an application filing fee for grants issued under subpart 2804 in order to increase interest and encourage nominators to propose efficient use of the public lands inside DLAs. Payment of fair market value will be received through a combination of the bids (not including Federal administrative costs) received during a competitive process and the rents and MW capacity fees described in sections 2806.50 through 2806.68 of this final rule.

Nomination fees are collected under Sections 304(b) and 504(g) of FLPMA as cost recovery fees. The nomination fees will reimburse the BLM for the expense of preparing and holding the competitive process for lands inside a DLA. Furthermore, the nomination allows the BLM to see specifically what parcel of land is of interest to a developer and would inform the BLM of parcel configurations for a competitive process. A variable offset may be offered for qualified bidders who submitted

nominations. Variable offsets are discussed further in section 2809.16.

The BLM revised paragraph (b) of this section from the proposed to final rule to prevent confusion over how the BLM uses the IPD-GDP to adjust the nomination fees. This revision is consistent with the revision to section 2804.12(c)(2), which describes application filing fees. Both application filing fees and nomination fees may be adjusted once every 10 years. See the preamble discussion for section 2804.12(c)(2) for more information on this revision.

Paragraph (b)(2) of this section requires the nomination to include the nominator's name and address of record. This information is necessary for the BLM to communicate with the nominator about future leasing issues.

Paragraph (b)(3) of this section requires that a nomination be accompanied by a legal land description and map of the parcel of land in a DLA. This information will help the BLM in identifying parcels in the competitive offer.

Under paragraph (c) of this section, the BLM may consider informal expressions of interest. An expression of interest is an informal submission to the BLM, suggesting that a parcel inside a designated leasing area be considered for a competitive offer. An expression of interest only provides a tentative bidder's interest in a parcel(s) of land located inside a DLA. If the expression of interest identifies a specific parcel, it must be submitted in writing, include the legal land description of the parcel, and a rationale for its inclusion in a competitive offer. There is no fee required to make an expression of interest, but submission does not qualify a potential bidder for a variable offset, as would formal nominations.

Under paragraph (d) of this section, you must qualify to hold a grant or lease under section 2803.10 in order to submit a nomination.

Under paragraph (e) of this section, a nomination cannot be withdrawn, except by the BLM for cause, in which case nomination monies would be refunded. This clause parallels language in the BLM's other competitive process regulations and encourages serious nominations for parcels on public lands.

Comments: Some comments stated that nomination fees, as discussed under section 2809.11(b)(1), should reflect the cost for the BLM to plan and conduct a competitive lease process. In addition, one comment recommended that the nomination fee be set at \$5 per acre and be adjusted downward to a minimum of \$2 per acre for large parcels. In the event the entity that

nominates the parcel is not the successful bidder, then the nomination should be refunded to that party and assessed to the successful bidder.

Response: The BLM will maintain a flat rate fee for nominations. A tiered or sliding scale approach to such fees would create an unnecessarily complicated system. A flat fee ensures that such costs are consistent for each action and the expectation to meet the requirements are clear. In addition, nomination fees are kept as a non-refundable fee because they are a cost recovery payment to the BLM for expenses the agency incurs. These fees would be used by the BLM to prepare and hold a competitive offer. Submission of a nomination demonstrates a developer's seriousness for use of an area. No other comments were received and nor changes are made from the proposed rule to the final rule.

Section 2809.12 How will BLM select and prepare parcels?

This section provides that the BLM will identify parcels suitable for leasing based on either nominations, expressions of interest, or its own initiative. Before offering the selected lands competitively, the BLM and as appropriate, other Federal or State entities, will conduct studies, comply with NEPA and other applicable laws, and complete other necessary site preparation work. This work is necessary to ensure that the parcels are ready for competitive leasing, to provide appropriate terms and conditions for any issued lease, to appropriately protect valuable resources, and to be consistent with the BLM's plan(s) for the area.

Paragraph (b) of this section is revised from the proposed to final rule by adding "as applicable" after "other Federal agencies." This revision clarifies that other Federal agencies will be involved, as applicable, but may not be involved on all projects. It may not always be necessary to include other Federal agencies and those agencies may not want to participate.

Comments: Some comments recommended that the BLM should include a procedural requirement in the regulation that a regional mitigation strategy must be completed before the initiation of a competitive leasing process. It is also suggested that this approach would benefit the project proponents with enhanced certainty regarding compensatory mitigation costs. One comment specifically recommended the addition of the following text, "(b) work, including applicable environmental reviews and public meetings and publish the

availability of a final regional mitigation strategy, before”

Response: The BLM considered including a requirement to complete a regional mitigation strategy; however, the BLM did not revise the rule as a result of the comment because each competitive offer will vary based upon resource concerns, public, tribal, and developer issues, and government interests. The BLM is currently in the process of establishing its mitigation policies and guidance, which include guidance for regional mitigation strategies. Consistent with this guidance, the BLM intends to prepare regional mitigation strategies, with opportunities for public review and engagement, before authorizing wind or solar energy development in DLAs, potentially including when the BLM designates DLAs in the future through land use planning.

Section 2809.13 How will the BLM conduct competitive offers?

Under this section, the BLM may use any type of competitive process or procedure to conduct its competitive offer. Several options, such as oral auctions, sealed bidding, a combination of oral and sealed bidding, and others are identified in section 2809.13(a). Oral auctions are planned events where bidders are asked to orally bid for a lease at a predetermined time and location. Sealed bidding would occur when bidders are asked to submit bids in writing by a certain date and time. Combination bidding is when sealed bids are first opened and then afterward an oral auction would occur, with oral bids having to exceed the highest sealed bid.

Under paragraph (b) of this section, the BLM would publish a notice of competitive offer at least 30 days before bidding takes place in the **Federal Register** and through other notification methods, such as a newspaper of general circulation in the area affected by the potential right-of-way or the Internet. This section of the final rule is revised, consistent with revisions to other sections of this final rule, to make notice in a newspaper an optional method for public notice. See section 2804.23(c) of this preamble for further discussion of these revisions. Minor revisions are also made from the proposed to the final rule to paragraph (b)(5) of this section to improve readability. The word “factor” is added throughout paragraph (b)(6) of this section for the final rule. This is intended to help the reader understand that an offset factor is part of the variable offset that may be presented in

the notice of competitive offer. A notice of competitive offer must include:

1. The date, time, and location (if any) of the competitive offer;
2. The legal land description of the parcel to be offered;
3. The bidding methodology and procedures that will be used in conducting the competitive offer, including any of the applicable competitive procedures identified in section 2809.13(a);
4. The required minimum bid (see section 2809.14(a));
5. The qualification requirements for potential bidders (see section 2809.11(d));
6. If applicable, the variable offset (see section 2809.16), including:
 - i. The percent of each offset factor;
 - ii. How bidders may pre-qualify for each offset factor; and
 - iii. The documentation required to pre-qualify for each offset factor; and
7. The terms and conditions to be contained in the lease, including requirements for the successful bidder to submit a POD for the lands involved in the competitive offer (see section 2809.18) and the lease mitigation requirements.

Section 2809.13(b)(7) is revised in the final rule to include in the terms and conditions of a notice of competitive offer any mitigation requirements, including those for compensatory mitigation to address residual impacts associated with the right-of-way. This revision is made to clarify where the BLM will incorporate mitigation in its administrative processes. Including mitigation requirements in this final rule is discussed in greater detail in the general comment and responses portion of this preamble.

Under paragraph (c) of this section, the BLM will notify you of its decision to conduct a competitive offer at least 30 days in advance of the bidding if you nominated lands and paid the nomination fees required by section 2809.11(b)(1). No comments were received and no other changes are made from the proposed rule to the final rule.

Section 2809.14 What types of bids are acceptable?

Section 2809.14 explains the requirements for bids submitted under the competitive process outlined in this subpart.

Paragraph (a) of this section provides that your bid submission will be accepted by the BLM only if it included the minimum bid established in the competitive offer, plus at least 20 percent of your bonus bid, and you are able to demonstrate that you are qualified to hold a right-of-way by

meeting the requirements in section 2803.10. Consistent with comments received and revisions made to the final rule, the words, “or lease” are added to this paragraph of the final rule to help improve its clarity. As proposed, the rule only referenced a grant, which is defined in these regulations to include the term lease. For the final rule, language was added to make it clear that the qualifications to hold a lease are the same as to hold a grant.

Paragraph (b) of this section provides that a minimum bid will consist of three components. The first component is the amount required for reimbursement of administrative costs incurred by the BLM and other Federal agencies in preparing and conducting the competitive offer. Administrative costs include all costs required for the BLM to comply with NEPA plus any other associated costs, including costs identified by other Federal agencies. As mentioned in the general discussion section of this preamble, administrative costs are not a component of fair market value, but are used to reimburse the Federal Government for its work in processing a competitive offer and performing other necessary work.

The second component of the minimum bid is an amount determined by the authorized officer for each competitive offer. The BLM will consider known values of the parcel when determining this amount, which include, but are not limited to, the acreage rent and a megawatt capacity fee. The authorized officer will identify these factors and explain how they were used to determine this amount. The third component is a bonus bid submitted by the bidder as part of a bid package. This amount will be determined by the bidder.

Consistent with section 2804.30(e)(2)(ii) for notice of competitive offers outside of DLAs, the BLM has removed the reference to mitigation costs from section 2809.14(b)(2). Please see section 2804.30 of this preamble for further discussion on this topic.

In other BLM programs, the minimum bid is often a statutory requirement or is based on fair market value of the resource, but there are no statutory requirements for a minimum bid for the right-of-way renewable energy program. The acreage rent is based on the value of the land and the MW capacity fee is based on the value of the commercial use of the land. The BLM plans to base this minimum bid on factors such as these that are known values of the parcel. The minimum bid amount, how it was determined, and the factors used in this determination will be clearly

articulated in the notice of competitive offer for each parcel.

A minimum bid is not a determination of fair market value, but a point at which bidding may start. Fair market value will be received through a combination of rent, MW capacity fees, and competitive bidding and this process will determine what the market is willing and able to pay for the parcel. Payment of cost recovery fees is also required, but is not considered a part of the minimum bid. The minimum bid is paid only by the successful bidder and is not prorated among all of the bidders.

As described in paragraph (c) of this section, a bonus bid consists of any dollar amount that a bidder wishes to bid, beyond the minimum bid. The total bid equals the minimum bid plus any additional bonus bid amount offered. If you are not the successful bidder, as defined in section 2809.15(a), your bid will be refunded.

Comments: Two comments were received pertaining to this section. The first comment states that the proposed rule does not provide an effective mechanism for incentivizing solar development in SEZs by eliminating or significantly reducing developer costs associated with NEPA compliance.

Response: There are significant incentives to developers for leases issued under subpart 2809, including the up-front land use planning and other environmental work that the BLM will complete and the certainty that after winning a competitive auction inside a DLA, a successful bidder would be awarded a lease. In addition, the BLM offers variable offsets, longer phase-ins for MW capacity fees, and greater time between acreage rent and MW capacity fees rate updates for leases issued under subpart 2809 that are not available for grants issued under subpart 2804.

Comment: The second comment stated that the BLM should not include the potential for lands to be developed for solar energy generation when determining the minimum bid for a competitive offer.

Response: Section 2809.14(b)(2) describes how the BLM will consider known and potential land values. While other competitive processes, such as the BLM's coal program, include a statutory requirement for the minimum bid, the BLM has no such requirement for the solar or wind energy programs. Therefore, the BLM determined that it would be appropriate to tie the minimum bid to the known values of the parcel being auctioned. These known values, such as the acreage rent, would reflect the potential for lands to be developed for solar energy. This

minimum bid component will be explained in each notice of competitive offer.

Section 2809.15 How will the BLM select the successful bidder?

This section explains how the successful bidder is determined and what requirements they must meet in order to be offered a lease. The bidder with the highest total bid, prior to any variable offset, will be declared the successful bidder and may be offered a lease in accordance with section 2805.10. In paragraph (a) of this section, "will" is changed to "may." The BLM will not offer a lease if the successful bidder does not meet the requirements described in paragraph (d) of this section. As written, paragraphs (a) and (d) of this section were inconsistent with each other and this revision is intended to resolve this inconsistency.

The BLM will determine the appropriate variable offset percentage by applying the appropriate factors identified in section 2809.16, before issuing final payment terms. The specific factors will be identified in the competitive offer. If you are the successful bidder, your payment must be submitted to the BLM by the close of official business hours on the day of the offer or at such other time as the BLM may have specified in the offer notice. Your payment must be made by personal check, cashier's check, certified check, bank draft, or money order, or by any other means the BLM deemed acceptable. Your remittance must be payable to the "Department of the Interior—Bureau of Land Management." Your payment must include at least 20 percent of the bonus bid prior to application of the variable offset described in section 2809.16, and the total amount of the minimum bid specified in section 2809.14(b). Within 15 calendar days after the day of the offer, you must submit to the BLM the balance of the bonus bid less the variable offset (see section 2809.16) and the acreage rent for the first full year of the solar or wind energy lease as provided for in sections 2806.54(a) or 2806.64(a), respectively. Submit these payments to the BLM office conducting the offer or as otherwise directed by the BLM in the offer notice.

In section 2809.15(d) of this final rule, the BLM revised "will approve your right-of-way lease" to "will offer you a right-of-way lease." This change is for consistency in terminology with paragraphs (a) and (e) of this section, which refer to the offering of a lease and not its approval. Under paragraph (e) of this section, the BLM will not offer a lease if the requirements of section (d)

are not met. The BLM does not intend for this revision to change how it offers a lease to successful bidders.

Under section 2809.15(e), the BLM will not offer the successful bidder a lease, and will keep all money submitted, if the requirements of section 2809.15(d) are not met. In this circumstance, the BLM may offer the lease to the next highest bidder under section 2809.17(b) or re-offer the lands under section 2809.17(d). No comments were received and no changes are made from the proposed rule to the final rule.

Section 2809.16 When do variable offsets apply?

Section 2809.16 provides that a successful bidder inside a DLA may be eligible for a variable offset of the bonus bid (in essence, a bidding credit), based on the factors identified in the notice of competitive offer. Variable offsets are not available outside of DLAs.

In providing for these offsets, the BLM intends to promote thoughtful and reasonable development based upon known environmental factors and impacts of different technologies. The BLM believes providing these offsets will increase the likelihood that a project is developed, expedite the development of that project, and encourage development that will result in lesser resource impacts from the right-of-way. Overall, the BLM believes the structure of these offsets will help encourage the production of clean renewable energy on public lands, which is a benefit to the general public.

Pre-qualified bidders may be eligible for offsets limited to no more than 20 percent of the high bid. Factors for a bidder to pre-qualify may vary from one competitive lease offer to another and may include offsets for bidders with an approved PPA or Interconnect Agreement, among other factors.

For example, the BLM may apply a 5 percent offset factor to a bidder that has a PPA. This offset factor could encourage a bidder to secure an agreement before the offer, which could increase the likelihood of a project being developed and expedite the completion of such development. In the BLM's experience with solar and wind energy developments, a project is not always developed after a right-of-way is issued. Based on this experience, the BLM believes that it is appropriate to award an offset to a bidder with an agreement in place to sell power, because that bidder will be more likely to develop a project on the right-of-way. This could prevent the unnecessary encumbrance of a right-of-way being issued to a holder who never develops the intended project.

The BLM may also identify as an offset factor the submission of a plan showing a reasonable development scenario. For example, the BLM may apply a 5 percent offset factor to a bidder that would use a particular technology. The BLM may identify a preferred technology type that would reduce impacts to identified environmental or cultural resources on the proposed parcel.

The BLM anticipates selected factors for the offsets to be in increments of 5 percent. These will be reviewed at the BLM Washington Office for consistency and relevance prior to each competitive offer made in the first several years after publication of the final rule. The BLM intends to provide additional guidance on the use of these individual factors to ensure consistency between individual notices of competitive offer.

The BLM may offer a different percentage for each offset factor based on how qualified the bidder is for a specific offset factor. For example, the BLM may offer a 3 percent offset for an interim step in the PPA process or a 5 percent offset for a signed PPA. The BLM acknowledges that in some circumstances qualifying for these offsets may be difficult. For this reason, the BLM may offer incremental offset percentages to bidders that are working toward such qualifications. These offset factors (and their various increments) will be identified in the notice of competitive offer (see section 2809.13(b)(6)).

The notice of competitive offer will identify each factor for which BLM may grant a variable offset, and the corresponding maximum percentage offset that would be applied to a qualified bidder's bonus bid. The notice will also identify the documentation a bidder must submit to pre-qualify for the offset. The authorized officer will determine the total offset for each competitive offer, based on the parcel(s) to be offered and any associated environmental concerns or technological limitations.

As identified under paragraph (c) of this section, the factors for which the BLM may grant a variable offset in a particular lease sale include:

1. *Power purchase agreement.* This could be a signed agreement between the potential lessee and an entity that agrees to purchase the power generated from the solar or wind energy facility;

2. *Large generator interconnect agreement.* This would consist of a signed agreement from the holder of an electrical transmission facility and the potential lessee that power would be accepted on the grid controlled by the

holder to be transported to a power receiving source;

3. *Preferred solar or wind energy technologies.* This would be an incentive to use technologies for generating or storing solar or wind energy that would efficiently use public lands or reduce impacts to identified resources such as water;

4. *Prior site testing and monitoring inside the DLA.* This would consist of evidence that the potential lessee or others associated with the lessee had previously performed appropriate testing or monitoring to determine the suitability and capability of the site for establishment of a successful solar or wind energy generating facility;

5. *Pending applications inside the DLA.* This would be a situation where the potential lessee had previously filed for authorization to construct facilities inside the DLA;

6. *Submission of nomination fees.* These are required when submitting a formal nomination (see section 2809.11(b));

7. *Submission of biological opinions, strategies, or plans.* This could include biological opinions, bird and bat conservation strategies, and habitat conservation plans;

8. *Environmental benefits.* This factor would include any positive environmental considerations such as identifying and salvaging archaeological or historical artifacts, additional protection for protected plant or animal species, or similar factors;

9. *Holding a solar or wind energy grant or lease on adjacent or mixed land ownership.* This could show the bidder's vested interest in developing the right-of-way;

10. *Public benefits.* These could include documented commitments or agreements to provide jobs or other support for local communities or supporting local public purposes projects; or

11. *Other similar factors.* These could include support for other Federal Government programs or national security by providing power for defense purposes or meeting government purchase contracts.

The only changes made in the listed variable offset factors between the proposed and final rule is for Factor Number 7, and those made for clarity and consistency in the final rule, are described in greater detail in the response to comments.

Comment: One comment requested that the BLM not use the variable offset concept, as it is unworkable and would result in appeals by rejected bidders.

Response: Throughout the preambles to the proposed and final rules, the BLM

has explained DLAs and the various aspects of the competitive process for solar and wind energy in these areas. By creating incentives for prospective developers and encouraging various conditions that would lead to environmental and other public benefits, the use of a variable offset is an integral aspect of this process.

The BLM manages the public land under the principles of multiple use and sustained yield, but does not expect all interested stakeholders to agree with all of the BLM's decisions. This is, in part, the reason for the BLM's appeal process, allowing the public to seek an administrative remedy for the BLM's decisions by which they have been adversely affected. The BLM expects that there will be appeals or protests on decisions that are made regarding management of the public lands.

For each notice of competitive offer, the BLM will include the factor(s) of a variable offset, as well as the requirements a bidder must meet to qualify for each incremental percentage. Bidders, as well as the public, will have this information made available to them through the notice of competitive offer and be able to act according to their interests or concerns over the proposed actions. The variable offset is carried forward in the final rule.

Comment: A comment expressed confusion over how the BLM would implement the proposed factor Number 7 (*Timeliness of project development, financing and economic factors*), and if the potential for meeting project timelines was even possible as a variable offset factor since the reduction in bid money would precede the demonstration of meeting agreed-upon time frames. Acts of God and other such influences that are outside the bidder's control were noted as possible reasons a bidder that received such a factor offset may not be able to meet it.

Response: Proposed factor number 7 for timeliness is removed from the final rule. The BLM agrees with the comment that implementing a timeliness factor would be difficult. There are many reasons outside of a winning bidder's control that may cause a delay to the development of a project. The proposed criteria for timeliness offset factor is a desired objective for an incentive, but was determined too difficult to enforce.

Comment: Another comment stated that the BLM must not shortchange taxpayers or other landowners through a discount that unjustly encourages development of public lands rather than comparable private lands. The BLM must ensure fair market value for the use of public lands.

Response: The variable offset is not a discount to a developer for the use of public lands. It is an incentive provided to a developer of the public lands, that accounts for certain steps a developer has already taken in a particular designated leasing area. Factors of the variable offset may also address the reduction of resource impacts, such as when a less water intensive technology is used. The variable offsets recognize these early developer steps that could increase the certainty of the successful development of a lease area and assist the BLM in its management of the public lands under the multiple use and sustained yield principles. This increased certainty benefits the public by not having public lands unnecessarily encumbered by a lease that may not be developed and increases the likelihood that solar or wind power generation would occur on public lands.

Comment: A third comment believes that incentives for DLAs should be reached exclusively by reducing rents rather than a complicated structure of variable offsets, time limits, bonding provisions, authorization terms, and MW capacity fees, and that the BLM proposed incentives should be removed from the final rule. This comment specifically addressed some of the proposed factors as follows:

Comment (1): Factors 1 (Power purchase agreement) and 2 (Large generator interconnect agreement) cannot be attained without demonstrated site control.

Response (1): Although securing a PPA or large generator interconnect agreement (LGIA) may not be attainable without site control, the notice may identify interim steps toward meeting the requirements of the offset factor. The final rule allows for interim steps in each of these identified offset factors. The text of the rule cites that the "variable offset may be based on any of the following factors." The notice of competitive offer would include the specific criteria required to qualify for a factor of the variable offset under paragraphs (c)(1) and (2) of this section, including any interim steps toward those factors.

Comment (2): Factor 3 (Preferred solar or wind energy technologies) for preferred technologies should be removed as it could discriminate against certain technologies without having the expertise of an energy regulatory body (outside of the BLM's authority and expertise).

Response (2): The BLM has expertise in many areas, including the impacts that a certain a technology type may have on the public lands and its resources. This may include

technologies with fewer impacts to wildlife or visual resources, or technologies that consume less water. The BLM may choose to provide a variable offset factor for a preferred technology that reduces impacts to the public lands and resources. However, in some cases, the BLM may choose to consult with one of the national laboratories or State authorities for their expertise for some technologies which may be outside of the BLM's expertise to determine as a preferred technology.

Comment (3): The comment asserts that under section 2809.19(a)(1), applications that are filed prior to the publication of the draft land use plan amendment that establishes a DLA should not make a bidder eligible for factors (4) (prior site testing in a DLA) and (5) (pending applications in a DLA). This would only encourage the strategic filing of speculative applications after publication of the draft land use plan amendment in order to qualify for factors (4) and (5).

Response (3): Applications that are filed on public lands before the publication of a notice of intent or other form of public notice by the BLM for a land use plan amendment that are later designated as a DLA will continue to be processed by the BLM and not subject to the competitive offer process of subpart 2809. The filing of speculative applications will not prevent the BLM from holding competitive offers in a particular area.

If the BLM elects to hold a competitive offer for the DLA, the applicant may qualify for offset factors (4) or (5) if they chose to participate. The BLM believes that submitting an application after a notice of intent or other public notice, paying the application filing fee, and waiting for the BLM to hold a competitive offer, should qualify an applicant for variable offset factor 4 or 5.

Comment (4): Factor 6 (submission of nomination fees) is not an incentive if a bidder can submit an expression of interest, which requires no fee, and increase their bonus bid by the amount of the nomination fee that they would have paid, thereby increasing their chances of being the winning bidder.

Response (4): Neither submitting an expression of interest nor submitting a nomination will guarantee that the BLM selects that parcel for a competitive offer. However, if a developer has a particular parcel in mind, the payment of a nomination fee may be preferable so that they may qualify for a variable offset factor. In addition, 5 percent of the bonus bid may result in greater savings to the bidder than the amount submitted for the nomination fees.

Comment (5): Factors 8 (environmental benefits) and 10 (public benefits) are open to distortion and variability across field offices.

Response (5): The BLM intends that in each notice of competitive offer it will identify each applicable variable offset factor offered and specify how a bidder may qualify for each factor. The criteria listed in the final rule are intended to be broad and varied so that they can be adapted for each competitive offer.

Factor 9 is revised from the proposed to the final rule to include grants. As proposed, the factor could appear to only apply for adjacent leases. In this final rule, the BLM may authorize a grant under subpart 2804 inside a DLA, which may be adjacent to a parcel which is bid on. The parcel may also be adjacent to a grant that is outside the DLA. This revision clarifies that the BLM would consider the site control of adjacent lands, regardless of the instrument.

Comment: One comment suggests the following variable offsets be added: (1) A bird and bat conservation strategy for the project site; (2) A commitment to a specific right-of-way lease condition to obtain a bald and golden eagle protection act permit; (3) A plan to employ best available operation minimization strategies; and (4) agreement to: (a) Conduct monitoring and research with land-based WEG and Eagle Conservation Plan Guidance; (b) Provide this monitoring data to the public to facilitate a greater understanding to the wildlife impacts; and (c) implement avoidance measures to avoid impacts.

Response: A variable offset factor has been added in the final rule to account for biological opinions, strategies and plans. This factor has been added in the place of offset factor 7 which, as noted in an earlier response to comment, has been removed from this rule. New variable offset factor 7 reads as "Submission of biological opinions, strategies, or plans." This will encourage the early and thoughtful development of the public lands. To have such a plan or opinion completed at this point could lead to fewer biological resource impacts and quicker NEPA review of the project POD. The BLM does not expect many projects to complete a biological opinion at this point in the process, but interim steps toward such a plan would demonstrate the developer's commitment to protecting resources on public lands. Such interim steps could qualify a developer for this factor of a variable offset, which would be described in the notice of competitive offer.

No other comments were received and no other changes are made to this section.

Section 2809.17 Will the BLM ever reject bids or re-conduct a competitive offer?

This section identifies situations where the BLM may reject a bid, offer a lease to another bidder, re-offer a parcel, and take other appropriate actions when no bids are received. Under section 2809.17(a), the BLM could reject bids regardless of the amount offered. Bid rejection could be for various reasons, such as discovery of resource values that cannot adequately be mitigated through stipulations (*e.g.*, the only known site of a rare or endangered plant or for security purposes). If this occurs, the bidder will be notified and the notice will explain the reason(s) for the rejection and whether you are entitled to any refunds. If the BLM rejects a bid, the bidder may appeal that decision under section 2801.10. Minor revisions are made from the proposed to the final rule to improve readability of this section's title by adding the word "the" before BLM.

The BLM could offer the lease to the next highest qualified bidder if the first successful bidder is later disqualified or does not sign and accept the offered lease (see section 2809.17(b)).

Under paragraph (c) of this section, the BLM could re-offer a parcel if it cannot determine a successful bidder. This may happen in the case of a tie or if a successful bidder is later determined to be unqualified to hold a lease.

Under paragraph (d) of this section, if public lands offered competitively under this subpart receive no bids, the BLM could either reoffer the parcels through the competitive process under section 2809.13 or make the lands available through the non-competitive process found in subparts 2803, 2804, and 2805. If the lands are offered on a noncompetitive basis, the successful applicant would receive a right-of-way grant issued under subpart 2804, rather than a lease issued under subpart 2809, and the offsets described in section 2809.16 would not apply.

Comment: A comment stated that the right to appeal a rejected bid must be qualified (*i.e.*, not be a spurious appeal). The comment goes on to say that this may be remedied by the BLM: (1) Prohibiting the issuance of a stay against a lease award while there is a pending appeal filed under section 2801.10; and (2) Specifying that a successful appeal would not rescind a lease award, but instead result in an automatic 20 percent offset for the next DLA

competitive process in which the successful appellant participates.

Response: The BLM agrees that appeals should not be spurious or intended to disrupt the BLM's administration of the public lands. However, the BLM does not agree that it should prohibit the issuance of a stay in its regulations. The right to appeal a BLM decision, including the issuance of a stay, is an important part of the BLM's orderly administration of the public lands.

Should an appeal be successful in the IBLA, the BLM would not award a 20 percent variable offset to the appellant. A successful appeal may be grounds for a re-offer of the parcels or other similar action that would be consistent with the administrative status of the BLM decision that was appealed. Also, should a variable offset be awarded to successful appellants, it would likely incite further appeals from other unsuccessful bidders in the hopes to secure such a future credit. Therefore, the BLM will not provide for such variable offset awards in the rule for successful appellants. No other comments were received or changes made to the final rule for this section.

Section 2809.18 What terms and conditions apply to leases?

Section 2809.18 lists the terms and conditions of solar and wind energy leases issued inside DLAs.

Under paragraph (a) of this section, the term of a lease issued under subpart 2809 will be 30 years and the lessee may apply for renewal under section 2805.14(g). While the BLM will issue grants under subpart 2804 for a term up to 30 years (see section 2805.11), leases issued under subpart 2809 are guaranteed a lease term of 30 years.

Under paragraph (b) of this section, a lessee must pay rent and MW capacity fees as specified in section 2806.54, if the lease is for solar energy development or as specified in section 2806.64, if the lease is for wind energy development. Rent and MW capacity fees are discussed in greater detail in sections 2806.50 through 2806.68 of the section-by-section analysis. Minor revisions are made from the proposed to the final rule to improve readability, but any significant changes are discussed in detail in this preamble.

Under paragraph (c) of this section, a lessee must submit, within 2 years of the lease issuance date, a POD that: (1) Is consistent with the development schedule and other requirements in the POD template posted on the BLM's Web site http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html; and (2) Addresses all pre-development and

development activities. A POD is often required for rights-of-way under section 2804.25(c) of this final rule and is currently required for all renewable energy projects through policy. Due to their complexity, solar and wind energy development projects will always require a POD. The POD must provide site-specific information that will be reviewed by the BLM and other Federal agencies in accordance with NEPA and other relevant laws.

Under paragraph (d) of this section, a lessee must pay the reasonable costs for the BLM or other Federal agencies to review and process the POD and to monitor the lease. The authority for collecting costs is derived from Sections 304(b) and 504(g) of FLPMA that authorize reimbursement to the United States of all reasonable and administrative costs associated with processing right-of-way applications and other documents relating to the public lands, and in the inspection and monitoring of construction, operation, and termination of right-of-way facilities. Such costs may be determined based on consideration of actual costs. A lessee may choose to pay full actual costs for the review of the POD and the monitoring activities of the lease. Through the BLM's experience, a lessee is more likely to choose payment of full actual costs as this expedites the BLM's review and monitoring actions by removing administrative steps in cost estimations and verifying estimated account balances.

Under paragraph (e) of this section, a lessee must provide a performance and reclamation bond for a solar or wind energy project. Bond amounts for leases issued under subpart 2809 will be set at a standard dollar amount (per acre for solar, or per turbine for wind) for either solar or wind energy development. See section 2805.20 of this preamble for additional information on the determination of these bond amounts. As explained in the general discussion section of this preamble, the BLM does not intend to change the amount of a standard bond after the lease is issued unless there is a change in use. As previously discussed, these bond amounts were determined based on a review of recently bonded solar and wind energy projects.

Comments: Several comments were received on paragraph (e) of this section. One comment suggested that the BLM should require bonds that are tied to the actual cost of reclamation and mitigation of the project, rather than an arbitrary per acre or per project figure.

Response: It is the intent that these standard bond amounts would incentivize solar and wind energy

development in DLAs. Reclamation of the lands in these DLAs is anticipated to be less than other locations outside of DLAs as the resource impacts are not expected to be as great, and the land could, in turn, be used for solar or wind development again if a developer failed to complete their lease obligation in developing the land. Additionally, consistent with its interim policy guidance for offsite mitigation (IM 2013-142) consistent with the recently issued mitigation manual and handbook guidance, the BLM intends to prepare regional mitigation strategies before authorizing wind or solar energy development in DLAs. These plans may identify additional costs for mitigating residual impacts of the right-of-way.

As noted in the preamble for section 2805.20, the minimum and standard bond amounts are the same. The BLM recently completed a review of existing bonded solar and wind energy projects and based the standard bond amounts provided in this final rule on the information found during this review. When determining these bond amounts, the BLM considered potential liabilities associated with the lands affected by the rights-of-way, such as cultural values, wildlife habitat, and scenic values, and the mitigation and reclamation of the project site. The BLM used this review to determine an appropriate standard bond amount to cover the potential liabilities associated with solar and wind energy projects.

Comment: Another comment stated that both DLA and non-DLA bonding requirements should be the same. The BLM should use differences in rent to encourage development of DLAs.

Response: Bonding requirements for both grants issued under subpart 2804 and leases issued under subpart 2809 are established to protect the public lands. The requirements for leases are established using the same methodology as those minimum amounts established outside of a DLA. However, the standard bond amount recognizes that the impacts to resources and uses are likely to be less inside of a DLA than outside of a DLA, due to the BLM's effort to establish DLAs in areas where resource conflicts are expected to be lower. Furthermore, standard bond amounts increase the certainty for developers of costs when planning for and developing their project.

Comment: A comment recommended that the BLM reevaluate the standard bond amounts and identify a range commensurate with actual costs of decommissioning. The comment noted that the preamble to the proposed rule stated the range of solar bonding costs of \$10,000 to \$20,000 and wind bonding

costs of \$22,000 to \$60,000. This comment asked if the minimum and standard bond amounts chosen at the bottom or below the stated ranges were adequate.

Response: The BLM has considered the recommendation to identify a range of standard bond amounts, but intends to keep these amounts as proposed. In order to accommodate the wind turbines that pose lesser risk to resources, and consistent with revisions made in section 2805.20, the BLM is including in the final rule a \$10,000 standard bond amount for projects utilizing smaller turbines. Turbines with a nameplate capacity of one MW or greater will have a standard bond amount of \$20,000, consistent with the proposed rule. This is because these amounts represent bond figures that are representative of the impacts to the resources of the public lands and the intended management decisions of DLAs for solar or wind energy development. Should a developer default or fail to fulfill the lease terms, the BLM may pursue a competitive offer to lease those lands again. The full amount of the bond may not be used in this situation. The balance will be returned to the previous leaseholder upon the completion of reclamation activities. See section 2805.20(d) comment responses of this preamble for further discussion on the added \$10,000 bond amount.

BLM has determined that establishing the proposed standard bond amounts as proposed is appropriate. Using the proposed bond amounts reduces the potential for the BLM to secure bonds in amounts beyond what is necessary for the project. If a higher bond amount were selected, the BLM might over-bond the project, especially considering that the BLM has already identified these areas as having lower potential for resource impacts. Grant holders are still liable for damage done during the term of the grant or lease even if the bond amount does not cover the cost of reclamation.

The bonds collected for a project issued under subpart 2809 consider hazardous material liabilities, reclamation, and project site restoration. In addition to the required bond, BLM may require a mitigation fee to address adverse impacts resulting from the right-of-way authorization. Between securing the bond and collection of mitigation fees, the BLM believes that the impacts to the public lands are adequately protected.

A new provision (section 2809.18(e)(3)) has been added to this final rule to explain that lease holders for the testing sites that will be authorized under a lease in a DLA will

provide a standard bond amount of \$2,000 per site. This addition to the final rule is to make this section consistent with revisions to section 2801.9(d), which open up the site-specific and project-area testing authorizations to solar and wind energy. The standard bond amount for a lease issued under subpart 2809 is the same as a minimum bond amount in the proposed rule. Grants issued in a DLA for testing purposes will have a minimum bond amount as determined under section 2805.20. Testing and monitoring facilities include meteorological towers and instrumentation facilities.

For a solar energy development project, a lessee must provide a bond in the amount of \$10,000 per acre at the time the BLM approves the POD. See the discussion at section 2805.20(b) for additional information. For a wind energy development project, a lessee must provide a bond in the amount of \$10,000 or \$20,000 per authorized turbine before the BLM issues a Notice to Proceed or otherwise gives permission to begin construction on of the development. See section 2805.20(c) and (d) of this preamble for additional information.

The BLM will adjust the solar or wind energy development bond amounts for inflation every 10 years by the average annual change in the IPD-GDP for the preceding 10-year period, and round the bond amount to the nearest \$100. This adjustment would be made at the same time that the Per Acre Rent Schedule for linear rights-of-way is adjusted under section 2806.22.

The BLM revised paragraph (e)(4) of this section from the proposed to final rule for consistency with other sections of this final rule where the BLM uses the IPD-GDP to adjust an amount every 10 years. See the preamble discussion of section 2804.12(c)(2) for further information about this revision.

Under paragraph (f) of this section, a lessee may assign a lease under section 2807.21, and if an assignment is approved, the BLM would not make any changes to the lease terms or conditions, as provided in section 2807.21(e). See section 2807.21(e) of this preamble for further discussion of this topic, in response to a comment asking that we clarify the BLM's right to modify the terms of a lease issued under subpart 2809. We added language in paragraph (e) of this section to be consistent with section 2807.21(e) to state that changes made to a lease issued under this subpart will be made only when there is a danger to the public health and safety, environment, or a change to the statutory authority and other

responsibilities of the BLM. These changes would only be made in coordination with the lessee.

Under paragraph (g) of this section, a lessee must start construction of a project within 5 years and begin generating electricity no later than 7 years from the date of lease issuance, as specified in the approved POD. The approved POD will outline the specific development requirements for the project, but all PODs require a lessee to start generating electricity within 7 years. The 5 years to start construction and 7 years to begin generating electricity contained in the rule should allow leaseholders time to construct and start generation of electricity and give a leaseholder time to address any concerns that are outside of the BLM's authority. Such concerns include PPAs or private land permitting or site control transactions. A request for an extension may be granted for up to 3 years with a show of good cause and BLM approval. If a leaseholder is unable to meet this timeframe, and does not obtain an extension, the BLM may terminate the lease. No other comments were received or changes made to the final rule for this section.

Section 2809.19 Applications in DLAs or on Lands That Later Become DLAs

Section 2809.19 explains how the BLM processes applications for lands located inside DLAs or on lands that later become DLAs. Under the rule, lands inside DLAs will be offered through the competitive bidding process described in this subpart, and applications may not be filed inside these areas after the lands have been offered for competitive bid.

Section 2809.19 is revised from proposed to the final rule by adding a paragraph (a)(3) and redesignating proposed paragraphs (b) and (c) as paragraphs (c) and (d), respectively. The BLM also moved some provisions of proposed paragraph (a)(2) to a new paragraph (b). These changes are made to clarify how the BLM handles applications in areas that later become designated leasing areas. There is no change from the proposed requirements in the final rule.

Paragraph (a) of this section explains how the BLM will process applications filed for solar or wind energy development on lands outside of DLAs that subsequently become DLAs.

Under paragraph (a)(1) of this section, if an application is filed before the BLM publishes a notice of intent or other public announcement of intent for a land use plan amendment that considers designating an area for solar or wind energy, the BLM would continue to

process the application, which would not be subject to the competitive leasing offer process found in this subpart. After publication of this notice, the public will have been notified of the BLM's intent to create a DLA.

Under paragraph (a)(2) of this section, if an application is filed after the notice of the proposed land use plan amendment, the application will remain in a pending status, unless it is withdrawn by the applicant or the BLM denies it or issues a grant. The BLM made a minor revision to this section from the proposed rule by adding "or issues a grant." This revision gives the BLM the option to approve a grant in pending status, if it chooses. This revision is made because the proposed rule inadvertently omitted the possibility that a pending application could be approved, instead of only being withdrawn or denied.

New paragraph (a)(3) of this section is added in this final rule to explain that applications may resume being processed by the BLM if lands in a DLA later become available for application. Under paragraph 2809.17(d)(2), the BLM may make the lands in a DLA available for application in some circumstances. For example, the BLM may hold a competitive offer and receive no bids. In this situation, the BLM may make these lands available for application and would resume processing any applications that are pending on these lands. This is consistent with the proposed rule but is added to the final rule to clarify how the BLM will handle such applications in these circumstances.

Some provisions of proposed paragraph (a)(2) of this section are moved into new paragraph (b) in this final rule. These provisions remain mostly unchanged and are discussed as follows.

Under new paragraph (b) of this section, if the subject lands become available for leasing under this subpart, an applicant could submit a bid for the lands. Under new paragraph (b)(1) of this section, any entity with an application pending on a parcel that submits a bid on such parcel may qualify for a variable offset as provided for under section 2809.16.

Under paragraph (b)(2) of this section, the applicant may receive a refund for any unused application fees or processing costs if the lands described in the application are later leased to another entity under section 2809.15. This provision is revised consistent with changes made for application filing fees in this final rule, which are now a cost recovery payment. The BLM may use some of these fees in processing an

application and will refund any unused fees to the applicant.

Proposed paragraph (b) of this section is redesignated as paragraph (c) in this final rule. Under paragraph (c) of this section, the BLM will not accept a new application for solar or wind energy development inside DLAs after the effective date of this rule (see sections 2804.12(b)(1) and 2804.23(e), except as provided for by section 2809.17(d)(2).

Proposed paragraph (c) of this section is redesignated as paragraph (d) in this final rule. Under paragraph (d) of this section, the BLM can authorize short term (3-year) grants for testing and monitoring purposes inside DLAs. These would be processed in accordance with sections 2805.11(b)(2)(i) or 2805.11(b)(2)(ii). These testing grants may qualify an entity for a variable offset under section 2809.16(b)(4).

Comment: One comment was received pertaining to paragraph (a)(1) of this section. The comment stated that the pending application exception in the paragraph requires clarification. A pending project exemption should be tied to a notice of intent rather than a notice of availability (NOA) to avoid a number of filings made immediately after publication of a notice of intent. Also, a pending project exemption should apply to the potential competitive leasing of non-DLA lands under section 2804.30. In addition, the BLM should clarify that the rule would not apply to applications accepted and serialized or a grant issued before the rule takes effect.

Response: The BLM agrees in part with these suggestions. In this final rule, this section has been modified so that a notice of intent or other public notice will be the point at which the BLM determines that your application qualifies as a pending application. The notice of intent is specific to land use plan amendments that use an EIS for the analysis. Because a plan amendment may also be using an environmental assessment, which does not require a notice of intent, the BLM added the language, "other public announcement" into this section. The BLM believes that it is appropriate to continue processing applications that were submitted before the BLM provided public notice (e.g., through a notice of intent).

The final rule will apply to applications that are accepted and serialized as well as grants that are issued before this rule is effective. There may be exceptions to whether the rule will fully apply to an application or right-of-way grant. For example, application filing fees and preliminary application review meetings may not be

required for some pending applications. Applications do not confer land use rights to an applicant, and other provisions of the rule such as rent and fees may be determined at the time a right-of-way is authorized, not at the time an application is submitted. Therefore, under the provisions of new sections 2804.40 and 2805.12(e), you may request alternative requirements, stipulations, terms, and conditions from the BLM with a showing of good cause, and an explanation or reason for an alternative requirements, stipulations, terms, and conditions.

V. Section-by-Section Analysis for Part 2880

In addition to the revisions to its regulations governing rights-of-way for solar and wind energy development, the BLM is also revising several subparts of part 2880. These revisions are necessary to make rights-of-way administered under part 2880 consistent, where possible, with the policies, processes, and procedures for those administered under part 2800. Specific areas where we are making consistency changes include: Bonding requirements; determination of initial rental payment periods; and when you must contact the BLM, including grant, lease, and temporary use permit (TUP) modification requests, assignments, and renewal requests. The BLM has removed the provision found in the proposed rule regarding pre application requirements and fees for any pipeline 10 inches or more in diameter from this final rule. This is because, based on further analysis and comments received, the use of a 10-inch diameter pipeline was found not to be an appropriate measure that could readily provide a basis for additional requirements.

This final rule adds Section 310 of FLPMA to the authority citation for this part to clarify that FLPMA authority may be used in processing a pipeline right-of-way. The MLA authorizes the Secretary to approve MLA pipeline rights-of-way that cross Federal lands when those pipeline rights-of-way are administered by the Secretary or by two or more Federal agencies. Where the Secretary authorizes a pipeline right-of-way across lands managed by the Secretary, including any bureaus or offices of the Department, other authorities applicable to the management of those lands would generally apply to the authorization. We have cited FLPMA specifically because that authority, governing the management of the public lands generally, is the authority most commonly relied upon in such authorizations.

Subpart 2884—Applying for MLA Grants or TUPs

Section 2884.10 What should I do before I file my application?

In the proposed rule, this section included requirements for pre-application meetings when applying for a right-of-way for an oil or gas pipeline having a diameter exceeding 10 inches. Many comments were received concerning this proposal, including many comments stating that it was not a reasonable criterion to use in determining the need for pre-application meetings. After considering these comments and upon further evaluation of the proposal the BLM decided to not require these pre-application meetings. As a result, the proposed changes were not made to the regulations in this section.

Section 2884.11 What information must I submit with my application?

Section 2884.11 includes requirements for submitting applications. This section has been retitled from “What information must I submit in my application?” to read as shown above. This revision is consistent with the title revision of section 2804.12. Proposed requirements for pipelines with a diameter of 10 inches or more have been removed from this section in the final rule.

Section 2884.11(c)(5) is amended by adding a second sentence that further explains that your POD must be consistent with the development schedule and other requirements that are noted on the POD template for oil or gas pipelines at <http://www.blm.gov>.

Comment: One comment suggested that paragraph (c)(5) of this section be revised to read as follows: “The estimated schedule for constructing, operating, maintaining, and terminating the project (a POD). Your POD must address the elements specified on the POD template for oil and gas pipelines at <http://www.blm.gov>.” This suggestion would remove the requirement for the POD to be consistent with the development schedule in the POD template.

Response: The BLM did not make the suggested changes. The suggested revision to the rule would require that the applicant address each element of a POD, but would not require consistency with the POD template. This could allow a developer to acknowledge the development timeline, but not provide it to the BLM. It is important that applicants provide the necessary information to the BLM for the orderly administration of public lands, including the development schedule for

the POD. No other comments were received and no changes are made from the proposed to the final rule.

Section 2884.12 What is the processing fee for a grant or TUP application?

Section 2884.12 explains the fees associated with an application, including those that involve Federal agencies other than the BLM. The applicant may either pay the BLM for work done by those Federal agencies or pay those Federal agencies directly for their work. This authority was recently delegated to the BLM by the Secretary by Secretarial Order 3327.

Paragraph (b) of this section revises the processing fee schedule to remove the 2005 category fees. Paragraph (c) of this section provides instructions on where you may obtain a copy of the current processing fee schedule. These changes parallel those made to section 2804.14, which describe processing fees for grant applications. A further analysis of these changes can be found in that part of the section-by-section analysis. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2884.16 What provisions do Master Agreements contain and what are their limitations?

Section 2884.16 is revised to require that Master Agreements describe existing agreements with other Federal agencies for cost reimbursement associated with the application. This change parallels changes made in section 2804.18, which describes Master Agreements for all other rights-of-way. With the authority recently delegated by Secretarial Order 3327 to collect costs for other Federal agencies, it is important for the applicant, the BLM, and other Federal agencies to coordinate and be consistent regarding cost reimbursement. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2884.17 How will BLM process my Processing Category 6 Application?

Section 2884.17 explains how the BLM processes Category 6 applications and these changes parallel changes in section 2804.19. Under paragraph (e) of this section, the BLM may collect reimbursement for the United States for actual costs with respect to right-of-way applications and other document processing relating to Federal lands. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2884.18 What if there are two or more competing applications for the same pipeline?

Section 2884.18 parallels section 2804.23. Under paragraph (a)(1) of this section, the requirement to reimburse the BLM is expanded to allow for cost reimbursement from all Federal agencies for the processing of these right-of-way authorizations.

Under paragraph (c) of this section, the BLM may offer lands through a competitive process on its own initiative. Language is added to this paragraph to include “other notification methods, such as a newspaper of general circulation in the area affected by the potential right-of-way or the Internet.” This revision is consistent with other public notice sections of this rule. See section 2804.23(c) of this preamble for further discussion. No comments were received and no other changes are made from the proposed rule to the final rule.

Section 2884.20 What are the public notification requirements for my application?

Under section 2884.20, the phrase “and may use other notification methods, such as a newspaper of general circulation in the vicinity of the lands involved or the Internet” is added to paragraphs (a) and (d) to provide for additional methods to notify the public of a pending application or to announce any public hearings or meetings. This final rule is revised, consistent with changes made to other notification language throughout this rule, to make notice in a newspaper an optional method of notice. See section 2804.23(c) of this preamble for further discussion. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2884.21 How will BLM process my application?

Under section 2884.21, the BLM will not process your application if you have any trespass action pending for any activity on BLM administered lands (see section 2888.11) or have any unpaid debts owed to the Federal Government. The only application the BLM will process to resolve the trespass is for a right-of-way as authorized in this part, or a lease or permit under the regulations found at 43 CFR part 2920, but only after all outstanding debts are paid. This provision is added to provide incentives for the applicant to resolve outstanding debts or other infractions involving the Federal Government and parallels section 2804.25.

New language is added to paragraph (b) of this section stating that

outstanding debts are those currently unpaid debts owed to the Federal Government after all administrative collection actions have occurred, including administrative appeal proceedings under applicable Federal regulations and review under the APA. This language is added to be consistent with section 2804.25(d). No comments were received for section 2884.21, but comments were received and addressed under section 2804.25. The notification language contained in paragraph (d)(4) of this section is amended by adding the phrase “and may use other notification methods, such as a newspaper of general circulation in the vicinity of the lands involved or the Internet.” This section is revised, consistent with changes made to other notification language throughout this rule, to make notice in a newspaper an optional method of notice. See section 2804.23(c) of this preamble for further discussion.

Section 2884.22 Can BLM ask me for additional information?

Section 2884.22 describes what information the BLM may require in processing an application. This section was revised by changing the reference found in paragraph (a) from section 2804.25(b) to section 2804.25(c). This change was not proposed, but is made to be consistent with other changes made in this final rule. No other changes were made to this section.

Section 2884.23 Under what circumstances may BLM deny my application?

Section 2884.23 describes the circumstances when the BLM may deny an application. In the proposed rule, section 2884.23(a)(6), stated that the BLM may deny an application if the required POD fails to meet the development schedule and other requirements for oil and gas pipelines.

Comment: Several comments suggested that the BLM remove the 10-inch pipeline threshold requirement in the proposed rule.

Response: As noted previously in the preamble, the BLM removed the proposed requirements for pipelines “10 inch or larger in diameter” from the final rule. This includes requirements such as the pre-application meetings, the POD timeline, and other such requirements that are specific to pipelines 10 inches in diameter or larger. The timeliness requirement, among others associated with the large-scale pipeline projects description has been removed from the final rule.

Comment: One comment stated that the BLM should account for instances when a developer does not meet the

timeframe due to reasons outside of their control.

Response: The final rule adds a new section 2884.30 that parallels section 2804.40, both of which address situations in which a developer misses a timeframe or is unable to meet a requirement because of circumstances beyond its control. The preamble for section 2804.40 explains in greater detail the circumstances when an applicant may be unable to meet a requirement.

No other comments were received and no other changes made from the proposed rule to the final rule.

Section 2884.24 What fees do I owe if BLM denies my application or if I withdraw my application?

In the proposed rule, this section was consistent with section 2804.27. The proposed section would have required an applicant to pay any pre-application costs submitted under section 2884.10(b)(4). The BLM removed the “10 inches or larger in diameter” criteria used for determining large-scale pipeline projects from the final rule and as a result, requirements that are specific to large-scale pipeline projects are not carried forward in the final rule. This includes requirements such as the pre-application meetings, application submission, POD and other such requirements.

Section 2884.30 Showing of Good Cause

This section was not in the proposed rule. It is added here to clarify that if you cannot meet one or more of the right-of-way process requirements for a MLA application, then you may: (a) Show good cause as to why you cannot meet a requirement; and (b) Suggest an alternative requirement and explain why that requirement is appropriate. This request must be in writing and received by the BLM before your deadline to meet a requirement(s) has passed. This section is added to respond to comments requesting a way to meet the intent of the regulation if an applicant believes that a requirement(s) cannot be met. Additional discussion can be found in section 2804.40 of this preamble.

Subpart 2885—Terms and Conditions of MLA Grants and TUPs

Section 2885.11 What terms and conditions must I comply with?

Section 2885.11 explains the terms and conditions of a grant. Paragraph (a) of this section is revised by adding the phrase “with the initial year of the grant considered to be the first year of the

term.” This revision clarifies what BLM considers to be the first year of a grant. For example, a 30-year grant issued on September 1, 2015, will expire on December 31, 2044, and have an effective term of 29 years and 4 months. This is consistent with law, policy, and procedures. For all grants issued under parts 2800 and 2880 with terms greater than 3 years, the actual term will include the number of full years, including any partial year. The term for a MLA grant differs from the term for rights-of-way authorized under FLPMA, as FLPMA rights-of-way may be issued for periods greater than 30 years, while a MLA right-of-way may be issued for a maximum period of 30 years. If a 30 year FLPMA grant is issued on a date other than the first of a calendar year, that partial year will count as additional time of the grant (see discussion of section 2805.11 earlier in this preamble section).

A new sentence is added to the end of section 2885.11(b)(7) referencing new section 2805.20 that explains the bonding requirements for all rights-of-way. The introduction of this paragraph is revised consistent with the introduction made to paragraph 2805.20(a) that has the similar provision by which the BLM may require a bond. The introduction of this paragraph now reads: “The BLM may require that you obtain,” instead of “If we require it. . . .” This revision is for consistency within the final rule and its regulations.

Comments: Several concerns were raised about bonding requirements. One comment suggested that bonding should focus only on large scale operations (e.g., use a 60 acre or greater criterion), that right-of-way holders should be able to use liability insurance to satisfy bonding requirements, and asked that the rule make it clear that the new requirements would not affect existing operations.

Response: This final rule does not require bonding for any rights-of-way, except for solar and wind energy developments. As previously noted, the BLM has removed the criteria for large scale projects from this final rule. The BLM will continue to determine whether a bond is necessary and what the bond amount will be on a case-by-case basis.

In this final rule, the BLM accepts many bond instruments, including insurance policies. Insurance policies would include those that are issued for general liabilities of a company, individual, or organization.

The bonding provisions in the final rule apply to the grants that were issued before the effective date of this rule. The existing regulations require that a holder

obtain or certify that they have obtained a bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property incurred in connection with the use and occupancy of the right-of-way or TUP area. The current regulations allow the BLM to adjust the bond requirements for any right-of-way grant or lease when a situation warrants it. These requirements in the existing rule are incorporated in this final rule and will continue to apply to existing and future grant holders.

Comments: Another comment suggested copying the bonding requirements from part 2800 into part 2880, instead of referring to the relevant requirements.

Response: The BLM intends to maintain the continuity of the regulations, as they currently exist. Section 2885.11(b)(7) refers to the terms and conditions in section 2805.12. This creates a consistent use of the regulations for the public as well as the BLM in its administration of the public lands. It is not necessary to duplicate the subpart 2805 regulations in part 2880. No other comments were received and no other changes made from the proposed rule to the final rule.

Section 2885.15 How will BLM charge me rent?

Section 2885.15 discusses how the BLM will prorate and charge rent for rights-of-way. Revisions to section 2885.15 clarify that there are no reductions of rents for grants or TUPs, except as provided under section 2885.20(b). Section 2885.20(b) is an existing provision under which a grant holder can qualify for phased-in rent. This section is revised to clarify existing requirements and add a cross-reference to another section of these regulations. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2885.16 When do I pay rent?

Revisions to section 2885.16 clarify that the BLM prorates the initial rental amount based on the number of full months left in the calendar year after the effective date of the grant or TUP. If your grant qualifies for annual payments, the initial rent bill consists of the beginning partial year plus the next full year. For example, the initial rent payment required for a 10-year grant issued on September 1 would be for 1 year and 3 months if the grant qualifies for annual billing. The initial rental bill for the same grant would be for 9 years and 3 months if the grant does not qualify for annual billing. This is a new provision that parallels section

2806.24(c) and creates consistency in how all rights-of-way are prorated. No comments were received and no changes are made from the proposed rule to the final rule.

Section 2885.17 What happens if I do not pay rents and fees or if I pay the rents or fees late?

Section 2885.17(e) parallels section 2806.13(e), which identifies when the BLM would retroactively bill for uncollected or under-collected rent, late payments, and administrative fees. The BLM will collect such rents if: (1) A clerical error is identified; (2) A rental schedule adjustment is not applied; or (3) An omission or error in complying with the terms and conditions of the authorized right-of-way is identified.

Comment: One comment pointed out that the titles of sections 2806.13(e) and 2885.17(e) were not consistent and also questioned the location of the new subject matter within these paragraphs.

Response: The BLM agrees with the comment that the titles of the two paragraphs identified are not consistent, therefore we revised the section heading to read as above. However, we did not revise the placement of the subject matter within the final regulations. After revisions to this section heading, the provisions for retroactive billing and unpaid or under collected rents are appropriately placed in this section. No other comments were received and no other changes made from the proposed rule to the final rule.

Section 2885.19 What is the rent for a linear right-of-way grant?

Section 2885.19 is revised by updating the addresses in paragraph (b). No comments were received and no changes are made from the proposed rule to the final rule.

Section 2885.20 How will the BLM calculate my rent for linear rights-of-way the Per Acre Rent Schedule covers?

Section 2885.20 is amended by removing paragraph (b)(1) that discussed the phase-in of the Per Acre Rent Schedule and the 2009 per acre rent, because this provision is no longer applicable. Paragraph (b) now consists of the language formerly found at paragraph (b)(2). No comments were received and no changes are made from the proposed rule to the final rule.

Section 2885.24 If I hold a grant or TUP what monitoring fees must I pay?

The changes in section 2885.24 parallel the changes made to other sections of this rule that contained tables with outdated numbers. Specific numbers are removed from the table.

However, the monitoring fee amounts are available to the public either from BLM offices or on the BLM Web site. The rule adds the methodology for adjusting these fees on an annual basis to paragraph (a) of this section. Since this methodology has been added to paragraph (a), a description of how the BLM updates the schedule has been removed from paragraph (b) of this section.

Consistent with revisions made under section 2805.16, the BLM is adding the words “inspecting and” to section 2885.24. This additional language codifies current practice or policy. It will allow the BLM to inspect and monitor the right-of-way to ensure a project’s compliance with the terms and conditions of an authorization. Under this provision, if a project is out of compliance, the BLM could inspect the project to ensure that the required actions are completed to the satisfaction of the BLM, such as continued maintenance of the required activity. No comments were received and no other changes are made from the proposed rule to the final rule.

Subpart 2886—Operations on MLA Grants and TUPs

Section 2886.12 When must I contact BLM during operations?

Section 2886.12 describes when a right-of-way grant holder must contact the BLM during operations. The changes in this section parallel the changes made to section 2807.11. A grant holder is required to contact the BLM when site-specific circumstances require changes to an approved right-of-way grant, POD, site plan, or other procedures, even when the changes are not substantial deviations in location or use. These types of changes are considered to be grant or TUP modification requests. Paragraph (e) is added to conform to similar provisions found at section 2807.11(e), which requires you to contact the BLM if your authorization requires submission of a certificate of construction. See section 2807.11 for further discussion of these topics.

Comment: One comment stated that requiring grant holders to contact the BLM prior to making non-substantial deviations in location or use, including operational changes, project materials, and mitigation measures, is overly burdensome.

Response: Unless a grant provides for non-substantial deviations, a grant holder must contact the BLM and request approval of non-substantial deviations for an authorization. Should a holder not receive approval from the

BLM, they could be found to be in noncompliance with the terms and conditions of the grant. The requirements of this section are required in order for the BLM to review and approve a non-substantial deviation and to ensure that the BLM is meeting its responsibilities under the MLA and any other applicable authorities, including FLPMA. It is the BLM’s responsibility to determine if a deviation is substantial, not a grant holder’s. No other comments were received and no changes are made from the proposed rule to the final rule.

Subpart 2887—Amending, Assigning, or Renewing MLA Grants and TUPs

Section 2887.11 May I assign or make other changes to my grant or TUP?

The final rule revises section 2887.11 to parallel the revisions made to section 2807.21, which describes assigning or making other changes to a FLPMA grant or lease. We received comments to sections 2807.21 and 2887.11 that apply to both sections. Sections 2807.21 and 2887.11 are consistent with each other in formatting and content, except where cross-references are made to their respective regulatory provisions.

The section heading for section 2887.11 is changed to be consistent with the section heading for section 2807.21 and the text in the final section. The existing regulations do not cover all instances when an assignment is necessary and also do not address situations when assignments are not required. The revisions to this section are necessary to: (1) Add and describe additional changes to a grant other than assignments; (2) Clarify what changes require an assignment; and (3) Make right-of-way grants or TUPs subject to the regulations in this section.

Paragraph (a) is revised to include two events that may require the filing of an assignment: (1) The transfer by the holder of any right or interest in the right-of-way grant to a third party, *e.g.*, a change in ownership; and (2) A change in control transactions involving the right-of-way grantee. See section 2807.21 of this preamble for further discussion.

Revised paragraph (b) clarifies that a change in the holder’s name only does not require an assignment. It also clarifies that changes in a holder’s articles of incorporation do not trigger an assignment.

Revised paragraph (c) pertains to payments for assignments and adds a requirement to pay application fees in addition to processing fees. Also, the BLM may now condition a grant assignment on payment of outstanding cost recovery fees to the BLM.

Added paragraph (g) clarifies that only interests in right-of-way grants or TUPs are assignable. A pending right-of-way application is not a property right or other interest that can be assigned. No comments were received and no other changes made from the proposed rule to the final rule.

Section 2887.12 How do I renew my grant?

Section 2887.12 adds paragraph (d), to be consistent with the revisions made to section 2807.22, explaining that if a holder makes a timely and sufficient application for renewal, the existing grant or lease does not expire until BLM issues a decision on the application for renewal. This provision is derived from the APA (5 U.S.C. 558(c)(1)), and it protects the interests of existing right-of-way holders who have timely and sufficiently made an application for the continued use of an existing authorization. In this situation, the authorized activity does not expire until the application for continued use has been evaluated and a decision on the extension is made by the agency. This reiterates and clarifies existing policy and procedures.

Under section 2887.12(e), you may appeal the BLM’s decision to deny your application under section 2881.10. This paragraph parallels the language under proposed section 2807.22(f), which is redesignated as section 2807.22(g). No comments were received and no changes are made from the proposed rule to the final rule.

VI. Procedural Matters

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is significant because it could raise novel legal or policy issues.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. This Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process

must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

This rule includes provisions intended to facilitate responsible solar and wind energy development and to receive fair market value for such development. These provisions are designed to:

1. Promote the use of preferred areas for solar and wind energy development (*i.e.*, DLAs); and

2. Establish competitive processes, terms, and conditions (including rental and bonding requirements) for solar and wind energy development rights-of-way both inside and outside of DLAs.

These provisions also will assist the BLM in: (a) Meeting goals established in Section 211 of the EPOA of 2005, Secretarial Order 3285A1, and the President's Climate Action Plan; and (b) Implementing recommendations from the GAO and OIG regarding renewable energy development.

In addition to provisions that would affect renewable energy specifically, this rule also includes some provisions that affect all rights-of-way, and some that affect only transmission lines with a capacity of 100 kV or more. These provisions clarify existing regulations and codify existing policies.

Economic Impacts

The rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The BLM anticipates this rule will reduce total costs to all applicants, lessees, and operators by up to approximately 17.9 million per year. The change in rents and fees from those currently set by policy primarily reflect changing market conditions. Increases in the minimum bond amounts also reflect increases in estimated reclamation costs. These impacts are discussed in detail in the Economic and Threshold Analysis for the rule.

Other Agencies

This rule does not create a serious inconsistency or otherwise interfere with another agency's actions or plans. The BLM is the only agency that may promulgate regulations for rights-of-way on public lands.

Budgetary Impacts

This rule does not materially alter the budgetary effects of entitlements, grants,

user fees, loan programs, or the rights or obligations of their recipients.

Novel Legal or Policy Issues

This rule may raise novel legal or policy issues. It codifies existing BLM policies and provides additional detail about submitting applications for solar or wind energy development grants, and for transmission lines with a capacity of 100 kV or more. In addition, the rule provides for a competitive process for those entities seeking solar and wind energy development leases inside of DLAs.

National Environmental Policy Act (NEPA)

These regulatory amendments are of an administrative or procedural nature and thus are eligible to be categorically excluded from the requirement to prepare an environmental assessment (EA) or EIS. See 43 CFR 46.205 and 46.210(i). They do not present any of the extraordinary circumstances listed at 43 CFR 46.215.

Nonetheless, the BLM prepared an EA and Finding of No Significant Impact (FONSI) analyzing the final rule to inform agency decision-makers and the public. The EA/FONSI incorporates by reference the Final Solar Energy Development Programmatic Environmental Impact Statement (July 2012) and the Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States (June 2005). The EA concludes that this rule does not constitute a major Federal action significantly affecting the quality of the human environment under Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)). A detailed statement under NEPA is not required. To obtain single copies of the Programmatic EISs or the EA/FONSI, you may contact the person listed under the section of this rule titled, **FOR FURTHER INFORMATION CONTACT**. You may also view the EA/FONSI and Programmatic Environmental Impact Statements at, respectively, <http://windeis.anl.gov/>, <http://solareis.anl.gov/>, and http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial,

on a substantial number of small entities. For the purposes of this analysis, the BLM assumes that all entities (all grant holders, lessees, and applicants for rights-of-way for solar or wind energy projects, pipelines, or transmission lines with a capacity of 100 kV or more) that may be affected by this rule are small entities, even though that is not actually the case.

This rule does not have a significant economic effect on a substantial number of small entities under the RFA.

The rule does affect new applicants or bidders for authorizations of solar or wind energy development and transmission lines with a capacity of 100 kV or more. The BLM reviewed current holders of such authorizations to determine whether they are small businesses as defined by the SBA. The BLM was unable to find financial reports or other information for all potentially affected entities, so this analysis assumes that the rule could potentially affect a substantial number of small entities.

To determine the extent to which this rule will impact these small entities, we took two approaches. First, we attempted to measure the direct costs of the rule as a portion of the net incomes of affected small entities. However, we were unable to obtain the financial records for a representative sample. Next, we estimated the direct costs of the rule as a portion of the total costs of a project.

The analysis showed that a range of potential impacts on the total cost of a project varied from a savings of 0.08 percent to a cost of 1.45 percent of the total project cost. The BLM determined that this was an insignificant impact in the context of developing a project and, therefore, not a significant economic impact on a substantial number of small businesses. For a more detailed discussion, please see the economic analysis.

Small Business Regulatory Enforcement Fairness Act

For the same reasons as discussed under the Executive Order 12866, Regulatory Planning and Review section of this preamble, this rule is not a "major rule" as defined at 5 U.S.C. 804(2). That is, it would not have an annual effect on the economy of \$100 million or more; it would not result in major cost or price increases for consumers, industries, government agencies, or regions; and it would 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.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector of \$100 million or more per year; nor would it have a significant or unique effect on State, local, or tribal governments. This rule amends portions of the regulations found at 43 CFR parts 2800 and 2880, redesignates existing 43 CFR part 2809 in its entirety to a new paragraph found at 2801.6(a)(2), adds new 43 CFR part 2809, and modifies the MLA pipeline regulations in 43 CFR part 2880, but does not result in any unfunded mandates. Therefore, the BLM does not need to prepare a statement containing the information required by Sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1531 *et seq.* The rule is also not subject to the requirements of Section 203 of UMRA because it contains no regulatory requirements that might uniquely affect small governments, nor does it contain requirements that either apply to such governments or impose obligations upon them.

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

This rule is not a government action that interferes with constitutionally protected property rights. This rule sets out competitive processes for solar and wind energy development and revises some requirements for pipelines and electric transmission facilities on BLM-managed public lands. It establishes rent and fee schedules for various components of the development of such facilities inside DLAs that are conducive to competitive right-of-way leasing and clarifies a process that would rely on the BLM's existing land use planning system to allow for these types of uses. Because any land use authorizations and resulting development of facilities under this rule are subject to valid existing rights, it does not interfere with constitutionally protected property rights. Therefore, the Department determined that this rule does not have significant takings implications and does not require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The BLM determined that this rule does not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. It does not

apply to State or local governments or State or local government entities. Therefore, in accordance with Executive Order 13132, the BLM determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the Department determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. The Department's Office of the Solicitor has reviewed this rule to eliminate drafting errors and ambiguity. It has been written to minimize litigation, provide clear legal standards for affected conduct rather than general standards, promote simplification, and avoid unnecessary burdens.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, the BLM found that this rule does not have significant tribal implications. Additionally, because the rulemaking itself is administrative in nature and does not establish any DLAs or approve any specific projects, the BLM has determined that it does not require tribal consultation.

Moreover, in the future when additional DLAs are established or projects are approved, the rule calls for further tribal consultation by the BLM and right-of-way applicants. Specifically, DLAs will be identified through the BLM's land use planning process. Tribal consultation is an important component of that process and will be undertaken when DLAs are identified. In addition to the preliminary review covered in the planning process, existing BLM regulations require site-specific analysis for specific projects. As part of that site-specific analysis, right-of-way applicants must consult with affected tribes to discuss the proposed action and other aspects of the proposed project. For example, site-specific requirements for applications for a grant issued under subpart 2804 include application review, public meetings, and tribal consultation. The BLM would be able to deny an application after these meetings based on a variety of criteria, including tribal concerns.

Data Quality Act

In promulgating this rule, the BLM did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act

(Section 515 of Public Law 106–554). In accordance with the Data Quality Act, the Department has issued guidance regarding the quality of information that it relies upon for regulatory decisions. This guidance is available at the Department's Web site at: <http://www.doi.gov/archive/ocio/iq.html>.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; (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.

This rule could raise novel legal or policy issues within the meaning of Executive Order 12866 or any successor order. However, the BLM believes this rule is unlikely to have a significant adverse effect on the supply, distribution, or use of energy, and may in fact have a positive impact on energy supply, distribution, or use. In fact, its intent is to facilitate such development. The rule codifies BLM policies and provides additional detail about the process for submitting applications for solar or wind energy development grants issued under subpart 2804, or for solar or wind energy development leases issued under subpart 2809.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM determined that this rule will not impede the facilitation of cooperative conservation. The rule takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provides that the programs, projects, and activities are consistent with protecting public health and safety.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) provides that 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. Collections of information include requests and requirements that

an individual, partnership, or corporation obtain information, and report it to a Federal agency. See 44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k).

This rule contains information collection activities that require approval by the OMB under the Paperwork Reduction Act. The BLM included an information collection request in the proposed rule. OMB has approved the information collection for the final rule under control number 1004-0206.

Some of the information collection activities in the final rule require the use of Standard Form 299 (SF-299), Application for Transportation and Utility Systems and Facilities on Federal Lands. SF-299 is approved for use by the BLM and other Federal agencies under control number 0596-0082. The U.S. Forest Service administers control number 0596-0082. The OMB has approved the information collection activities in this final rule under control number 1004-0206.

The information collection activities in this rule are described below along with estimates of the annual burdens. Included in the burden estimates are the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each component of the proposed information collection.

The following features of the final rule pertain to more than one information collection activity.

Designated leasing areas: As defined in an amendment to 43 CFR 2801.5, a designated leasing area is a parcel of land identified in a BLM land use plan as a preferred location for solar or wind energy development. Regulations at 43 CFR subpart 2809 provide for the issuance of solar or wind right-of-way development “leases” inside a designated leasing area. Regulations at subpart 2804 provide for right-of-way development “grants” for solar or wind energy projects outside of any designated leasing area. Regulations at subpart 2804 also provide for testing grants for solar or wind energy inside or outside designated leasing areas.

Competitive process for solar or wind energy outside any designated leasing area: Section 2804.30 provides that the BLM may invite bids for land outside any designated leasing area for solar or wind energy testing and development. Section 2804.30(g) allows only one applicant (*i.e.*, a “preferred applicant”) to apply for a right-of-way grant for solar or wind energy testing or development outside any designated leasing area. The preferred applicant is the successful

bidder in the competitive process outlined in subpart 2804.

Competitive process for solar or wind energy inside a designated leasing area: Subpart 2809 outlines a competitive process for land inside a designated leasing area, which provides for a parcel nomination and competitive offer instead of an application process.

Application filing fees: Section 2804.12(c)(2) requires an “application filing fee” as follows:

(1) \$15 per acre for applications for solar or wind energy development outside any designated leasing area; and

(2) \$2 per acre for applications for energy project-area testing inside or outside designated leasing areas.

As defined in an amendment to section 2801.5, an application filing fee is specific to solar and wind energy right-of-way applications. Section 2804.30(e)(4) provides that the BLM will refund the fee, except for the reasonable costs incurred on behalf of the applicant, if the applicant is not a successful bidder under subpart 2804 or subpart 2809. The proposed rule would have required an application filing fee for energy site-specific testing grants. On consideration of comments questioning whether site-specific testing should be subject to an application filing fee, the BLM has removed that requirement from the final rule. The \$2 per acre filing fee applies to applications for energy project-area testing, but not to energy site-specific testing.

Applications: Section 2804.12(b) refers to applications in the context of large-scale projects. In the BLM’s experience, most applications and plans of development for large-scale projects evolve from several iterations of the first application that is submitted. Some requirements in the final rule (for example, application filing fees) apply to the first time an application is submitted but not to subsequent submissions of an application for the same project.

The information collection activities in the final rule are discussed below.

Application for a Solar or Wind Energy Development Project Outside Any Designated Leasing Area (43 CFR 2804.12 and 2804.30(g)); and

Application for an Electric Transmission Line with a Capacity of 100 kV or More (43 CFR 2804.12)

New requirements at section 2804.12(b) apply to the following types of applications:

- Solar and wind energy development grants outside any designated leasing area; and

- Electric transmission lines with a capacity of 100 kV or more.

In addition to these categories of applications, the proposed rule would have made these new requirements applicable to applications for pipelines 10 inches or greater. The rationale was that these applications, as well as the other 2 types of applications, were for large-scale operations that warrant their own procedures. Some comments questioned the BLM’s description of pipelines 10 inches or greater in diameter as a measure for large-scale pipeline projects, and suggested that the scale of pipeline projects is better measured by acreage than pipeline diameter. The BLM agrees. Rights-of-way for pipelines 10 inches or greater in diameter are not subject to section 2804.12 of the final rule.

Section 2804.12(b) includes the following requirements for applications for a solar or wind energy development project outside a designated leasing area, and to applications for a transmission line project with a capacity of 100 kV or more:

- A discussion of all known potential resource conflicts with sensitive resources and values, including special designations or protections; and
- Applicant-proposed measures to avoid, minimize, and compensate for such resource conflicts, if any.

Section 2804.12(b) also requires applicants to initiate early discussions with any grazing permittees that may be affected by the proposed project. This requirement stems from FLPMA Section 402(g) (43 U.S.C. 1752(g)) and a BLM grazing regulation (43 CFR 4110.4-2(b)) that require 2 years’ prior notice to grazing permittees and lessees before cancellation of their grazing privileges.

In addition to the information listed at 43 CFR 2804.12(b), an application for a solar or wind project, or for a transmission line of at least 100 kV, must include the information listed at 43 CFR 2804.12(a)(1) through (7). These provisions are not amended in the final rule. The requirements at section 2804.12(e) (formerly section 2804.12(b)) apply to applicants that are business entities. These requirements are not amended substantively in the final rule. The burdens for all of these regulations are already included in the burdens associated with the BLM for SF-299 and control number 0596-0082, and therefore are not included in the burdens for the final rule.

Applications for solar or wind energy development outside any designated leasing area, but not applications for large-scale transmission lines, are subject to a requirement (at 43 CFR 2804.12(c)(2)) to submit an “application

filing fee” of \$15 per acre. As defined in an amendment to section 2801.5, an application filing fee is specific to solar and wind energy right-of-way applications. Section 2804.30(e)(4) provides that the BLM will refund the fee, except for the reasonable costs incurred on behalf of the applicant, if the applicant is not a successful bidder in the competitive process outlined in subpart 2804.

General Description of a Proposed Project and Schedule for Submittal of a POD (2804.12(b)(1) and (2))

Paragraph 2804.12(b)(1) and (2) require applicants for a solar or wind development project outside a designated leasing area to submit the following information, using Form SF-299:

- A general description of the proposed project and a schedule for the submission of a POD conforming to the POD template at <http://www.blm.gov>;
- A discussion of all known potential resource conflicts with sensitive resources and values, including special designations or protections; and
- Proposals to avoid, minimize, and compensate for such resource conflicts, if any.

Preliminary Application Review Meetings for a Large-Scale Right-of-Way (43 CFR 2804.12 (b)(4))

The proposed rule would have required pre-application meetings for each large-scale project (defined in the proposed rule as an application for a solar or wind energy development project outside a designated leasing area, a transmission line project with a capacity of 100 kV or more, or a pipeline 10 inches or more in diameter). Several comments suggested that the BLM lacks authority to impose requirements on a developer before submission of an application without an application being submitted to the BLM.

The BLM agrees with these comments and has revised the proposed rule. Instead of pre-application meetings, the final rule requires “preliminary application review meetings” that will be held after an application for a large-scale right-of-way has been filed with the BLM. As discussed above, the BLM also has decided to remove 10-inch pipelines from the final rule, in response to comments questioning the characterization of pipelines 10 inches or greater in diameter as large-scale projects.

Within 6 months from the time the BLM receives the cost recovery fee for an application for a large-scale project (*i.e.*, for solar or wind energy development outside a designated

leasing area or for a transmission line with a capacity of 100 kV or more), the applicant must schedule and hold at least two preliminary application review meetings.

In the first meeting, the BLM will collect information from the applicant to supplement the application on subjects such as the general project proposal. The BLM will also discuss with the applicant subjects such as the status of BLM land use planning for the lands involved, potential siting issues or concerns, potential environmental issues or concerns, potential alternative site locations, and the right-of-way application process.

In the second meeting, the applicant and the BLM will meet with appropriate Federal and State agencies and tribal and local governments to facilitate coordination of potential environmental and siting issues and concerns.

The applicant and the BLM may agree to hold additional preliminary application review meetings.

Application for an Energy Site-Specific Testing Grant (43 CFR 2804.30, 2805.11(b)(2)(i), and 2809.19(c));

Application for an Energy Project-Area Testing Grant (43 CFR 2804.30, 2805.11(b)(2)(ii), and 2809.19(c)); and

Application for a Short-Term Grant (43 CFR 2805.11(b)(2)(iii))

Section 2804.30(g) authorizes only one applicant (*i.e.*, a “preferred applicant”) to apply for an energy project-area testing grant or an energy site-specific testing grant for land outside any designated leasing area. Section 2809.19(c) authorizes only one applicant (*i.e.*, the successful bidder in the competitive process outlined at 43 CFR subpart 2809) to apply for an energy project-area testing grant or an energy site-specific testing grant for land inside a designated leasing area. Section 2805.11(b) authorizes applications for short-term grants for other purposes (such as geotechnical testing and temporary land-disturbing activities) either inside or outside a designated leasing area.

Each of these grants is for 3 years or less. All of these applications must be submitted on an SF-299. Applications for project-area grants (but not site-specific grants) are subject to a \$2 per-acre application filing fee in accordance with section 2804.12(c)(2). Applicants for short-term grants for other purposes (such as geotechnical testing and temporary land-disturbing activities) are subject to a processing fee in accordance with section 2804.14.

The proposed rule would have limited testing grants to wind energy.

Some comments suggested that these authorizations should be made available for solar energy. The BLM has adopted this suggestion in the final rule.

Showing of Good Cause (43 CFR 2805.12(c)(6))

Any authorization for a solar and wind energy right-of-way requires due diligence in development. In accordance with section 2805.12(c)(6), the BLM will notify the holder before suspending or terminating a right-of-way for lack of due diligence. This notice will provide the holder with a reasonable opportunity to correct any noncompliance or to start or resume use of the right-of-way. A showing of good cause will be required in response. That showing must include:

- Reasonable justification for any delays in construction (for example, delays in equipment delivery, legal challenges, and acts of God);
- The anticipated date for the completion of construction and evidence of progress toward the start or resumption of construction; and
- A request for extension of the timelines in the approved POD.

The BLM will use the information to determine whether or not to suspend or terminate the right-of-way for failure to comply with due diligence requirements.

Reclamation Cost Estimate for Lands Outside Any Designated Leasing Area (43 CFR 2805.20(a)(3) and (5))

New section 2805.20(a)(3) provides that the bond amount for projects other than a solar or wind energy lease under subpart 2809 (*i.e.*, inside a designated leasing area) will be determined based on the preparation of a reclamation cost estimate that includes the cost to the BLM to administer a reclamation contract and review it periodically for adequacy.

New section 2805.20(a)(5) provides that reclamation cost estimate must include at minimum:

- Remediation of environmental liabilities such as use of hazardous materials waste and hazardous substances, herbicide use, the use of petroleum-based fluids, and dust control or soil stabilization materials;
- The decommissioning, removal, and proper disposal, as appropriate, of any improvements and facilities; and
- Interim and final reclamation, revegetation, recontouring, and soil stabilization. This component must address the potential for flood events and downstream sedimentation from the site that may result in offsite impacts.

Request To Assign a Solar or Wind Energy Development Right-of-Way (43 CFR 2807.21)

Section 2807.21, as amended, provides for assignment, in whole or in part, of any right or interest in a grant or lease for a solar or wind development right-of-way. Actions that may require an assignment include the transfer by the holder (assignor) of any right or interest in the grant or lease to a third party (assignee) or any change in control transaction involving the grant holder or lease holder, including corporate mergers or acquisitions.

The proposed assignee must file an assignment application, using SF-299, and pay application and processing fees. No preliminary application review meetings and or public meetings are required.

The assignment application must include:

- Documentation that the assignor agrees to the assignment; and
- A signed statement that the proposed assignee agrees to comply with and be bound by the terms and conditions of the grant that is being assigned and all applicable laws and regulations.

Application for Renewal of an Energy Project-Area Testing Grant or Short-Term Grant (43 CFR 2805.11(b)(2), 2805.14(h), and 2807.22)

Section 2805.11(b)(2), as amended, provides that holders of some types of grants may seek renewal of those grants. For an energy site-specific testing grant, the term is 3 years or less, without the option of renewal. However, for an energy project-area testing grant, the initial term is 3 years or less, with the option to renew for one additional 3-year period when the renewal application is also accompanied by a solar or wind energy development application and a POD. For short-term grants, such as for geotechnical testing and temporary land-disturbing activities, the term is 3 years or less with an option for renewal.

Applications for renewal of testing grants (except site-specific testing grants) may be filed, using SF-299, under sections 2805.14(h) and 2807.22. Processing fees in accordance with section 2804.14, as amended, apply to these renewal applications.

Section 2807.22 provides that an application for renewal of any right-of-way grant or lease must be submitted at least 120 calendar days before the grant or lease expires. The application must show that the grantee or lessee is in compliance with the renewal terms and conditions (if any), with the other terms,

conditions, and stipulations of the grant or lease, and with other applicable laws and regulations. The application also must explain why a renewal of the grant or lease is necessary.

Environmental, Technical, and Financial Records, Reports, and Other Information (43 CFR 2805.12(a)(15))

Section 2805.12(a)(15) authorizes the BLM to require a holder of any type of right-of-way to provide, or give the BLM access to, any pertinent environmental, technical, and financial records, reports, and other information. The use of SF-299 is required. The BLM will use the information for monitoring and inspection activities.

Application for Renewal of a Solar or Wind Energy Development Grant or Lease (43 CFR 2805.14(g) and 2807.22)

Amendments to sections 2805.14 and 2807.22 authorize holders of leases and grants to apply for renewal of their rights-of-way. A renewal requires submission of the same information, on SF-299, that is necessary for a new application. Processing fees, in accordance with 43 CFR 2804.14, as amended, will apply to these renewal applications. The BLM will use the information submitted by the applicant to decide whether or not to renew the right-of-way.

Request for an Amendment or Name Change, Amendment, or Assignment (FLPMA) (43 CFR 2807.11(b) and (d)) and 2807.21)

New section 2807.11(b) requires a holder of any type of right-of-way grant to contact the BLM, seek an amendment to the grant under section 2807.20 (a regulation that is not amended in this final rule), and obtain the BLM's approval before beginning any activity that is a "substantial deviation" from what is authorized.

New section 2807.11(d) requires contact with the BLM, a request for an amendment to the pertinent right-of-way grant or lease, and prior approval whenever site-specific circumstances or conditions result in the need for changes to an approved right-of-way grant or lease, plan of development, site plan, mitigation measures, or construction, operation, or termination procedures that are not "substantial deviations."

New section 2807.21 authorizes assignment of a grant or leased with the BLM's approval. It also authorizes the BLM to require a grant or lease holder to file new or revised information in circumstances that include, but are not limited to:

- Transactions within the same corporate family;
- Changes in the holder's name only; and
- Changes in the holder's articles of incorporation.

A request for an amendment of a right-of-way, using SF-299, is required in cases of a substantial deviation (for example, a change in the boundaries of the right-of-way, major improvements not previously approved by the BLM, or a change in the use of the right-of-way). Other changes, such as changes in project materials, or changes in mitigation measures within the existing, approved right-of-way area, must be submitted to the BLM for review and approval. In order to assign a grant, the proposed assignee must file an assignment application and follow the same procedures and standards as for a new grant or lease, as well as pay application and processing fees. In order to request a name change, the holder will be required to file an application and follow the same procedures and standards as for a new grant or lease and pay processing fees, but no application fee is required. The following documents are also required in the case of a name change:

- A copy of the court order or legal document effectuating the name change of an individual; or
- If the name change is for a corporation, a copy of the corporate resolution proposing and approving the name change, a copy of a document showing acceptance of the name change by the State in which incorporated, and a copy of the appropriate resolution, order, or other document showing the name change.

In all these cases, the BLM will use the information to monitor and inspect rights-of-way, and to maintain current data.

Nomination of a Parcel of Land Inside a Designated Leasing Area (43 CFR 2809.10 and 2809.11)

Sections 2809.10 and 2809.11 authorize the BLM to offer land competitively inside a designated leasing area for solar or wind energy development on its own initiative. These regulations also authorize the BLM to solicit nominations for such development. In order to nominate a parcel under this process, the nominator must be qualified to hold a right-of-way under 43 CFR 2803.10. After publication of a notice by the BLM, anyone meeting the qualifications may submit a nomination for a specific parcel of land to be developed for solar or wind energy. There is a fee of \$5 per acre for

each nomination. The following information is required:

- The nominator's name and personal or business address;
- The legal land description; and
- A map of the nominated lands.

The BLM will use the information to communicate with the nominator and to determine whether or not to proceed with a competitive offer.

Expression of Interest in Parcel of Land Inside a Designated Leasing Area (43 CFR 2809.11(c))

Section 2809.11(c) authorizes the BLM to consider informal expressions of interest suggesting specific lands inside a designated leasing area to be included in a competitive offer. The expression of interest must include a description of the suggested lands and a rationale for their inclusion in a competitive offer. The information will assist the BLM in determining whether or not to proceed with a competitive offer.

Plan of Development for a Solar or Wind Energy Development Lease Inside a Designated Leasing Area (43 CFR 2809.18)

Section 2809.18(c) requires the holder of a solar or wind energy development lease for land inside a designated leasing area to submit a plan of development, using SF-299, within 2 years of the lease issuance date. The plan must address all pre-development and development activities. This collection activity is necessary to ensure diligent development.

This new provision will be a new use of Item #7 of SF-299, which calls for the following information:

Project description (describe in detail): (a) Type of system or facility (e.g., canal, pipeline, road); (b) related structures and facilities; (c) physical specifications (length, width, grading, etc.); (d) term of years needed; (e) time of year of use or operation; (f) volume or amount of product to be transported; (g) duration and timing of construction; and (h) temporary work areas needed for construction.

This collection has been justified and authorized under control number 0596-0082. In addition, section 2809.18(c) provides that the minimum requirements for either a "Wind Energy Plan of Development" or "Solar Energy Plan of Development" can be found at a link to a template at www.blm.gov. To some extent, that template duplicates the information required by Item #7 of SF-299. The following requirements do not duplicate the elements listed in SF-299:

- *Financial Operations and maintenance*. This information will

assist the BLM in verifying the right-of-way holder's compliance with terms and conditions regarding all aspects of operations and maintenance, including road maintenance and workplace safety;

- *Environmental considerations*. This information will assist the BLM in monitoring compliance with terms and conditions regarding mitigation measures and site-specific issues such as protection of sensitive species and avoidance of conflicts with recreation uses of nearby lands;

- *Maps and drawings*. This information will assist the BLM in monitoring compliance with all terms and conditions; and

- *Supplementary information*. This information, which will be required after submission of the holder's initial POD, will assist the BLM in reviewing possible alternative designs and mitigation measures for a final POD.

Section 2809.18(d) requires the holder of a solar or wind energy development lease for land inside a designated leasing area to pay reasonable costs for the BLM or other Federal agencies to review and approve the plan of development and to monitor the lease. To expedite review and monitoring, the holder may notify BLM in writing of an intention to pay the full actual costs incurred by the BLM.

Request for an Amendment, Assignment, or Name Change (MLA) (43 CFR 2886.12(b) and (d) and 2887.11)

Sections 2886.12 and 2887.11 pertain to holders of rights-of-way and temporary use permits authorized under the Mineral Leasing Act (MLA). A temporary use permit authorizes a holder of a MLA right-of-way to use land temporarily in order to construct, operate, maintain, or terminate a pipeline, or for purposes of environmental protection or public safety. See 43 CFR 2881.12. The regulations require these holders to contact the BLM:

- Before engaging in any activity that is a "substantial deviation" from what is authorized;
- Whenever site-specific circumstances or conditions arise that result in the need for changes that are not substantial deviations;
- When the holder submits a certification of construction;
- Before assigning, in whole or in part, any right or interest in a grant or lease;
- Before any change in control transaction involving the grant- or leaseholder; and
- Before changing the name of a holder (i.e., when the name change is

not the result of an underlying change in control of the right-of-way).

A request for an amendment of a right-of-way or temporary use permit is required in cases of a substantial deviation (e.g., a change in the boundaries of the right-of-way, major improvements not previously approved by the BLM, or a change in the use of the right-of-way). Other changes, such as changes in project materials, or changes in mitigation measures within the existing, approved right-of-way area, are required to be submitted to the BLM for review and approval. In order to assign a grant, the proposed assignee must file an assignment application and follow the same procedures and standards as for a new grant or lease, as well as pay processing fees. In order to request a name change, the holder will be required to file an application and follow the same procedures and standards as for a new grant or lease and pay processing fees, but no application fee is required. The following documents are also required in the case of a name change:

- A copy of the court order or legal document effectuating the name change of an individual; or
- If the name change is for a corporation, a copy of the corporate resolution proposing and approving the name change, a copy of a document showing acceptance of the name change by the State in which incorporated, and a copy of the appropriate resolution, order, or other document showing the name change.

The use of SF-299 is required. In all these cases, the BLM will use the information for monitoring and inspection purposes, and to maintain current data on rights-of-way.

Certification of Construction (43 CFR 2886.12(f))

A certification of construction is a document a holder of an MLA right-of-way must submit, using SF-299, to the BLM after finishing construction of a facility, but before operations begin. The BLM will use the information to verify that the holder has constructed and tested the facility to ensure that it complies with the terms of the right-of-way and is in accordance with applicable Federal and State laws and regulations.

Estimated Hour Burdens

The estimated hour burdens of the proposed supplemental collection requirements are shown in the following table.

INFORMATION COLLECTION REQUIREMENTS: ESTIMATED ANNUAL HOUR BURDENS

Type of response A.	Number of responses B.	Hours per response C.	Total hours (column B × column C) D.
Application for a Solar or Wind Energy Development Project Outside Any Designated Leasing Area 43 CFR 2804.12 and 2804.30(g) Form SF-299	10	8	80
Application for an Electric Transmission Line with a Capacity of 100 kV or More 43 CFR 2804.12 Form SF-299	10	8	80
General Description of a Proposed Project and Schedule for Submittal of a Plan of Development 43 CFR 2804.12(b)(1) and (2) Form SF-299	20	2	40
Preliminary Application Review Meetings for a Large-Scale Right-of-Way 43 CFR 2804.12(b)(4)	20	2	40
Application for an Energy Site-Specific Testing Grant 43 CFR 2804.30, 2805.11(b)(2)(i), and 2809.19(c) Form SF-299	20	8	160
Application for an Energy Project-Area Testing Grant 43 CFR 2804.30, 2805.11(b)(2)(ii), and 2809.19(c) Form SF-299	20	8	160
Application for a Short-Term Grant 43 CFR 2805.11(b)(2)(iii) Form SF-299	1	8	8
Showing of good cause 43 CFR 2805.12(c)(6)	1	2	2
Reclamation Cost Estimate for Lands Outside Any Designated Leasing Area 43 CFR 2805.20(a)(3) and (a)(5)	1	10	10
Request to Assign a Solar or Wind Energy Development Right-of-Way 43 CFR 2807.21 Form SF-299	11	8	88
Application for Renewal of an Energy Project-Area Testing Grant or Short-Term Grant 43 CFR 2805.11(b)(2), 2805.14(h), and 2807.22 Form SF-299	6	6	36
Environmental, Technical, and Financial Records, Reports, and Other Information 43 CFR 2805.12(a)(15) Form SF-299	20	4	80
Application for Renewal of a Solar or Wind Energy Development Grant or Lease 43 CFR 2805.14(g) and 2807.22 Form SF-299	1	12	12
Request for an Amendment or Name Change (FLPMA) 43 CFR 2807.11(b) and (d) and 2807.21 Form SF-299	30	16	480
Nomination of a Parcel of Land Inside a Designated Leasing Area 43 CFR 2809.10 and 2809.11	1	4	4
Expression of Interest in a Parcel of Land Inside a Designated Leasing Area 43 CFR 2809.11(c)	1	4	4
Plan of Development for a Solar or Wind Energy Development Lease Inside a Designated Leasing Area 43 CFR 2809.18(c) Form SF-299	2	8	16
Request for an Amendment, Assignment, or Name Change (MLA) 43 CFR 2886.12(b) and (d) and 2887.11 Form SF-299	2,862	16	45,792
Certification of Construction 43 CFR 2886.12(f) Form SF-299	5	4	20
Totals	3,042	130	47,112

Estimated Non-Hour Burdens

The non-hour burdens of this final rule consist of fees authorized by Sections 304 and 504(g) of FLPMA (43 U.S.C. 1734 and 1764(g)). Section 1734 authorizes the Secretary of the Interior to establish reasonable filing and service

fees and reasonable charges with respect to applications and other documents relating to the public lands. Section 504(g) authorizes the Secretary to promulgate regulations that require, as a condition of a right-of-way, that an applicant for or holder of a right-of-way

reimburse the United States for all reasonable administrative and other costs incurred with respect to right-of-way applications and with respect to inspection and monitoring of construction, operation, and termination

of a facility pursuant to such right-of-way.

The fees (*i.e.*, non-hour burdens) are itemized in the following table.

INFORMATION COLLECTION REQUIREMENTS—ESTIMATED ANNUAL NON-HOUR BURDENS

Type of response A.	Regulatory authority for fee B.	Number of responses C.	Amount of fee per response D.	Total amount of fees (column C × column D) E.
Application for a Solar or Wind Energy Development Project Outside Any Designated Leasing Area.	43 CFR 2804.12(c)(2)	10	\$15 per acre × average of 6,000 acres per application = \$90,000.	\$900,000
43 CFR 2804.12 and 2804.30(g) Form SF–299				
Application for an Electric Transmission Line with a Capacity of 100 kV or More.	43 CFR 2804.14	10	\$1,156 ¹	11,560
43 CFR 2804.12 Form SF–299				
Application for an Energy Project-Area Testing Grant.	43 CFR 2804.12(c)(2)	20	\$2 per acre × average of 6,000 acres per application = \$12,000.	240,000
43 CFR 2804.30, 2805.11(b)(2)(ii), and 2809.19(c). Form SF–299				
Application for a Short-Term Grant	43 CFR 2804.14	1	\$1,156 ²	1,156
43 CFR 2805.11(b)(2)(iii) Form SF–299				
Request to Assign a Solar or Wind Energy Development Right-of-Way.	43 CFR 2804.14	11	\$15 per acre × average of 6,000 acres per application = \$90,000.	990,000
43 CFR 2807.21 Form SF–299				
Application for Renewal of an Energy Project-Area Testing Grant or Short-Term Grant.	43 CFR 2804.14	6	\$1,156 ³	6,936
43 CFR 2805.11(b)(2), 2805.14(h), and 2807.22 .. Form SF–299				
Application for Renewal of a Solar or Wind Energy Development Grant or Lease.	43 CFR 2804.14	1	\$1,156 ⁴	1,156
43 CFR 2805.14(g) and 2807.22 Form SF–299				
Nomination of a Parcel of Land Inside a Designated Leasing Area.	43 CFR 2809.11(b)(1)	1	\$5 per acre × average of 6,000 acres per nomination = \$30,000.	30,000
43 CFR 2809.10 and 2809.11				
Total				2,180,808

Authors

The principal author of this rule is Jayme Lopez, Program Lead, National

¹ In the BLM’s experience, this collection activity usually falls under Category Four of the Processing Fee Schedule at 43 CFR 2804.14. The amount shown is for Processing Category Four for calendar year 2016, at IM 2016–025 (Dec. 1, 2015) (“Rights-of-Way Management and Land Use Authorization Management”).

² In the BLM’s experience, this collection activity usually falls under Category Four of the Processing Fee Schedule at 43 CFR 2804.14. The amount shown is for Processing Category Four for calendar year 2016, at IM 2016–025 (Dec. 1, 2015) (“Rights-of-Way Management and Land Use Authorization Management”).

³ In the BLM’s experience, this collection activity usually falls under Category Four of the Processing Fee Schedule at 43 CFR 2804.14. The amount shown is for Processing Category Four for calendar year 2016, at IM 2016–025 (Dec. 1, 2015) (“Rights-of-Way Management and Land Use Authorization Management”).

⁴ In the BLM’s experience, this collection activity usually falls under Category Four of the Processing Fee Schedule at 43 CFR 2804.14. The amount shown is for Processing Category Four for calendar

Renewable Energy Coordination Office Washington Office, Bureau of Land Management, Department of the Interior, assisted by Charles Yudson, Jean Sonneman and Ian Senio, Office of Regulatory Affairs, BLM Washington Office; Michael Ford, Economist, BLM Washington Office; Michael Hildner, Planning and Environmental Analyst; Dylan Fuge, Counselor to the Director, BLM Washington Office; and Gregory Russell, Attorney Advisor, Office of the Solicitor, Department of the Interior.

List of Subjects

43 CFR Part 2800

Communications, Electric power, Highways and roads, Penalties, Public lands and rights-of-way, Reporting and recordkeeping requirements.

year 2016, at IM 2016–025 (Dec. 1, 2015) (“Rights-of-Way Management and Land Use Authorization Management”).

43 CFR Part 2880

Administrative practice and procedures, Common carriers, Pipelines, Federal lands and rights-of-way, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons stated in the preamble, the BLM amends 43 CFR parts 2800 and 2880 as set forth below:

PART 2800—RIGHTS-OF-WAY UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT

■ 1. The authority citation for part 2800 continues to read as follows:

Authority: 43 U.S.C. 1733, 1740, 1763, and 1764.

■ 2. Revise the heading of part 2800 to read as set forth above.

Subpart 2801—General Information

■ 3. Amend § 2801.5(b) by:

- a. Adding, in alphabetical order, definitions of “Acreage rent,” “Application filing fee,” “Assignment,” “Designated leasing area,” “Megawatt (MW) capacity fee,” “Megawatt rate,” “Performance and reclamation bond,” “Reclamation cost estimate (RCE),” “Screening criteria for solar and wind energy development,” and “Short-term right-of-way grant;” and
- b. Revising the definitions of “Designated right-of-way corridor,” “Management overhead costs,” and “Right-of-way.”

The additions and revisions read as follows:

§ 2801.5 What acronyms and terms are used in the regulations in this part?

(b) * * *

Acreage rent means rent assessed for solar and wind energy development grants and leases that is determined by the number of acres authorized for the grant or lease.

* * * * *

Application filing fee means a filing fee specific to solar and wind energy applications. This fee is an initial payment for the reasonable costs for processing, inspecting, and monitoring a right-of-way.

Assignment means the transfer, in whole or in part, of any right or interest in a right-of-way grant or lease from the holder (assignor) to a subsequent party (assignee) with the BLM’s written approval. A change in ownership of the grant or lease, or other related change-in-control transaction involving the holder, including a merger or acquisition, also constitutes an assignment for purposes of these regulations requiring the BLM’s written approval, unless applicable statutory authority provides otherwise.

* * * * *

Designated leasing area means a parcel of land with specific boundaries identified by the BLM land use planning process as being a preferred location for solar or wind energy development that may be offered competitively.

Designated right-of-way corridor means a parcel of land with specific boundaries identified by law, Secretarial order, the land use planning process, or other management decision, as being a preferred location for existing and future linear rights-of-way and facilities. The corridor may be suitable to accommodate more than one right-of-way use or facility, provided that they are compatible with one another and the corridor designation.

* * * * *

Management overhead costs means Federal expenditures associated with a

particular Federal agency’s directorate. The BLM’s directorate includes all State Directors and the entire Washington Office staff, except where a State Director or Washington Office staff member is required to perform work on a specific right-of-way case.

Megawatt (MW) capacity fee means the fee paid in addition to the acreage rent for solar and wind energy development grants and leases. The MW capacity fee is the approved MW capacity of the solar or wind energy grant or lease multiplied by the appropriate MW rate. A grant or lease may provide for stages of development, and the grantee or lessee will be charged a fee for each stage by multiplying the MW rate by the approved MW capacity for the stage of the project.

Megawatt rate means the price of each MW of capacity for various solar and wind energy technologies as determined by the MW rate formula. Current MW rates are found on the BLM’s MW rate schedule, which can be obtained at any BLM office or at <http://www.blm.gov>. The MW rate is calculated by multiplying the total hours per year by the net capacity factor, by the MW hour (MWh) price, and by the rate of return, where:

(1) *Net capacity factor* means the average operational time divided by the average potential operational time of a solar or wind energy development, multiplied by the current technology efficiency rates. The BLM establishes net capacity factors for different technology types but may determine another net capacity factor to be more appropriate, on a case-by-case or regional basis, to reflect changes in technology, such as a solar or wind project that employs energy storage technologies, or if a grant or lease holder or applicant is able to demonstrate that another net capacity factor is appropriate for a particular project or region. The net capacity factor for each technology type is:

- (i) Photovoltaic (PV)—20 percent;
- (ii) Concentrated photovoltaic (CPV) and concentrated solar power (CSP)—25 percent;
- (iii) CSP with storage capacity of 3 hours or more—30 percent; and
- (iv) Wind energy—35 percent;

(2) *Megawatt hour (MWh) price* means the 5 calendar-year average of the annual weighted average wholesale prices per MWh for the major trading hubs serving the 11 western States of the continental United States (U.S.);

(3) *Rate of return* means the relationship of income (to the property owner) to revenue generated from authorized solar and wind energy development facilities based on the 10-

year average of the 20-year U.S. Treasury bond yield rounded to the nearest one-tenth percent; and

(4) *Hours per year* means the total number of hours in a year, which, for purposes of this part, means 8,760 hours.

* * * * *

Performance and reclamation bond means the document provided by the holder of a right-of-way grant or lease that provides the appropriate financial guarantees, including cash, to cover potential liabilities or specific requirements identified by the BLM for the construction, operation, decommissioning, and reclamation of an authorized right-of-way on public lands.

(1) *Acceptable bond instruments.* The BLM will accept cash, cashier’s or certified check, certificate or book entry deposits, negotiable U.S. Treasury securities, and surety bonds from the approved list of sureties (U.S. Treasury Circular 570) payable to the BLM. Irrevocable letters of credit payable to the BLM and issued by banks or financial institutions organized or authorized to transact business in the United States are also acceptable bond instruments. An insurance policy can also qualify as an acceptable bond instrument, provided that the BLM is a named beneficiary of the policy, and the BLM determines that the insurance policy will guarantee performance of financial obligations and was issued by an insurance carrier that has the authority to issue policies in the applicable jurisdiction and whose insurance operations are organized or authorized to transact business in the United States.

(2) *Unacceptable bond instruments.* The BLM will not accept a corporate guarantee as an acceptable form of bond instrument.

* * * * *

Reclamation cost estimate (RCE) means the estimate of costs to restore the land to a condition that will support pre-disturbance land uses. This includes the cost to remove all improvements made under the right-of-way authorization, return the land to approximate original contour, and establish a sustainable vegetative community, as required by the BLM. The RCE will be used to establish the appropriate amount for financial guarantees of land uses on the public lands, including those uses authorized by right-of-way grants or leases issued under this part.

* * * * *

Right-of-way means the public lands that the BLM authorizes a holder to use

or occupy under a particular grant or lease.

Screening criteria for solar and wind energy development refers to the policies and procedures that the BLM uses to prioritize how it processes solar and wind energy development right-of-way applications to facilitate the environmentally responsible development of such facilities through the consideration of resource conflicts, land use plans, and applicable statutory and regulatory requirements. Applications for projects with lesser resource conflicts are anticipated to be less costly and time-consuming for the BLM to process and will be prioritized over those with greater resource conflicts.

Short-term right-of-way grant means any grant issued for a term of 3 years or less for such uses as storage sites, construction areas, and site testing and monitoring activities, including site characterization studies and environmental monitoring.

* * * * *

■ 4. In § 2801.6, revise paragraph (a)(2) to read as follows:

§ 2801.6 Scope.

(a) * * *

(2) Grants to Federal departments or agencies for all systems and facilities identified in § 2801.9(a), including grants for transporting by pipeline and related facilities, commodities such as oil, natural gas, synthetic liquid or gaseous fuels, and any refined products produced from them; and

* * * * *

■ 5. Amend § 2801.9 by revising paragraphs (a)(4) and (7) and adding paragraph (d) to read as follows:

§ 2801.9 When do I need a grant?

(a) * * *

(4) Systems for generating, transmitting, and distributing electricity, including solar and wind energy development facilities and associated short-term actions, such as site and geotechnical testing for solar and wind energy projects;

* * * * *

(7) Such other necessary transportation or other systems or facilities, including any temporary or short-term surface disturbing activities associated with approved systems or facilities, which are in the public interest and which require rights-of-way.

* * * * *

(d) All systems, facilities, and related activities for solar and wind energy projects are specifically authorized as follows:

(1) Energy site-specific testing activities, including those with individual meteorological towers and instrumentation facilities, are authorized with a short-term right-of-way grant issued for 3 years or less;

(2) Energy project-area testing activities are authorized with a short-term right-of-way grant for an initial term of 3 years or less with the option to renew for one additional 3-year period under § 2805.14(h) when the renewal application is accompanied by an energy development application;

(3) Solar and wind energy development facilities located outside designated leasing areas, and those facilities located inside designated leasing areas under § 2809.17(d)(2), are authorized with a right-of-way grant issued for up to 30 years (plus the initial partial year of issuance). An application for renewal of the grant may be submitted under § 2805.14(g);

(4) Solar and wind energy development facilities located inside designated leasing areas are authorized with a solar or wind energy development lease when issued competitively under subpart 2809. The term is fixed for 30 years (plus the initial partial year of issuance). An application for renewal of the lease may be submitted under § 2805.14(g); and

(5) Other associated actions not specifically included in § 2801.9(d)(1) through (4), such as geotechnical testing and other temporary land disturbing activities, are authorized with a short-term right-of-way grant issued for 3 years or less.

Subpart 2802—Lands Available for FLPMA Grants

■ 6. In § 2802.11, revise the section heading and paragraphs (a), (b) introductory text, (b)(3), (4), (6), and (7), and (d) to read as follows:

§ 2802.11 How does the BLM designate right-of-way corridors and designated leasing areas?

(a) The BLM may determine the locations and boundaries of right-of-way corridors or designated leasing areas during the land use planning process described in part 1600 of this chapter. During this process, the BLM coordinates with other Federal agencies, State, local, and tribal governments, and the public to identify resource-related issues, concerns, and needs. The process results in a resource management plan or plan amendment, which addresses the extent to which you may use public lands and resources for specific purposes.

(b) When determining which lands may be suitable for right-of-way

corridors or designated leasing areas, the factors the BLM considers include, but are not limited to, the following:

* * * * *

(3) Physical effects and constraints on corridor placement or leasing areas due to geology, hydrology, meteorology, soil, or land forms;

(4) Costs of construction, operation, and maintenance and costs of modifying or relocating existing facilities in a proposed right-of-way corridor or designated leasing area (*i.e.*, the economic efficiency of placing a right-of-way within a proposed corridor or providing a lease inside a designated leasing area);

* * * * *

(6) Potential health and safety hazards imposed on the public by facilities or activities located within the proposed right-of-way corridor or designated leasing area;

(7) Social and economic impacts of the right-of-way corridor or designated leasing area on public land users, adjacent landowners, and other groups or individuals;

* * * * *

(d) The resource management plan or plan amendment may also identify areas where the BLM will not allow right-of-way corridors or designated leasing areas for environmental, safety, or other reasons.

Subpart 2804—Applying for FLPMA Grants

■ 7. Amend § 2804.10 by revising paragraph (a)(2) to read as follows:

§ 2804.10 What should I do before I file my application?

(a) * * *

(2) Determine whether the lands are located inside a designated or existing right-of-way corridor or a designated leasing area;

* * * * *

■ 8. Revise § 2804.12 to read as follows:

§ 2804.12 What must I do when submitting my application?

(a) File your application on Standard Form 299, available from any BLM office or at <http://www.blm.gov>, and fill in the required information as completely as possible. Your completed application must include the following:

(1) A description of the project and the scope of the facilities;

(2) The estimated schedule for constructing, operating, maintaining, and terminating the project;

(3) The estimated life of the project and the proposed construction and reclamation techniques;

(4) A map of the project, showing its proposed location and existing facilities adjacent to the proposal;

(5) A statement of your financial and technical capability to construct, operate, maintain, and terminate the project;

(6) Any plans, contracts, agreements, or other information concerning your use of the right-of-way and its effect on competition;

(7) A statement certifying that you are of legal age and authorized to do business in the State(s) where the right-of-way would be located and that you have submitted correct information to the best of your knowledge; and

(8) A schedule for the submission of a plan of development (POD) conforming to the POD template at <http://www.blm.gov>, should the BLM require you to submit a POD under § 2804.25(c).

(b) When submitting an application for a solar or wind energy development project or for a transmission line project with a capacity of 100 kV or more, in addition to the information required in paragraph (a) of this section, you must:

(1) Include a general description of the proposed project and a schedule for the submission of a POD conforming to the POD template at <http://www.blm.gov>;

(2) Address all known potential resource conflicts with sensitive resources and values, including special designations or protections, and include applicant-proposed measures to avoid, minimize, and compensate for such resource conflicts, if any;

(3) Initiate early discussions with any grazing permittees that may be affected by the proposed project in accordance with 43 CFR 4110.4-2(b); and

(4) Within 6 months from the time the BLM receives the cost recovery fee under § 2804.14, schedule and hold two preliminary application review meetings as follows:

(i) The first meeting will be with the BLM to discuss the general project proposal, the status of BLM land use planning for the lands involved, potential siting issues or concerns, potential environmental issues or concerns, potential alternative site locations and the right-of-way application process;

(ii) The second meeting will be with appropriate Federal and State agencies and tribal and local governments to facilitate coordination of potential environmental and siting issues and concerns; and

(iii) You and the BLM may agree to hold additional preliminary application review meetings.

(c) When submitting an application for a solar or wind energy project under this subpart rather than subpart 2809, you must:

(1) Propose a project sited on lands outside a designated leasing area, except as provided for by § 2809.19; and

(2) Pay an application filing fee of \$15 per acre for solar or wind energy development applications and \$2 per acre for energy project-area testing applications. The BLM will refund your fee, except for the reasonable costs incurred on your behalf, if you are the unsuccessful bidder in a competitive offer held under § 2804.30 or subpart 2809. The BLM will adjust the application filing fee at least once every 10 years using the change in the Implicit Price Deflator, Gross Domestic Product (IPD-GDP) for the preceding 10-year period and round it to the nearest one-half dollar. This 10-year average will be adjusted at the same time as the Per Acre Rent Schedule for linear rights-of-way under § 2806.22.

(d) If you are unable to meet a requirement of the application outlined in this section, you may submit a request for an alternative requirement under § 2804.40.

(e) If you are a business entity, you must also submit the following information:

(1) Copies of the formal documents creating the entity, such as articles of incorporation, and including the corporate bylaws;

(2) Evidence that the party signing the application has the authority to bind the applicant;

(3) The name and address of each participant in the business;

(4) The name and address of each shareholder owning 3 percent or more of the shares and the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote;

(5) The name and address of each affiliate of the business;

(6) The number of shares and the percentage of any class of voting stock owned by the business, directly or indirectly, in any affiliate controlled by the business;

(7) The number of shares and the percentage of any class of voting stock owned by an affiliate, directly or indirectly, in the business controlled by the affiliate; and

(8) If you have already provided the information in paragraphs (b)(1) through (7) of this section to the BLM and the information remains accurate, you need only reference the BLM serial number under which you previously filed it.

(f) The BLM may require you to submit additional information at any

time while processing your application. See § 2884.11(c) of this chapter for the type of information we may require.

(g) If you are a Federal oil and gas lessee or operator and you need a right-of-way for access to your production facilities or oil and gas lease, you may include your right-of-way requirements with your Application for Permit to Drill or Sundry Notice required under parts 3160 through 3190 of this chapter.

(h) If you are filing with another Federal agency for a license, certificate of public convenience and necessity, or other authorization for a project involving a right-of-way on public lands, simultaneously file an application with the BLM for a grant. Include a copy of the materials, or reference all the information, you filed with the other Federal agency.

(i) *Inter-agency coordination.* You may request, in writing, an exemption from the requirements of this section if you can demonstrate to the BLM that you have satisfied similar requirements by participating in an inter-agency coordination process with another Federal, State, local, or Tribal authority. No exemption is approved until you receive BLM approval in writing.

■ 9. In § 2804.14, revise paragraphs (a), (b), and (c) to read as follows:

§ 2804.14 What is the processing fee for a grant application?

(a) Unless you are exempt under § 2804.16, you must pay a fee to the BLM for the reasonable costs of processing your application. Subject to applicable laws and regulations, if processing your application involves Federal agencies other than the BLM, your fee may also include the reasonable costs estimated to be incurred by those Federal agencies. Instead of paying the BLM a fee for the reasonable costs incurred by other Federal agencies in processing your application, you may pay other Federal agencies directly for such costs. Reasonable costs are those costs as defined in Section 304(b) of FLPMA (43 U.S.C. 1734(b)). The fees for Processing Categories 1 through 4 (see paragraph (b) of this section) are one-time fees and are not refundable. The fees are categorized based on an estimate of the amount of time that the Federal Government will expend to process your application and issue a decision granting or denying the application.

(b) There is no processing fee if the Federal Government's work is estimated to take 1 hour or less. Processing fees are based on categories. The BLM will update the processing fees for Categories 1 through 4 in the schedule each calendar year, based on the previous

year's change in the IPD-GDP, as measured second quarter to second quarter, rounded to the nearest dollar.

The BLM will update Category 5 processing fees as specified in the Master Agreement. These categories and

the estimated range of Federal work hours for each category are:

PROCESSING CATEGORIES

Processing category	Federal work hours involved
(1) Applications for new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >1 ≤ 8
(2) Applications for new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >8 ≤ 24
(3) Applications for new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >24 ≤ 36
(4) Applications for new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >36 ≤ 50
(5) Master agreements	Varies
(6) Applications for new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >50

(c) You may obtain a copy of the current year's processing fee schedule from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM also posts the current processing fee schedule at <http://www.blm.gov>.

■ 10. Amend § 2804.18 by redesignating paragraphs (a)(6) through (8) as paragraphs (a)(7) through (9) and adding new paragraph (a)(6) to read as follows:

§ 2804.18 What provisions do Master Agreements contain and what are their limitations?

(a) * * *

(6) Describes existing agreements between the BLM and other Federal agencies for cost reimbursement;

■ 11. Amend § 2804.19 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 2804.19 How will BLM process my Processing Category 6 application?

(a) For Processing Category 6 applications, you and the BLM must enter into a written agreement that describes how the BLM will process your application. The final agreement consists of a work plan, a financial plan, and a description of any existing agreements you have with other Federal agencies for cost reimbursement associated with your application.

(e) We may collect reimbursement for reasonable costs to the United States for processing applications and other documents under this part relating to the public lands.

■ 12. Amend § 2804.20 by revising paragraphs (a)(1) and (5), redesignating paragraph (a)(6) as paragraph (a)(7), and

adding new paragraph (a)(6) to read as follows:

§ 2804.20 How does BLM determine reasonable costs for Processing Category 6 or Monitoring Category 6 applications?

* * * * *

(a) * * *

(1) Actual costs to the Federal Government (exclusive of management overhead costs) of processing your application and of monitoring construction, operation, maintenance, and termination of a facility authorized by the right-of-way grant;

* * * * *

(5) Any tangible improvements, such as roads, trails, and recreation facilities, which provide significant public service and are expected in connection with constructing and operating the facility;

(6) Existing agreements between the BLM and other Federal agencies for cost reimbursement associated with such application; and

* * * * *

■ 13. Amend § 2804.23 by revising the section heading and paragraphs (a)(1) and (c) and adding paragraphs (d) and (e) to read as follows:

§ 2804.23 When will the BLM use a competitive process?

(a) * * *

(1) *Processing Category 1 through 4.* You must reimburse the Federal Government for processing costs as if the other application or applications had not been filed.

* * * * *

(c) If we determine that competition exists, we will describe the procedures for a competitive bid through a bid announcement in the **Federal Register**. We may also provide notice by other methods, such as a newspaper of general circulation in the area affected by the potential right-of-way, or the Internet. We may offer lands through a

competitive process on our own initiative. The BLM will not competitively offer lands for which the BLM has accepted an application and received a plan of development and cost recovery agreement.

(d) *Competitive process for solar and wind energy development outside designated leasing areas.* Lands outside designated leasing areas may be made available for solar and wind energy applications through a competitive application process established by the BLM under § 2804.30.

(e) *Competitive process for solar and wind energy development inside designated leasing areas.* Lands inside designated leasing areas may be offered competitively under subpart 2809.

■ 14. Amend § 2804.24 by revising paragraph (a), redesignating paragraph (b) as paragraph (c), and adding new paragraph (b) to read as follows:

§ 2804.24 Do I always have to submit an application for a grant using Standard Form 299?

* * * * *

(a) The BLM offers lands competitively under § 2804.23(c) and you have already submitted an application for the facility or system;

(b) The BLM offers lands for competitive lease under subpart 2809 of this part; or

* * * * *

■ 15. Revise § 2804.25 to read as follows:

§ 2804.25 How will BLM process my application?

(a) The BLM will notify you in writing when it receives your application. This notification will also:

(1) Identify your processing fee described at § 2804.14; and

(2) Inform you of any other grant applications which involve all or part of the lands for which you applied.

(b) The BLM will not process your application if you have any:
 (1) Outstanding unpaid debts owed to the Federal Government. Outstanding debts are those currently unpaid debts owed to the Federal Government after all administrative collection actions have occurred, including any appeal proceedings under applicable Federal regulations and the Administrative Procedure Act; or
 (2) Trespass action pending against you for any activity on BLM-administered lands (see § 2808.12), except those to resolve the trespass with a right-of-way as authorized in this part, or a lease or permit under the

regulations found at 43 CFR part 2920, but only after outstanding unpaid debts are paid.
 (c) The BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan (*i.e.*, a POD), and any needed cultural resource surveys or inventories for threatened or endangered species. If the BLM needs more information, the BLM will identify this information in a written deficiency notice asking you to provide the additional information within a specified period of time.

(1) For solar or wind energy development projects, and transmission lines with a capacity of 100 kV or more, you must commence any required resource surveys or inventories within one year of the request date, unless otherwise specified by the BLM; or
 (2) If you are unable to meet any of the requirements of this section, you must show good cause and submit a request for an alternative under § 2804.40.
 (d) *Customer service standard.* The BLM will process your completed application as follows:

Processing category	Processing time	Conditions
1–4	60 calendar days	If processing your application will take longer than 60 calendar days, the BLM will notify you in writing of this fact prior to the 30th calendar day and inform you of when you can expect a final decision on your application.
5	As specified in the Master Agreement	The BLM will process applications as specified in the Agreement.
6	Over 60 calendar days	The BLM will notify you in writing within the initial 60-day processing period of the estimated processing time.

(e) In processing an application, the BLM will:
 (1) Hold public meetings if sufficient public interest exists to warrant their time and expense. The BLM will publish a notice in the **Federal Register** and may use other notification methods, such as a newspaper of general circulation in the vicinity of the lands involved in the area affected by the potential right-of-way or the Internet, to announce in advance any public hearings or meetings;
 (2) If your application is for solar or wind energy development:
 (i) Hold a public meeting in the area affected by the potential right-of-way;
 (ii) Apply screening criteria to prioritize processing applications with lesser resource conflicts over applications with greater resource conflicts and categorize screened applications according to the criteria listed in § 2804.35; and
 (iii) Evaluate the application based on the information provided by the applicant and input from other parties, such as Federal, State, and local government agencies, and tribes, as well as comments received in preliminary application review meetings held under § 2804.12(b)(4) and the public meeting held under paragraph (e)(2)(i) of this section. The BLM will also evaluate your application based on whether you propose to site the development appropriately (*e.g.* outside of a designated leasing area or exclusion area) and whether you address known resource values discussed in the

preliminary application review meetings. Based on these evaluations, the BLM will either deny your application or continue processing it.
 (3) Determine whether a POD schedule submitted with your application meets the development schedule or other requirements described by the BLM, such as in § 2804.12(b);
 (4) Complete appropriate National Environmental Policy Act (NEPA) compliance for the application, as required by 43 CFR part 46 and 40 CFR parts 1500 through 1508;
 (5) Determine whether your proposed use complies with applicable Federal and State laws;
 (6) If your application is for a road, determine whether it is in the public interest to require you to grant the United States an equivalent authorization across lands that you own;
 (7) Consult, as necessary, on a government-to-government basis with tribes and other governmental entities; and
 (8) Take any other action necessary to fully evaluate and decide whether to approve or deny your application.
 (f)(1) The BLM may segregate, if it finds it necessary for the orderly administration of the public lands, lands included in a right-of-way application under this subpart for the generation of electrical energy from wind or solar sources. In addition, the BLM may also segregate lands that it identifies for potential rights-of-way for electricity generation from wind or solar sources when initiating a competitive

process for solar or wind development on particular lands. Upon segregation, such lands would not be subject to appropriation under the public land laws, including location under the Mining Law of 1872 (30 U.S.C. 22 *et seq.*), but would remain open under the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) or the Materials Act of 1947 (30 U.S.C. 601 *et seq.*). The BLM would effect a segregation by publishing a **Federal Register** notice that includes a description of the lands being segregated. The BLM may effect segregation in this way for both pending and new right-of-way applications.
 (2) The effective date of segregation is the date of publication of the notice in the **Federal Register**. Consistent with 43 CFR 2091–3.2, the segregation terminates and the lands automatically open on the date that is the earliest of the following:
 (i) When the BLM issues a decision granting, granting with modifications, or denying the application for a right-of-way;
 (ii) Automatically at the end of the segregation period stated in the **Federal Register** notice initiating the segregation; or
 (iii) Upon publication of a **Federal Register** notice terminating the segregation and opening the lands.
 (3) The segregation period may not exceed 2 years from the date of publication in the **Federal Register** of the notice initiating the segregation, unless the State Director determines and documents in writing, prior to the

expiration of the segregation period, that an extension is necessary for the orderly administration of the public lands. If the State Director determines an extension is necessary, the BLM will extend the segregation for up to 2 years by publishing a notice in the **Federal Register**, prior to the expiration of the initial segregation period. Segregations under this part may only be extended once and the total segregation period may not exceed 4 years.

■ 16. Amend § 2804.26 by revising paragraph (a)(5), redesignating paragraph (a)(6) as paragraph (a)(8), revising newly redesignated paragraph (a)(8), and adding new paragraphs (a)(6), (a)(7), and (c) to read as follows:

§ 2804.26 Under what circumstances may BLM deny my application?

(a) * * *

(5) You do not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way.

(i) Applicants must have or be able to demonstrate technical and financial capability to construct, operate, maintain, and terminate a project throughout the application process and authorization period. You can demonstrate your financial and technical capability to construct, operate, maintain, and terminate a project by:

(A) Documenting any previous successful experience in construction, operation, and maintenance of similar facilities on either public or non-public lands;

(B) Providing information on the availability of sufficient capitalization to carry out development, including the preliminary study stage of the project and the environmental review and clearance process; or

(C) Providing written copies of conditional commitments of Federal and other loan guarantees; confirmed power purchase agreements; engineering, procurement, and construction contracts; and supply contracts with credible third-party vendors for the manufacture or supply of key components for the project facilities.

(ii) Failure to demonstrate and sustain technical and financial capability is grounds for denying an application or terminating an authorization;

(6) The PODs required by §§ 2804.25(e)(3) and 2804.12(a)(8) and (c)(1) do not meet the development schedule or other requirements in the POD template and the applicant is unable to demonstrate why the POD should be approved;

(7) Failure to commence necessary surveys and studies, or plans for permit processing as required by § 2804.25(c); or

(8) The BLM's evaluation of your solar or wind application made under § 2804.25(e)(2)(iii) provides a basis for a denial.

* * * * *

(c) If you are unable to meet any of the requirements in this section you may request an alternative from the BLM (see § 2804.40).

■ 17. In § 2804.27, revise the section heading and introductory text to read as follows:

§ 2804.27 What fees must I pay if BLM denies my application or if I withdraw my application?

If the BLM denies your application or you withdraw it, you must still pay any application filing fees under § 2804.12(b)(2), and any processing fee set forth at § 2804.14, unless you have a Processing Category 5 or 6 application. Then, the following conditions apply:

* * * * *

■ 18. Add § 2804.30 to subpart 2804 to read as follows:

§ 2804.30 What is the competitive process for solar or wind energy development for lands outside of designated leasing areas?

(a) *Available land.* The BLM may offer through a competitive process any land not inside a designated leasing area and open to right-of-way applications under § 2802.10.

(b) *Variety of competitive procedures available.* The BLM may use any type of competitive process or procedure to conduct its competitive offer and any method, including the use of the Internet, to conduct the actual auction or competitive bid procedure. Possible bid procedures could include, but are not limited to: Sealed bidding, oral auctions, modified competitive bidding, electronic bidding, and any combination thereof.

(c) *Competitive offer.* The BLM may identify a parcel for competitive offer if competition exists or may include land in a competitive offer on its own initiative.

(d) *Notice of competitive offer.* The BLM will publish a notice in the **Federal Register** at least 30 days prior to the competitive offer and may use other notification methods, such as a newspaper of general circulation in the area affected by the potential right-of-way or the Internet. The notice would explain that the successful bidder would become the preferred applicant (see paragraph (g) of this section) and may then apply for a grant. The **Federal**

Register and other notices must also include:

(1) The date, time, and location, if any, of the competitive offer;

(2) The legal land description of the parcel to be offered;

(3) The bidding methodology and procedures to be used in conducting the competitive offer, which may include any of the competitive procedures identified in § 2804.30(b);

(4) The minimum bid required (see § 2804.30(e)(2));

(5) The qualification requirements for potential bidders (see § 2803.10); and

(6) The requirements for the successful bidder to submit a schedule for the submission of a POD for the lands involved in the competitive offer (see § 2804.12(c)(1)).

(e) *Bidding*—(1) *Bid submissions.* The BLM will accept your bid only if it includes payment for the minimum bid and at least 20 percent of the bonus bid.

(2) *Minimum bid.* The minimum bid is not prorated among all bidders, but paid entirely by the successful bidder. The minimum bid consists of:

(i) The administrative costs incurred by the BLM and other Federal agencies in preparing for and conducting the competitive offer, including required environmental reviews; and

(ii) An amount determined by the authorizing officer and disclosed in the notice of competitive offer. This amount will be based on known or potential values of the parcel. In setting this amount, the BLM will consider factors that include, but are not limited to, the acreage rent and megawatt capacity fee.

(3) *Bonus bid.* The bonus bid consists of any dollar amount that a bidder wishes to bid in addition to the minimum bid.

(4) If you are not the successful bidder, as defined in paragraph (f) of this section, the BLM will refund your bid and any application filing fees, less the reasonable costs incurred by the United States in connection with your application, under § 2804.12(c)(2).

(f) *Successful bidder.* The successful bidder is determined by the highest total bid. If you are the successful bidder, you become the preferred applicant only if, within 15 calendar days after the day of the offer, you submit the balance of the bonus bid to the BLM office conducting the competitive offer. You must make payments by personal check, cashier's check, certified check, bank draft, money order, or by other means deemed acceptable by the BLM, payable to the "Department of the Interior—Bureau of Land Management."

(g) *Preferred applicant.* The preferred applicant may apply for an energy project-area testing grant, an energy site-

specific testing grant, or a solar or wind energy development grant for the parcel identified in the offer. Grant approval is not guaranteed by winning the subject bid and is solely at the BLM's discretion. The BLM will not accept applications on lands where a preferred applicant has been identified, unless allowed by the preferred applicant.

(h) *Reservations.* (1) The BLM may reject bids regardless of the amount offered. If the BLM rejects your bid under this provision, you will be notified in writing and such notice will include the reasons for the rejection and any refunds to which you are entitled.

(2) The BLM may make the next highest bidder the preferred applicant if the first successful bidder fails to satisfy the requirements under paragraph (f) of this section.

(3) If the BLM is unable to determine the successful bidder, such as in the case of a tie, the BLM may re-offer the lands competitively to the tied bidders, or to all bidders.

(4) If lands offered under this section receive no bids the BLM may:

(i) Re-offer the lands through the competitive process under this section; or

(ii) Make the lands available through the non-competitive application process found in subparts 2803, 2804, and 2805 of this part, if the BLM determines that doing so is in the public interest.

■ 19. Add § 2804.31 to subpart 2804 to read as follows:

§ 2804.31 How will the BLM call for site testing for solar and wind energy?

(a) *Call for site testing.* The BLM may, at its own discretion, initiate a call for site testing. The BLM will publish this call for site testing in the **Federal Register** and may also use other notification methods, such as a newspaper of general circulation in the area affected by the potential right-of-way, or the Internet. The **Federal Register** and any other notices will include:

(1) The date, time, and location that site testing applications identified under § 2801.9(d)(1) of this part may be submitted;

(2) The date by which applicants will be notified of the BLM's decision on timely submitted site testing applications;

(3) The legal land description of the area for which site testing applications are being requested; and

(4) The qualification requirements for applicants (see § 2803.10).

(b) You may request that the BLM hold a call for site testing for certain public lands. The BLM may proceed with a call for site testing at its own discretion.

(c) The BLM may identify lands surrounding the site testing as designated leasing areas under § 2802.11. If a designated leasing area is established, a competitive offer for a development lease under subpart 2809 may be held at the discretion of the BLM.

■ 20. Add § 2804.35 to subpart 2804 to read as follows:

§ 2804.35 How will the BLM prioritize my solar or wind energy application?

The BLM will prioritize your application by placing it into one of three categories and may re-categorize your application based on new information received through surveys, public meetings, or other data collection, or after any changes to the application. The BLM will generally prioritize the processing of leases awarded under subpart 2809 before applications submitted under subpart 2804. For applications submitted under subpart 2804, the BLM will categorize your application based on the following screening criteria.

(a) High-priority applications are given processing priority over medium- and low-priority applications and may include lands that meet the following criteria:

(1) Lands specifically identified as appropriate for solar or wind energy development, other than designated leasing areas;

(2) Previously disturbed sites or areas adjacent to previously disturbed or developed sites;

(3) Lands currently designated as Visual Resource Management Class IV; or

(4) Lands identified as suitable for disposal in BLM land use plans.

(b) Medium-priority applications are given priority over low-priority applications and may include lands that meet the following criteria:

(1) BLM special management areas that provide for limited development, including recreation sites and facilities;

(2) Areas where a project may adversely affect conservation lands, including lands with wilderness characteristics that have been identified in an updated wilderness characteristics inventory;

(3) Right-of-way avoidance areas;

(4) Areas where project development may adversely affect resources and properties listed nationally such as the National Register of Historic Places, National Natural Landmarks, or National Historic Landmarks;

(5) Sensitive habitat areas, including important species use areas, riparian areas, or areas of importance for Federal or State sensitive species;

(6) Lands currently designated as Visual Resource Management Class III;

(7) Department of Defense operating areas with land use or operational mission conflicts; or

(8) Projects with proposed groundwater uses within groundwater basins that have been allocated by State water resource agencies.

(c) Low-priority applications may not be feasible to authorize. These applications may include lands that meet the following criteria:

(1) Lands near or adjacent to lands designated by Congress, the President, or the Secretary for the protection of sensitive viewsheds, resources, and values (e.g., units of the National Park System, Fish and Wildlife Service Refuge System, some National Forest System units, and the BLM National Landscape Conservation System), which may be adversely affected by development;

(2) Lands near or adjacent to Wild, Scenic, and Recreational Rivers and river segments determined suitable for Wild or Scenic River status, if project development may have significant adverse effects on sensitive viewsheds, resources, and values;

(3) Designated critical habitat for federally threatened or endangered species, if project development may result in the destruction or adverse modification of that critical habitat;

(4) Lands currently designated as Visual Resource Management Class I or Class II;

(5) Right-of-way exclusion areas; or

(6) Lands currently designated as no surface occupancy for oil and gas development in BLM land use plans.

■ 21. Add § 2804.40 to subpart 2804 to read as follows:

§ 2804.40 Alternative requirements.

If you are unable to meet any of the requirements in this subpart you may request approval for an alternative requirement from the BLM. Any such request is not approved until you receive BLM approval in writing. Your request to the BLM must:

(a) Show good cause for your inability to meet a requirement;

(b) Suggest an alternative requirement and explain why that requirement is appropriate; and

(c) Be received in writing by the BLM in a timely manner, before the deadline to meet a particular requirement has passed.

Subpart 2805—Terms and Conditions of Grants

■ 22. Amend § 2805.10 as follows:

■ a. Revise the section heading and paragraph (a);

- b. Redesignate paragraph (b) and (c) as paragraphs (c) and (d), respectively; and
- c. Add new paragraph (b).

The revisions and addition read as follows:

§ 2805.10 How will I know whether the BLM has approved or denied my application or if my bid for a solar or wind energy development grant or lease is successful or unsuccessful?

(a) The BLM will send you a written response when it has made a decision on your application or if you are the successful bidder for a solar or wind energy development grant or lease. If we approve your application, we will send you an unsigned grant for your review and signature. If you are the successful bidder for a solar or wind energy lease inside a designated leasing area under § 2809.15, we may send you an unsigned lease for your review and signature. If your bid is unsuccessful, it will be refunded under § 2804.30(e)(4) or § 2809.14(d) and you will receive written notice from us.

(b) Your unsigned grant or lease document:

(1) Will include any terms, conditions, and stipulations that we determine to be in the public interest, such as modifying your proposed use or changing the route or location of the facilities;

(2) May include terms that prevent your use of the right-of-way until you have an approved Plan of Development (POD) and BLM has issued a Notice to Proceed; and

(3) Will impose a specific term for the grant or lease. Each grant or lease that we issue for 20 or more years will contain a provision requiring periodic review at the end of the twentieth year and subsequently at 10-year intervals. We may change the terms and conditions of the grant or lease, including leases issued under subpart 2809, as a result of these reviews in accordance with § 2805.15(e).

* * * * *

■ 23. Amend § 2805.11 by redesignating paragraph (b)(2) as paragraph (b)(3), adding new paragraph (b)(2), and revising newly redesignated paragraph (b)(3) to read as follows:

§ 2805.11 What does a grant contain?

* * * * *

(b) * * *

(2) Specific terms for solar and wind energy grants and leases are as follows:

(i) For an energy site-specific testing grant, the term is 3 years or less, without the option of renewal;

(ii) For an energy project-area testing grant, the initial term is 3 years or less, with the option to renew for one

additional 3-year period when the renewal application is also accompanied by a solar or wind energy development application and a POD as required by § 2804.25(e)(3);

(iii) For a short-term grant for all other associated actions not specifically included in paragraphs (b)(2)(i) and (ii) of this section, such as geotechnical testing and other temporary land disturbing activities, the term is 3 years or less;

(iv) For solar and wind energy development grants, the term is up to 30 years (plus the initial partial year of issuance) with adjustable terms and conditions. The grantee may submit an application for renewal under § 2805.14(g); and

(v) For solar and wind energy development leases located inside designated leasing areas, the term is fixed for 30 years (plus the initial partial year of issuance). The lessee may submit an application for renewal under § 2805.14(g).

(3) All grants and leases, except those issued for a term of 3 years or less and those issued in perpetuity, will expire on December 31 of the final year of the grant or lease. For grants and leases with terms greater than 3 years, the actual term includes the number of full years specified, plus the initial partial year, if any.

* * * * *

■ 24. Revise § 2805.12 to read as follows:

§ 2805.12 What terms and conditions must I comply with?

(a) By accepting a grant or lease, you agree to comply with and be bound by the following terms and conditions. During construction, operation, maintenance, and termination of the project you must:

(1) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations and State laws and regulations applicable to the authorized use;

(2) Rebuild and repair roads, fences, and established trails destroyed or damaged by the project;

(3) Build and maintain suitable crossings for existing roads and significant trails that intersect the project;

(4) Do everything reasonable to prevent and suppress wildfires on or in the immediate vicinity of the right-of-way area;

(5) Not discriminate against any employee or applicant for employment during any stage of the project because of race, creed, color, sex, sexual orientation, or national origin. You must

also require subcontractors to not discriminate;

(6) Pay monitoring fees and rent described in § 2805.16 and subpart 2806;

(7) Assume full liability if third parties are injured or damages occur to property on or near the right-of-way (see § 2807.12);

(8) Comply with project-specific terms, conditions, and stipulations, including requirements to:

(i) Restore, revegetate, and curtail erosion or conduct any other rehabilitation measure the BLM determines necessary;

(ii) Ensure that activities in connection with the grant comply with air and water quality standards or related facility siting standards contained in applicable Federal or State law or regulations;

(iii) Control or prevent damage to:

(A) Scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat;

(B) Public and private property; and

(C) Public health and safety;

(iv) Provide for compensatory mitigation for residual impacts associated with the right-of-way;

(v) Protect the interests of individuals living in the general area who rely on the area for subsistence uses as that term is used in Title VIII of Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111 *et seq.*);

(vi) Ensure that you construct, operate, maintain, and terminate the facilities on the lands in the right-of-way in a manner consistent with the grant or lease, including the approved POD, if one was required;

(vii) When the State standards are more stringent than Federal standards, comply with State standards for public health and safety, environmental protection, and siting, constructing, operating, and maintaining any facilities and improvements on the right-of-way; and

(viii) Grant the BLM an equivalent authorization for an access road across your land if the BLM determines that a reciprocal authorization is needed in the public interest and the authorization the BLM issues to you is also for road access;

(9) Immediately notify all Federal, State, tribal, and local agencies of any release or discharge of hazardous material reportable to such entity under applicable law. You must also notify the BLM at the same time and send the BLM a copy of any written notification you prepared;

(10) Not dispose of or store hazardous material on your right-of-way, except as provided by the terms, conditions, and stipulations of your grant;

(11) Certify your compliance with all requirements of the Emergency Planning and Community Right-to-Know Act of 1986, (42 U.S.C. 11001 *et seq.*), when you receive, assign, renew, amend, or terminate your grant;

(12) Control and remove any release or discharge of hazardous material on or near the right-of-way arising in connection with your use and occupancy of the right-of-way, whether or not the release or discharge is authorized under the grant. You must also remediate and restore lands and resources affected by the release or discharge to the BLM's satisfaction and to the satisfaction of any other Federal, State, tribal, or local agency having jurisdiction over the land, resource, or hazardous material;

(13) Comply with all liability and indemnification provisions and stipulations in the grant;

(14) As the BLM directs, provide diagrams or maps showing the location of any constructed facility;

(15) As the BLM directs, provide, or give access to, any pertinent environmental, technical, and financial records, reports, and other information, such as Power Purchase and Interconnection Agreements or the production and sale data for electricity generated from the approved facilities on public lands. Failure to comply with such requirements may, at the discretion of the BLM, result in suspension or termination of the right-of-way authorization. The BLM may use this and similar information for the purpose of monitoring your authorization and for periodic evaluation of financial obligations under the authorization, as appropriate. Any records the BLM obtains will be made available to the public subject to all applicable legal requirements and limitations for inspection and duplication under the Freedom of Information Act. Any information marked confidential or proprietary will be kept confidential to the extent allowed by law; and

(16) Comply with all other stipulations that the BLM may require.

(b) You must comply with the bonding requirements under § 2805.20. The BLM will not issue a Notice to Proceed or give written approval to proceed with ground disturbing activities until you comply with this requirement.

(c) By accepting a grant or lease for solar or wind energy development, you also agree to comply with and be bound by the following terms and conditions. You must:

(1) Not begin any ground disturbing activities until the BLM issues a Notice

to Proceed (see § 2807.10) or written approval to proceed with ground disturbing activities;

(2) Complete construction within the timeframes in the approved POD, but no later than 24 months after the start of construction, unless the project has been approved for staged development, or as otherwise authorized by the BLM;

(3) If an approved POD provides for staged development, unless otherwise approved by the BLM:

(i) Begin construction of the initial phase of development within 12 months after issuance of the Notice to Proceed, but no later than 24 months after the effective date of the right-of-way authorization;

(ii) Begin construction of each stage of development (following the first) within 3 years of the start of construction of the previous stage of development, and complete construction of that stage no later than 24 months after the start of construction of that stage, unless otherwise authorized by the BLM; and

(iii) Have no more than 3 development stages, unless otherwise authorized by the BLM;

(4) Maintain all onsite electrical generation equipment and facilities in accordance with the design standards in the approved POD;

(5) Repair and place into service, or remove from the site, damaged or abandoned facilities that have been inoperative for any continuous period of 3 months and that present an unnecessary hazard to the public lands. You must take appropriate remedial action within 30 days after receipt of a written noncompliance notice, unless you have been provided an extension of time by the BLM. Alternatively, you must show good cause for any delays in repairs, use, or removal; estimate when corrective action will be completed; provide evidence of diligent operation of the facilities; and submit a written request for an extension of the 30-day deadline. If you do not comply with this provision, the BLM may suspend or terminate the authorization under §§ 2807.17 through 2807.19; and

(6) Comply with the diligent development provisions of the authorization or the BLM may suspend or terminate your grant or lease under §§ 2807.17 through 2807.19. Before suspending or terminating the authorization, the BLM will send you a notice that gives you a reasonable opportunity to correct any noncompliance or to start or resume use of the right-of-way (see § 2807.18). In response to this notice, you must:

(i) Provide reasonable justification for any delays in construction (for example,

delays in equipment delivery, legal challenges, and acts of God);

(ii) Provide the anticipated date of completion of construction and evidence of progress toward the start or resumption of construction; and

(iii) Submit a written request under paragraph (e) of this section for extension of the timelines in the approved POD. If you do not comply with the requirements of paragraph (c)(7) of this section, the BLM may deny your request for an extension of the timelines in the approved POD.

(7) In addition to the RCE requirements of § 2805.20(a)(5) for a grant, the bond secured for a grant or lease must cover the estimated costs of cultural resource and Indian cultural resource identification, protection, and mitigation for project impacts.

(d) For energy site or project testing grants:

(1) You must install all monitoring facilities within 12 months after the effective date of the grant or other authorization. If monitoring facilities under a site testing and monitoring right-of-way authorization have not been installed within 12 months after the effective date of the authorization or consistent with the timeframe of the approved POD, you must request an extension pursuant to paragraph (e) of this section;

(2) You must maintain all onsite equipment and facilities in accordance with the approved design standards;

(3) You must repair and place into service, or remove from the site, damaged or abandoned facilities that have been inoperative for any continuous period of 3 months and that present an unnecessary hazard to the public lands; and

(4) If you do not comply with the diligent development provisions of either the site testing and monitoring authorization or the project testing and monitoring authorization, the BLM may terminate your authorization under § 2807.17.

(e) *Notification of noncompliance and request for alternative requirements.* (1) As soon as you anticipate that you will not meet any stipulation, term, or condition of the approved right-of-way grant or lease, or in the event of your noncompliance with any such stipulation, term, or condition, you must notify the BLM in writing and show good cause for the noncompliance, including an explanation of the reasons for the failure.

(2) You may also request that the BLM consider alternative stipulations, terms, or conditions. Any request for an alternative stipulation, term, or

condition must comply with applicable law in order to be considered. Any proposed alternative to applicable bonding requirements must provide the United States with adequate financial assurance for potential liabilities associated with your right-of-way grant or lease. Any such request is not approved until you receive BLM approval in writing.

■ 25. Amend § 2805.14 by removing “and” from the end of paragraph (e), removing the period from the end of paragraph (f) and adding “; and” in its place, and adding paragraphs (g) and (h) to read as follows:

§ 2805.14 What rights does a grant convey?

* * * * *

(g) Apply to renew your solar or wind energy development grant or lease, under § 2807.22; and

(h) Apply to renew your energy project-area testing grant for one

additional term of 3 years or less when the renewal application also includes an energy development application under § 2801.9(d)(2).

■ 26. In § 2805.15, revise the first sentence of paragraph (b) to read as follows:

§ 2805.15 What rights does the United States retain?

* * * * *

(b) Require common use of your right-of-way, including facilities (see § 2805.14(b)), subsurface, and air space, and authorize use of the right-of-way for compatible uses. * * *

* * * * *

■ 27. Revise § 2805.16 to read as follows:

§ 2805.16 If I hold a grant, what monitoring fees must I pay?

(a) You must pay a fee to the BLM for the reasonable costs the Federal Government incurs in inspecting and

monitoring the construction, operation, maintenance, and termination of the project and protection and rehabilitation of the public lands your grant covers.

Instead of paying the BLM a fee for the reasonable costs incurred by other Federal agencies in monitoring your grant, you may pay the other Federal agencies directly for such costs. The BLM will annually adjust the Category 1 through 4 monitoring fees in the manner described at § 2804.14(b). The BLM will update Category 5 monitoring fees as specified in the Master Agreement. Category 6 monitoring fees are addressed at § 2805.17(c). The BLM categorizes the monitoring fees based on the estimated number of work hours necessary to monitor your grant. Category 1 through 4 monitoring fees are one-time fees and are not refundable. The monitoring categories and work hours are as follows:

MONITORING CATEGORIES

Monitoring category	Federal work hours involved
(1) Inspecting and monitoring of new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >1 ≤8.
(2) Inspecting and monitoring of new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >8 ≤24.
(3) Inspecting and monitoring of new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >24 ≤36.
(4) Inspecting and monitoring of new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >36 ≤50.
(5) Master Agreements	Varies.
(6) Inspecting and monitoring of new grants, assignments, renewals, and amendments to existing grants	Estimated Federal work hours are >50.

(b) The monitoring cost schedule is available from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM also posts the current schedule at <http://www.blm.gov>.

■ 28. Add § 2805.20 to subpart 2805 to read as follows:

§ 2805.20 Bonding requirements.

If you hold a grant or lease under this part, you must comply with the following bonding requirements:

(a) The BLM may require that you obtain, or certify that you have obtained, a performance and reclamation bond or other acceptable bond instrument to cover any losses, damages, or injury to human health, the environment, or property in connection with your use and occupancy of the right-of-way, including costs associated with terminating the grant, and to secure all obligations imposed by the grant and applicable laws and regulations. If you

plan to use hazardous materials in the operation of your grant, you must provide a bond that covers liability for damages or injuries resulting from releases or discharges of hazardous materials. The BLM will periodically review your bond for adequacy and may require a new bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant or lease.

(1) The BLM must be listed as an additionally named insured on the bond instrument if a State regulatory authority requires a bond to cover some portion of environmental liabilities, such as hazardous material damages or releases, reclamation, or other requirements for the project. The bond must:

- (i) Be redeemable by the BLM;
- (ii) Be held or approved by a State agency for the same reclamation requirements as specified by our right-of-way authorization; and

(iii) Provide the same or greater financial guarantee that we require for the portion of environmental liabilities covered by the State’s bond.

(2) *Bond acceptance.* The BLM authorized officer must review and approve all bonds, including any State bonds, prior to acceptance, and at the time of any right-of-way assignment, amendment, or renewal.

(3) *Bond amount.* Unless you hold a solar or wind energy lease under subpart 2809, the bond amount will be determined based on the preparation of a RCE, which the BLM may require you to prepare and submit. The estimate must include our cost to administer a reclamation contract and will be reviewed periodically for adequacy. The BLM may also consider other factors, such as salvage value, when determining the bond amount.

(4) You must post a bond on or before the deadline that we give you.

(5) Bond components that must be addressed when determining the RCE amount include, but are not limited to:

- (i) Environmental liabilities such as use of hazardous materials waste and hazardous substances, herbicide use, the use of petroleum-based fluids, and dust control or soil stabilization materials;
- (ii) The decommissioning, removal, and proper disposal, as appropriate, of any improvements and facilities; and
- (iii) Interim and final reclamation, re-vegetation, recontouring, and soil stabilization. This component must address the potential for flood events and downstream sedimentation from the site that may result in offsite impacts.

(6) You may ask us to accept a replacement performance and reclamation bond at any time after the approval of the initial bond. We will review the replacement bond for adequacy. A surety company is not released from obligations that accrued while the surety bond was in effect unless the replacement bond covers those obligations to our satisfaction.

(7) You must notify us that reclamation has occurred and you may request that the BLM reevaluate your bond. If we determine that you have completed reclamation, we may release all or part of your bond.

(8) If you hold a grant, you are still liable under § 2807.12 if:

- (i) We release all or part of your bond;
- (ii) The bond amount does not cover the cost of reclamation; or
- (iii) There is no bond in place;

(b) If you hold a grant for solar energy development outside of designated leasing areas, you must provide a performance and reclamation bond (see paragraph (a) of this section) prior to the BLM issuing a Notice to Proceed (see § 2805.12(c)(1)). We will determine the bond amount based on the RCE (see paragraph (a)(3) of this section) and it must be no less than \$10,000 per acre that will be disturbed;

(c) If you hold a grant for wind energy development outside of designated leasing areas, you must provide a performance and reclamation bond (see paragraph (a) of this section) prior to the BLM issuing a Notice to Proceed (see § 2805.12(c)(1)). We will determine the bond amount based on the RCE (see paragraph (a)(3) of this section) and it must be no less than \$10,000 per authorized turbine less than 1 MW in nameplate capacity or \$20,000 per authorized turbine equal to or greater than 1 MW in nameplate capacity; and

(d) For short-term right-of-way grants for energy site or project-area testing, the bond amount must be no less than \$2,000 per authorized meteorological tower or instrumentation facility

location and must be provided before the written approval to proceed with ground disturbing activities (see § 2805.12(c)(1)).

■ 29. Revise the heading for subpart 2806 to read as follows:

Subpart 2806—Annual Rents and Payments

■ 30. Amend § 2806.12 by revising the section heading and paragraphs (a) and (b) and adding paragraph (d) to read as follows:

§ 2806.12 When and where do I pay rent?

(a) You must pay rent for the initial rental period before the BLM issues you a grant or lease.

(1) If your non-linear grant or lease is effective on:

(i) January 1 through September 30 and qualifies for annual payments, your initial rent bill is pro-rated to include only the remaining full months in the initial year; or

(ii) October 1 through December 31 and qualifies for annual payments, your initial rent bill is pro-rated to include the remaining full months in the initial year plus the next full year.

(2) If your non-linear grant allows for multi-year payments, such as a short term grant issued for energy site-specific testing, you may request that your initial rent bill be for the full term of the grant instead of the initial rent bill periods provided under paragraph (a)(1)(i) or (ii) of this section.

(b) You must make all rental payments for linear rights-of-way according to the payment plan described in § 2806.24.

* * * * *

(d) You must make all rental payments as instructed by us or as provided for by Secretarial order or legislative authority.

■ 31. Amend § 2806.13 by:

- a. Revising the section heading and paragraph (a);
- b. Redesignating paragraph (e) as paragraph (f); and
- c. Adding new paragraphs (e) and (g).

The revisions and additions read as follows:

§ 2806.13 What happens if I do not pay rents and fees or if I pay the rents or fees late?

(a) If the BLM does not receive the rent or fee payment required in subpart 2806 within 15 calendar days after the payment was due under § 2806.12, we will charge you a late payment fee of \$25 or 10 percent of the amount you owe, whichever is greater, per authorization.

* * * * *

(e) Subject to applicable laws and regulations, we will retroactively bill for uncollected or under-collected rent, fees, and late payments, if:

- (1) A clerical error is identified;
- (2) An adjustment to rental schedules is not applied; or
- (3) An omission or error in complying with the terms and conditions of the authorized right-of-way is identified.

* * * * *

(g) We will not approve any further activities associated with your right-of-way until we receive any outstanding payments that are due.

■ 32. In § 2806.20, revise paragraph (c) to read as follows:

§ 2806.20 What is the rent for a linear right-of-way grant?

* * * * *

(c) You may obtain a copy of the current Per Acre Rent Schedule from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. We also post the current rent schedule at <http://www.blm.gov>.

■ 33. In § 2806.22, revise the second sentence of paragraph (a) to read as follows:

§ 2806.22 When and how does the Per Acre Rent Schedule change?

(a) * * * For example, the average annual change in the IPD-GDP from 1994 to 2003 (the 10-year period immediately preceding the year (2004) that the 2002 National Agricultural Statistics Service Census data became available) was 1.9 percent. * * *

* * * * *

§ 2806.23 [Amended]

■ 34. Amend § 2806.23 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

■ 35. In § 2806.24, revise paragraph (c) to read as follows:

§ 2806.24 How must I make rental payments for a linear grant?

* * * * *

(c) *Proration of payments.* The BLM prorates the first year rental amount based on the number of months left in the calendar year after the effective date of the grant. If your grant requires, or you chose a 10-year payment term, or multiples thereof, the initial rent bill consists of the remaining partial year plus the next 10 years, or multiple thereof.

■ 36. Amend § 2806.30 by:

- a. Revising paragraphs (a)(1) and (2);
- b. Removing paragraph (b); and
- c. Redesignating paragraph (c) as paragraph (b).

The revisions read as follows:

§ 2806.30 What are the rents for communication site rights-of-way?

(a) *Rent schedule.* (1) The BLM uses a rent schedule to calculate the rent for communication site rights-of-way. The schedule is based on nine population strata (the population served), as depicted in the most recent version of the Ranally Metro Area (RMA) Population Ranking, and the type of communication use or uses for which we normally grant communication site rights-of-way. These uses are listed as part of the definition of “communication use rent schedule,” set out at § 2801.5(b). You may obtain a copy of the current schedule from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. We also post the current communication use rent schedule at <http://www.blm.gov>.

(2) We update the schedule annually based on two sources: The U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (CPI-U), as of July of each year (difference in CPI-U from July of one year to July of the following year), and the RMA population rankings.

* * * * *

■ 37. In § 2806.34, revise the second sentence of paragraph (b)(4) to read as follows:

§ 2806.34 How will BLM calculate the rent for a grant or lease authorizing a multiple-use communication facility?

* * * * *

(b) * * *

(4) * * * This paragraph (b)(4) does not apply to facilities exempt from rent under § 2806.14(a)(4) except when the facility also includes ineligible facilities.

■ 38. In § 2806.43, revise the third sentence of paragraph (a) to read as follows:

§ 2806.43 How does BLM calculate rent for passive reflectors and local exchange networks?

(a) * * * For passive reflectors and local exchange networks not covered by a Forest Service regional schedule, we use the provisions in § 2806.70 to determine rent. * * *

* * * * *

■ 39. Amend § 2806.44 by revising the section heading, adding introductory text, and revising paragraph (a) to read as follows:

§ 2806.44 How will BLM calculate rent for a facility owner's or facility manager's grant or lease which authorizes communication uses?

This section applies to a grant or lease that authorizes a mixture of communication uses, some of which are subject to the communication use rent schedule and some of which are not. We will determine rent for these leases under the provisions of this section.

(a) The BLM establishes the rent for each of the uses in the facility that are not covered by the communication use rent schedule using § 2806.70.

* * * * *

■ 40. Remove the undesignated centered heading preceding § 2806.50.

§ 2806.50 [Redesignated as § 2806.70]

■ 41. Redesignate § 2806.50 as § 2806.70.

■ 42. Add an undesignated centered heading and §§ 2806.50, 2806.51, 2806.52, 2806.54, 2806.56, and 2806.58 to read as follows:

Solar Energy Rights-of-Way

Sec.

2806.50 Rents and fees for solar energy rights-of-way.

2806.51 Scheduled Rate Adjustment.

2806.52 Rents and fees for solar energy development grants.

2806.54 Rents and fees for solar energy development leases.

2806.56 Rent for support facilities authorized under separate grant(s).

2806.58 Rent for energy development testing grants.

§ 2806.50 Rents and fees for solar energy rights-of-way.

If you hold a right-of-way authorizing solar energy site-specific or project-area testing, or solar energy development, you must pay an annual rent and fee in accordance with this section and subpart. Your solar energy right-of-way authorization will either be a grant (if issued under subpart 2804) or a lease (if issued under subpart 2809). Rents and fees for either type of authorization consist of an acreage rent that must be paid prior to issuance of the authorization and a phased-in MW capacity fee. Both the acreage rent and the phased-in MW capacity fee are charged and calculated consistent with § 2806.11 and prorated consistent with § 2806.12(a). The MW capacity fee will vary depending on the size and technology of the solar energy development project.

§ 2806.51 Scheduled Rate Adjustment.

(a) The BLM will adjust your acreage rent and MW capacity fee over the course of your authorization as described in these regulations. For new grants or leases, you may choose either

the standard rate adjustment method (see § 2806.52(a)(5) and (b)(3) for grants; see § 2806.54(a)(4) or (c) for leases) or the scheduled rate adjustment method (see § 2806.52(d) for grants; see § 2806.54(d) for leases). Once you select a rate adjustment method, that method will be fixed until you renew your grant or lease (see § 2807.22).

(b) For new grants or leases, if you select the scheduled rate adjustment method you must notify the BLM of your decision in writing. Your decision must be received by the BLM before your grant or lease is issued. If you do not select the scheduled rate adjustment method, the standard rate adjustment method will apply.

(c) If you hold a grant that is in effect prior to January 18, 2017, you may either accept the standard rate adjustment method or request in writing that the BLM apply the scheduled rate adjustment method, as set forth in § 2806.52(d), to your grant. To take advantage of the scheduled rate adjustment option, your request must be received by the BLM before December 19, 2018. The BLM will continue to apply the standard rate adjustment method to adjust your rates unless and until it receives your request to use the scheduled rate adjustment method.

§ 2806.52 Rents and fees for solar energy development grants.

You must pay an annual acreage rent and MW capacity fee for your solar energy development grant as follows:

(a) *Acreage rent.* The BLM will calculate the acreage rent by multiplying the number of acres (rounded up to the nearest tenth of an acre) within the authorized area times the annual per acre zone rate from the solar energy acreage rent schedule in effect at the time the authorization is issued.

(1) *Per acre zone rate.* The annual per acre zone rate from the solar energy acreage rent schedule is calculated using the per acre zone value (as assigned under paragraph (a)(2) of this section), encumbrance factor, rate of return, and the annual adjustment factor. The calculation for determining the annual per acre zone rate is $A \times B \times C \times D = E$ where:

(i) A is the per acre zone value = the same per acre zone values described in the linear rent schedule in § 2806.20(c);

(ii) B is the encumbrance factor = 100 percent;

(iii) C is the rate of return = 5.27 percent;

(iv) D is the annual adjustment factor = the average annual change in the IPD-GDP for the 10-year period immediately preceding the year that the NASS

Census data becomes available (see § 2806.22(a)). The BLM will adjust the per acre zone rates each year based on the average annual change in the IPD-GDP as determined under § 2806.22(a). Adjusted rates are effective each year on January 1; and

(v) E is the annual per acre zone rate.

(2) *Assignment of counties.* The BLM will calculate the per acre zone rate in paragraph (a)(1) of this section by using a State-specific factor to assign a county to a zone in the solar energy acreage rent schedule. The BLM will calculate a State-specific factor and apply it to the NASS data (county average per acre land and building value) to determine the per acre value and assign a county (or other geographical area) to a zone. The State-specific factor represents the percent difference between improved agricultural land and unimproved rangeland values, using NASS data. The calculation for determining the State-specific factor is $(A/B) - (C/D) = E$ where:

(i) A = the NASS Census statewide average per acre value of non-irrigated acres;

(ii) B = the NASS Census statewide average per acre land and building value;

(iii) C = the NASS Census total statewide acres in farmsteads, homes, buildings, livestock facilities, ponds, roads, wasteland, etc.;

(iv) D = the total statewide acres in farms; and

(v) E = the State-specific percent factor or 20 percent, whichever is greater.

(3) The initial assignment of counties to the zones on the solar energy acreage rent schedule will be based upon the most recent NASS Census data (2012) for years 2016 through 2020. The BLM may on its own or in response to requests consider making regional adjustments to those initial assignments, based on evidence that the NASS Census values do not accurately reflect the value of the BLM-managed lands in a given area. The BLM will update this rent schedule once every 5 years by re-assigning counties to reflect the updated NASS Census values as described in § 2806.21 and recalculate the State-specific percent factor once every 10 years as described in § 2806.22(b).

(4) *Acreage rent payment.* You must pay the acreage rent regardless of the stage of development or operations on the entire public land acreage described in the right-of-way authorization. The BLM State Director may approve a rental payment plan consistent with § 2806.15(c).

(5) *Acreage rent adjustments.* This paragraph (a)(5) applies unless you

selected the scheduled rate adjustment method (see § 2806.51). The BLM will adjust the acreage rent annually to reflect the change in the per acre zone rates as specified in paragraph (a)(1) of this section. The BLM will use the most current per acre zone rates to calculate the acreage rent for each year of the grant term.

(6) You may obtain a copy of the current per acre zone rates for solar energy development (solar energy acreage rent schedule) from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Attention: Renewable Energy Coordination Office, Washington, DC 20003. The BLM also posts the current solar energy acreage rent schedule for solar energy development at <http://www.blm.gov>.

(b) *MW capacity fee.* The MW capacity fee is calculated by multiplying the approved MW capacity by the MW rate (for the applicable type of technology employed by the project) from the MW rate schedule (see paragraph (b)(2) of this section). You must pay the MW capacity fee annually when electricity generation begins or is scheduled to begin in the approved POD, whichever comes first:

(1) *MW rate.* The MW rate is calculated by multiplying the total hours per year, by the net capacity factor, by the MWh price, by the rate of return. For an explanation of each of these terms, see the definition of MW rate in § 2801.5(b).

(2) *MW rate schedule.* You may obtain a copy of the current MW rate schedule for solar energy development from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Attention: Renewable Energy Coordination Office, Washington, DC 20003. The BLM also posts the current MW rate schedule for solar energy development at <http://www.blm.gov>.

(3) *Periodic adjustments in the MW rate.* This paragraph (b)(3) applies unless you selected the scheduled rate adjustment method (see § 2806.51). The BLM will adjust the MW rate applicable to your grant every 5 years, beginning in 2021, by recalculating the following two components of the MW rate formula:

(i) The adjusted MWh price is the average of the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States for the full 5 calendar-year period preceding the adjustment, rounded to the nearest dollar increment; and

(ii) The adjusted rate of return is the 10-year average of the 20-year U.S. Treasury bond yield for the full 10 calendar-year period preceding the adjustment, rounded to the nearest one-tenth percent, with a minimum rate of return of 4 percent.

(4) *MW rate phase-in.* This paragraph (b)(4) applies unless you selected the scheduled rate adjustment method (see § 2806.51). If you hold a solar energy development grant, the MW rate will be phased in as follows:

(i) There is a 3-year phase-in of the MW rate when electricity generation begins or is scheduled to begin in the approved POD, whichever comes first, at the rates of:

(A) 25 percent for the first year. This rate applies for the first partial calendar year of operations, from the date electricity generation begins until Dec. 31 of that year;

(B) 50 percent for the second year; and

(C) 100 percent for the third and subsequent years of operations.

(ii) After generation of electricity starts and an approved POD provides for staged development:

(A) The 3-year phase-in of the MW rate applies to each stage of development; and

(B) The MW capacity fee is calculated using the authorized MW capacity approved for that stage plus any previously approved stages, multiplied by the MW rate.

(5) The general payment provisions for rents described in this subpart, except for § 2806.14(a)(4), also apply to the MW capacity fee.

(c) *Initial implementation of the acreage rent and MW capacity fee.* This paragraph (c) applies unless you selected the scheduled rate adjustment method (see § 2806.51). If you hold a solar energy grant and made payments for billing year 2016, the BLM will reduce by 50 percent the net increase in annual costs between billing year 2017 and billing year 2016. The net increase will be calculated based on a full calendar year.

(d) *Scheduled rate adjustment.* Under the scheduled rate adjustment method (see § 2806.51), the BLM will update your per acre zone rate and MW rate as follows:

(1) The BLM will calculate your payments using the per acre zone rate (see § 2806.52(a)(1)) and MW rate (see § 2806.52(b)(1)) in place when your grant is issued, or for existing grants, the per acre zone rate and MW rate in place prior to December 19, 2016, as adjusted under paragraph (d)(6) of this section;

(2) The per acre zone rate will increase:

(i) Annually, beginning after the first full calendar year plus any initial partial year following issuance of your grant, by the average annual change in the IPD-GDP as described in § 2806.22(b); and

(ii) Every 5 years, beginning after the first 5 calendar years, plus any initial partial year, following issuance of your grant, by 20 percent;

(3) The MW rate will increase by 20 percent every 5 years, beginning after the first 5 years, plus the initial partial year, if any, your grant is in effect;

(4) The BLM will not apply the phase-in to your MW rate under § 2806.52(b)(4) or the reduction under § 2806.52(c);

(5) If the approved POD for your project provides for staged development, the BLM will calculate the MW capacity fee using the MW capacity approved for the current stage plus any previously approved stages, multiplied by the MW rate, as described under this section.

(6) For grants in place prior to January 18, 2017 that select the scheduled rate adjustment method offered under § 2806.51(c), the per acre zone rate and the MW rate in place prior to December 19, 2016 will be adjusted for the first year's payment using the scheduled rate adjustment method as follows:

(i) The per acre zone rate will increase by the average annual change in the IPD-GDP as described in § 2806.22(b) plus 20 percent;

(ii) The MW rate will increase by 20 percent; and

(iii) Subsequent increases will be performed as set forth in paragraphs (d)(2) and (3) of this section from the date of the initial adjustment under this paragraph (d).

§ 2806.54 Rents and fees for solar energy development leases.

If you hold a solar energy development lease obtained through competitive bidding under subpart 2809 of this part, you must make annual payments in accordance with this section and subpart, in addition to the one-time, upfront bonus bid you paid to obtain the lease. The annual payment includes an acreage rent for the number of acres included within the solar energy lease and an additional MW capacity fee based on the total authorized MW capacity for the approved solar energy project on the public lands.

(a) *Acreage rent.* The BLM will calculate and bill you an acreage rent that must be paid prior to issuance of your lease as described in § 2806.52(a). This acreage rent will be based on the following:

(1) *Per acre zone rate.* See § 2806.52(a)(1).

(2) *Assignment of counties.* See § 2806.52(a)(2) and (3).

(3) *Acreage rent payment.* See § 2806.52(a)(4).

(4) *Acreage rent adjustments.* This paragraph (a)(4) applies unless you selected the scheduled rate adjustment method (see § 2806.51). Once the acreage rent is determined under § 2806.52(a), no further adjustments in the annual acreage rent will be made until year 11 of the lease term and each subsequent 10-year period thereafter. The BLM will use the per acre zone rates in effect when it adjusts the annual acreage rent at those 10-year intervals.

(b) *MW capacity fee.* See § 2806.52(b) introductory text and (b)(1), (2), and (3).

(c) *MW rate phase-in.* This paragraph (c) applies unless you selected the scheduled rate adjustment method (see § 2806.51). If you hold a solar energy development lease, the MW capacity fee will be phased in, starting when electricity begins to be generated. The MW capacity fee for years 1–20 will be calculated using the MW rate in effect when the lease is issued. The MW capacity fee for years 21–30 will be calculated using the MW rate in effect in year 21 of the lease. These rates will be phased-in as follows:

(1) For years 1 through 10 of the lease, plus any initial partial year, the MW capacity fee is calculated by multiplying the project's authorized MW capacity by 50 percent of the applicable solar technology MW rate, as described in § 2806.52(b)(2).

(2) For years 11 through 20 of the lease, the MW capacity fee is calculated by multiplying the project's authorized MW capacity by 100 percent of the applicable solar technology MW rate, as described in § 2806.52(b)(2).

(3) For years 21 through 30 of the lease, the MW capacity fee is calculated by multiplying the project's authorized MW capacity by 100 percent of the applicable solar technology MW rate, as described in § 2806.52(b)(2).

(4) If the lease is renewed, the MW capacity fee is calculated using the MW rates at the beginning of the renewed lease period and will remain at that rate through the initial 10-year period of the renewal term. The MW capacity fee will be adjusted using the MW rate at the beginning of each subsequent 10-year period of the renewed lease term.

(5) If an approved POD provides for staged development, the MW capacity fee is calculated using the MW capacity approved for that stage plus any previously approved stages, multiplied by the MW rate as described under this section.

(d) *Scheduled rate adjustment.* Under the scheduled rate adjustment (see § 2806.51), the BLM will update your per acre zone rate and MW rate as follows:

(1) The BLM will calculate your payments using the per acre zone rate (see § 2806.52(a)(1)) and MW rate (see § 2806.52(b)(1)) in place when your lease is issued;

(2) The per acre zone rate will increase every 10 years, beginning after the first 10 years, plus the initial partial year, if any, your lease is in effect, by the average annual change in the IPD-GDP for the preceding 10-year period as described in § 2806.22(b) plus 40 percent;

(3) The MW rate will increase by 40 percent every 10 years, beginning after the first 10 years, plus the initial partial year, if any, your lease is in effect;

(4) The BLM will not apply the phase-in to your MW rate under § 2806.52(c). Instead, for years 1 through 5, plus any initial partial year, the BLM will calculate the MW capacity fee by multiplying the project's authorized MW capacity by 50 percent of the applicable solar technology MW rate. This phase-in will not be applied to renewed leases; and

(5) If the approved POD for your project provides for staged development, the BLM will calculate the MW capacity fee using the MW capacity approved for the current stage plus any previously approved stages, multiplied by the MW rate, as described under this section.

§ 2806.56 Rent for support facilities authorized under separate grant(s).

If a solar energy development project includes separate right-of-way authorizations issued for support facilities only (administration building, groundwater wells, construction lay down and staging areas, surface water management and control structures, etc.) or linear right-of-way facilities (pipelines, roads, power lines, etc.), rent is determined using the Per Acre Rent Schedule for linear facilities (see § 2806.20(c)).

§ 2806.58 Rent for energy development testing grants.

(a) *Grants for energy site-specific testing.* You must pay \$100 per year for each meteorological tower or instrumentation facility location. BLM offices with approved small site rental schedules may use those fee structures if the fees in those schedules charge more than \$100 per meteorological tower per year. In lieu of annual payments, you may instead pay for the entire term of the grant (3 years or less).

(b) *Grants for energy project-area testing.* You must pay \$2,000 per year or \$2 per acre per year for the lands authorized by the grant, whichever is greater. There is no additional rent for the installation of each meteorological tower or instrumentation facility located within the site testing and monitoring project-area.

■ 43. Add an undesignated centered heading and §§ 2806.60, 2806.61, 2806.62, 2806.64, 2806.66, and 2806.68 to read as follows:

Wind Energy Rights-of-Way

Sec.

2806.60 Rents and fees for wind energy rights-of-way.

2806.61 Scheduled Rate Adjustment.

2806.62 Rents and fees for wind energy development grants.

2806.64 Rents and fees for wind energy development leases.

2806.66 Rent for support facilities authorized under separate grant(s).

2806.68 Rent for energy development testing grants.

§ 2806.60 Rents and fees for wind energy rights-of-way.

If you hold a right-of-way authorizing wind energy site-specific testing or project-area testing or wind energy development, you must pay an annual rent and fee in accordance with this section and subpart. Your wind energy development right-of-way authorization will either be a grant (if issued under subpart 2804) or a lease (if issued under subpart 2809). Rents and fees for either type of authorization consist of an acreage rent that must be paid prior to issuance of the authorization and a phased-in MW capacity fee. Both the acreage rent and the phased-in MW capacity fee are charged and calculated consistent with § 2806.11 and prorated consistent with § 2806.12(a). The MW capacity fee will vary depending on the size of the wind energy development project.

§ 2806.61 Scheduled Rate Adjustment.

(a) The BLM will adjust your acreage rent and MW capacity fee over the course of your authorization as described in these regulations. For new grants or leases, you may choose either the standard rate adjustment method (see § 2806.52(a)(5) and (b)(3) for grants; see § 2806.54(a)(4) or (c) for leases) or the scheduled rate adjustment method (see § 2806.52(d) for grants; see § 2806.54(d) for leases). Once you select a rate adjustment method, that method will be fixed until you renew your grant or lease (see § 2807.22).

(b) For new grants or leases, if you select the scheduled rate adjustment method you must notify the BLM of

your decision in writing. Your decision must be received by the BLM before your grant or lease is issued. If you do not select the scheduled rate adjustment method, the standard rate adjustment method will apply.

(c) If you hold a grant that is in effect prior to January 18, 2017, you may either accept the standard rate adjustment method or request in writing that the BLM apply the scheduled rate adjustment method, as set forth in § 2806.52(d), to your grant. To take advantage of the scheduled rate adjustment option, your request must be received by the BLM before December 19, 2018. The BLM will continue to apply the standard rate adjustment method to adjust your rates unless and until it receives your request to use the scheduled rate adjustment method.

§ 2806.62 Rents and fees for wind energy development grants.

You must pay an annual acreage rent and MW capacity fee for your wind energy development grant as follows:

(a) *Acreage rent.* The BLM will calculate the acreage rent by multiplying the number of acres (rounded up to the nearest tenth of an acre) within the authorized area times the per acre zone rate from the wind energy acreage rent schedule in effect at the time the authorization is issued.

(1) *Per acre zone rate.* The annual per acre zone rate from the wind energy acreage rent schedule is calculated using the per acre zone value (as assigned in accordance with paragraph (a)(2) of this section), encumbrance factor, rate of return, and the annual adjustment factor. The calculation for determining the annual per acre zone rate is $A \times B \times C \times D = E$ where:

- (i) A is the per acre zone value = the same per-acre zone values described in the linear rent schedule in § 2806.20(c);
- (ii) B is the encumbrance factor = 10 percent;
- (iii) C is the rate of return = 5.27 percent;
- (iv) D is the annual adjustment factor = the average annual change in the IPD-GDP for the 10-year period immediately preceding the year that the NASS Census data becomes available (see § 2806.22(a)). The BLM will adjust the per acre rates each year based on the average annual change in the IPD-GDP as determined under § 2806.22(a). Adjusted rates are effective each year on January 1; and
- (v) E is the annual per acre zone rate.

(2) *Assignment of counties.* The BLM will calculate the per acre zone rate in paragraph (a)(1) of this section by using a State-specific factor to assign a county to a zone in the wind energy acreage rent schedule. The BLM will calculate a State-specific factor and apply it to the NASS data (county average per acre land and building value) to determine

the per acre value and assign a county (or other geographical area) to a zone. The State-specific factor represents the percent difference between improved agricultural land and unimproved rangeland values, using NASS data. The calculation per acre for determining the State-specific factor is $(A/B) - (C/D) = E$ where:

- (i) A = the NASS Census statewide average per acre value of non-irrigated acres;
- (ii) B = the NASS Census statewide average per acre land and building value;
- (iii) C = the NASS Census total statewide acres in farmsteads, homes, buildings, livestock facilities, ponds, roads, wasteland, etc.;
- (iv) D = the total statewide acres in farms; and
- (v) E = the State-specific percent factor or 20 percent, whichever is greater.

(3) The initial assignment of counties to the zones on the wind energy acreage rent schedule will be based upon the most recent NASS Census data (2012) for years 2016 through 2020. The BLM may on its own or in response to requests consider making regional adjustments to those initial assignments, based on evidence that the NASS Census values do not accurately reflect those of the BLM-managed lands. The BLM will update this rent schedule once every 5 years by re-assigning counties to reflect the updated NASS Census values as described in § 2806.21 and recalculate the State-specific percent factor once every 10 years as described in § 2806.22(b).

(4) *Acreage rent payment.* You must pay the acreage rent regardless of the stage of development or operations on the entire public land acreage described in the right-of-way authorization. The BLM State Director may approve a rental payment plan consistent with § 2806.15(c).

(5) *Acreage rent adjustments.* This paragraph (a)(5) applies unless you selected the scheduled rate adjustment method (see § 2806.61). The BLM will adjust the acreage rent annually to reflect the change in the per acre zone rates as specified in paragraph (a)(1) of this section. The BLM will use the most current per acre zone rates to calculate the acreage rent for each year of the grant term.

(6) The acreage rent must be paid as described in § 2806.62(a) except for the initial implementation of the wind energy acreage rent schedule of section § 2806.62(c).

(7) You may obtain a copy of the current per acre zone rates for wind energy development (wind energy acreage rent schedule) from any BLM State, district, or field office or by writing: U.S. Department of the Interior,

Bureau of Land Management, 20 M Street SE., Room 2134LM, Attention: Renewable Energy Coordination Office, Washington, DC 20003. The BLM also posts the current wind energy acreage rent schedule for wind energy development at <http://www.blm.gov>.

(b) *MW capacity fee*. The MW capacity fee is calculated by multiplying the approved MW capacity by the MW rate. You must pay the MW capacity fee annually when electricity generation begins or is scheduled to begin in the approved POD, whichever comes first.

(1) *MW rate*. The MW rate is calculated by multiplying the total hours per year by the net capacity factor, by the MWh price, by the rate of return. For an explanation of each of these terms, see the definition of MW rate in § 2801.5(b).

(2) *MW rate schedule*. You may obtain a copy of the current MW rate schedule for wind energy development from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Attention: Renewable Energy Coordination Office, Washington, DC 20003. The BLM also posts the current MW rate schedule for wind energy development at <http://www.blm.gov>.

(3) *Periodic adjustments in the MW rate*. This paragraph (b)(3) applies unless you selected the scheduled rate adjustment method (see § 2806.61). We will adjust the MW rate every 5 years, beginning in 2021, by recalculating the following two components of the MW rate formula:

(i) The adjusted MWh price is the average of the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States for the full 5 calendar-year period preceding the adjustment, rounded to the nearest dollar increment; and

(ii) The adjusted rate of return is the 10-year average of the 20-year U.S. Treasury bond yield for the full 10 calendar-year period preceding the adjustment, rounded to the nearest one-tenth percent, with a minimum rate of return of 4 percent.

(4) *MW rate phase-in*. This paragraph (b)(4) applies unless you selected the scheduled rate adjustment method (see § 2806.61). If you hold a wind energy development grant, the MW rate will be phased in as follows:

(i) There is a 3-year phase-in of the MW rate when electricity generation begins or is scheduled to begin in the approved POD, whichever comes first, at the rates of:

(A) 25 percent for the first year. This rate applies for the first partial calendar year of operations;

(B) 50 percent for the second year; and

(C) 100 percent for the third and subsequent years of operations.

(ii) After generation of electricity starts and an approved POD provides for staged development:

(A) The 3-year phase-in of the MW rate applies to each stage of development; and

(B) The MW capacity fee is calculated using the authorized MW capacity approved for that stage, plus any previously approved stages, multiplied by the MW rate.

(iii) The MW rate may be phased in further, as described in paragraph (c) of this section.

(5) The general payment provisions for rents described in this subpart, except for § 2806.14(a)(4), also apply to the MW capacity fee.

(c) *Initial implementation of the acreage rent and MW capacity fee*. This paragraph (c) applies unless you selected the scheduled rate adjustment method (see § 2806.61).

(1) If you hold a wind energy grant and made payments for billing year 2016, the BLM will reduce by 50 percent the net increase in annual costs between billing year 2017 and billing year 2016. The net increase will be calculated based on a full calendar year.

(2) If the BLM accepted your application for a wind energy development grant, including a plan of development and cost recovery agreement, prior to September 30, 2014, the BLM will phase in your payment of the acreage rent and MW capacity fee by reducing the:

(i) Acreage rent of the grant by 50 percent for the initial partial year of the grant; and

(ii) MW capacity fee by 75 percent for the first (initial partial) and second years and by 50 percent for the third and fourth years for which the BLM requires payment of the MW capacity fee. This reduction to the MW capacity fee applies to each stage of development.

(d) *Scheduled rate adjustment*. Under the scheduled rate adjustment (see § 2806.61), the BLM will update your per acre zone rate and MW rate as follows:

(1) The BLM will calculate your payments using the per acre zone rate (see § 2806.62(a)(1)) and MW rate (see § 2806.62(b)(1)) in place when your grant is issued, or for existing grants, the per acre zone rate and MW rate in place prior to December 19, 2016, as adjusted under paragraph (d)(6) of this section;

(2) The per acre zone rate will increase:

(i) Annually, beginning after the first full year plus the initial partial year, if any, your grant is in effect by the average annual change in the IPD–GDP as described in § 2806.22(b); and

(ii) Every 5 years, beginning after the first 5 years, plus the initial partial year, if any, your grant is in effect, by 20 percent;

(3) The MW rate will increase by 20 percent every 5 years, beginning after the first 5 years, plus the initial partial year, if any, your grant is in effect;

(4) The BLM will not apply the phase-in to your MW rate under § 2806.62(b)(4) or the reduction under § 2806.62(c); and

(5) If the approved POD for your project provides for staged development, the BLM will calculate the MW capacity fee using the MW capacity approved for that stage in question plus any previously approved stages, multiplied by the MW rate as described under this section.

(6) For grants in place prior to January 18, 2017 that select the scheduled rate adjustment method offered under § 2806.61(c), the per acre zone rate and the MW rate in place prior to December 19, 2016 will be adjusted for the first year's payment using the scheduled rate adjustment method as follows:

(i) The per acre zone rate will increase by the average annual change in the IPD–GDP as described in § 2806.22(b) plus 20 percent;

(ii) The MW rate will increase by 20 percent; and

(iii) Subsequent increases will be performed as set forth in paragraphs (d)(2) and (3) of this section from the date of the initial adjustment under paragraph (d)(6) of this section.

§ 2806.64 Rents and fees for wind energy development leases.

If you hold a wind energy development lease obtained through competitive bidding under subpart 2809 of this part, you must make annual payments in accordance with this section and subpart, in addition to the one-time, up front bonus bid you paid to obtain the lease. The annual payment includes an acreage rent for the number of acres included within the wind energy lease and an additional MW capacity fee based on the total authorized MW capacity for the approved wind energy project on the public lands.

(a) *Acreage rent*. The BLM will calculate and bill you an acreage rent that must be paid prior to issuance of your lease as described in § 2806.62(a).

This acreage rent will be based on the following:

- (1) *Per acre zone rate.* See § 2806.62(a)(1).
- (2) *Assignment of counties.* See § 2806.62(a)(2) and (3).
- (3) *Acreage rent payment.* See § 2806.62(a)(4).
- (4) *Acreage rent adjustments.* This paragraph (a)(4) applies unless you selected the scheduled rate adjustment method (see § 2806.61). Once the acreage rent is determined under § 2806.62(a), no further adjustments in the annual acreage rent will be made until year 11 of the lease term and each subsequent 10-year period thereafter. We will use the per acre zone rates in effect at the time the acreage rent is due (at the beginning of each 10-year period) to calculate the annual acreage rent for each of the subsequent 10-year periods.
- (b) *MW capacity fee.* See § 2806.62(b) introductory text and (b)(1), (2), and (3).
- (c) *MW rate phase-in.* This paragraph (c) applies unless you selected the scheduled rate adjustment method (see § 2806.61). If you hold a wind energy development lease, the MW capacity fee will be phased in, starting when electricity begins to be generated. The MW capacity fee for years 1–20 will be calculated using the MW rate in effect when the lease is issued. The MW capacity fee for years 21–30 will be calculated using the MW rate in effect in year 21 of the lease. These rates will be phased-in as follows:
 - (1) For years 1 through 10 of the lease, plus any initial partial year, the MW capacity fee is calculated by multiplying the project’s authorized MW capacity by 50 percent of the wind energy technology MW rate, as described in § 2806.62(b)(2);
 - (2) For years 11 through 20 of the lease, the MW capacity fee is calculated by multiplying the project’s authorized MW capacity by 100 percent of the wind energy technology MW rate described in § 2806.62(b)(2);
 - (3) For years 21 through 30 of the lease, the MW capacity fee is calculated by multiplying the project’s authorized MW capacity by 100 percent of the wind energy technology MW rate as described in § 2806.62(b)(2);
 - (4) If the lease is renewed, the MW capacity fee is calculated using the MW rates at the beginning of the renewed lease period and will remain at that rate through the initial 10 year period of the renewal term. The MW capacity fee will continue to adjust at the beginning of each subsequent 10 year period of the renewed lease term to reflect the then currently applicable MW rates; and
 - (5) If an approved POD provides for staged development, the MW capacity

fee is calculated using the MW capacity approved for that stage plus any previously approved stage, multiplied by the MW rate, as described in this section.

(d) *Scheduled rate adjustment.* Under the scheduled rate adjustment (see § 2806.61), the BLM will update your per acre zone rate and MW rate as follows:

- (1) The BLM will calculate your payments using the per acre zone rate (see § 2806.62(a)(1)) and MW rate (see § 2806.62(b)(1)) in place when your lease is issued;
- (2) The per acre zone rate will increase every 10 years, beginning after the first 10 years, plus the initial partial year, if any, your lease is in effect, by the average annual change in the IPD–GDP for the preceding 10-year period as described in § 2806.22(b) plus 40 percent;
- (3) The MW rate will increase by 40 percent every 10 years, beginning after the first 10 years, plus the initial partial year, if any, your lease is in effect;
- (4) The BLM will not apply the phase-in to your MW rate under § 2806.62(c). Instead, for years 1 through 5, plus any initial partial year, the BLM will calculate the MW capacity fee by multiplying the project’s authorized MW capacity by 50 percent of the applicable solar technology MW rate. This phase-in will not be applied to renewed leases; and
- (5) If the approved POD for your project provides for staged development, the BLM will calculate the MW capacity fee using the MW capacity approved for that stage in question plus any previously approved stages, multiplied by the MW rate as described under this section.

§ 2806.66 Rent for support facilities authorized under separate grant(s).

If a wind energy development project includes separate right-of-way authorizations issued for support facilities only (administration building, groundwater wells, construction lay down and staging areas, surface water management, and control structures, etc.) or linear right-of-way facilities (pipelines, roads, power lines, etc.), rent is determined using the Per Acre Rent Schedule for linear facilities (see § 2806.20(c)).

§ 2806.68 Rent for energy development testing grants.

(a) *Grant for energy site-specific testing.* You must pay \$100 per year for each meteorological tower or instrumentation facility location. BLM offices with approved small site rental schedules may use those fee structures

if the fees in those schedules charge more than \$100 per meteorological tower per year. In lieu of annual payments, you may instead pay for the entire term of the grant (3 years or less).

(b) *Grant for energy project-area testing.* You must pay \$2,000 per year or \$2 per acre per year for the lands authorized by the grant, whichever is greater. There is no additional rent for the installation of each meteorological tower or instrumentation facility located within the site testing and monitoring project area.

■ 44. Add an undesignated centered heading immediately preceding newly redesignated § 2806.70 to read as follows:

Other Rights-of-Way

■ 45. Revise newly redesignated § 2806.70 to read as follows:

§ 2806.70 How will the BLM determine the payment for a grant or lease when the linear, communication use, solar energy, or wind energy payment schedules do not apply?

When we determine that the linear, communication use, solar, or wind energy payment schedules do not apply, we may determine your payment through a process based on comparable commercial practices, appraisals, competitive bids, or other reasonable methods. We will notify you in writing of the payment determination. If you disagree with the payment determination, you may appeal our final determination under § 2801.10.

Subpart 2807—Grant Administration and Operation

- 46. Amend § 2807.11 by:
 - a. Revising paragraph (b);
 - b. Redesignating paragraphs (d) and (e) as paragraphs (f) and (g); and
 - c. Adding new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 2807.11 When must I contact BLM during operations?

* * * * *

(b) When your use requires a substantial deviation from the grant. You must seek an amendment to your grant under § 2807.20 and obtain the BLM’s approval before you begin any activity that is a substantial deviation;

* * * * *

(d) Whenever site-specific circumstances or conditions result in the need for changes to an approved right-of-way grant or lease, POD, site plan, mitigation measures, or construction, operation, or termination procedures that are not substantial deviations in location or use authorized

by a right-of-way grant or lease. Changes for authorized actions, project materials, or adopted mitigation measures within the existing, approved right-of-way area must be submitted to us for review and approval;

(e) To identify and correct discrepancies or inconsistencies;

* * * * *

■ 47. Amend § 2807.17 by redesignating paragraph (d) as paragraph (e) and adding new paragraph (d) to read as follows:

§ 2807.17 Under what conditions may the BLM suspend or terminate my grant?

* * * * *

(d) The BLM may suspend or terminate another Federal agency's grant only if:

(1) The terms and conditions of the Federal agency's grant allow it; or

(2) The agency head holding the grant consents to it.

* * * * *

■ 48. Revise § 2807.21 to read as follows:

§ 2807.21 May I assign or make other changes to my grant or lease?

(a) With the BLM's approval, you may assign, in whole or in part, any right or interest in a grant or lease. Assignment actions that may require BLM approval include, but are not limited to, the following:

(1) The transfer by the holder (assignor) of any right or interest in the grant or lease to a third party (assignee); and

(2) Changes in ownership or other related change in control transactions involving the BLM right-of-way holder and another business entity (assignee), including corporate mergers or acquisitions, but not transactions within the same corporate family.

(b) The BLM may require a grant or lease holder to file new or revised information in some circumstances that do not constitute an assignment (see subpart 2803 and §§ 2804.12(e) and 2807.11). Circumstances that would not constitute an assignment but may necessitate this filing include, but are not limited to:

(1) Transactions within the same corporate family;

(2) Changes in the holder's name only (see paragraph (h) of this section); and

(3) Changes in the holder's articles of incorporation.

(c) In order to assign a grant or lease, the proposed assignee must file an assignment application and follow the same procedures and standards as for a new grant or lease, including paying application and processing fees, and the grant must be in compliance with the

terms and conditions of § 2805.12. The preliminary application review meetings and public meeting under §§ 2804.12 and 2804.25 are not required for an assignment. We will not approve any assignment until the assignor makes any outstanding payments that are due (see § 2806.13(g)).

(d) The assignment application must also include:

(1) Documentation that the assignor agrees to the assignment; and

(2) A signed statement that the proposed assignee agrees to comply with and be bound by the terms and conditions of the grant that is being assigned and all applicable laws and regulations.

(e) Your assignment is not recognized until the BLM approves it in writing. We will approve the assignment if doing so is in the public interest. Except for leases issued under subpart 2809 of this part, we may modify the grant or lease or add bonding and other requirements, including additional terms and conditions, to the grant or lease when approving the assignment, unless a modification to a lease issued under subpart 2809 of this part is required under § 2805.15(e). We may decrease rents if the new holder qualifies for an exemption (see § 2806.14) or waiver or reduction (see § 2806.15) and the previous holder did not. Similarly, we may increase rents if the previous holder qualified for an exemption or waiver or reduction and the new holder does not. If we approve the assignment, the benefits and liabilities of the grant or lease apply to the new grant or lease holder.

(f) The processing time and conditions described at § 2804.25(d) of this part apply to assignment applications.

(g) Only interests in issued right-of-way grants and leases are assignable. Except for applications submitted by a preferred applicant under § 2804.30(g), pending right-of-way applications do not create any property rights or other interest and may not be assigned from one entity to another, except that an entity with a pending application may continue to pursue that application even if that entity becomes a wholly owned subsidiary of a new third party.

(h) To complete a change in name only, (*i.e.*, when the name change in question is not the result of an underlying change in control of the right-of-way grant), the following requirements must be met:

(1) The holder must file an application requesting a name change and follow the same procedures as for a new grant, including paying processing fees. However, the

application fees (see subpart 2804 of this part) and the preliminary application review and public meetings (see §§ 2804.12 and 2804.25) are not required. The name change request must include:

(i) If the name change is for an individual, a copy of the court order or other legal document effectuating the name change; or

(ii) If the name change is for a corporation, a copy of the corporate resolution(s) proposing and approving the name change, a copy of the acceptance of the change in name by the State or Territory in which it is incorporated, and a copy of the appropriate resolution, order or other documentation showing the name change.

(2) When reviewing a proposed name change only, we may determine it is necessary to:

(i) Modify a grant issued under subpart 2804 to add bonding and other requirements, including additional terms and conditions to the grant; or

(ii) Modify a lease issued under subpart 2809 in accordance with § 2805.15(e).

(3) Your name change is not recognized until the BLM approves it in writing.

■ 49. Amend § 2807.22 by:

■ a. Revising the section heading and paragraphs (a), (b), and (d);

■ b. Redesignating paragraph (f) as paragraph (g); and

■ c. Adding new paragraph (f).

The revisions and addition read as follows:

§ 2807.22 How do I renew my grant or lease?

(a) If your grant or lease specifies the terms and conditions for its renewal, and you choose to renew it, you must request a renewal from the BLM at least 120 calendar days before your grant or lease expires consistent with the renewal terms and conditions specified in your grant or lease. We will renew the grant or lease if you are in compliance with the renewal terms and conditions; the other terms, conditions, and stipulations of the grant or lease; and other applicable laws and regulations.

(b) If your grant or lease does not specify the terms and conditions for its renewal, you may apply to us to renew the grant or lease. You must send us your application at least 120 calendar days before your grant or lease expires. In your application you must show that you are in compliance with the terms, conditions, and stipulations of the grant or lease and other applicable laws and regulations, and explain why a renewal

of your grant or lease is necessary. We may approve or deny your application to renew your grant or lease.

* * * * *

(d) We will review your application and determine the applicable terms and conditions of any renewed grant or lease.

* * * * *

(f) If you make a timely and sufficient application for a renewal of your existing grant or lease, or for a new grant or lease, in accordance with this section, the existing grant does not expire until we have issued a decision to approve or deny the application.

* * * * *

■ 50. Revise subpart 2809 to read as follows:

Subpart 2809—Competitive Process for Leasing Public Lands for Solar and Wind Energy Development Inside Designated Leasing Areas

Sec.

2809.10 General.

2809.11 How will the BLM solicit nominations?

2809.12 How will the BLM select and prepare parcels?

2809.13 How will the BLM conduct competitive offers?

2809.14 What types of bids are acceptable?

2809.15 How will the BLM select the successful bidder?

2809.16 When do variable offsets apply?

2809.17 Will the BLM ever reject bids or re-conduct a competitive offer?

2809.18 What terms and conditions apply to leases?

2809.19 Applications in designated leasing areas or on lands that later become designated leasing areas.

Subpart 2809—Competitive Process for Leasing Public Lands for Solar and Wind Energy Development Inside Designated Leasing Areas

§ 2809.10 General.

(a) Lands inside designated leasing areas may be made available for solar and wind energy development through a competitive leasing offer process established by the BLM under this subpart.

(b) The BLM may include lands in a competitive offer on its own initiative.

(c) The BLM may solicit nominations by publishing a call for nominations under § 2809.11(a).

(d) The BLM will generally prioritize the processing of “leases” awarded under this subpart over the processing of non-competitive “grant” applications under subpart 2804, including those that are “high priority” under § 2804.35.

§ 2809.11 How will the BLM solicit nominations?

(a) *Call for nominations.* The BLM will publish a notice in the **Federal**

Register and may use other notification methods, such as a newspaper of general circulation in the area affected by the potential offer of public land for solar and wind energy development or the Internet; to solicit nominations and expressions of interest for parcels of land inside designated leasing areas for solar or wind energy development.

(b) *Nomination submission.* A nomination must be in writing and must include the following:

(1) *Nomination fee.* If you nominate a specific parcel of land under paragraph (a) of this section, you must also include a non-refundable nomination fee of \$5 per acre. We will adjust the nomination fee once every 10 years using the change in the IPD–GDP for the preceding 10-year period and round it to the nearest half dollar. This 10 year average will be adjusted at the same time as the per acre rent schedule for linear rights-of-way under § 2806.22;

(2) *Nominator’s name and personal or business address.* The name of only one citizen, association, partnership, corporation, or municipality may appear as the nominator. All communications relating to leasing will be sent to that name and address, which constitutes the nominator’s name and address of record; and

(3) The legal land description and a map of the nominated lands.

(c) We may consider informal expressions of interest suggesting lands to be included in a competitive offer. If you submit a written expression of interest, you must provide a description of the suggested lands and rationale for their inclusion in a competitive offer.

(d) In order to submit a nomination, you must be qualified to hold a grant or lease under

§ 2803.10.

(e) *Nomination withdrawals.* A nomination cannot be withdrawn, except by the BLM for cause, in which case all nomination monies will be refunded to the nominator.

§ 2809.12 How will the BLM select and prepare parcels?

(a) The BLM will identify parcels for competitive offer based on nominations and expressions of interest or on its own initiative.

(b) The BLM and other Federal agencies, as applicable, will conduct necessary studies and site evaluation work, including applicable environmental reviews and public meetings, before offering lands competitively.

§ 2809.13 How will the BLM conduct competitive offers?

(a) *Variety of competitive procedures available.* The BLM may use any type of competitive process or procedure to conduct its competitive offer, and any method, including the use of the Internet, to conduct the actual auction or competitive bid procedure. Possible bid procedures could include, but are not limited to: Sealed bidding, oral auctions, modified competitive bidding, electronic bidding, and any combination thereof.

(b) *Notice of competitive offer.* We will publish a notice in the **Federal Register** at least 30 days prior to the competitive offer and may use other notification methods, such as a newspaper of general circulation in the area affected by the potential right-of-way or the Internet. The **Federal Register** and other notices will include:

(1) The date, time, and location, if any, of the competitive offer;

(2) The legal land description of the parcel to be offered;

(3) The bidding methodology and procedures to be used in conducting the competitive offer, which may include any of the competitive procedures identified in paragraph (a) of this section;

(4) The minimum bid required (see § 2809.14(a)), including an explanation of how we determined this amount;

(5) The qualification requirements for potential bidders (see § 2803.10);

(6) If a variable offset (see § 2809.16) is offered:

(i) The percent of each offset factor;

(ii) How bidders may pre-qualify for each offset factor; and

(iii) The documentation required to pre-qualify for each offset factor; and

(7) The terms and conditions of the lease, including the requirements for the successful bidder to submit a POD for the lands involved in the competitive offer (see § 2809.18) and any lease mitigation requirements, including compensatory mitigation for residual impacts associated with the right-of-way.

(c) We will notify you in writing of our decision to conduct a competitive offer at least 30 days prior to the competitive offer if you nominated lands and paid the nomination fees required by § 2809.11(b)(1).

§ 2809.14 What types of bids are acceptable?

(a) *Bid submissions.* The BLM will accept your bid only if:

(1) It includes the minimum bid and at least 20 percent of the bonus bid; and

(2) The BLM determines that you are qualified to hold a grant or lease under

§ 2803.10. You must include documentation of your qualifications with your bid, unless we have previously approved your qualifications under § 2809.10(d) or § 2809.11(d).

(b) *Minimum bid.* The minimum bid is not prorated among all bidders, but must be paid entirely by the successful bidder. The minimum bid consists of:

(1) The administrative costs incurred by the BLM and other Federal agencies in preparing for and conducting the competitive offer, including required environmental reviews; and

(2) An amount determined by the authorized officer and disclosed in the notice of competitive offer. This amount will be based on known or potential values of the parcel. In setting this amount, the BLM will consider factors that include, but are not limited to, the acreage rent and megawatt capacity fee.

(c) *Bonus bid.* The bonus bid consists of any dollar amount that a bidder wishes to bid in addition to the minimum bid.

(d) If you are not the successful bidder, as defined in § 2809.15(a), the BLM will refund your bid.

§ 2809.15 How will the BLM select the successful bidder?

(a) The bidder with the highest total bid, prior to any variable offset, is the successful bidder and may be offered a lease in accordance with § 2805.10.

(b) The BLM will determine the variable offsets for the successful bidder in accordance with § 2809.16 before issuing final payment terms.

(c) *Payment terms.* If you are the successful bidder, you must:

(1) Make payments by personal check, cashier's check, certified check, bank draft, or money order, or by other means deemed acceptable by the BLM, payable to the Department of the Interior—Bureau of Land Management;

(2) By the close of official business hours on the day of the offer or such other time as the BLM may have specified in the offer notices, submit for each parcel:

(i) Twenty percent of the bonus bid (before the offsets are applied under paragraph (b) of this section); and

(ii) The total amount of the minimum bid specified in § 2809.14(b);

(3) Within 15 calendar days after the day of the offer, submit the balance of the bonus bid (after the variable offsets are applied under paragraph (b) of this section) to the BLM office conducting the offer; and

(4) Within 15 calendar days after the day of the offer, submit the acreage rent for the first full year of the solar or wind energy development lease as provided in § 2806.54(a) or § 2806.64(a),

respectively. This amount will be applied toward the first 12 months acreage rent, if the successful bidder becomes the lessee.

(d) The BLM will offer you a right-of-way lease if you are the successful bidder and:

(1) Satisfy the qualifications in § 2803.10;

(2) Make the payments required under paragraph (c) of this section; and

(3) Do not have any trespass action pending against you for any activity on BLM-administered lands (see § 2808.12) or have any unpaid debts owed to the Federal Government.

(e) The BLM will not offer a lease to the successful bidder and will keep all money that has been submitted, if the successful bidder does not satisfy the requirements of paragraph (d) of this section. In this case, the BLM may offer the lease to the next highest bidder under § 2809.17(b) or re-offer the lands under § 2809.17(d).

§ 2809.16 When do variable offsets apply?

(a) The successful bidder may be eligible for an offset of up to 20 percent of the bonus bid based on the factors identified in the notice of competitive offer.

(b) The BLM may apply a variable offset to the bonus bid of the successful bidder. The notice of competitive offer will identify each factor of the variable offset, the specific percentage for each factor that would be applied to the bonus bid, and the documentation required to be provided to the BLM prior to the day of the offer to qualify for the offset. The total variable offset cannot be greater than 20 percent of the bonus bid.

(c) The variable offset may be based on any of the following factors:

(1) Power purchase agreement;

(2) Large generator interconnect agreement;

(3) Preferred solar or wind energy technologies;

(4) Prior site testing and monitoring inside the designated leasing area;

(5) Pending applications inside the designated leasing area;

(6) Submission of nomination fees;

(7) Submission of biological opinions, strategies, or plans;

(8) Environmental benefits;

(9) Holding a solar or wind energy grant or lease on adjacent or mixed land ownership;

(10) Public benefits; and

(11) Other similar factors.

(d) The BLM will determine your variable offset prior to the competitive offer.

§ 2809.17 Will the BLM ever reject bids or re-conduct a competitive offer?

(a) The BLM may reject bids regardless of the amount offered. If the BLM rejects your bid under this provision, you will be notified in writing and such notice will include the reason(s) for the rejection and what refunds to which you are entitled. If the BLM rejects a bid, the bidder may appeal that decision under § 2801.10.

(b) We may offer the lease to the next highest qualified bidder if the successful bidder does not execute the lease or is for any reason disqualified from holding the lease.

(c) If we are unable to determine the successful bidder, such as in the case of a tie, we may re-offer the lands competitively (under § 2809.13) to the tied bidders or to all prospective bidders.

(d) If lands offered under § 2809.13 receive no bids, we may:

(1) Re-offer the lands through the competitive process under § 2809.13; or

(2) Make the lands available through the non-competitive application process found in subparts 2803, 2804, and 2805 of this part, if we determine that doing so is in the public interest.

§ 2809.18 What terms and conditions apply to leases?

The lease will be issued subject to the following terms and conditions:

(a) *Lease term.* The term of your lease includes the initial partial year in which it is issued, plus 30 additional full years. The lease will terminate on December 31 of the final year of the lease term. You may submit an application for renewal under § 2805.14(g).

(b) *Rent.* You must pay rent as specified in:

(1) Section 2806.54, if your lease is for solar energy development; or

(2) Section 2806.64, if your lease is for wind energy development.

(c) *POD.* You must submit, within 2 years of the lease issuance date, a POD that:

(1) Is consistent with the development schedule and other requirements in the POD template posted at <http://www.blm.gov>; and

(2) Addresses all pre-development and development activities.

(d) *Cost recovery.* You must pay the reasonable costs for the BLM or other Federal agencies to review and approve your POD and to monitor your lease. To expedite review of your POD and monitoring of your lease, you may notify BLM in writing that you are waiving paying reasonable costs and are electing to pay the full actual costs incurred by the BLM.

(e) *Performance and reclamation bond.* (1) For Solar Energy Development, you must provide a bond in the amount of \$10,000 per acre prior to written approval to proceed with ground disturbing activities.

(2) For Wind Energy Development, you must provide a bond in the amount of \$10,000 per authorized turbine less than 1 MW in nameplate capacity or \$20,000 per authorized turbine equal or greater than 1 MW in nameplate capacity prior to written approval to proceed with ground disturbing activities.

(3) For testing and monitoring sites authorized under a development lease, you must provide a bond in the amount of \$2,000 per site prior to receiving written approval to proceed with ground disturbing activities.

(4) The BLM will adjust the solar and wind energy development bond amounts every 10 years using the change in the IPD–GDP for the preceding 10-year period rounded to the nearest \$100. This 10-year average will be adjusted at the same time as the Per Acre Rent Schedule for linear rights-of-way under § 2806.22.

(f) *Assignments.* You may assign your lease under § 2807.21, and if an assignment is approved, the BLM will not make any changes to the lease terms or conditions, as provided for by § 2807.21(e) except for modifications required under § 2805.15(e).

(g) *Due diligence of operations.* You must start construction within 5 years and begin generation of electricity no later than 7 years from the date of lease issuance, as specified in your approved POD. A request for an extension may be granted for up to 3 years with a show of good cause and approval by the BLM.

§ 2809.19 Applications in designated leasing areas or on lands that later become designated leasing areas.

(a) Applications for solar or wind energy development filed on lands outside of designated leasing areas, which subsequently become designated leasing areas will:

(1) Continue to be processed by the BLM and are not subject to the competitive leasing offer process of this subpart, if such applications are filed prior to the publication of the notice of intent or other public announcement from the BLM of the proposed land use plan amendment to designate the solar or wind leasing area; or

(2) Remain in pending status unless withdrawn by the applicant, denied, or issued a grant by the BLM, or the subject lands become available for application or leasing under this part, if such applications are filed on or after the date

of publication of the notice of intent or other public announcement from the BLM of the proposed land use plan amendment to designate the solar or wind leasing area.

(3) Resume being processed by the BLM if your application is pending under paragraph (a)(2) of this section and the lands become available for application under § 2809.17(d)(2).

(b) An applicant that submits a bid on a parcel of land for which an application is pending under paragraph (a)(2) of this section may:

(1) Qualify for a variable offset under § 2809.16; and

(2) Receive a refund for any unused application fees or processing costs if the lands identified in the application are subsequently leased to another entity under § 2809.13.

(c) After the effective date of this regulation, the BLM will not accept a new application for solar or wind energy development inside designated leasing areas (see §§ 2804.12(b)(1) and 2804.23(e)), except as provided by § 2809.17(d)(2).

(d) You may file a new application under part 2804 for testing and monitoring purposes inside designated leasing areas. If the BLM approves your application, you will receive a short term grant in accordance with § 2805.11(b)(2)(i) or (ii), which may qualify you for an offset under § 2809.16.

PART 2880—RIGHTS-OF-WAY UNDER THE MINERAL LEASING ACT

■ 51. Revise the authority citation for part 2880 to read as follows:

Authority: 30 U.S.C. 185 and 189, and 43 U.S.C. 1732(b), 1733, and 1740.

Subpart 2884—Applying for MLA Grants or TUPs

■ 52. In § 2884.11, revise paragraph (c)(5) to read as follows:

§ 2884.11 What information must I submit in my application?

* * * * *

(c) * * *

(5) The estimated schedule for constructing, operating, maintaining, and terminating the project (a POD). Your POD must be consistent with the development schedule and other requirements as noted on the POD template for oil and gas pipelines at <http://www.blm.gov>;

* * * * *

53. In § 2884.12, revise paragraphs (a), (b), and (c) to read as follows:

§ 2884.12 What is the processing fee for a grant or TUP application?

(a) You must pay a processing fee with the application to cover the costs to the Federal Government of processing your application before the Federal Government incurs them. Subject to applicable laws and regulations, if processing your application will involve Federal agencies other than the BLM, your fee may also include the reasonable costs estimated to be incurred by those Federal agencies. Instead of paying the BLM a fee for the estimated work of other Federal agencies in processing your application, you may pay other Federal agencies directly for the costs estimated to be incurred by them in processing your application. The fees for Processing Categories 1 through 4 are one-time fees and are not refundable. The fees are categorized based on an estimate of the amount of time that the Federal Government will expend to process your application and issue a decision granting or denying the application.

(b) There is no processing fee if work is estimated to take 1 hour or less. Processing fees are based on categories. We update the processing fees for Categories 1 through 4 in the schedule each calendar year, based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter. We will round these changes to the nearest dollar. We will update Category 5 processing fees as specified in the Master Agreement. These processing categories and the estimated range of Federal work hours for each category are:

PROCESSING CATEGORIES

Processing category	Federal work hours involved
(1) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >1 ≤8.
(2) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >8 ≤24.
(3) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >24 ≤36.
(4) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >36 ≤50.
(5) Master Agreements	Varies.

PROCESSING CATEGORIES—Continued

Processing category	Federal work hours involved
(6) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >50.

(c) You may obtain a copy of the current schedule from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM also posts the current schedule at <http://www.blm.gov>.

* * * * *

■ 54. Amend § 2884.16 by redesignating paragraphs (a)(6), (7), and (8) as paragraphs (a)(7), (8), and (9), and adding new paragraph (a)(6) to read as follows:

§ 2884.16 What provisions do Master Agreements contain and what are their limitations?

(a) * * *

(6) Describes existing agreements between the BLM and other Federal agencies for cost reimbursement;

* * * * *

■ 55. Amend § 2884.17 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 2884.17 How will BLM process my Processing Category 6 application?

(a) For Processing Category 6 applications, you and the BLM must enter into a written agreement that describes how we will process your application. The final agreement consists of a work plan, a financial plan, and a description of any existing agreements you have with other Federal agencies for cost reimbursement associated with such application.

* * * * *

(e) We may collect funds to reimburse the Federal Government for reasonable costs for processing applications and other documents under this part relating to the Federal lands.

■ 56. In § 2884.18, revise paragraphs (a)(1) and (c) to read as follows:

§ 2884.18 What if there are two or more competing applications for the same pipeline?

(a) * * *

(1) *Processing Categories 1 through 4.* You must reimburse the Federal Government for processing costs as if the other application or applications had not been filed.

* * * * *

(c) If we determine that competition exists, we will describe the procedures for a competitive bid through a bid announcement in the **Federal Register** and may use other notification methods, such as a newspaper of general circulation or the Internet. We may offer lands through a competitive process on our own initiative.

■ 57. Amend § 2884.20 by revising paragraphs (a) introductory text and (d) to read as follows:

§ 2884.20 What are the public notification requirements for my application?

(a) When the BLM receives your application, it will publish a notice in the **Federal Register** and may use other notification methods, such as a newspaper of general circulation in the vicinity of the lands involved or the Internet. If we determine the pipeline(s) will have only minor environmental impacts, we are not required to publish this notice. The notice will, at a minimum, contain:

* * * * *

(d) We may hold public hearings or meetings on your application if we determine that there is sufficient interest to warrant the time and expense of such hearings or meetings. We will publish a notice in the **Federal Register** and may use other notification methods, such as a newspaper of general circulation in the vicinity of the lands involved or the Internet, to announce in advance any public hearings or meetings.

■ 58. Amend § 2884.21 by:
 ■ a. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d);
 ■ b. Adding new paragraph (b); and
 ■ c. Revising newly redesignated paragraph (d)(4).

The revisions and addition read as follows:

§ 2884.21 How will BLM process my application?

* * * * *

(b) The BLM will not process your application if you have any trespass action pending against you for any activity on BLM-administered lands (see § 2888.11) or have any unpaid debts owed to the Federal Government. The only applications the BLM would process are those to resolve the trespass with a right-of-way as authorized in this part, or a lease or permit under the regulations found at 43 CFR part 2920, but only after outstanding debts are paid. Outstanding debts are those currently unpaid debts owed to the Federal Government after all administrative collection actions have occurred, including any appeal proceedings under applicable Federal

regulations and the Administrative Procedure Act.

* * * * *

(d) * * *

(4) Hold public meetings, if sufficient public interest exists to warrant their time and expense. The BLM will publish a notice in the **Federal Register** and may use other methods, such as a newspaper of general circulation in the vicinity of the lands involved or the Internet, to announce in advance any public hearings or meetings; and

* * * * *

■ 59. Amend § 2884.22 by revising paragraph (a) to read as follows:

§ 2884.22 Can BLM ask me for additional information?

(a) If we ask for additional information, we will follow the procedures in § 2804.25(c) of this chapter.

* * * * *

■ 60. Amend § 2884.23 by revising paragraph (a)(6), redesignating paragraph (b) as paragraph (c), and adding new paragraph (b) to read as follows:

§ 2884.23 Under what circumstances may BLM deny my application?

(a) * * *

(6) You do not adequately comply with a deficiency notice (see § 2804.25(c) of this chapter) or with any requests from the BLM for additional information needed to process the application.

(b) If you are unable to meet any of the requirements in this section you may request an alternative from the BLM (see § 2884.30).

* * * * *

■ 61. Add § 2884.30 to read as follows:

§ 2884.30 Showing of good cause.

If you are unable to meet any of the processing requirements in this subpart, you may request approval for an alternative requirement from the BLM. Any such request is not approved until you receive BLM approval in writing. Your request to the BLM must:

(a) Show good cause for your inability to meet a requirement;

(b) Suggest an alternative requirement and explain why that requirement is appropriate; and

(c) Be received in writing by the BLM in a timely manner, before the deadline to meet a particular requirement has passed.

Subpart 2885—Terms and Conditions of MLA Grants and TUPs

■ 62. Amend § 2885.11 by revising paragraphs (a) introductory text and (b)(7) to read as follows:

§ 2885.11 What terms and conditions must I comply with?

(a) *Duration.* All grants, except those issued for a term of 3 years or less, will expire on December 31 of the final year of the grant. The term of a grant may not exceed 30 years, with the initial partial year of the grant considered to be the first year of the term. The term of a TUP may not exceed 3 years. The BLM will consider the following factors in establishing a reasonable term:

* * * * *

(b) * * *

(7) The BLM may require that you obtain, or certify that you have obtained, a performance and reclamation bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP area, including terminating the grant or TUP, and to secure all obligations imposed by the grant or TUP and applicable laws and regulations. Your bond must cover liability for damages or injuries resulting from releases or discharges of hazardous materials. We may require a bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant or TUP. This bond is in addition to any individual lease, statewide, or nationwide oil and gas bonds you may have. All other provisions in § 2805.12(b) of this chapter regarding bond requirements for grants and leases issued under FLPMA also apply to grants or TUPs for oil and gas pipelines issued under this part;

* * * * *

■ 63. Amend § 2885.15 by revising paragraph (b) to read as follows:

§ 2885.15 How will BLM charge me rent?

* * * * *

(b) There are no reductions or waivers of rent for grants or TUPs, except as provided under § 2885.20(b).

* * * * *

■ 64. Amend § 2885.16 by revising paragraph (a) to read as follows:

§ 2885.16 When do I pay rent?

(a) You must pay rent for the initial rental period before we issue you a grant or TUP. We prorate the initial rental amount based on the number of full months left in the calendar year after the effective date of the grant or TUP. If your grant qualifies for annual payments, the initial rent consists of the remaining partial year plus the next full year. If your grant or TUP allows for multi-year payments, your initial rent payment may be for the full term of the grant or TUP. See § 2885.21 for additional information on payment of rent.

* * * * *

■ 65. Amend § 2885.17 by revising the section heading, redesignating paragraph (e) as paragraph (f), and adding new paragraph (e) to read as follows:

§ 2885.17 What happens if I do not pay rents and fees or if I pay the rents or fees late?

* * * * *

(e) We will retroactively bill for uncollected or under-collected rent, including late payment and administrative fees, upon discovery if:

- (1) A clerical error is identified;
- (2) An adjustment to rental schedules is not applied; or
- (3) An omission or error in complying with the terms and conditions of the authorized right-of-way is identified.

* * * * *

■ 66. In § 2885.19, revise paragraph (b) to read as follows:

§ 2885.19 What is the rent for a linear right-of-way grant?

* * * * *

(b) You may obtain a copy of the current Per Acre Rent Schedule from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM also posts the current rent schedule at <http://www.blm.gov>.

■ 67. In § 2885.20, revise paragraph (b) to read as follows:

§ 2885.20 How will the BLM calculate my rent for linear rights-of-way the Per Acre Rent Schedule covers?

* * * * *

(b) *Phase-in provisions.* If, as the result of any revisions made to the Per Acre Rent Schedule under § 2885.19(a)(2), the payment of your new annual rental amount would cause you undue hardship, you may qualify for a 2-year phase-in period if you are a small business entity as that term is defined in Small Business Administration regulations and if it is in the public interest. We will require you to submit information to support your claim. If approved by the BLM State Director, payment of the amount in excess of the previous year's rent may be phased-in by equal increments over a 2-year period. In addition, the BLM will adjust the total calculated rent for year 2 of the phase-in period by the annual index provided by § 2885.19(a)(1).

* * * * *

■ 68. Revise § 2885.24 to read as follows:

§ 2885.24 If I hold a grant or TUP, what monitoring fees must I pay?

(a) *Monitoring fees.* Subject to § 2886.11, you must pay a fee to the BLM for any costs the Federal Government incurs in inspecting and monitoring the construction, operation, maintenance, and termination of the pipeline and protection and rehabilitation of the affected public lands your grant or TUP covers. We update the monitoring fees for Categories 1 through 4 in the schedule each calendar year, based on the previous year's change in the IPD-GDP, as measured second quarter to second quarter. We will round these changes to the nearest dollar. We will update Category 5 monitoring fees as specified in the Master Agreement. We categorize the monitoring fees based on the estimated number of work hours necessary to monitor your grant or TUP. Monitoring fees for Categories 1 through 4 are one-time fees and are not refundable. These monitoring categories and the estimated range of Federal work hours for each category are:

MONITORING CATEGORIES

Monitoring category	Federal work hours involved
(1) Inspecting and monitoring of new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are >1 ≤8.
(2) Inspecting and monitoring of new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are >8 ≤24.
(3) Inspecting and monitoring of new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are >24 ≤36.

MONITORING CATEGORIES—Continued

Monitoring category	Federal work hours involved
(4) Inspecting and monitoring of new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPS.	Estimated Federal work hours are >36 ≤50.
(5) Master Agreements	Varies.
(6) Inspecting and monitoring of new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPS.	Estimated Federal work hours >50.

(b) The current monitoring cost schedule is available from any BLM State, district, or field office or by writing: U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM also posts the current schedule at <http://www.blm.gov>.

- 69. Amend § 2886.12 by:
- a. Revising paragraph (b);
- b. Redesignating paragraph (d) as paragraph (g); and
- c. Adding new paragraphs (d), (e), and (f).

The revisions and additions read as follows:

§ 2886.12 When must I contact BLM during operations?

* * * * *

(b) When your use requires a substantial deviation from the grant or TUP. You must seek an amendment to your grant or TUP under § 2887.10 and obtain our approval before you begin any activity that is a substantial deviation;

* * * * *

(d) Whenever site-specific circumstances or conditions arise that result in the need for changes to an approved right-of-way grant or TUP, POD, site plan, mitigation measures, or construction, operation, or termination procedures that are not substantial deviations in location or use authorized by a right-of-way grant or TUP. Changes for authorized actions, project materials, or adopted mitigation measures within the existing, approved right-of-way or TUP area must be submitted to the BLM for review and approval;

(e) To identify and correct discrepancies or inconsistencies;

(f) When you submit a certification of construction, if the terms of your grant require it. A certification of construction is a document you submit to the BLM after you have finished constructing a facility, but before you begin operating it, verifying that you have constructed and tested the facility to ensure that it complies with the terms of the grant and with applicable Federal and State laws and regulations; and

* * * * *

Subpart 2887—Amending, Assigning, or Renewing MLA Grants and TUPs

■ 70. Revise § 2887.11 to read as follows:

§ 2887.11 May I assign or make other changes to my grant or TUP?

(a) With the BLM’s approval, you may assign, in whole or in part, any right or interest in a grant or TUP. Assignment actions that may require BLM approval include, but are not limited to, the following:

(1) The transfer by the holder (assignor) of any right or interest in the grant or TUP to a third party (assignee); and

(2) Changes in ownership or other related change in control transactions involving the BLM right-of-way grant holder or TUP holder and another business entity (assignee), including corporate mergers or acquisitions, but not transactions within the same corporate family.

(b) The BLM may require a grant or lease holder to file new or revised information in some circumstances that do not constitute an assignment (see subpart 2883 and §§ 2884.11(c) and 2886.12). Circumstances that would not constitute an assignment but may necessitate this filing include, but are not limited to:

(1) Transactions within the same corporate family;

(2) Changes in the holder’s name only (see paragraph (h) of this section); and

(3) Changes in the holder’s articles of incorporation.

(c) In order to assign a grant or TUP, the proposed assignee, subject to § 2886.11, must file an application and follow the same procedures and standards as for a new grant or TUP, including paying processing fees (see § 2884.12).

(d) The assignment application must also include:

(1) Documentation that the assignor agrees to the assignment; and

(2) A signed statement that the proposed assignee agrees to comply with and to be bound by the terms and conditions of the grant or TUP that is being assigned and all applicable laws and regulations.

(e) Your assignment is not recognized until the BLM approves it in writing. We will approve the assignment if doing so is in the public interest. The BLM may modify the grant or TUP or add bonding and other requirements, including terms and conditions, to the grant or TUP when approving the assignment. If we approve the assignment, the benefits and liabilities of the grant or TUP apply to the new grant or TUP holder.

(f) The processing time and conditions described at § 2884.21 apply to assignment applications.

(g) Only interests in issued right-of-way grants and TUPs are assignable. Pending right-of-way and TUP applications do not create any property rights or other interest and may not be assigned from one entity to another, except that an entity with a pending application may continue to pursue that application even if that entity becomes a wholly owned subsidiary of a new third party.

(h) *Change in name only of holder.* Name-only changes are made by individuals, partnerships, corporations, and other right-of-way and TUP holders for a variety of business or legal reasons. To complete a change in name only, (*i.e.*, when the name change in question is not the result of an underlying change in control of the right-of-way grant or TUP), the following requirements must be met:

(1) The holder must file an application requesting a name change and follow the same procedures as for a new grant or TUP, including paying processing fees (see subpart 2884 of this part). The name change request must include:

(i) If the name change is for an individual, a copy of the court order or other legal document effectuating the name change; or

(ii) If the name change is for a corporation, a copy of the corporate resolution(s) proposing and approving the name change, a copy of the filing/ acceptance of the change in name by the State or territory in which it is incorporated, and a copy of the appropriate resolution(s), order(s), or

other documentation showing the name change.

(2) In connection with processing of a name change only, the BLM retains the authority under § 2885.13(e) to modify the grant or TUP, or add bonding and other requirements, including additional terms and conditions, to the grant or TUP.

(3) Your name change is not recognized until the BLM approves it in writing.

■ 71. In § 2887.12, add paragraphs (d) and (e) to read as follows:

§ 2887.12 How do I renew my grant?

* * * * *

(d) If you make a timely and sufficient application for a renewal of your existing grant or for a new grant in accordance with this section, the existing grant does not expire until we have issued a decision to approve or deny the application.

(e) If we deny your application, you may appeal the decision under § 2881.10.

Dated: November 10, 2016.

Amanda C. Leiter,

Acting Assistant Secretary for Land and Minerals Management, Department of the Interior.

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Part IV

Department of Education

34 CFR Parts 600 and 668

Program Integrity and Improvement; Final Rule

DEPARTMENT OF EDUCATION**34 CFR Parts 600 and 668****[Docket ID ED–2016–OPE–0050]****RIN 1840–AD20****Program Integrity and Improvement****AGENCY:** Office of Postsecondary Education, Department of Education.**ACTION:** Final regulations.

SUMMARY: The Secretary amends the State authorization sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA). In addition, the Secretary amends the Student Assistance General Provisions regulations issued under the HEA, including the addition of a new section on required institutional disclosures for distance education and correspondence courses.

DATES: These regulations are effective July 1, 2018.

FOR FURTHER INFORMATION CONTACT:

Sophia McArdle, U.S. Department of Education, 400 Maryland Ave. SW., Room 6W256, Washington, DC 20202. Telephone (202) 453–6318 or by email: sophia.mcardle@ed.gov. Scott Filter, U.S. Department of Education, 400 Maryland Ave. SW., Room 6W253, Washington, DC 20202. Telephone (202) 453–7249 or by email: scott.filter@ed.gov. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:**Executive Summary**

Purpose of This Regulatory Action: This regulatory action establishes requirements for institutional eligibility to participate in title IV, HEA programs. These financial aid programs are the Federal Pell Grant program, the Federal Supplemental Educational Opportunity Grant, the Federal Work-Study program, the Teacher Education Assistance for College and Higher Education (TEACH) Grant program, Federal Family Educational Loan Program, and the William D. Ford Direct Loan program.

The HEA established what is commonly known as the program integrity “triad” under which States, accrediting agencies, and the Department act jointly as gatekeepers for the Federal student aid programs mentioned above. This triad has been in existence since the inception of the HEA; and as an important component of this triad, the HEA requires institutions of higher education to obtain approval

from the States in which they provide postsecondary educational programs.

This requirement recognizes the important oversight role States play in protecting students, their families, taxpayers, and the general public as a whole. The Department established regulations on October 29, 2010 (75 FR 66832) to clarify the minimum standards of State authorization that an institution must demonstrate in order to establish eligibility to participate in HEA title IV programs. While the regulations established in 2010 made clear that all eligible institutions must have State authorization in the States in which they are physically located, the U.S. Court of Appeals for the District of Columbia set aside the Department’s regulations requiring authorization of distance education programs or correspondence courses by other States where students were located outside of the State with the physical location. Furthermore, the 2010 regulations did not address additional locations or branch campuses located in foreign locations. As such, these regulations clarify the State authorization requirements an institution must comply with in order to be eligible to participate in HEA title IV programs, ending uncertainty with respect to State authorization and closing any gaps in State oversight to ensure students, families, and taxpayers are protected.

The Office of the Inspector General (OIG), the Government Accountability Office (GAO), and others have voiced concerns over fraudulent practices, issues of noncompliance with requirements of the title IV programs, and other challenges within the distance education environment. Such practices and challenges include misuse of title IV funds, verification of student identity, and gaps in consumer protections for students. The clarified requirements related to State authorization will support the integrity of the title IV, HEA programs by permitting the Department to withhold those title IV funds from institutions that are not authorized to operate in a given State. Because institutions that offer distance education programs usually offer the programs in multiple States, there are unique challenges with respect to oversight of these programs by States and other agencies.

Many States and stakeholders have expressed concerns with these unique challenges, especially those related to ensuring adequate consumer protections for students as well as compliance by institutions participating in this sector. For example, some States have expressed concerns over their ability to identify which out of State providers are

operating in their States; whether those programs prepare their students for employment, including meeting licensure or certification requirements in those States; the academic quality of programs offered by those providers; as well as the ability to receive, investigate and address student complaints about out-of-State institutions. One stakeholder provided an example of a student in California who enrolled in an online program offered by an institution in Virginia, but then informed the institution of her decision to cancel her enrollment agreement. Four years later, that student was told that her wages would be garnished if she did not begin making monthly payments on her debt to the institution. Although the State of California had a cancellation law that may have been beneficial to the student, that law did not apply due to the institution’s lack of physical presence in the State. According to the stakeholder, the Virginia-based institution was also exempt from oversight by the appropriate State oversight agency, making it problematic for the student to voice a complaint or have any action taken on it. Documented wrong-doing has been reflected in the actions of multiple State Attorney Generals who have filed lawsuits against online education providers due to misleading business tactics. For example, the Attorney General of Iowa settled a case against a distance education provider for misleading Iowa students because the provider incorrectly represented that its educational programs would qualify a student to earn teacher licensure. As such, this regulatory action also establishes requirements for institutional disclosures to prospective and enrolled students in programs offered through distance education or correspondence courses, which we believe will protect students by providing them with important information that will aid their decisions regarding whether to enroll in distance education programs or correspondence courses as well as improve the efficacy of State-based consumer protections for students.

Since distance education may involve multiple States, authorization requirements among States may differ, and students may be unfamiliar with or fail to receive information about complaint processes, licensure requirements, or other requirements of authorities in States in which they do not reside. These disclosures will provide consistent information necessary to safeguard students and taxpayer investments in the title IV, HEA programs. By requiring disclosures

that reflect actions taken against a distance education program, how to lodge complaints against a program they believe has misled them, and whether the program will lead to certification or licensure will provide enrolled and prospective students with important information that will protect them.

Summary of the Major Provisions of This Regulatory Action: The regulations would—

- Require an institution offering distance education or correspondence courses to be authorized by each State in which the institution enrolls students, if such authorization is required by the State, in order to link State authorization of institutions offering distance education to institutional eligibility to participate in the title IV, HEA programs, including through a State authorization reciprocity agreement.

- Define the term “State authorization reciprocity agreement” to be an agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students residing in other States covered by the agreement and does not prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.

- Require an institution to document the State process for resolving complaints from students enrolled in programs offered through distance education or correspondence courses.

- Require that an additional location or branch campus located in a foreign location be authorized by an appropriate government agency of the country where the additional location or branch campus is located and, if at least half of an educational program can be completed at the location or branch campus, be approved by the institution’s accrediting agency and be reported to the State where the institution’s main campus is located.

- Require that an institution provide public and individualized disclosures to enrolled and prospective students regarding its programs offered solely through distance education or correspondence courses.

Costs and Benefits: The regulations support States in their efforts to develop standards and increase State accountability for a significant sector of higher education—the distance education sector. In 2014, over 2,800,000 students were enrolled in

distance education programs.¹ The potential primary benefits of the regulations are: (1) Increased transparency and access to institutional/program information for prospective students through additional disclosures, (2) updated and clarified requirements for State authorization of distance education and foreign additional locations, and (3) a process for students to access complaint resolution from the State in which the institution is authorized and the State in which the students reside. The clarified requirements related to State authorization also support the integrity of the title IV, HEA programs by permitting the Department to withhold title IV funds from institutions that are not authorized to operate in a given State. Institutions that choose to offer distance education will incur costs in complying with State authorization requirements as well as costs associated with the disclosures that would be required by the regulations.

Public Comments: In response to our invitation in the notice of proposed rulemaking (NPRM) published July 25, 2016 (81 FR 48598), 139 parties submitted comments on the proposed regulations. We also had a consultative meeting with staff from the Department of Defense. We group major issues according to subject, with appropriate sections of the regulations to which they pertain. Generally, we do not address technical or other minor changes.

Analysis of Comments and Changes: An analysis of the comments and of any changes to the regulations since publication of the NPRM follows:

General Comments

Comments: Commenters were concerned that the Department has overstepped its statutory authority under the HEA, stating that, much like the previous State Authorization regulations, the requirement under the proposed regulations that schools offering online and distance learning programs meet licensing requirements in every State where their students happen to be found is contrary to the HEA. Rather, the commenters asserted that HEA requires only that an institution be authorized in the State where it is located, not where the student is located. The commenters noted a discussion from H.R. Rep. No. 105–481, at 148 (1998) (explaining that “States have a number of options in

overseeing institutions within their boundaries”) and conclude that the Department’s distance education requirements exceed the statutory scope.

Discussion: We disagree with the commenters and believe that we have the authority to require an institution to obtain any required State approval for distance education programs by each and every State in which its enrolled students reside. The HEA requires institutions to be authorized by States, and the Department recognizes that this encompasses a State’s authority to set standards for in-State students for educational programs that originate outside of that State. Additionally, the language in the legislative history that the commenters quoted was a statement made to explain the elimination from the HEA of the State Postsecondary Review Program that had required States to create certain postsecondary oversight functions to conduct reviews at physical school locations, and that language did not address whether States could establish requirements over distance education programs.

Changes: None.

Section 600.2 Definitions

State Authorization Reciprocity Agreement

Comments: Several commenters supported the Department’s definition of the term “State authorization reciprocity agreement.” Many commenters requested clarification on the term “consumer protection laws” under the definition of a State authorization reciprocity agreement. Some commenters suggested that the Department’s clarification specify that “consumer protection laws” encompasses a State’s consumer protection statutes and the regulations interpreting those statutes, both general and specific, including those directed at all or a subset of educational institutions. Some commenters further asked that “consumer protection laws” include laws specifically applicable to higher education institutions that cover the following: Disclosures to current and prospective students, the contents of any documents provided to students or prospective students, prohibited practices, refunds, cancellation rights, student protection funds or bonds, private causes of action, and student complaint standards and procedures. Other commenters asked for clarification that any State authorization reciprocity agreement that the Department authorizes for the purpose of institutional title IV eligibility must be governed and controlled by member

¹ 2015 Digest of Education Statistics: Table 311.15: Number and percentage of students enrolled in degree-granting postsecondary institutions, by distance education participation, location of student, level of enrollment, and control and level of institution: Fall 2013 and Fall 2014.

States under clearly defined policies and procedures that allow the member States to exercise ultimate authority for establishing, maintaining, and enforcing conditions of State and institutional participation in the agreement. Commenters also recommended that reciprocity agreements be required to include standard due process requirements, similar to those provided in proceedings by State agencies, the Department, and by accrediting agencies. Several commenters argued that States should not be forced to accept conditions that would limit specific State requirements such as refund policies in order to join a State authorization reciprocity agreement.

Other commenters were concerned that the proposed provision on “consumer protection laws” would make the institutions need to comply with additional State requirements besides the conditions required under the State reciprocity agreement. This was described as something that could result in the end of reciprocity agreements because States would still be able to enforce their own rules, regardless of the reciprocity agreement. Other commenters suggested that “consumer protection laws” be clarified to refer to a State’s general consumer protection laws (commonly dealing with issues such as fraud, misrepresentation or abuse, and applicable to all entities doing business in the State) rather than any consumer protection aspects of laws dealing specifically with postsecondary education. Some commenters specifically cited the existing State Authorization Reciprocity Agreement (SARA) administered by the National Council for State Authorization Reciprocity Agreement (NC-SARA) as allowing SARA member States to have authority to enforce all their general purpose laws against non-domestic institutions (including SARA participating institutions) providing distance education in the State, including, but not limited to, those laws related to consumer protection and fraudulent activities, where the term “general-purpose law” is defined as “one that applies to all entities doing business in the State, not just institutions of higher education.” Commenters stated that this type of definition would ensure that distance education providers operating in a given State under SARA must still comply with the consumer protection standards any other business must meet, and noted that those provisions are commonly enforced by the offices of Attorneys General. The commenters further said that this approach also

ensures that a given State may limit the applicability of its own laws by recasting State authorization requirements focused solely on institutions of higher education as “consumer protection laws.”

In a related vein, commenters recommended that the Department clarify that a State authorization reciprocity agreement cannot bar any State from membership on grounds related to its consumer protection laws because a State’s consumer protection statutes and regulations should never be a barrier to its entry into a reciprocity agreement. Commenters recommended that the word “participating” should be replaced with the word “any” so that a prospective State authorization reciprocity agreement would not be able to cite the word “participating” to refuse to admit an otherwise eligible State for membership in, or force a State to withdraw from, an agreement on the grounds that the State’s consumer protection laws are too rigorous.

Discussion: We appreciate commenters’ support regarding the definition of the term State authorization reciprocity agreement.

We define a State authorization reciprocity agreement as “an agreement between two or more States,” not an agreement between States and a non-State entity. Therefore, while States may permit a non-State entity to oversee the requirements of a State authorization reciprocity agreement, we agree with the comment that the ultimate responsibility for establishing, maintaining, and enforcing such requirements must rest with the member States that are parties to the agreement. An agreement that placed such responsibilities with a non-State entity would not fulfill the definition of a State authorization reciprocity agreement. While we agree that the ultimate responsibility for resolving disagreements between two participating States who are party to an agreement rests with those States, not with a non-State entity, we decline to define due process procedures for resolving conflicts or disagreements between States. The member States to an agreement have the discretion to establish due process requirements in the manner that they so choose.

We disagree with the recommendation by some commenters that the term “consumer protection laws” be clarified to only refer to the laws that apply to all entities doing business in the State, not just institutions of higher education, so that the resulting outcome would be that laws that applied only to institutions of higher education would be displaced by

a State reciprocity agreement. Rather, we believe that if a State has laws that are specific to postsecondary institutions, the State’s laws should not be preempted by a reciprocity agreement that does not recognize those State laws. Thus, we believe that the definition of a State authorization reciprocity agreement should encompass a State’s statutes and the regulations interpreting those statutes, both general and specific, including those directed at all or a subset of educational institutions. We decline to further specify the content of State statutes and regulations, and we also decline to require specific State policies and procedures.

Moreover, we agree that States should be active in protecting their own students, and thus, agree that the word “participating” should be replaced with “any” when referring to reciprocity agreements, so that a State authorization reciprocity agreement does not prohibit any State from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions. We would expect States to work together to implement a reciprocity arrangement to resolve conflicts between their respective State statutes and regulations and the provisions of the State authorization reciprocity agreement.

Changes: We have revised the definition of State authorization reciprocity agreement by deleting the words “consumer protection laws” and adding in their place “statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.” In addition, we have replaced the word “participating” with reference to a participating State with the word “any” so that a State authorization reciprocity agreement does not prohibit any State from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions. We add the word “residing” after the word “students” to clarify that the agreement authorizing and institution to provide postsecondary education through distance education or correspondence courses is to students residing in other States covered by the agreement. We also add the words “in the agreement” after “any State” to clarify that the agreement does not prohibit any State in the agreement from enforcing its own statutes and regulations.

Comments: Some commenters stated concerns that certain institutions will not be able to participate in the currently existing SARA because they

are not degree-granting institutions and that there is no way for those institutions to develop a SARA-type structure due to differences between States in length, curriculum, examination requirements, and licensure prerequisites. Commenters stated that although utilization of technology at their institutions is in its infancy, the proposed regulations create a roadblock that will prohibit advances that are beneficial to students and recommended that the Department provide some form of accommodation so as not to impede the potential benefits students attending these institutions would be able to access under State authorization reciprocity agreements.

Discussion: We do not agree with the commenter's recommendation that the Department provide accommodations for institutions that cannot join an existing reciprocity agreement. The proposed definition of the term "State authorization reciprocity agreement" is intended to apply to any State authorization reciprocity agreement, not just the existing SARA. States are able to develop reciprocity agreements as they deem necessary or desirable, and there is nothing in the final regulations that would prohibit a State from developing or participating in a State authorization reciprocity agreement that authorizes non-degree-granting institutions.

Changes: None.

Comments: A commenter requested that the Department clearly define or create a process that provides reciprocity based on accreditation status and mandate that all States participate in this as many State requirements for approving institutions of higher education were created for brick-and-mortar institutions and do not fit well with new technologies and pedagogy that crosses State lines.

Discussion: We disagree that the Department should define or create a process that provides reciprocity based on accreditation status and mandate that all States participate in this. As we discussed in the preamble to the NPRM, the HEA established what is commonly called the triad under which States, accrediting agencies, and the Department act jointly as gatekeepers for the Federal student aid programs. State authorization is an important part of the triad, recognizing the important oversight role States play in protecting students, their families, taxpayers, and the general public as a whole. Accepting the commenter's recommendation would undermine the concept of the triad and would jeopardize the State's important oversight role. Lastly, it is the

State, not accrediting agencies, that has jurisdiction over who operates in that State.

Changes: None.

Comments: Some commenters stated that State and Federal laws treat for-profit entities very differently from nonprofit and public entities, and that while the governing boards of for-profit entities may spend their revenue virtually without restriction, including taking the money for themselves, the corporate structure of public and other nonprofit entities is designed to provide built-in protections against self-interest. The structural difference results in contrasting behavior by colleges, the commenters stated, with for-profit colleges far more likely to engage in predatory practices. The commenters indicate that some States may not wish to adopt reciprocity that recognizes the approval of for-profit colleges by other States and that States should not be forced by a reciprocity agreement to accept all of a State's approvals without regard to sector. The commenters recommend that the Department add a provision that would require reciprocity agreements to allow States to adopt reciprocity for public and nonprofit colleges without automatic inclusion of for-profit companies.

Discussion: We do not agree that the Department should require reciprocity agreements to allow States to adopt reciprocity for public and nonprofit colleges without automatic inclusion of for-profit companies. If States want to develop and participate in such reciprocity agreements, they are able to do so.

Changes: None.

Section 600.9(c)(1) State Authorization of Distance Education and Correspondence Courses

Comments: A few commenters cited a letter urging the Department to explicitly exempt clinical education rotations from any future rulemaking on distance education to avoid compounding the harmful impacts of the existing State authorization regulations on educational and health professions institutions.

Discussion: While we understand the commenters' concern regarding the effects of this rulemaking on health professions institutions, Dear Colleague Letter GEN-12-13 states that, for State authorization purposes, in the case of an additional location of an institution where a student cannot complete more than 50 percent of a program, the student is considered to be enrolled at the main campus of the institution, and thus, no additional State authorization would be required. We believe that most

clinical education rotations would fall under this policy, and students enrolled in such rotations would not be considered enrolled in distance education or correspondence courses. However, it should be noted that States may independently have requirements that an institution obtain approval of such locations.

Changes: None.

Comments: Some commenters were concerned that the proposed regulation would render institutions entirely ineligible to participate in title IV programs because they have not met applicable State authorization requirements for distance education programs that are not title-IV eligible. An institution could be ineligible for Federal financial aid for all of its on-campus programs even if none of its distance education programs were eligible for title IV aid—or, for that matter, if any one non-title IV program or course, including a course offered free of charge to students worldwide, failed to exclude a student from a State that had not authorized the instruction. The commenters asked that if the Department does intend to apply the State authorization requirement to overall institutional eligibility, even in cases in which no HEA title IV funds are used for students enrolled in an institution's distance education programs, clarification be provided as to the Department's authority and interest to regulate non-title IV distance education programs. Other commenters asked the Department to clarify in the case where an institution does not obtain or maintain State authorization for distance education programs or correspondence courses in any particular State, what financial aid eligibility would be at risk in that State—eligibility of the institution or eligibility of certain programs?

Discussion: These regulations do not apply to education programs that are not title IV-eligible. However, for title IV-eligible programs that include distance education or correspondence courses, if an institution does not obtain or maintain State authorization for distance education or correspondence courses in any particular State that has such requirements, such programs would only lose eligibility for HEA title IV funding for students residing in that State. An institution's inadvertent or unintentional failure to obtain State authorization for distance education or correspondence courses in a State where its enrolled students reside would not jeopardize the entire institution's eligibility if the institution otherwise met eligibility requirements.

Changes: None.

Comments: Some commenters were concerned that the State authorization requirement in proposed section 600.9(c) applies at such time as an institution “offers” postsecondary education through distance education or correspondence courses to students in a State in which the institution is not physically located, whether or not the institution actually enrolls students in the State. Thus, under the proposed rule, an institution may face a loss of Federal financial aid for failure to comply with requirements of a State in which it has not enrolled any distance education students. The commenters recommended that the final rule should permit institutions to identify the States in which applicants to particular programs reside, and then make determinations regarding the need for authorization based on expected enrollment, regardless of whether or not courses have been offered more broadly.

Discussion: We disagree with the commenters’ recommendation. Institutions should not market to, nor enroll students in, a program in a State unless the institution has met applicable State authorization requirements. A State may also have specific State requirements for how postsecondary institutions market distance education programs within that State, and we would expect institutions to comply with those requirements. We note that, if an institution does not obtain or maintain State authorization for distance education or correspondence courses in any particular State that has such requirements, such programs would only lose eligibility for HEA title IV funding for students residing in that State.

Changes: None.

Comments: A few commenters expressed concerns regarding the case of a student from a State in which the institution was approved at the time the student initially enrolled relocating during the period of enrollment to a State which requires authorization and in which the institution is not authorized. The commenters ask whether, in order to maintain compliance with the requirement to be authorized in every State in which students are served, would the institution be required to administratively dismiss the student from the program. They note that if so, this seems unfair to the student who invested time and resources in the program and for whom transfer to a different institution that is authorized in her new State of residence may be costly and burdensome. In addition, commenters argue that such a case also creates an untenable situation for the

institution that may not, due to financial constraints or strategy regarding market area, be in a position to seek or obtain approval in the student’s new State of residence so the student can stay enrolled through completion of the program. Even if willing and able to do so, and in the interest of supporting the student’s educational goals, obtaining such approval will take time for the institution and may result in a period of noncompliance while in process. The commenters also posit that a rigid approach in this circumstance could have a disproportionate impact on certain classes of students, including those who are in the military and employees who may be required to relocate as a condition of a military or work assignment. The commenters recommend some consideration for an amnesty, exemption, or “safe harbor” that would allow these students to remain enrolled in the institution through the completion of the program, as long as the institution was in compliance in the student’s original State of residence at the time the student initially enrolled or through a modification to the attestation language in the program participation agreement to reflect that the institution was in compliance with the Federal program integrity rules related to distance education at the time of student enrollment in the online program.

Discussion: An institution is not required to dismiss a student from a program if the student moves to a State in which the institution is not authorized under the requirements in § 600.9(c); however, the institution may not disburse additional Federal student aid to the student if the institution has information that the student has moved to another State in which the institution is not authorized. For purposes of this rulemaking, a student is considered to reside in a State if the student meets the requirements for residency under that State’s law. In general, when determining the State in which a student resides, an institution may rely on a student’s self-determination unless the institution has information that conflicts with that determination. An institution should be providing the student with information about its State authorization status and should be informing the student that, if the student relocates to a State where the institution is not authorized, the institution cannot disburse Federal student aid to the student as long as the student continues to reside in that State.

With respect to military personnel, just as with non-military personnel, we treat the student’s State of residence to be the State for which the student meets

the requirements for residency under State law. Further, similar to non-military personnel, when determining the State in which the military student resides, the institution may rely on the student’s self-determination unless the institution has information that conflicts with that determination. The Department expects institutions who already offer distance education programs to be in compliance with State laws and we decline to create any safe harbors that would permit an institution to provide title IV funds to a student in a State where the program does not meet State requirements. Institutions must use the disclosure process and conversations with prospective students to ensure the students understand and consider that relocating to other States could affect the title IV funding for their program.

Changes: None.

Comments: Some commenters stated that some educational programs, including hybrid programs with on-campus components, are subject to the laws of the State in which the institution’s physical campus is located, and thus, no additional purpose is served by requiring hybrid programs to meet both home State requirements and authorization requirements from each State in which students reside, simply because a portion of the program is offered through distance education. If students attend any portion of a program at the physical campus where the institution is located, the program is subject to the oversight of authorities in the State where the campus is located. The commenters recommend that the Department amend § 600.9(c) to apply only to educational programs that can be completed “solely” through distance education or correspondence courses.

Discussion: The regulations do not require that hybrid programs meet both home State requirements and authorization requirements from each State in which students reside, simply because a portion of the program is offered through distance education. Rather, an institution is required to meet any State requirements for it to be legally offering postsecondary distance education or correspondence courses in the State. If a State has applicable requirements for students taking a portion of a hybrid program through distance education, the institution must meet those state requirements.

Changes: None.

Comments: A commenter recommended that the Department clarify that any institution offering distance education has the option to decide whether it chooses to be authorized individually in each

required State or whether it participates in a reciprocity agreement between States. The commenter suggested that the regulations clearly state the option, perhaps by adding “or” between paragraphs (i) and (ii) of § 600.9(c)(1).

Discussion: We agree with the commenter that the regulations provide any institution offering distance education with the option to decide whether it chooses to be authorized individually in each required State or whether it participates in a reciprocity agreement between States and that adding “or” between paragraphs (i) and (ii) of § 600.9(c)(1) clarifies this point. In addition, we note that an institution could simultaneously participate in multiple State authorization reciprocity agreements and simultaneously be authorized individually in multiple States.

Changes: We have added “or” between paragraphs (i) and (ii) of § 600.9(c)(1).

Comments: Some commenters opined that proposed § 600.9(c)(1)(i) did not appear to address those States that regulate—in some way—institutions offering distance education courses to residents, but that do not require full State approval or authorization in order to do so. They recommended that § 600.9 be revised to address these types of situations as there are many States that have an exemption process or otherwise have a registration process that results in something less than full approval yet still allows the institution to enroll residents.

Discussion: We decline to revise the regulations. It is a State’s discretion as to how it may choose to regulate by establishing requirements that exceed the minimum requirements for title IV program eligibility. An institution is responsible for meeting any State requirements and should maintain the applicable documentation.

Changes: None.

Comments: Some commenters requested clarification regarding what entity the Department would rely upon to determine whether an institution covered by a State authorization reciprocity agreement is operating in a State outside of the limitations of that agreement. These commenters also asked the Department to affirm that each State in which an institution is offering distance education remains the ultimate authority for determining whether an institution is operating lawfully in that State, regardless of whether a non-State entity administers the agreement.

Discussion: We agree with the commenters that each State in which an institution is offering distance education remains the ultimate authority for

determining whether an institution is operating lawfully in that State, regardless of whether a non-State entity administers the agreement, including whether an institution covered by a State authorization reciprocity agreement is operating in a State outside of the limitations of that agreement.

Changes: None.

Comments: Some commenters stated that though the regulation is given the title of “State authorization” it seems that an institution will need to prove compliance with more State agencies than just the State higher education agency, such as a State Secretary of State or a State’s licensing board. These commenters stated that this issue is important for institutions so that they can make plans for compliance, and if necessary, restrict enrollments in certain States until all State requirements are met.

Discussion: Institutions are required to know what State requirements exist for an educational program to be offered to a student in a particular State, and the required approvals that constitute what is needed for the program to be authorized by that State. While we agree that institutions should not enroll students from a State until all State requirements are met, we believe institutions should routinely identify this information and ensure State requirements are being met where their students live.

Changes: None.

Comments: A commenter asked the Department to declare that, for the purpose of this regulation, an institution authorized to provide higher education in its own State is also authorized to serve students from any other State in the country.

Discussion: We disagree with the commenter’s suggestion as it would allow one State to preempt another State’s requirements.

Changes: None.

Section 600.9(c)(2) State Authorization of Distance Education and Correspondence Courses—Complaint Process

Comments: Some commenters supported the proposal that students enrolled in an out-of-State online school are eligible for title IV aid only if they are able to seek and receive action on their complaints from the authorizing agency in their State of residence. However, the commenters were concerned that complaint-handling is inadequate if the State does not have the ability to enforce its decisions. They recommended language clarifying that the State’s process must be able to ultimately lead to denying the

institution’s authority to enroll residents of that State.

Discussion: We appreciate the commenters’ support. We further agree that a State should be able to deny an institution’s authorization to enroll students who reside in that State and believe that the regulations as drafted do not interfere with the State’s ability to exercise this authority. We decline to specify that the State complaint process must allow a State to deny an institution from enrolling students because that is an issue best left to each State.

Changes: None.

Comments: Some commenters were concerned that, for institutions that do not have access to reciprocity agreements, the proposed regulations would impose a number of new compliance requirements that will require significant resources on an ongoing basis. For instance, States would be required to document the existence of a State process for action on complaints in each State from which a distance education program enrolls students. The commenters asked that the Department or another agency make the determination if a State process exists and publish this information, or alternatively, to write into the final regulations the previous guidance from the Department (Dear Colleague Letter (DCL) GEN–12–13, July 27, 2013, Question 9) which permitted institutions offering distance education in multiple States to satisfy the requirement to provide State contact information for filing complaints by providing a link to non-institutional Web sites that identified contact information for filing student complaints for multiple States.

Discussion: We believe that access to a complaint process is an important student protection that an institution should be able to document and provide to a student regardless of whether the institution participates in a reciprocity agreement. This policy is not new, since every institution already has to provide this information under 34 CFR 668.43(b). In addition, DCL GEN–12–13 states that an institution must make sure that all of its students are provided with the applicable consumer information that corresponds to their enrollment and that the information must be for every State in which the institution is operating, including every State where students are enrolled for distance education. The consumer information to be provided includes the complaint process.

We make a distinction, however, between an institution that provides documentation to the Department in order to satisfy the requirements under

the State authorization regulations and an institution that is providing information to a student regarding the State's complaint process to satisfy the consumer information requirements. DCL GEN-12-13 Question 9 was related to consumer information requirements, thus we would not include this guidance for compliance with the State authorization regulations. We discuss consumer information requirements further under the consumer disclosures section.

Changes: None.

Comments: A few commenters asked that the regulations include compliance for their students from States such as California that reportedly lack oversight for their out-of-State student complaints. Other commenters opined that the proposed rule would require all States to have a process for reviewing complaints from any student located in that State enrolled in a distance education program or at an out-of-State institution even if the State law does not require the institution to be authorized in that State. Other commenters noted that the California Bureau for Private Postsecondary Education (CA-BPPE) does not currently require purely online institutions to be authorized and will not accept complaints against non-authorized institutions. These commenters recommended that the Department determine that these students in distance education programs are not adequately covered by a complaint process and, therefore, not eligible for title IV funding. Some commenters recommended allowing institutions to use their home State's complaint processes for students in States lacking adequate complaint procedures.

Discussion: Section 600.9(c)(2) provides that if an institution offers postsecondary education or correspondence courses to students residing in a State in which the institution is not physically located, the institution must document that there is a State complaint process in each State in which the institution's enrolled students reside or through a State authorization reciprocity agreement which designates for this purpose either the State in which the institution's enrolled students reside or the State in which the institution's main campus is located. In addition, any student who is enrolled in distance or correspondence education provided by an institution must have access to the consumer complaint system in the State where the institution's main campus is located (the home State), as that complaint process is described under 34 CFR 600.9(a). Thus, we agree with

commenters that, if a State does not provide a complaint process as described in a State where an institution's enrolled students reside, the institution would not be able to disburse Federal student aid to students in that State. Additionally, if the State in which the institution's main campus is located does not provide an appropriate complaint process to students enrolled through distance or correspondence education at that institution, none of those students would be eligible to receive Federal student aid.

Changes: None.

Comments: Commenters stated that policymakers may see not establishing a complaint process and not entering into a reciprocity agreement as a way to protect their in-State institutions from out-of-State competition, which would limit opportunities and create considerable confusion for students. The commenters recommended that the regulations be revised to say that, in cases where a student resides in a State that does not participate in a reciprocity agreement or have its own student complaint process, a distance or correspondence education program located in a State with a student complaint process should be able to use such home State complaint procedures, or other procedures designated in a reciprocity agreement, to satisfy the Department's requirement if clearly and conspicuously disclosed to the student under § 668.50(b)(1) and (2).

Discussion: We disagree with the commenter's suggestion. A State is not required to have a complaint process, although, if it does not, institutions would not be able to disburse Federal student aid to resident students in that State. A State is also not required to participate in a reciprocity agreement, thus, it cannot be required to be subject to a complaint process under a reciprocity agreement. However, as provided in 34 CFR 600.9(a), the complaint process in the State where the institution's main campus is located may be utilized.

Changes: None.

Comments: Several commenters felt that it is unclear what the term "document" in the proposed regulations requires, stating that some commenters are interpreting that term to require that institutions verify the efficacy of the process, as opposed to its mere existence. They also stated that it is not appropriate for institutions to be put in the position of determining whether a student complaint process in a particular State contains "appropriate action" on complaints, as required by the proposed regulations because such a

subjective determination puts an institution in a position of potential sanctions or liabilities for substantial misrepresentation should the institution make an incorrect, though good faith, determination. The commenters asked that the Department provide clarification or delete the requirement. Other commenters asked whether institutions would be required to provide yearly proof of compliance.

Discussion: Institutions will be asked to provide documentation of the State's complaint process when an institution is seeking certification or recertification or if a question arises due to a complaint, program review or audit, not on an annual basis. The Department will subsequently determine if the State's complaint process is compliant with the State authorization regulations. This same process is currently used for institutions under § 600.9(a) and (b). If the Department determines that the complaint process is not compliant with the State authorization regulations, it will notify the institution and subsequently work with the institution to address this issue.

Changes: None.

Comments: Commenters said that the Disclosures section of the proposed regulations are only applicable to students completing programs "solely" through distance education, yet, the term "solely" is not employed elsewhere to define distance education and asked for clarification that distance education in § 600.9(c) pertains only to programs offered 100 percent off campus. Commenters further stated that the NPRM did not address the issue of hybrid style courses or programs and the regulations seem to omit any Federal oversight of hybrid programs and requested a formal definition of distance education be provided. Some commenters recommended that the term "distance education" include both purely online programs and online programs which include a requirement for a credit-bearing internship or practicum that the student could complete in his or her State of residence. Other commenters were concerned that the NPRM did not adequately distinguish between distance education "programs" and "courses" and suggested that the Department focus the intent of the NPRM on the programmatic level and amend the regulations to clearly refer to "distance education programs," as opposed to distance education courses.

Discussion: We disagree that a formal definition of distance education should be provided. A State has discretion as to whether it has any State authorization requirements with respect to an

institution offering postsecondary education through distance education in that State and that discretion includes how the State defines distance education. States may therefore choose whether or not to exercise authority over hybrid distance education or correspondence programs, but any requirements established by the State must be complied with in order for an institution to be considered authorized for title IV eligibility purposes.

Changes: None.

Comments: Commenters stated that the NPRM uses disclosure in its attempt to address situations in which a college's program does not satisfy the occupational licensing or prerequisites in the State where the student lives and that, in these situations, disclosure is not an adequate or appropriate solution. Instead, the commenters argued that the regulations should generally prohibit using title IV funds for programs that do not meet State requirements for the occupation, allowing for exceptions only when the student has provided the specific, personal reason he or she is seeking to enroll in a program that does not qualify them for the occupation in the State where they live (for example, an intention to relocate). Commenters asked that the Department add § 600.9(c)(3) to say that "If an institution described under paragraph (a)(1) of this section offers postsecondary education through distance education or correspondence courses, its programs must meet the applicable educational prerequisites for professional licensure or certification for the occupation for which the program prepares students to enter, in the student's State of residence, unless prior to enrollment the student affirmatively states in writing, in his or her own words, that he or she knows that the program does not meet the State requirements, and explains the reason he or she is seeking to enroll in the program."

Discussion: While we agree with the focus and spirit of this comment, we do not agree with the recommendation that we withhold Federal student aid where programs provided through distance education do not meet State requirements where a student resides unless an institution documents the reasons each student decided to enroll in that program anyway. We are requiring an institution to determine whether a program it offers meets State requirements in each State where the students enrolled in that program reside, and to publicly disclose that information to students. We also believe that the complaint process and program review process will readily identify any instances where institutions fail to

provide this information through disclosures. Furthermore, we note that, upon implementation of this final rule, institutions offering GE programs will need to ensure that those programs fulfill licensure or certification requirements in each State in which the institution is required to be authorized, or in which the institution is authorized through a State authorization reciprocity agreement. This will ensure that institutions certify that distance education or correspondence GE programs fulfill requirements for licensure or certification in the majority of States where enrolled students reside.

More specifically, the GE final regulations include several provisions under 34 CFR 668.414(d) that are connected to the State authorization rules under 34 CFR 600.9. In particular, § 668.414(d)(2) requires an institution to certify that each eligible GE program it offers is programmatically accredited, if such accreditation is required by a Federal governmental entity or by a governmental entity, in each State in which the institution is required to obtain State approval under 34 CFR 600.9. Similarly, § 668.414(d)(3) requires an institution to certify that, for each State in which the institution is required to obtain State approval under 34 CFR 600.9, each eligible GE program that it offers satisfies the applicable educational prerequisites for professional licensure or certification requirements in that State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter. Under these final regulations an institution must fulfill any requirements for it to be legally offering postsecondary distance education or correspondence courses in that State, or be authorized under a State authorization reciprocity agreement if the State chooses that mechanism to authorize postsecondary institutions. Therefore, for the purposes of institutional compliance with the GE regulations in 34 CFR 668.414(d)(2) and (3), a GE program will be required to have the appropriate programmatic accreditation and/or lead to licensure or certification in each State in which at least one enrolled student resides and where there is either a State requirement for authorization or where the State is part of a State authorization reciprocity agreement that confers authorization to the institution.

We believe that the combination of the disclosure requirements regarding licensure and certification in new 34

CFR 668.50(b)(7) and the requirements for GE programs to meet licensure and certification requirements in each State where students reside (if such States require authorization or are part of a reciprocity agreement) are sufficient to mitigate the commenter's concerns about distance education programs not leading to licensure or certification.

Changes: None.

Comments: One commenter expressed concern that a student residing in one State could not take an online course from a school located in another State, unless the latter conformed to the educational standards set for schools in the first State. The commenter further stated that what recent experience has shown is that the proposed regulations are unlikely to be value-neutral across the board and that some of the regulations would establish norms and goals for diversity that would be impossible for private, confessional schools to meet in good conscience and that the proposed regulations should be withdrawn.

Discussion: We disagree with the commenter. The regulations do not prohibit a student residing in one State from taking an online course from a school located in another State, unless the latter conformed to the educational standards set for schools in the first State. Rather, the regulations establish that an institution that offers postsecondary education through distance or correspondence courses to students in a State in which the institution is not physically located, or in which the institution is otherwise subject to that State's jurisdiction as determined by the State, must meet any State requirements for it to be legally offering postsecondary distance or correspondence courses in the State and offer a complaint process. Institutions may also meet the requirements by participating in a State authorization reciprocity agreement. In addition, institutions are required to document the State's complaint process.

Changes: None.

Section 600.9(d) State Authorization of Foreign Additional Locations and Branch Campuses of Domestic Institutions

General Opposition

Comments: Some commenters did not support a rulemaking to address State authorization of foreign additional locations and branch campuses of domestic institutions. A few commenters asserted that the Department does not have the authority to regulate foreign locations of domestic institutions. Commenters argued that

the HEA does not grant the Department the authority to regulate institutions outside of the United States as it defines an “institution of higher education” as an educational institution *in any State* that is legally authorized *within such State* to provide a program of education beyond secondary education.

Commenters also stated that the proposed regulations exceeded the Department’s authority by mandating compliance with the requirements of foreign governments, with one commenter stating that enforcement of foreign requirements is the responsibility of the foreign country, not the Department. Some commenters asserted that the provisions of § 600.9(d) also raise significant federalism issues, as they impose substantive requirements for foreign authorization that go beyond what individual States may decide to require with respect to authorization of institutions with locations outside U.S. borders. The commenter noted that State agencies may decline to regulate the foreign locations of in-State institutions. One commenter stated that education in foreign locations is a complex topic and any rulemaking addressing foreign locations should not be conflated with the State authorization rulemaking. Some commenters opposed regulations for foreign locations on the grounds that they would be too complex to implement and too difficult to enforce.

Discussion: Sections 101(a)(2), 102(a)(1), 102(b)(1)(B), and 102(c)(1)(B) of the HEA require an educational institution to be legally authorized in a State in order to be eligible to apply to participate in programs approved under the HEA, unless an institution meets the definition of a foreign institution. As stated in the NPRM, these regulations allow an institution with a foreign additional location or branch campus to meet the statutory State authorization requirement for the foreign location or branch campus in a manner that recognizes both the domestic control of the institution as a whole, while ensuring that the foreign location or branch campus is legally operating in the foreign country in which it is located. The Department believes it is consistent with the HEA and in the best interest of students to allow the provision of title IV, HEA program funds to students attending a foreign additional location or branch campus of a domestic institution. Thus, we are establishing authorization regulations that provide the protections to United States students intended by the HEA to those attending foreign locations or branch campuses of domestic

institutions. To permit an institution to operate in violation of a foreign country’s requirements would be irresponsible and, in many cases, ineffectual as it is the Department’s responsibility to ensure the proper administration of the title IV, HEA programs. We address commenters’ specific concerns regarding the difficulty in working with foreign countries to comply with the regulations in the discussion of the difficulty in obtaining foreign authorization below.

The Department will not be enforcing the requirements of any foreign country on behalf of the foreign country. Rather, we will be determining whether or not an institution is in compliance with any requirements of a foreign country in order to ensure whether title IV, HEA program funds are appropriately available to students at any foreign additional location or branch.

Changes: None.

Applicability

Comments: Commenters asked for clarification of the applicability of the regulations. Commenters asked whether the regulations would cover programs through agreements that domestic schools have with foreign institutions. For example, commenters stated that they have agreements to offer programs at foreign “host” universities, and it is not clear whether the regulations extend to such situations. Commenters also asked for clarification of what constitutes a branch campus or an additional location of an institution. Specifically, one commenter asked whether a faculty-led overseas trip constitutes a university establishing a branch campus or additional location since the presence in the foreign country is temporary. Commenters also questioned whether these regulations would apply to educational programs that are not title IV eligible.

Commenters, referencing the proposed differentiation of requirements for additional locations or branch campuses where 50 percent or more of an educational program is offered and those where less than 50 percent of the educational program is offered, asked what the definition of an “educational program” is. One commenter asked whether educational program means a degree-seeking program only, or whether a study abroad experience would stand alone as an educational program. One commenter, an institution contracted to offer educational services on military bases abroad, requested that the Department include language declaring that (1) as an education services contractor, it is fully exempt without proving any foreign

government’s proof of exemption, since the Department of Defense requires it to provide educational services on the specified foreign bases/additional locations; or (2) that compliance could be verified by providing proof of the Education Services contract with the Department of Defense. Another commenter, a university active in serving an international school by way of distance education, stated that, should they choose to offer more than 50 percent of their programs on-site, the international school should be treated in a manner similar to military bases. Commenters asked whether the regulations would apply when an institution does not have a physical presence in a foreign country, but offers programs to students in foreign countries through distance education. One commenter was also concerned that if the logic of domestic requirements for State authorization is eventually extended to students in online programs who live abroad (that is, they would need to seek authorization in every country in which an international student is taking an online class) they would have to discontinue enrolling those students.

Discussion: The requirements of § 600.9(d) apply to foreign additional locations and branch campuses of a domestic institution at which all or more than half of a title IV, HEA eligible educational program is offered by a domestic institution. They do not apply to study abroad arrangements or other agreements that domestic institutions have with foreign institutions whereby a student attends less than half of a program at separate foreign institutions, which are regulated under § 668.5. They do not apply to foreign institutions (*i.e.*, institutions that have their main campus located outside of a State). They do not apply to programs for which the institution does not seek title IV, HEA program eligibility. They also do not apply when a domestic institution is offering an educational program to title IV eligible students in a foreign country through distance education.

These regulations note that the term “educational program,” as used in § 600.9(d)(1) and (2), is defined in § 600.2. That is, an educational program is a legally authorized postsecondary program of organized instruction or study that: (1) Leads to an academic, professional, or vocational degree, or certificate, or other recognized educational credential, or is a comprehensive transition and postsecondary program, as described in 34 CFR part 668, subpart O; and (2) May, in lieu of credit hours or clock hours as a measure of student learning,

utilize direct assessment of student learning, or recognize the direct assessment of student learning by others, if such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment and with the provisions of § 668.10.

A branch campus is defined in § 600.2 as a location of an institution that is geographically apart and independent of the main campus of the institution. The Department considers an institution to be independent of the main campus if the location (1) is permanent in nature; (2) offers courses in educational programs leading to a degree, certificate, or other recognized educational credential; (3) has its own faculty and administrative or supervisory organization; and (4) has its own budgetary and hiring authority. Institutions are required to obtain approval from the Department for a location to be designated as a branch campus. All other locations of an institution are referred to as additional locations. An additional location is any location of an institution that is geographically apart from the main campus and does not meet the definition of a branch campus.

An institution that is contracted by the U.S. military may be exempt from obtaining legal authorization from an appropriate government authority to operate in the country for an additional location at which 50 percent or more of an educational program is offered. That additional location or branch campus would be exempt if it is physically located on a U.S. military base, facility, or area that the foreign country has granted the U.S. military to use and the institution can demonstrate that it is exempt from obtaining such authorization from the foreign country. The Department believes the regulations provide clear language that reflects when a contractor may be exempt from obtaining foreign authorization to offer programs and we decline to provide additional regulatory language to further this exemption. However, an institution that does not contract with the U.S. military as stated that offers more than 50 percent or more of an educational program, as defined in § 600.2, would not be eligible for that exemption. Institutions that contract with the U.S. military are in a unique position in that they have a contract with a U.S. military base which has a Status of Forces Agreement with a foreign government that may address the inclusion of educational programs offered through a contract with the U.S. military.

The Department wishes to clarify that military bases, for purposes of the

foreign authorization exemption, are any areas that are under use by the U.S. military, including facilities and areas that foreign countries have allowed the U.S. military to use.

A temporary class site may qualify as an additional location. If an institution offers or will offer 50 percent or more of an educational program at that temporary location, then that temporary location would meet the definition of an additional location. Similarly, if an institution only rents space that it does not own, then it may still be considered an additional location if the institution is offering or will offer 50 percent of more of an educational program in that temporary space. The Department expects that institutions will comply with the appropriate requirements to operate in the foreign country for any temporary or permanent locations they establish.

Changes: The exemption to obtaining foreign authorization in § 600.9(d)(1)(i) has been altered to include facilities and areas in which the foreign country has granted the U.S. military usage.

Difficulty in Obtaining Authorization

Comments: Some commenters expressed concern about the difficulty of obtaining legal authorization from a foreign country for a foreign additional location or branch campus under proposed § 600.9(d)(1)(i). Commenters argued that requiring institutions to obtain legal authorization by a foreign government would leave institutions in a likely impossible position of attempting to determine the appropriate authority amidst multiple levels of government, often in countries in which there is no formal governmental process for oversight of foreign or private institutions. One commenter asserted that there will be certain situations where the foreign government itself will not know which of its agencies is responsible for issuing an approval. Commenters were also concerned about the difficulty of obtaining legal authorization in a foreign country if the foreign country is unaware of the requirement that an institution must seek their authorization. Commenters asserted that it is also possible that foreign governments may see United States-required authorization as a revenue source and charge institutions significant sums of money for their required approval. Commenters stated that the difficulty in obtaining the required legal authorization may limit enriching international opportunities for students.

Commenters asserted that foreign governments are sometimes unresponsive. One commenter noted

that they have contacted foreign governments on occasion and have experienced difficulties getting an official response, or any response at all, from certain governments. One commenter noted that some foreign governments are highly adverse to provide specific wording in an authorization letter. Some commenters were concerned with the amount of time it can take to obtain legal authorization from a foreign country.

Discussion: The Department believes that locations should meet the legal requirements where they are located in order to provide educational programs to students receiving title IV funds. This includes institutions operating additional locations or branch campuses in foreign countries. This authorization will serve as a protection to students against potential interruptions in their education should that operation be suspended or shut down due to noncompliance. Institutions must perform the due diligence of learning what additional requirements a foreign government may put on an institution to offer educational programs in their jurisdiction and comply with those requirements as a basic price of doing business in that foreign country. An institution of higher education is not required to create additional locations in foreign countries and should follow the laws of the foreign Nation in order to legally operate in that location. An institution that would be unable to meet the requirements of a foreign country or that cannot show that it has received authorization to operate in that country would not have the ability to offer title IV financial aid programs to students enrolled at those additional locations.

Section 600.9(d)(1) specifies the requirements for legal authorization for any additional location at which 50 percent or more of an educational program is offered, or will be offered, and any foreign branch campus. These additional locations and branch campuses are required to be legally authorized to operate by an appropriate government authority in the country where the foreign additional location or branch campus is physically located. An institution is required to provide documentation of that authorization by the foreign country to the Department upon request, unless the additional location or branch campus is located on a U.S. military base and is therefore exempt from obtaining such authorization from the foreign country. The documentation is required to demonstrate that the government authority for the foreign country is aware that the additional location or branch provides postsecondary

education and does not object to those activities. Beyond that, the Department declines to provide specific requirements of what that documentation must look like, to allow flexibility to institutions since foreign countries may vary in what documentation they provide. The regulations do not require that any statement of authorization from a foreign government include the phrase "does not object to those activities." The Department expects that any authorization given by a foreign government will show that the foreign government is aware of what it is authorizing and that it has given approval to an institution that is offering educational programs in its jurisdiction. The Department expects that an institution will determine if and what authorization requirements a foreign country has for institutions that wish to offer educational programs within its jurisdiction. If there are legitimate barriers to obtaining authorization, such as a lack of authorization requirements in the foreign jurisdiction, then the institution should document its efforts to obtain authorization, but the Department does not expect that an institution would not offer programs in these instances. However, an institution should ensure that the lack of receiving written correspondence authorizing the institution to offer educational programs at a branch campus or additional location is not a denial of authorization by that foreign entity. If an institution can readily determine that its locations or programs do not meet the authorization requirements, the institution cannot operate its program under the guise of an inability to navigate a foreign country's authorization process. As mentioned previously, an institution that does not meet the clear authorization requirements of a foreign country would not be considered authorized under these regulations.

An institution must receive authorization from a foreign government prior to enrolling title IV eligible students who would take more than 50 percent of a program at an additional location or branch campus. An institution should plan ahead for a country's authorization process before enrolling title IV eligible students so that it is compliant with the authorization requirements. For institutions that have enrolled students prior to these regulations' effective date, we encourage the institution to provide information to students about the potential loss of title IV aid for programs that do not receive foreign authorization

when these regulations go into effect. If an institution is advertising a program and recruiting students for a program that meets this 50 percent threshold, the Department believes that the institution must have obtained authorization from a foreign government for that additional location before enrolling any title IV eligible students in that program. The Department believes that an institution must meet these requirements as the cost of doing business in a foreign location, regardless of what those requirements are or if there is a monetary cost to meeting the authorization requirements in a foreign country.

We disagree with the commenter that believes that requiring an institution to meet any authorization requirements established by the foreign country would unfairly limit the opportunities of institutions to limit the international experiences of students. The Department believes that an institution should follow the requirements of a foreign country if an institution is planning on having a branch campus or additional location in that country.

Changes: None.

Sufficient Documentation

Comments: The commenters also asked, for purposes of § 600.9(d)(1)(ii), what would constitute sufficient documentation of the foreign government's lack of objection. Commenters asserted that it was unclear exactly what types of legal authorization and documentation of legal authorization would satisfy the requirement. Some commenters stated that the Department should provide a list of appropriate foreign government authorities that may provide acceptable legal authorization and should delineate the types of legal authorizations that would be acceptable to demonstrate compliance with the legal authorization requirement. Commenters stated that regulations should provide specific guidance as to what would be considered sufficient evidence of appropriate legal authorization that a foreign government is aware of a program and does not object to operation of a program. One commenter suggested that the regulations consider a response from a foreign government stating it does not prohibit any higher education institution of other countries to grant college credit to its citizens to be sufficient authorization. With respect to a Status of Forces agreement between the U.S. and another country, commenters wanted the Department to clarify that this counts as sufficient documentation of foreign authorization if the agreement specifically mentions

the offering of educational programs at additional locations or branch campuses located in the country. Commenters asked whether an institution would be required to obtain legal authorization if a foreign government chooses to exempt the institution from needing authorization.

Discussion: Each country may provide a wide variety of documentation to reflect that an institution has authorization to have a branch campus or additional location in their country. As such, the Department declines to provide an exhaustive list of what documentation would be appropriate to prove authorization in a foreign country to allow for maximum flexibility to an institution in obtaining documentation. However, an institution should ensure that the documentation they obtain to prove foreign authorization has made it clear that the institution has indeed received authorization. If an institution receives documentation stating that a foreign entity does not provide authorization approvals to institutions but does not object to the establishment of a branch campus or additional location of U.S. institutions, then the Department would consider that to be sufficient documentation for obtaining foreign authorization. This would also apply if an appropriate foreign entity provides documentation that the institution is exempt from authorization requirements in that country. A Status of Forces Agreement may be used to demonstrate authorization if that Status of Forces Agreement addresses and provides for authorization of branch campuses or additional locations of domestic institutions or provides for exemption to foreign authorization for these facilities.

The Department does not require a specific foreign government agency to provide authorization to an institution for the operation of branch campuses or additional locations because the relevant approving authority will vary from country to country. An institution should receive authorization from an appropriate agency that would have the authority to legally authorize an educational entity in a foreign location. An institution could identify this agency, for example, if the agency provided similar authorization for other entities for schools within the country, or for other foreign entities or businesses. It is also up to the institution to be aware of, and comply with, any additional requirements of a foreign country to ensure legal operations within the country.

Changes: None.

No Objection From Foreign Country

Comments: Commenters argued that it was unfair to require an institution to obtain such legal authorization if a country has no such authorization process in place. Commenters stated that, if it is not the Department's intent to require legal authorization if the foreign government has no mechanism or requirement for such authorization, the Department should change § 600.9(d)(1)(i) to a conforming "no objection" standard. Commenters asserted that there was an inconsistency between the language in § 600.9(d)(1)(i), which requires that any additional location at which 50 percent or more of an education program is offered, or will be offered, or at a branch campus "must be legally authorized" to operate by an appropriate government authority, and the wording of § 600.9(d)(1)(ii), which requires the institution to provide, upon request, documentation to the Secretary that the government authority is aware that the additional location or branch campus provides postsecondary education and does not object. One commenter asserted that the additional requirement that an institution's documentation of their authorization to operate must also include a statement by the foreign government that the government "does not object to those activities" should be removed from the regulations. The commenter asserted that it is easy to imagine circumstances in which a domestic institution may be operating abroad in full compliance with all relevant laws and regulations, but the government may object to how specific topics are taught. For example, foreign governments may condition approval based on changes in curriculum, such as revising history to be more favorable to that country. With the other provisions that require notification to, and approval of, foreign additional locations and branch campuses by relevant accreditation agencies and State governments, the commenter stated that this requirement is unnecessary to protect student interests and is likely to cause significant problems for institutions operating abroad.

Discussion: The Department disagrees with the commenters that believe it is unfair to require an institution to obtain legal authorization even when their authorization process is unclear. Institutions should make an effort to understand the requirements of foreign authorization in any country it wishes to do business. As mentioned earlier in this preamble, if there are no requirements for authorization or a country exempts an institution from its

authorization requirements, then the Department would consider that being legally recognized by a foreign government. However, the institution should retain documentation reflecting their efforts in determining the authorization process, results of any inquiries with appropriate foreign entities, and any exemptions provided by the foreign government. The Department does not believe there is contradictory wording in § 600.9(d)(1)(i) and (ii).

If a foreign country has a process in which a U.S. institution can be legally recognized in their jurisdiction, it is expected that the institution will follow that process and obtain proper authorization from an appropriate foreign governmental agency. However, if that process does not exist, an institution must obtain some documentation that the foreign country does not object to the operation of a branch campus or additional location in their jurisdiction, which is established in § 600.9(d)(1)(i). An institution must have documentation on file and be able to provide that documentation to the Secretary, if requested, which is established in § 600.9(d)(1)(ii). As stated earlier in the preamble, the regulations do not require that any statement of authorization from a foreign government include the phrase "does not object to those activities." It is expected that institutions doing business in foreign countries follow the requirements in those countries. An institution would not be considered to be authorized if a foreign country objects to the institution providing educational programs within their country, regardless of the nature of the foreign country's objection.

Changes: None.

Miscellaneous

Comments: One commenter argued that, because the proposed requirements would be too difficult to implement, for all foreign additional locations and branch campuses, the regulations should require only that the educational program does not violate the laws of the country in which it is present. One commenter encouraged the Department to allow an optional reciprocity agreement for countries similar to what is available between States in order to provide a cost-effective and efficient process for any additional location at which 50 percent or more of an educational program is offered, or will be offered, and any foreign branch campus. Some commenters asserted that the proposed legal authorization requirements for foreign additional locations and branch campuses are unnecessary because accrediting agency

criteria for adding international locations are sufficient.

Some commenters asked the Department to clarify what programs that "will be offered" means for purposes of foreign authorization in proposed § 600.9(d). The commenter wanted to know at what point the Department considered a program to be one that "will be offered." For example if an institution commences development of a program with an intent to offer it at a new foreign additional location at some undetermined point in the future, but has not yet advised students of the potential program, much less enrolled them, is the institution required to have met the provisions of the regulations for the location?

One commenter asserted that, as the proposed regulations would exempt from legal authorization a foreign additional location or branch campus at which 50 percent or more of an educational program is offered, or will be offered, that is located on a U.S. military base and is exempt from obtaining legal authorization from the foreign country, the Department should provide a current and updated list of which military bases are exempt in which countries.

Discussion: The Department disagrees with the commenter who suggested that it would be too difficult to obtain authorization for all branch campuses in all foreign countries and that it should be sufficient to just ensure that the programs do not break the laws of the foreign country. If a country has requirements for institutions offering programs in their country for authorization, the Department expects an institution to follow those requirements and if those requirements do not exist, as addressed earlier, an institution should make a good faith effort to determine any requirements and document the lack of authorization in a country that does not have requirements. Should multiple countries establish some sort of reciprocity in which a particular foreign government accepts the authorization of another country or organization in lieu of making their own determinations on any requirements for an institution to be considered legally authorized in the country, the Department would not interfere with that country's process in authorizing institutions. While accrediting agencies may have criteria, the Department believes that these regulations provide needed protections to students by reinforcing the State's—or in this case the foreign government's—role in the program

integrity “triad” of accrediting agencies, states, and the Department.

An institution should have legal authorization from an appropriate foreign governmental agency by the time that it enrolls students at a branch campus or additional location in that foreign country. An institution should plan for this process when deciding to open a branch campus or additional location in a foreign country.

While these regulations provide an exemption for branch campuses that is physically located on a military base, facility, or area that a foreign country has granted the U.S. military to use, the Department declines to publish a complete listing of these areas. These areas would be decided by a Status of Forces agreement between the U.S. and a foreign country. Based on the unique nature of having a branch campus on a U.S. military base, the Department believes that an institution with a branch campus on a military base would know if they fall within that exemption.

Changes: None.

State Provisions

Some commenters stated that proposed § 600.9(d)(1)(v), which would require an institution to report at least annually to the State in which its main campus is located regarding the establishment or operation of each foreign additional location or branch campus, will force States to create a costly reporting mechanism for receiving and processing such information, without evident benefit. The commenters questioned why the Department does not defer to the States with respect to what reporting obligations institutions should or should not have with respect to foreign additional locations and branch campuses. One commenter, who asserted that the proposed regulation is over-reach by the Department, asked to which State an institution would be required to report the establishment of a foreign additional location or branch campus under proposed § 600.9(d)(1)(v). The commenter also asked how the requirement would apply to SARA-participating institutions. A few commenters suggested that the Department change the proposed regulations to allow those States that do not currently oversee foreign additional locations and branch campuses to become compliant without adjusting State laws.

Some commenters were unclear as to the legal authority for States to place limitations on institutions’ establishment or operation of foreign additional locations or branch campuses. These commenters asked the

Department to clarify the premise underlying proposed § 600.9(d)(1)(vi), which would require an institution to comply with any limitations the State places on the establishment or operation of the foreign additional location or branch campus.

One commenter requested that the Department reconsider the proposed regulation that would require State agencies to monitor institutions’ compliance with international authorizing bodies. The commenter, who noted that their experience shows that many State authorizing agencies already struggle with limited staff and resources, questioned how a State would be able to monitor international authorizations in addition to their current responsibilities.

One commenter asked the Department to clarify the institution’s home State’s role in an institution’s compliance with the requirement in proposed § 600.9(d)(4), in instances where the home State prohibits the foreign additional location or branch campus.

Discussion: The regulations delineate requirements with which a foreign additional location or branch campus of a domestic institution must comply to meet the State authorization requirements. They do not impose any requirements on State agencies, but instead ensure that those State agencies are informed about any foreign locations an institution is operating. The State where the institution’s main location is located will know all locations in which the institution is operating within the State, in other States, and in foreign locations so that the State is aware of what locations it is authorizing. The Department believes that this is basic information that should be provided to State agencies when an institution applies for new and renewal approvals. Authorization from a State for an institution’s main campus after the State has been notified of an institution’s foreign location is required in order for the institution to provide title IV financial aid to students attending courses at those foreign locations.

These regulations do not require States to create sophisticated and costly mechanisms for receiving and processing this information on additional locations or branch campuses in foreign locations, and each State may establish its own application and notification process for institutions to provide this information. Additionally, these regulations do not require State agencies to monitor an institution’s compliance with foreign requirements, but instead make sure that States are aware the foreign locations are in operation so that further inquiry may be

made if a State chooses to do so. These regulations do not require States to change their laws, as they do not create any requirements for States. The regulations in § 600.9(d) create requirements for institutions with branch campuses or additional locations in foreign locations to be compliant with authorization standards, but do not require States to do anything. States can determine the level of oversight they deem necessary. These regulations do not impose requirements on State agencies and would not necessarily require States to increase staff or resources to comply with these regulations. Institutions should already be following any requirements that a State providing their authorization has established, whether that applies to their main campus located in that State or to branch campuses in foreign locations.

The regulations at § 600.9(d) do not delineate any difference in authorization for those institutions that may participate in a State authorization reciprocity agreement. A State authorization reciprocity agreement handles authorization for distance education programs or correspondence courses, not the authorization requirements for branch campuses or additional locations in foreign countries.

Changes: None.

Complaint Process

Comments: One commenter asserted that it would be very complicated for an institution to obtain information on the student complaint process that is required by proposed § 600.9(d)(3). This commenter suggested that the regulations instead require students at foreign locations and branches to follow the complaint process of the State in which the main campus of the institution is physically located, or as prescribed by a reciprocity agreement.

Discussion: As stated in the preamble to the NPRM on page 48604, proposed § 600.9(d)(3) required institutions to disclose information regarding that student complaint process to enrolled and prospective students to ensure that students at foreign additional locations and branches are aware of the complaint process of the State in which the main campus of the institution is located and we have clarified this point in the final regulations. Section 600.9(d)(3) does not impose any new requirements regarding what consumer information must be disclosed to students. Note also that an institution is only required to make disclosures under § 600.9(d)(3) to title IV-eligible students enrolled at the foreign location.

Changes: Section 600.9(d)(3) has been changed to clarify that institutions must disclose to enrolled and prospective students information regarding that student complaint process of the State in which the main campus of the institution is located.

Comments: None.

Discussion: The intent of proposed § 600.9(d)(3), as indicated in the preamble to the NPRM on page 48603, was to require institutions to disclose to enrolled and prospective students at foreign additional locations and foreign branch campuses, the information regarding the institution's student complaint process as described in § 668.43(b). However, we inadvertently left out the reference to foreign branch campuses in the proposed regulatory language.

Changes: Section 600.9(d)(3) has been changed to make clear that an institution must disclose to enrolled and prospective students at both foreign additional locations and foreign branch campuses the information regarding the institution's student complaint process.

More Time Needed for Implementation

Comment: Some commenters requested a longer implementation period for the requirements applicable to foreign additional locations and branch campuses because they asserted that some States and institutions would not be equipped to implement the new requirements by July 1, 2017. One commenter stated that complying with the proposed requirements that any foreign additional location at which 50 percent or more of an education program is offered, or will be offered, and any branch campus, be legally authorized by the foreign country in which it is located (proposed § 600.9(d)(1)(i)) and receive accrediting agency approval (proposed § 600.9(d)(1)(iii)), would impede an institution's ability to comply in a short period of time. One commenter argued that the Department should not enforce the regulations for at least three years after enactment because institutions will need time to do initial research and coordinate with the State agency, which cannot be done quickly. The commenter added that States that have no current process in place will need the extra time to put one in place. Commenters from public institutions in Alabama stated that, currently, the Alabama Commission on Higher Education and the Alabama State Portal Agency consider foreign locations to be outside their jurisdiction for regulatory authorization. The commenters asserted that the State would need time to make appropriate legislative changes to

address this. These commenters also asked the Department to prepare a timeline to phase in full compliance with this regulation.

Discussion: These regulations do not require a State to establish any authorization requirements or procedures for foreign additional locations or branch campuses of a domestic institution, and instead ensure that institutions with foreign locations are advising States about those locations.

An institution must report to the State in which the main campus of the institution is located at least annually, or more frequently if required by the State, the establishment or operation of each additional foreign location or branch campus for any additional location at which 50 percent or more of an educational program is offered, or will be offered, and any foreign branch campus. If an institution cannot comply with this requirement through a procedure that is already known to the institution, the State can provide the institution the proper format to submit this information to the State.

We note that the Department will review an institution's documentation of legal authorization by a foreign jurisdiction, established under § 600.9(d)(2), and therefore the State is under no obligation to review that documentation if they choose to take no action with that information.

We believe that institutions operating foreign locations should already be aware of, and in compliance with, any applicable foreign requirements. These regulations will go into effect on July 1, 2018, and that should provide institutions with adequate time to ensure they are in compliance.

In the example of Alabama, these regulations do not require the State to change their regulatory jurisdiction. These regulations require institutions to submit to their State a report of their branch campuses or additional locations in foreign locations, but do not require States to change their oversight of institutions in their State. States may claim regulatory oversight of these locations, but may choose to take no action.

Changes: None.

Section 668.50 Institutional Disclosures for Distance or Correspondence Programs

Comments: Multiple commenters identified conflicting language in proposed § 668.50(a) and (c), which referred to an institution that offers a program solely through distance education or correspondence course, and proposed § 668.50(b), which

referred to an institution that offers an educational program that is provided, or can be completed solely through distance education or correspondence courses, excluding internships and practicums. The commenters believed that these regulatory provisions should be worded the same.

Discussion: We agree with the commenters regarding the inconsistency between proposed § 668.50(a) and (c) and proposed § 668.50(b) and with the recommendation to change the regulatory language for consistency and clarity.

Changes: We have revised § 668.50(a) and (c) to say an institution that offers an educational program that is provided, or can be completed solely through distance education or correspondence courses, excluding internships and practicums.

Public Disclosures

Comments: A commenter requested clarification on the meaning of "enrolled student" and "prospective student" in the context of these disclosures. A second commenter stated that these disclosures create additional protections that were not given to students who enrolled in traditional brick and mortar campuses. Another commenter believed that the disclosures in § 668.50 were excessive in number. The same commenter asked whether an institution would be required to provide these disclosures separately or if an institution could combine them all into a larger disclosure for students. Another commenter recommended that the Department revise the regulatory language of this disclosure to ensure that the institution provides this information prominently, clearly and concisely, and that it is readable at a 6th grade level.

Discussion: The term "enrolled student" is defined in § 668.2(b) and is the status of a student who has completed the registration requirements (except for the payment of tuition and fees) at the institution that he or she is attending; or has been admitted into an educational program offered predominantly by correspondence and has submitted one lesson after being accepted for enrollment that the student completed without the help of a representative of the institution. We define the term prospective student as an individual who has been in contact with an eligible institution requesting information concerning admission to that institution. These definitions apply to 34 CFR 668.50.

The Department is requiring these disclosures because they create additional protections that do not exist

for students enrolling in traditional programs. The distance education sector has been fraught with problems where students were not provided adequate information that may have informed them of deficiencies in a particular program and these disclosures for distance education programs are intended to address this problem. We disagree with the commenter who believes the disclosures in § 668.50(b) and (c) are excessive. The Department believes that this is important information that a prospective or enrolled student in a distance education program should receive about his or her educational program. An institution may combine these disclosures or provide them separately as it sees fit in order to ensure that important information will be presented to students in a clear and concise manner. The Department believes that institutions will make a good faith effort to provide these disclosures to students in a way that will clearly convey the information, so the Department declines to regulate the exact parameters of these disclosures at this time. However, the Secretary may provide additional guidance on this matter in the future.

Changes: None.

Authorization Status Disclosure

Comments: One commenter supported the regulation by agreeing that institutions should notify students whether an institution is authorized directly by a State or through participation in a reciprocity agreement.

Other commenters asked for clarification on the level of detail that must be disclosed under § 668.50(b)(1).

Discussion: We appreciate the support for the requirement to disclose whether an institution is authorized to enroll students in a distance education program.

This disclosure only requires an institution to inform students whether it is authorized to enroll students in a distance education program to students residing in a particular State. It does not require institutions to provide details related to the authorization process it completed to obtain authorization.

Changes: None.

Comments: Some commenters asked for additional guidance on how the proposed State authorization regulations would coexist with the June 16, 2016 proposed Defense to Repayment regulations. Commenters discuss a hypothetical situation where an online or correspondence student resides in a non-SARA participating State or, during their course of study, relocates to a non-SARA State, and thus, an institution would be faced with either completing

the burdensome process of State authorization in the non-SARA State in order to ensure that student could continue his/her course of study, or disenroll that student. If the student is disenrolled, at potentially no fault of the institution, the commenter suggests that the student could then potentially begin a Defense to Repayment claim against the institution. Under the proposed Defense to Repayment regulation, there could be circumstances where the institution would be required to post a 10 percent letter of credit. Commenters stated this hypothetical case places institutions in a regulatory Catch-22 and asked the Department to consider this likely scenario and address it either through changes to the regulatory text or through a "Dear Colleague" letter. The commenters specifically recommended that the Department allow students currently enrolled through online or correspondence courses to continue to be exempt from the proposed regulation through a grandfather clause or delaying implementation of the regulation to afford students ample time to complete their course of study.

Discussion: We appreciate the commenter's concern, and we also believe that the potential consequences to students of relocating to a State where an institution is not authorized or where the student's program does not lead to licensure or certification are sufficiently severe that disclosure of these consequences by institutions should be required. If a school misrepresents or omits information that a student reasonably relies on to his or her detriment, it may give rise to a borrower defense claim; however, at this stage, without sufficient evidence surrounding the potential misrepresentation, it is unclear whether the commenter's hypothetical would apply.

Changes: We revised the disclosures in § 668.50(b)(1) to include a disclosure that explains the potential consequences for students who change their State of residence to a State where the institution does not meet State requirements, or in the case of a GE program, where the program does not lead to licensure or certification in the State.

Complaint Process Disclosure

Comments: Multiple commenters asked for clarification about an institution's obligation to disclose complaint processes to distance education students when the institution participates in a State authorization reciprocity agreement, and also when the institution does not participate in such an agreement. They specifically asked whether an institution would be

prohibited from enrolling students in a distance education program if those students reside in a State that lacks an appropriate complaint process. One commenter stated that providing information about complaint processes will confuse students. This commenter also recommended that for institutions that participate in the currently operating SARA, an institution does not have to provide both the disclosure under § 668.50(b)(2) and the disclosure under § 668.50(b)(3).

One commenter believed that this requirement was superfluous and should be tied to § 668.43(b), which requires institutions to provide prospective and current students with contact information for filing complaints with its accreditor and with its State approval or licensing entity.

One commenter believed that this requirement would inappropriately cause institutions to interfere and lobby in the legislative process for other States. One commenter requested that the Department of Education collect the information required for the disclosure in § 668.50(b)(3) and provide a centralized Web site in which this information could be accessed by students. Other commenters also recommended that the Department indicate which States it believes to have an inadequate student complaint process.

Other commenters asked whether this disclosure would still be required for States that do not require authorization to offer distance education programs or for States that choose to not assert jurisdiction over a complaint process. Additionally, another commenter recommended adding in language to limit this disclosure to those States that have an appropriate State complaint process in place by adding the phrase "to the extent the State has a complaint process applicable to the institution."

Discussion: Under § 668.50(b)(2), an institution that is authorized directly by a State would need to disclose the process for submitting a complaint to an appropriate State agency for the State in which the institution's main campus is located. If an institution is authorized by a State authorization reciprocity agreement, it would be required to provide a description for submitting complaints that was established in the reciprocity agreement. For both types of authorization, an institution also must provide a description of a complaint process for the student's State of residence under § 668.50(b)(3), if such a process applies. In a State that has not joined a State authorization reciprocity agreement and does not have an appropriate complaint process for its

resident, an institution would not meet the authorization requirements established in § 600.9(c)(2)(i) and would be precluded from providing title IV aid to enrolled students who reside in that particular State.

The Department does not believe § 668.50(b) creates a situation where institutions are forced to become involved in the legislative process of States without an appropriate complaint process, though such institutions could choose to contact States to request that they create or revise this process in order to ensure that the State's residents become title IV-eligible. We disagree with the commenter that believes providing information on State complaint processes will confuse students. We believe that students are best served when provided with important information regarding their institution that will support their decision to enroll or remain enrolled.

While we agree with the commenter that there may be some overlap between the requirements in §§ 668.50(b)(2) and 668.43(b), we believe that the focus of the information is substantively different. The information disclosed under § 668.43(b) focuses on complaint processes in States where the institution maintains physical locations, and those complaint processes may differ from the complaint process disclosed under § 668.50(b)(2). For example, the disclosures in § 668.50(b)(2)(ii) refer to complaint processes that are designated by a State reciprocity agreement, which could feasibly require an institution to disclose complaint processes in any of the fifty States and additional jurisdictions within the country. We believe that students who reside in States other than the ones in which the institution is physically located benefit when they are able to easily identify the complaint process that is applicable to them, and the place where such students find information about how to file a complaint may differ because they are not enrolled to know specifically at a physical location of the institution where hard copies of information about filing complaints could be readily obtained. Therefore, we believe that it is important to require a disclosure about the complaint process in the State where the institution's main campus is located and any complaint process that is provided through an approved State authorization reciprocity agreement that the institution is a part of.

Discussion: The Department does not agree that it should provide a centralized Federal Web site listing the complaint processes of each State. The Department is concerned that providing this information on its Web site may be

misperceived as indicating a formal approval of such processes by the Department. Additionally, information may become outdated regarding State-based complaint processes because these processes that change, and the Department does not have the authority to compel States to provide and update this information in a timely way. We believe that each individual institution is in a better position to identify and obtain the necessary approvals from the States where it provides educational programs to students, since the institution would need to establish and maintain a working relationship with those State agencies. The Department does not believe that an institution necessarily has to do all the work to provide this disclosure to students. The administrators of a State authorization reciprocity agreement could provide this information to its members as a potential service, which could reduce the burden on individual institutions while still providing necessary information for the protection of students. The Department expects that all distance education programs will provide this disclosure regardless of the level of active review a State provides in providing authorization to distance education programs. For a distance education program to be considered to be authorized in a State, that State must have a complaint process in place. Therefore, there should not be programs operating in States that are not exerting jurisdiction over a complaint process.

The Department does not believe that adding exemptions to this disclosure is in the best interest of protecting students. As previously discussed, an institution would be prohibited from using title IV funds for students enrolling in distance education programs or correspondence courses in States that do not offer an appropriate complaint process to students who reside in the State.

Changes: None.

State Initiated Adverse Actions Disclosure

Comments: Many commenters requested additional information on the definition of "adverse action" in § 668.50(b)(4), which requires an Institution to disclose any adverse actions related to a postsecondary education program that a State entity has initiated. They noted that adverse action has a clear definition in the world of accreditation, but does not have a clear definition in State law or regulation. One commenter recommended that the Department use language established in NC-SARA's Agreement's Policies and Standards as a

definition for adverse actions. One commenter also asked for a definition for the word "initiated," stating that there may be investigations occurring that take years to resolve, but never result in any actions actually taken against the institution. A third commenter asked for a definition for the term "State entity." This commenter also recommended that those actions initiated by State entities be reported to any reciprocity agreement the institution is a member of, but only actions taken against the institution be reported to students. Another commenter requested that the rule be revised to only require that those adverse actions that remain pending or unresolved be required to be disclosed to students. One commenter requested that the Department eliminate this disclosure because these terms vary State by State and may cause confusion among students. One commenter requested clarification on whether this disclosure would need to be provided only to students in the State where the adverse action occurred, or whether it would need to be provided to all students enrolled in an institution's distance education programs. One commenter recommended the Department use these regulations to limit the title IV eligibility of institutions that receive legitimate complaints of malfeasance.

Discussion: The Department declines to define State adverse action in these regulations because it is difficult to capture all the different States' processes in one comprehensive definition. However, we agree that some further clarification is merited regarding what constitutes a State initiated adverse action that an institution must disclose to students. Adverse actions include any official finding for which an institution can appeal an administrative or judicial review, any penalty against an institution including a restriction on an institution's State approval, or the initiation of a civil or criminal legal proceeding. These actions include anything related to distance programs offered by an institution, as well as actions that apply to the institution as a whole. The Department also considers an adverse action to include any settlement of a legal proceeding initiated by a State entity, regardless of whether the institution had to admit to any wrongdoing. This disclosure is intended to provide students with information about adverse actions that either are being taken or were taken against an institution or program. An institution must disclose any adverse action at the point that it is publicly

announced or, for instances in which there will be no public announcements, within 14 days of being notified of the action, which is when the Department considers an adverse action to have been initiated. The Department believes that an institution that is a member of a State authorization reciprocity agreement should report adverse actions to other States members if it is required as part of their agreement, but that does not absolve the institution from disclosing that information to students, who should be informed of any adverse actions taken against an institution or program. Additionally, we believe that institutions should disclose information about adverse actions after the action concludes to ensure that a student is informed that an action was taken, including any settlement, so that the student may seek further information about it from the State or from the institution.

The Department believes that these disclosures should be made to all prospective or enrolled students in distance education at an institution, not just to students who reside in the State that has initiated the particular adverse action. This is because such disclosures may demonstrate risk indicators that any student should be aware of to determine their comfort level with enrollment in a particular program.

A State entity is any State department or agency that has the authority of the State to initiate an investigation or lawsuit against an institution of higher education. The Department believes that institutions which receive legitimate complaints of malfeasance will be handled through other mechanisms within the Department, such as audit findings and program reviews. As such, the Department does not believe these disclosures should be tied to specific penalties for issues beyond State authorization.

Changes: None.

Accreditation Adverse Action Disclosure

Comments: One commenter expressed concern at the term “adverse actions” with regards to accrediting agencies in § 668.50(B)(5), stating that what may be considered an adverse action for one accrediting agency may be a minor issue to another accrediting agency. The commenter requested that the Department standardize adverse actions initiated by an accrediting agency. Another commenter stated that information-gathering activities or those that might place an institution or program on probation or show cause should not constitute adverse actions under currently used definitions by

accrediting agencies. That commenter continued by stating that actions that should be considered adverse actions are: Denial, withdrawal, suspension, revocation, or termination of accreditation. The same commenter also noted that those actions of lesser severity that do not incorporate any right of appeal should not constitute adverse actions under this disclosure. One commenter noted that they felt it was unjustified to only require the disclosure of adverse actions of programs offered solely through distance education, but that all institutions of higher education should be required to disclose this information to students. Another commenter stated that accrediting agencies generally take actions against an institution and not a program and recommended the Department revisit their terminology throughout the regulation.

Discussion: “Adverse accrediting action,” as defined in 34 CFR 602.3, is the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program. While the Department believes that these examples provide a starting point for adverse actions initiated by an accrediting agency, the Department believes that, for purposes of this regulation, any downgrade in accreditation status, such as being placed on show cause or probation, is an adverse action and must be disclosed to students.

Information being requested for any type of accreditation review would not be considered an adverse action, but if the accrediting agency ends their review with a downgrade of accreditation status, then the institution would be required to disclose that downgrade as an adverse action. While we appreciate the support of the commenter who believes a disclosure for accreditation agency initiated adverse actions should be provided to students who are enrolled in traditional programs, we believe that is beyond the scope of this rulemaking. Institutions are required to provide information pertaining to their accreditation status per the requirements in 34 CFR 668.43(a)(6) by providing the names and addresses of the organizations that accredit the institution and their programs to students and prospective students upon request, even if it does not require calling specific attention to any downgraded status in their accreditation status. The Department believes that an institution must disclose adverse actions that pertain either to an institution’s accreditation status from a

regional accrediting agency or a programmatic accreditation that the institution’s programs may have. If a particular adverse action by an accrediting agency could affect the ability of an institution to continue to offer title IV funds to students enrolled in one of its programs, such as a downgrade in accreditation status, we would expect that institution to disclose this information. The Department believes that the language used in the regulation clearly indicates that any adverse actions by an accrediting agency that could have a negative impact on a distance education program or correspondence course would need to be disclosed to students.

Changes: None.

Refund Policies Disclosure

Comments: A number of commenters questioned the efficiency of the refund policy disclosure in § 668.50(b)(6) and they believed there would be significant errors in accuracy. They recommended that this disclosure would be more effective if the information could be collected once and then a centralized portal could be created to disclose the information to students. One commenter noted that the Department should also specifically require institutions to disclose, in writing, any refund promises that an institution of higher education makes to students beyond what is required by State law. One commenter stated that colleges and universities should not be required to comply with individual State tuition refund policies due to the high administrative burden since all title IV participating institutions are required to comply with Return of Title IV funds (R2T4) regulations, as established in 34 CFR 668.22. Another commenter asked for clarification on whether an institution that is exempt from State regulations, such as through a State authorization reciprocity agreement, can use its own refund policies.

Discussion: The Department believes that an institution of higher education is required to follow the laws in the State in which it operates or enrolls students, including any refund policies that the State enacts. While there may be a lack of efficiency in each institution providing a disclosure related to the refund policies in each State it enrolls students, an institution of higher education would still need to know those refund policies in order to follow them. Again, this disclosure is one that the Department believes that the administrators of a State authorization reciprocity agreement could provide as a service to its members, which would increase the efficiency and accuracy of

the information as the reciprocity agreement would have established relationships with State agencies to ensure accurate information. Even in cases where an institution participates in a State authorization reciprocity agreement, the institution must follow the individualized State refund policies. The Department considers refund policies as an integral part of a State's consumer protection laws and believes that institutions of higher education enrolling students within a State's jurisdiction are required to follow the laws of that State, even if it participates in a State authorization reciprocity agreement. As such, based on the definition of State authorization reciprocity agreement in § 600.2, a State authorization reciprocity agreement does not have the ability to overrule State law with regards to consumer protection, including refund policies. Institutions must follow the R2T4 regulations to determine the proper return of Federal, title IV funds when a student does not complete an academic term, however the Department does not have any specific requirements for tuitions to make tuition refunds to students. While not mandated in this disclosure, institutions of higher education must provide information about any institutional refund policies that a college or university follows under 34 CFR 668.43(a)(2), which requires an institution to disclose any refund policy with which the institution is required to comply for the return of unearned tuition and fees and other refundable portions of costs paid to the institution.

Changes: None.

Licensure or Certification Disclosure General Support

Comments: Multiple commenters supported the disclosure of educational prerequisites for professional licensure or certification in each State under § 668.50(b)(7)(i)(A) and (B). One commenter specifically encouraged the Department to keep this disclosure despite any opposition to its inclusion in these regulations.

Discussion: We appreciate the commenters' support for this disclosure under § 668.50(b)(7)(i)(A) and (B).

Changes: None.

Determining State Prerequisites for Licensure

Comments: Multiple commenters recommended that these regulations should generally prohibit using title IV funds for programs that do not meet State requirements for the occupation that it prepares students for, allowing exemptions only when a particular

student has provided a specific, personal reason on why they are enrolling in a program that does not qualify them for the licensure or certification requirements in their state of residence. One commenter specifically asked under what circumstances it would be permissible for an institution to not make a determination on whether their program meets the licensure or certification requirements in a particular State. The same commenter asked if it would be permissible for an institution to provide the licensure and certification prerequisites for a particular State and then distribute a "do not know" statement on whether their program meets those prerequisites. Another commenter asked that this disclosure be limited to States where the program is offered by the institution. Another commenter requested that this disclosure be limited to those programs that lead to professions that have licensure or certification prerequisites in a particular State.

Discussion: This disclosure is limited to programs that lead to a profession where the State has established licensure or certification prerequisites. If a State has not established prerequisites to work in the jobs associated with the program training, then the institution would have nothing to disclose. Obviously, certain professions are more regulated than others. For example, programs that lead to teaching or nursing as a career would be more likely to have established prerequisites, while a general studies program, which could lead to a multitude of other careers, may not have established prerequisites. However, if an academic program offered in a State may foreseeably lead to careers that require licensure or certification in that State, based on how an institution markets or advertises a particular distance education program or correspondence course, an institution must provide information to students on the requirements to meet that licensure or certification. We expect that if an institution has determined what the licensure or certification prerequisites are for a given State, the institution would also determine whether its programs fulfill those prerequisite requirements.

Many distance education programs are also held to the standards established by the GE regulations. GE programs are forbidden from using title IV aid for students enrolled in programs that do not meet the licensure or certification prerequisites of a State. However, these regulations do not extend that prohibition to distance

education programs that are not also GE programs.

Changes: None.

Determining the Applicable State for Licensure Disclosure

Comments: One commenter expressed concern that this disclosure was unfair to distance education programs which may be offered in States where the institution does not have a physical presence. They continued that this may be a problem for students who do not plan to remain in a particular State after they receive their degree. Another commenter recommended a change that a program be given an entire year in which to make a determination on whether their program meets licensure or certification requirements when a student moves to a State that the institution has not made a determination about their program.

Other commenters expressed concern that these regulations may require that they be held responsible for personal characteristics of the student that may disqualify the individual from licensure, such as moral character issues. Two commenters specifically recommended that this disclosure provide information on obtaining a job in-field and if the student needs to do anything beyond simply graduating in order to meet the State standard.

One commenter requested that this requirement be revised to include providing this disclosure to prospective students in any State where the institution is marketing its programs. Multiple commenters asked for clarification on the meaning of "where a student resides."

Discussion: We disagree with the commenter that believes it is unfair to require this disclosure of distance education programs because they do not have a physical presence in the State. In fact, we believe that is a strong justification that makes this an important justification for this disclosure. It is important that students being enrolled by an institution in a distance education program are provided information on how their educational program relates to career opportunities in the State in which they reside. Institutions should make the effort to provide students not in the same State as the institution with accurate information about licensure or certification prerequisites. As stated above, many distance education programs are also GE programs and are required to comply with the GE regulations, which prohibit enrollment of title IV eligible students in programs that do not meet licensure or certification requirements in a State.

However, these regulations do not extend that prohibition to distance education programs that are not GE programs. However, we expect that institutions will provide accurate information to students about the licensure or certification prerequisites in their State of residence. The Department believes that institutions should make these determinations as a part of doing business in a State. Where an institution does the research to determine the licensure or certification prerequisites for a State, then that institution should go the next step and determine whether their programs meet such prerequisites.

While the Department agrees with the commenter that this disclosure provides important information that could be shared with students, we believe it would be too difficult for institutions to be able to accurately identify every possible State in which a potential student could reside. Oftentimes, students find information on a program and contact an institution about a program from conducting Internet searches, rather than the recruitment techniques of an institution. In such cases, it would be unrealistic for an institution to be able to provide certification or licensure prerequisites to prospective students across the country. However, by the time a student enrolls, the institution should know what the prerequisites for that student's State of residence is and whether the program fulfills those requirements. The Department expects institutions to have provided this disclosure by the time the student enrolls.

The Department believes that if graduates of a program are able to sit for any type of licensure or certification examination, then the distance education program they were enrolled in meets State requirements for licensure or certification. If a program does not meet State requirements for licensure or certification, the Department believes that graduates of that program will be denied the ability to sit for licensure or certification. We agree that an institution of higher education is only responsible for how their programs meet or do not meet the requirements for licensure or certification in a State and are not responsible for student-level qualifications to sit for licensure or certification. The Department does not feel that providing information on obtaining a job in-field is necessary because information on State licensure or certification prerequisites is sufficient to allow a student to make an informed choice about whether to enroll or continue in an educational program.

The student's State of legal residence is the residency or domicile of a student's true, fixed, and permanent home of a student, usually where their domicile is located. As noted above, a student is considered to reside in a State if the student meets the requirements for residency under State law, and an institution may rely on a student's self-determination of the State in which he or she resides unless the institution has information to the contrary.

Changes: None.

Miscellaneous Issues Related to Licensure Disclosure

Comments: Multiple commenters noted that they believed that the Department should provide a centralized Web site or searchable government data base to ease the burden on institutions of higher education. Outside of a Federal Web site, other commenters requested clarification on whether an institution could link to a non-institutional Web site, such as a third-party Web site or a State professional licensure board Web site to provide appropriate disclosures to students. A number of commenters noted that this disclosure is difficult to fulfill because State agencies are not equipped to provide responses to institution requests for information on licensure and certification requirements. Other commenters requested guidance on how to provide this disclosure to students, recommending size, format and wording. One commenter specifically requested permission to encourage students to confirm whether the program meets the licensure or certification requirements of a State. Other commenters asked for sufficient time to become compliant with this regulation. One commenter asked for clarification on how it will be determined if a program leads to a career that would in fact need licensure or certification. One commenter requested that the Department exempt graduate programs from this disclosure requirement. Another commenter recommended that this disclosure only be required for those programs and States where schools have awarded more than ten degrees in the previous five years. One other commenter recommended that this disclosure be waived for institutions that are accredited by a regional accreditation agency and for programs that are accredited by a nationally recognized accrediting agency. One commenter requested clarification on which State's licensure and certification prerequisites should be disclosed to students. One commenter asked for clarification on how often an institution would need to

confirm accurate licensing or certification prerequisites to determine that their program continues to meet those prerequisites.

Discussion: The Department does not plan on developing a centralized Federal Web site to house information on the licensure or certification requirements of each State for those professions that States have implemented licensure or certification requirements. However, the Department does not believe that this information must necessarily be collected by each and every institution independently. Rather, an institution can be in compliance with this requirement by referring to a non-institutional Web site, including relevant State professional licensure board Web sites, which contains such information. Institutions that link to a non-institutional Web site should follow the guidance issued in Dear Colleague Letter GEN-12-13, and make the link accessible from the institution's Web site and have the link prominently displayed and accurately described. The institution is also responsible for ensuring that the link is functioning and accurate. Additionally, an institution should not need to request information on the licensure and certification requirements through official communications with a State agency. As pointed out by other commenters, many State agencies have licensure and certification prerequisites listed on a Web site and the Department believes that institutions could find this information on the Internet easily and they do not need to rely on State agency staff for official information. An institution would still be responsible for ensuring accurate information is being provided to their students though. Administrators of a State authorization reciprocity agreement could also offer the collection of this information to institutions as a service for membership in the agreement, which would reduce the burden on institutions.

The Department, at this time, declines to mandate any particular requirements about how these disclosures must be provided to students, but reserves the right to provide further guidance on that issue. However, we expect that institutions of higher education will collect and disclose this information for students and not put the onus of discovering the information on the student. Institutions should not try to hide this information deep on their Web sites, but should instead make these disclosures easily accessible for students. The institution is ultimately responsible for ensuring that this information is disclosed to students and should not put the burden on the

student making the determination about whether the program meets the prerequisites for licensure or certification. The Department believes that an institution makes the determination about the careers that potential academic programs can lead to when developing programs as a matter of conducting business. Institutions of higher education advertise these linkages between their academic programs and potential careers as part of the advertising and student recruitment process. Institutions report these linkages, especially in GE reporting, by connecting the programs' Classification of Instructional Program (CIP) codes to their related Standard Occupational Classification (SOC) codes. These regulations become active on July 1, 2018, and the Department believes that is sufficient time for institutions of higher education to prepare for compliance. The Department disagrees with the recommendation that graduate programs should be exempted from this disclosure. We believe that graduate students would also benefit from this information and should be provided this disclosure, as graduate programs may also be preparing students for careers in subject areas that States have established licensure or certification prerequisites.

The Department also disagrees with the recommendation that the disclosure only be required of programs for States where the institution has awarded more than ten degrees in five years. We believe that this information should be provided to all students so they will know whether the program they enroll in will meet the licensure or certification prerequisites regardless of how many degrees are given in a particular program. The Department disagrees with the recommendation to provide an exemption to institutions with regional accreditation or programs with national accreditation. While accreditation status is another disclosure required under these regulations, we believe that students should be informed of whether a program meets licensure and certification prerequisites and obtaining accreditation does not mean that an institution's program necessarily meets those prerequisites. The Department believes that an institution must disclose the licensure and certification requirements to students for the State in which the student resides because that is the State where a student would most likely be searching for employment upon completing their academic program. The Department does not intend to define the minimum

timeframe required for an institution to confirm licensing or certification prerequisites with State agency information, but believes that an institution should do so regularly to ensure that each prospective student receives accurate information. The Department would like to remind institutions that in addition to providing accurate public disclosures that it would also need to ensure accurate information when providing individualized disclosures to prospective students that a program they are enrolling in does not meet licensure or certification prerequisites in their State of residence, as required by § 668.50(c)(1)(i).

Changes: None.

Programs That Do Not Satisfy Licensure or Certification Prerequisites

Comments: Multiple commenters expressed concern with § 668.50(b)(7)(ii), which requires disclosing whether a program does or does not satisfy the applicable educational prerequisites for licensure or certification where the institution determines a State's requirements. These commenters were concerned that § 668.50(b)(7)(ii) does not require a program to meet certification or licensure prerequisites to be eligible to award title IV aid to students. One commenter requested that the Department require institutions with distance education programs to make a determination with respect to certification or licensure prerequisites for all States, regardless of whether the institution is recruiting students for enrollment. One commenter also requested clarification on what it means to make a "determination with respect to certification or licensure prerequisites." Specifically, the commenter asked whether an institution that has made an incorrect determination of whether a program meets licensure or certification requirements would still be considered in compliance with this requirement. The commenter provided as an example an institution that advertises that a certain program will lead to a career such as teaching, but fails to conduct the research on whether the program meets those prerequisites established by the State.

Discussion: The Department believes that students are best served by having accurate information to be able to make decisions regarding their academic pursuits, including with regard to the certification or licensure prerequisites of potential careers. As stated above, most distance education programs are also GE programs, which means that an

institution cannot provide Title IV aid to students enrolled in those programs unless the program meets the licensure or certification status of a State. The GE regulations do not forbid non-GE distance education programs from enrolling title IV eligible students.

However, the Department expects that institutions will make a good faith effort in determining whether their programs meet State licensure or certification prerequisites. We do not believe that requiring institutions to research and provide information on States that it does not plan on recruiting or enrolling students will be useful to students, as the individuals that the information would pertain to are not being solicited for enrollment.

Therefore, we believe that requiring institutions to research State certification or licensure prerequisites for States in which it is not actively recruiting or enrolling students would significantly increase the burden associated with this disclosure without substantial benefit to those individuals that enroll in their programs. If an institution advertises that a distance education program could lead to a career that would require certification or licensure in a State, such as teaching, but does not follow through to research the licensure requirements to determine how the program matches up against the prerequisites, then the institution has not provided accurate licensure requirements to students nor stated that its program meets the academic requirements of those prerequisites, as required by this regulation.

Changes: None.

Timeline for Individualized Disclosures

Comments: One commenter requested that the timeframe in which an institution must disclose any determination that its program ceases to meet licensure or certification prerequisites be increased from 7 days to 45 days under § 668.50(c)(1)(ii)(B). The commenter continued by stating that it would take significantly more than 7 days to understand the impact of a change in licensure requirements, inform internal stakeholders, determine impacted learners, craft and route communications for approval, educate employees who may receive questions from learners, and execute a mass communication. The same commenter also asked for clarification on when the clock would start to provide this disclosure. Another commenter asked whether an institution would be allowed to make a determination that it has not made a determination with respect to how their program meets the licensure or certification prerequisites

in a State, rather than disclosing that the institution no longer meets those prerequisites.

Discussion: The Department believes that a 45-day window from determining that an institution's distance education program ceases to meet licensure or certification programs to informing enrolled and prospective students of that determination is too long. However, the Department recognizes that seven days may be too small a window to inform prospective and enrolled students of a determination. This disclosure's time-frame would not start until an institution has made a determination that a distance education program no longer meets the certification or licensure prerequisites for a State. Once that determination has been made, we believe an institution can move quickly to prepare notifications and inform students, especially with the use of technology in mass communications.

We believe that a 14-calendar day period from the point that an institution has determined a program no longer meets the licensure or certification requirements of a State is sufficient to notify prospective and enrolled students. If an institution determines that a program ceases to meet the licensure or certification requirements in a State, the institution must inform students of that determination within 14 calendar days. That institution cannot avoid providing students with accurate information by claiming the institution is not making a determination with respect to those prerequisites.

Changes: We revised § 668.50(c)(1)(ii)(B) to provide institutions 14-calendar days to disclose any determination by the institution that the program ceases to meet licensure or certification prerequisites of a State.

Individualized Disclosure Acknowledgement

Comments: One commenter stated that § 668.50(c)(2) should not require institutions, under the penalty of losing title IV eligibility, to obtain acknowledgment from students that they received notification of any determination by the institution that the program does not meet licensure or certification prerequisites in the State of the student's residence, prior to the student's enrollment. Another commenter stated that institutions with a very mobile student population, such as military students, would have particular difficulty in obtaining this acknowledgment.

Discussion: The Department disagrees with the commenters that receiving

acknowledgment of this disclosure would be extremely difficult to achieve. As mentioned in the NPRM, the Department believes that an institution could simply add in a paragraph to their enrollment agreement, a process that takes place electronically for many distance education programs already, that addresses receiving this disclosure. This disclosure does not require a separate, stand-alone affirmation and can be combined with other acknowledgments that the student may have to provide to an institution during the enrollment process. As such, the Department does not believe that an institution would have to create a separate process for record keeping of these disclosures outside of the record keeping an institution would already do on enrollment agreements. Based on the flexibility of how an institution can obtain acknowledgement from a student that they received the disclosure that the program they are enrolling in does not meet the licensure or certification prerequisites in their State of residence, we believe that institutions with a highly mobile population should not have any difficulty obtaining this acknowledgement from individuals enrolling in their distance education programs. We believe that the best way to demonstrate to students that they are receiving important information that may influence their decision to enroll in a program would be for the student to attest to receiving such information before enrollment.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Introduction

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement 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 stated in the Executive order.

This regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these

regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In this Regulatory Impact Analysis we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, assumptions, limitations, and data sources, as well as regulatory alternatives we considered. Although the majority of the costs related to information collection are discussed within this RIA, elsewhere in this Notice of Final Rules, under Paperwork Reduction Act of 1995, we also identify and further explain burdens specifically associated with information collection requirements.

Need for Regulatory Action

States have a vital and unique role in the oversight of higher education and the Department believes that states are a key partner in setting minimum standards for institutions to operate. Recognizing the important role that States play in the oversight of distance education and the interest that States

have in protecting their residents, the Department's regulation requires that institutions fulfill any requirements imposed by States whose residents are enrolled in the institution's postsecondary programs. The landscape of higher education has changed over the last 20 years. During that time, the role of distance education in the higher education sector has grown significantly. For the 1999–2000 Academic Year, eight percent of undergraduate students participated in at least one distance education course.² Recent National Center for Education Statistics' Integrated Postsecondary Education Data System (IPEDS) data indicate that in the fall of 2014, 28.5 percent of students at degree-granting, title IV participating institutions were enrolled in at least one distance education class.³ The emergence of online learning options has allowed students to enroll in colleges authorized in other States and jurisdictions with relative ease. According to IPEDS, in the fall of 2014, the number of students enrolled exclusively in distance education programs totaled 2,824,334.⁴ Distance education industry sales have increased alongside student enrollment.

As students continue to embrace distance education, revenue for distance education providers has increased steadily. In 2014, market research firm Global Industry Analysts projected that 2015 revenue for the distance education industry would reach \$107 billion.⁵ For the same year, gross output for the overall non-hospital private Education Services sector totaled \$332.2 billion. Distance education has grown to account for roughly one-third of the U.S. non-hospital private Education Services sector.

In this aggressive market environment, distance education providers have looked to expand their footprint to gain market share. An analysis of recent data from IPEDS indicates that 2,301 HEA title-IV-participating institutions offered 23,434 programs through distance education in 2014. Approximately 2.8 million students were exclusively enrolled in distance education courses, with 1.2 million of those students enrolled in programs offered by institutions from a different State. Table 1 summarizes the number of institutions, programs, and students involved in distance education by sector.

TABLE 1—2014 PARTICIPATION IN DISTANCE EDUCATION BY SECTOR

Sector	Institutions offering distance education programs	No. of distance education programs	Students exclusively in distance education programs	Students exclusively in out-of-state distance education programs
Public 4-year	540	5,967	692,074	144,039
Private Not-for-Profit 4-year	745	6,555	607,224	333,495
Proprietary 4-year	255	5,153	820,630	628,699
Public 2-year	625	5,311	690,771	45,684
Private Not-for-Profit 2-year	15	42	814	388
Proprietary 2-year	87	339	21,421	5,291
Public less-than-2-year	7	10	55	.....
Private Not-for-Profit less-than- 2-year	1	1	.....	.....
Proprietary less-than-2-year	26	56	1,056	382
Total	2,301	23,434	2,834,045	1,157,978

States have differing requirements that institutions of higher education must meet, such as varying application requirements and fees. The different requirements can potentially cause increased costs and burden for those institutions, and some States have entered into reciprocity agreements with other States in an effort to coordinate oversight of distance education. For example, as of June 2016, 40 States and

the District of Columbia have entered into a State Authorization Reciprocity Agreement administered by the National Council for State Authorization Reciprocity Agreements, which establishes standards for the interstate offering of postsecondary distance-education courses and programs. Through a State authorization reciprocity agreement, an approved institution may provide distance

education to residents of any other member State without seeking authorization from each member State. However, even where States accept the terms of a reciprocity agreement, that agreement may not apply to all institutions and programs in any given State. The regulation defines the type of reciprocity agreements that are an acceptable means for States to confer

² NCES, "A Profile of Participation in Distance Education: 1999–2000", p.6 available at <http://nces.ed.gov/pubs2003/2003154.pdf>.

³ 2015 Digest of Education Statistics: Table 311.15: Number and percentage of students enrolled

in degree-granting postsecondary institutions, by distance education participation, location of student, level of enrollment, and control and level of institution: Fall 2013 and Fall 2014.

⁴ Id.

⁵ Online Learning Industry Poised for \$107 Billion In 2015 (<http://www.forbes.com/sites/tjmccue/2014/08/27/online-learning-industry-poised-for-107-billion-in-2015/#46857a0966bc>).

authorization to distance education programs.

There also has been a significant growth in the number of American institutions and programs enrolling students abroad. As of May 2016, American universities were operating 80 foreign locations worldwide according to information available from the Department's Postsecondary Education Participation System (PEPS).

American institutions operating foreign locations are still relatively new. As such, data about the costs involved in these operations is limited. Some American institutions establishing locations in other countries have negotiated joint ventures and reimbursement agreements with foreign governments to share the startup costs or other costs of doing business.

With the expansion of these higher education models, the Department believes it is important to maintain a minimum standard of State authorization of postsecondary education institutions. These regulations support States in their efforts to develop standards for this growing sector of higher education. The clarified requirements related to State authorization also support the integrity of the Federal student aid programs by not supplying funds to programs and institutions that are not authorized to operate in a given State.

Summary of Comments and Changes

Following the publication of the NPRM on July 25, 2016 (81 FR 48598), the Department received 139 comments on the proposed regulations. Many of these comments have been addressed in the *Analysis of Comments and Changes* in this preamble. A number of commenters expressed concern about the costs of complying with these State authorization regulations. These commenters state that the Department underestimated the costs of researching State authorization requirements, coordination between the institution and foreign locations, and interactions with State agencies. Commenters representing HBCUs and other Minority Serving Institutions ("MSIs") raised concerns about the costs and effect on those institutions, with some commenters requesting additional resources be made available to help them comply if the regulations passed. Additionally, commenters representing small institutions stated that the regulations and associated compliance costs would serve as a barrier to entry that would prevent small, highly reputable institutions from competing in the distance education market and potentially deny students a high-quality

and cost-effective educational opportunity. The commenters noted that, in recent years, distance education has become an important source of revenue and a way to level the playing field with larger and better funded public and private institutions. The comments asserted that the Department underestimated the complexity and burden of complying with the regulations, and that the costs, including unintended negative consequences of the regulations such as cost transfers to students, outweigh the benefits.

The Department appreciates the comments and the specificity with which some commenters discussed the calculation of burden for the regulations. Where applicable, comments about the relevant burden calculation will be addressed in the *Paperwork Reduction Act* section of this preamble. Other comments about the overall costs of the regulation relative to the benefits are addressed in the *Discussion of Costs, Benefits, and Transfers* section.

Based on the comments received and the Department's internal review, a number of changes have been made from the proposed regulations. In particular, with respect to distance education, the final regulations: (1) State that for a reciprocity agreement to be valid under these regulations, it may not prohibit a State from enforcing its own statutes and regulations; (2) clarify that institutions may choose to be authorized individually in each State required or to participate in a reciprocity agreement between States; (3) revise the language in § 668.50(a) and (c) to be consistent with § 668.50(b) in requiring the specified disclosure from institutions that offer programs solely through distance education or correspondence courses, excluding internships and practicums; (4) Add a new requirement under § 668.50(b)(1)(iii) that an institution must explain to students the consequences of relocating to a State where the institution does not meet State requirements or where one of the institution's GE programs does not meet licensure or certification requirements in the State; and (5) revise the timeframe in § 668.50(c)(1)(ii)(B) for disclosing that the program ceases to meet licensure or certification prerequisites of a State within 14 days of that determination, not 7 days as proposed in the NPRM. With respect to foreign locations, the final regulations make the following changes: (1) Revise § 600.9(d)(1)(i) to clarify that military bases, for purposes of foreign authorization exemption, are any area that is under use by the U.S. military, including facilities and areas

that foreign countries have allowed the U.S. military to use; (2) revise § 600.9(d)(3) to clarify that institutions must disclose to enrolled and prospective students information regarding the student complaint process of the State in which the main campus of the institution is located; and (3) revise § 600.9(d)(3) to make clear that an institution must disclose to enrolled and prospective students at both foreign additional locations and foreign branch campuses the information regarding the institution's student complaint process.

Discussion of Costs, Benefits, and Transfers

The primary benefits of these regulations are: (1) Increased transparency and access to institutional and program information, (2) updated and clarified requirements for State authorization of distance education and foreign additional locations, and (3) a process for students to access complaint resolution in either the State in which the institution is authorized or the State in which they reside.

We have identified the following groups and entities we expect to be affected by these regulations:

- Students
- Institutions
- Federal, State, and local government

Students

During the negotiated rulemaking students stated that the availability of online courses allowed them to earn credentials in an environment that suited their personal needs. We believe, therefore, that students would benefit from increased transparency about distance education programs. The disclosures of adverse actions against the programs, refund policies, consequences of moving to a State in which the program does not meet requirements, and the prerequisites for licensure and whether the program meets those prerequisites in States for which the institution has made those determinations will provide valuable information that can help students make more informed decisions about which institution to attend.

Increased access to information could help students identify programs that offer credentials that potential employers recognize and value. Additionally, institutions have to provide an individualized disclosure to enrolled and prospective students of adverse actions against the institution and when programs offered solely through distance education or correspondence courses do not meet licensure or certification prerequisites

in the student's State of residence. The disclosure regarding adverse actions will ensure that students have information about potential wrongdoing by institutions. Similarly, disclosures regarding whether a program meets applicable licensure or certification requirements will provide students with valuable information about whether attending the program will allow them to pursue the chosen career upon program completion, helping students make a better choice of program before they incur significant loan debt or use up their Pell Grant and subsidized loan eligibility.

In response to comments received about the NPRM, the Department has added a requirement that institutions disclose the potential loss of title IV eligibility or disenrollment of students who relocate to a State in which the program does not meet the requirements. This information does not require an individualized disclosure, but should provide students with generalized information on where the program meets requirements and the consequences if the student relocates to a State not on that list and will give the student information about how their choice of residence and program interact with respect to eligibility for title IV funding. The licensure disclosure requires acknowledgment by the student before enrollment, which emphasizes the importance of ensuring students receive that information. It also recognizes that students may have specific plans for using their degree, potentially in a new State of residence where the program would meet the relevant prerequisites.

Students in distance education or at foreign locations of domestic institutions will also benefit from the disclosure and availability of complaint resolution processes that will let them know how to submit complaints to the State in which the main campus of the institution is located or, for distance education students, the students' State of residence. This will help students to access available consumer protections.

Some commenters did note that students could bear the costs of compliance with the regulations through increased tuition and fees or through reduced options for pursuing their education. The Department recognizes that some colleges may choose to pass some costs through to students, but we believe that the increased value of a program that is legally authorized to operate in a State, has a clear complaints process, and lets students know if it leads to valid licensure opportunities, if applicable, is worth the potential cost increase.

Commenters representing small colleges expressed concern that the costs of compliance with the regulations would favor larger and better resourced institutions, potentially reducing competition and options for students. The Department appreciates these comments and acknowledges that the burden will vary for different types of institutions, but we believe that requiring institutions to comply with State standards is a minimum expectation to operate a program.

Institutions

Institutions will benefit from the increased clarity concerning the requirements and process for State authorization of distance education and of foreign additional locations. Institutions will bear the costs of complying with State authorization requirements, whether through entering into a State authorization reciprocity agreement or researching and meeting the relevant requirements of the States in which they operate distance education programs. The Department does not ascribe specific costs to the State authorization regulations and associated definitions because it is presumed that institutions are already complying with applicable State authorization requirements. Additionally, nothing in these regulations would require institutions to participate in distance education. In the NPRM, the Department estimated potential costs of complying with State authorization requirements as an illustrative example in the event that the clarification of the State authorization requirements in the regulations, among other factors, would provide an incentive for more institutions to offer distance education courses. As noted in the NPRM, the actual costs to institutions would vary based on a number of factors including the institutions' size, the extent to which an institution provides distance education, and whether it participates in a State authorization reciprocity agreement or chooses to obtain authorization in specific States. The Department applied the costs associated with a SARA arrangement to all 2,301 title IV participating institutions reported as offering distance education programs in IPEDS for a total of \$19.3 million annually in direct fees and charges associated with distance education authorization. Additional State fees to institutions applied were \$3,000 for institutions under 2,500 FTE, \$6,000 for 2,500 to 9,999 FTE, and \$10,000 for institutions with 10,000 or more FTE.

As discussed previously, several commenters stated that the Department

underestimated the costs of compliance with the regulations, noting that extensive research would be required for each program in each State. One institution noted that it costs \$23,520 to obtain authorization for a program with an internship in all 50 States and \$3,650 to obtain authorization for a new 100 percent online program in all 50 States. To renew the authorization for its existing programs, this institution estimates a cost of \$75,000 including fees, costs for surety bonds, and accounting services, and notes these costs have been increasing in recent years. The commenter noted the institution currently has one full-time employee to oversee the State authorization process and contracts with State authorization and licensing experts and expects those personnel and contracting costs would increase significantly under the proposed regulations from the NPRM. We appreciate the cost information provided by the commenters. These comments demonstrate that the costs of establishing distance education programs could vary significantly, but, as stated earlier, we assume that institutions are already operating programs with appropriate authorizations. Domestic institutions that choose to operate foreign locations may incur costs from complying with the requirements of the foreign country or the State of their main campus, and these will vary based on the location, the State, the percentage of the program offered at the foreign location, and other factors. As with distance education, nothing in the regulation requires institutions to operate foreign locations and we assume that institutions have complied with applicable requirements in operating their foreign locations.

In addition to the costs institutions incur from identifying State requirements or entering a State authorization reciprocity agreement to comply with the regulations, institutions will incur costs associated with the disclosure requirements. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of this preamble. In total, these regulations are estimated to increase burden on institutions participating in the title IV, HEA programs by 152,565 hours. The monetized cost of this burden on institutions, using wage data developed using Bureau of Labor Statistics BLS data available at: www.bls.gov/ncs/ect/sp/ecsuphst.pdf, is \$5,576,251. This burden estimate is based on an hourly rate of \$36.55.

Federal, State, and Local Governments

These regulations maintain the important role of States in authorizing institutions and in providing consumer protection for residents. The increased clarity about State authorization should also assist the Federal government in administering the title IV, HEA programs. The regulations do not require States to take specific actions related to authorization of distance education programs. States may choose the systems they establish, their participation in a State authorization reciprocity agreement, and the fees they charge institutions and States have the option to do nothing in response to the regulations. Therefore, the Department has not quantified specific annual costs to States based on these regulations.

Net Budget Impacts

As indicated in the NPRM, these regulations are not estimated to have a significant net budget impact in costs over the 2017–2026 loan cohorts. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans.

In the absence of evidence that these regulations will significantly change the size and nature of the student loan borrower population, the Department estimates no significant net budget impact from these regulations. While the clarity about the requirements for State authorization and the option to use State authorization reciprocity agreements may expand the availability of distance education, that does not necessarily mean the volume of student loans will expand greatly. Additional distance education could serve as a convenient option for students to pursue their education and loan funding may shift from physical to online campuses. Distance education has expanded significantly already and these regulations are only one factor in institutions' plans within this field. The distribution of title IV, HEA program funding could continue to evolve, but the overall volume is also driven by demographic and economic conditions that are not affected by these regulations and State authorization requirements are not expected to change loan volumes in a way that would result in a significant net budget impact.

Likewise, the availability of options to study abroad at foreign locations of domestic institutions offers students flexibility and potentially rewarding

experiences, but is not expected to significantly change the amount or type of loans students use to finance their education. Therefore, the Department does not estimate that the foreign location requirements in § 600.9(d) will have a significant budget impact on title IV, HEA programs. The changes made from the proposed regulations discussed in the *Summary of Comments and Changes* section of this RIA are not expected to significantly change the budget impact of these regulations.

Assumptions, Limitations, and Data Sources

In developing these estimates, a wide range of data sources were used, including data from the National Student Loan Data System, and data from a range of surveys conducted by the National Center for Education Statistics such as the 2012 National Postsecondary Student Aid Survey. Data from other sources, such as the U.S. Census Bureau, were also used.

Alternatives Considered

In the interest of promoting good governance and ensuring that these regulations produce the best possible outcome, the Department reviewed and considered various proposals from both internal sources as well as from non-Federal negotiators. We summarize below the major proposals that we considered but ultimately declined to adopt these regulations.

The Department has addressed State authorization during two negotiated rulemaking sessions, one in 2010 and the other in 2014. In 2010, State authorization of distance education was not a topic addressed in the negotiations, but the Department addressed the issue in the final rule in response to public comment. The distance education provision in the 2010 regulation was struck down in court on procedural grounds, leading to the inclusion of the issue in the 2014 negotiations. The 2014 negotiated rulemaking considered, in part, requiring an institution of higher education to obtain State authorization wherever its students were located. That option would also have allowed for reciprocity agreements between States as a form of State authorization, including State authorization reciprocity agreements administered by a non-State entity. The Department and participants of the 2014 rulemaking session were unable to reach consensus.

As it developed the regulations, the Department considered adopting the approaches considered in 2010 or 2014. However, the 2010 rule did not allow for reciprocity agreements and did not

require a student complaint process for distance education students if a State did not already require it. The option considered in 2014 raised concerns about complexity and the level of burden involved. The Department therefore used elements of both the 2010 and 2014 rulemakings in formulating these regulations. Using the 2010 rule as a starting point, these regulations allow for State authorization reciprocity agreements and provide a student complaint process requirement to achieve a balance between appropriate oversight and burden level. In 2014, the Department and non-Federal negotiators reached agreement on the provisions related to foreign locations without considering specific alternative proposals.

Regulatory Flexibility Analysis

The final regulations would affect institutions that participate in the title IV, HEA. The U.S. Small Business Administration (SBA) Size Standards define “for-profit institutions” as “small businesses” if they are independently owned and operated and not dominant in their field of operation with total annual revenue below \$7,000,000. The SBA Size Standards define “not-for-profit institutions” as “small organizations” if they are independently owned and operated and not dominant in their field of operation, or as “small entities” if they are institutions controlled by governmental entities with populations below 50,000. Under these definitions, approximately 4,267 of the IHEs that would be subject to the paperwork compliance provisions of the final regulations are small entities. Accordingly, we have prepared this regulatory flexibility analysis to present an estimate of the effect on small entities of the final regulations.

Description of the Reasons That Action by the Agency Is Being Considered

The Secretary is amending the regulations governing the title IV, HEA programs to provide clarity to the requirements for, and options to: Obtain State authorization of distance education, correspondence courses, and foreign locations; document the process to resolve complaints from distance education students in the State in which they reside; and make disclosures about distance education and correspondence courses.

Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Regulations

Section 101(a)(2) of the HEA defines the term “institution of higher education” to mean, in part, an

educational institution in any State that is legally authorized within the State to provide a program of education beyond secondary education. Section 102(a) of the HEA provides, by reference to section 101(a)(2) of the HEA, that a proprietary institution of higher education and a postsecondary vocational institution must be similarly authorized within a State. Section 485(a)(1) of the HEA provides that an institution must disclose information about the institution's accreditation and State authorization.

Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Regulations Will Apply

These final regulations would affect IHEs that participate in the Federal Direct Loan Program and borrowers. Approximately 60 percent of IHEs qualify as small entities, even if the range of revenues at the not-for-profit institutions varies greatly. Using data from IPEDS, the Department estimates that approximately 4,267 IHEs participating in the title IV, HEA programs qualify as small entities—1,878 are not-for-profit institutions, 2,099 are for-profit institutions with programs of two years or less, and 290 are for-profit institutions with four-year programs. The Department believes that most proprietary institutions that are heavily involved in distance education should not be considered small entities because the scale required to operate substantial distance education programs would put them above the relevant revenue threshold. However, the private non-profit sector's involvement in the field may mean that a significant

number of small entities could be affected. The Department also expects this to be the case for foreign locations of domestic institutions, with proprietary institutions operating foreign locations unlikely to be small entities and a number of private not-for-profits classified as small entities involved.

Distance education offers small entities, particularly not-for-profit entities of substantial size that are classified as small entities, an opportunity to serve students who could not be accommodated at their physical locations. Institutions that choose to provide distance education could potentially capture a larger share of the higher education market. Overall, as of Fall 2014, approximately 14.5 percent of students receive their education exclusively through distance education while 71.5 percent took no distance education courses. However, at proprietary institutions almost 53.9 percent of students were exclusively distance education students and 38.6 percent had not enrolled in distance education courses.⁶ As discussed above, we assume that most of the proprietary institutions offering a substantial amount of distance education are not small entities, but if not-for-profit institutions expand their role in the distance education sector, small entities could increase their share of revenue. On the other hand, small entities that operate physical campuses could face more competition from distance education providers. The potential reshuffling of resources within higher education would occur regardless of the final regulations, but the clarity provided by the distance education

requirements and the acceptance of State authorization reciprocity agreements could accelerate those changes.

In order to accommodate students through distance learning, institutions face a number of costs, including the costs of complying with authorization requirements. As with the broader set of institutions, the costs for small entities would vary based on the scope of the distance education they choose to provide, the States in which they operate, and the size of the institution. In the Initial Regulatory Flexibility Analysis in the NPRM, we estimated that small entities will face annual costs of \$7.0 million for SARA fees and additional state fees, using the same analysis and costs as in Table 2 of the NPRM.⁷ As noted in the Regulatory Impact Analysis, several commenters stated that the Department's illustrative costs were understated, and, in particular, that the cost of complying with State authorization requirements would be a greater burden for small institutions. The Department acknowledges that the costs of obtaining State authorization will vary by type and existing resources of institutions and that these considerations may influence the extent to which small entities operate distance education programs. It is possible that some costs can be mitigated through shared research on compliance requirements through national organizations or other approaches, but the Department maintains that State authorization is an important oversight mechanism and a minimum expectation for institutions to operate a program, whatever their size.

TABLE 3—ESTIMATED COSTS FOR STATE AUTHORIZATION OF DISTANCE EDUCATION FOR SMALL ENTITIES

Institutions	Count	SARA fees	Additional State fees
Private Not-for-Profit 2-year or less			
Under 2,500	16	\$32,000	\$48,000
2,500 to 9,999			
10,000 or more			
Proprietary 2-year or less			
Under 2,500	109	218,000	327,000
2,500 to 9,999			
10,000 or more			
Private Not-for-Profit 4-year			
Under 2,500	474	948,000	1,422,000
2,500 to 9,999	227	908,000	1,362,000
10,000 or more	44	264,000	440,000
Proprietary 4-year			
Under 2,500	198	396,000	594,000
2,500 to 9,999			

⁶ 2015 Digest of Education Statistics: Table 311.15: Number and percentage of students enrolled in degree-granting postsecondary institutions, by distance education participation, location of

student, level of enrollment, and control and level of institution: Fall 2013 and Fall 2014.

⁷ Notice of Proposed Rulemaking published July 25, 2016, Table 2, p.48609 available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-17068.pdf>.

www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-17068.pdf.

TABLE 3—ESTIMATED COSTS FOR STATE AUTHORIZATION OF DISTANCE EDUCATION FOR SMALL ENTITIES—Continued

Institutions	Count	SARA fees	Additional State fees
10,000 or more .....	.....	.....	.....
Total	1,068	2,766,000	4,193,000

Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Table 3 relates the estimated burden of each information collection

requirement to the hours and costs estimated in the *Paperwork Reduction Act of 1995* section of the preamble. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of the preamble. Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the

reassignment of existing staff from other activities. In total, these changes are estimated to increase burden on small entities participating in the title IV, HEA programs by 13,981 hours. The monetized cost of this additional burden on institutions, using wage data developed using BLS data available at www.bls.gov/ncs/ect/sp/ecsuhst.pdf, is \$510,991. This cost was based on an hourly rate of \$36.55.

TABLE 4—PAPERWORK REDUCTION ACT BURDEN FOR SMALL ENTITIES

Provision	Reg. section	OMB control number	Hours	Costs
Reporting related to foreign additional locations or branch campuses.	600.9	1845–0144	86	\$3,158
Public disclosure made to enrolled and prospective students in the institution’s distance education programs or correspondence courses. Requires 7 disclosures related to State authorization, complaints process, adverse actions, refund policies, and whether the program meets prerequisites for licensure or certification.	668.50(b)	1845–0145	57,743	2,110,547
Individualized disclosure to and attestation by enrolled and prospective students of distance education programs about adverse actions or the program not meeting licensure requirements in the student’s State.	668.50(c)	1845–0145	271	9,912
Total .....	.....	.....	58,101	2,123,577

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Regulations

As acknowledged in the Analysis of Comments and Changes, the disclosure requirement about the State complaint process in § 668.50(b)(2) overlaps the more generalized institutional information disclosure requirement in § 668.43(b). The Department believes this overlap is warranted because of the importance of these disclosures to distance education students and the means of providing the disclosure may be different for this population.

Alternatives Considered

As described above, the Department participated in negotiated rulemaking when developing the proposed regulations, and considered a number of options for some of the provisions. No alternatives were aimed specifically at small entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department’s collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

Sections 600.9 and 668.50 contain information collection requirements. Under the PRA, the Department has submitted a copy of these sections, and an Information Collection Request (ICR) to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information

unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number.

Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In these final regulations, we display the control numbers assigned by OMB to any information collection requirements proposed in the NPRM and adopted in the final regulations.

Background

The following data will be used throughout this section: For the year 2014, there were 2,301 institutions that reported to IPEDS that they had enrollment of 2,834,045 students attending 23,434 programs offered through distance education as follows:

1,172 public institutions reported 1,382,900 students attending 11,288 programs through distance education;

761 private, not-for-profit institutions reported 608,038 students attending 6,598 programs through distance education;

368 private, for-profit institutions reported 843,107 students attending 5,548 programs through distance education.

According to information available from the Department's Postsecondary Education Participation System (PEPS), there are currently 80 domestic institutions with identified additional locations in 60 foreign countries; 35 public institutions, 42 private, not-for-profit institutions, and 3 private, for-profit institutions.

Section 600.9 State Authorization

State Authorization of Foreign Additional Locations and Branch Campuses of Domestic Institutions

Requirements: Section 600.9(d)(1)(v) specifies that, for any foreign additional location at which 50 percent or more of an educational program is offered, or will be offered, and any foreign branch campus, an institution is required to report the establishment or operation of the foreign additional location or branch campus to the State in which the main campus of the institution is located at least annually, or more frequently if required by the State.

Burden Calculation: There will be burden on each domestic institution reporting the establishment or continued operation of a foreign additional location or branch campus to the State in which the main campus of the domestic institution is located. We estimate that each institution will require 2 hours annually to draft and submit the required notice. We estimate that 35 public institutions will require a total of 70 hours to draft and submit the required State notice (35 institutions \times 2 hours). We estimate that 42 private, not-for-profit institutions will require a total of 84 hours to draft and submit the required State notice (42 institutions \times 2 hours). We estimate that 3 private, for-profit institutions will require a total of 6 hours to draft and submit the required State notice (3 institutions \times 2 hours).

The total estimated burden for 34 CFR 600.9 will be 160 hours under OMB Control Number 1845-0144.

Section 668.50 Institutional Disclosures for Distance or Correspondence Programs

Requirements: The Department added new § 668.50(b) and (c), which requires disclosures to enrolled and prospective

students in the institution's distance education programs or correspondence courses. Seven disclosures will be made publicly available, and up to three disclosures will require direct communication with enrolled and prospective students when certain conditions have been met. These disclosures will not change any other required disclosures of the Student Assistance General Provisions regulations.

Public Disclosures

Under § 668.50(b)(1), an institution will be required to disclose whether or not the program offered through distance education or correspondence courses is authorized by each State in which enrolled students reside. If an institution is authorized through a State authorization reciprocity agreement, the institution will be required to disclose its authorization status under such an agreement. An institution will also be required to explain to students the consequences of relocating to a State where the institution does not meet State authorization requirements, or, in the case of a GE program, where the program does not meet licensure or certification requirements in the State.

Under § 668.50(b)(2)(i), an institution authorized by a State agency will be required to disclose the process for submitting complaints to the appropriate State agency in the State in which the main campus of the institution is located, including contact information for the appropriate State agencies that handle consumer complaints.

Under § 668.50(b)(2)(ii), an institution authorized by a State authorization reciprocity agreement will be required to disclose the complaint process established by the reciprocity agreement, if the agreement established such a process. An institution will be required to provide contact information for receipt of such complaints, as set out in the State authorization reciprocity agreement.

Under § 668.50(b)(3), an institution will be required to disclose the process for submitting complaints to the appropriate State agency in the State in which enrolled students reside, including contact information for those State agencies that handle consumer complaints.

Under § 668.50(b)(4), an institution will be required to disclose any adverse actions a State entity has initiated related to the institution's distance education programs or correspondence courses for a five calendar year period prior to the year in which the institution makes the disclosure.

Under § 668.50(b)(5) an institution will be required to disclose any adverse actions an accrediting agency has initiated related to the institution's distance education programs or correspondence courses for a five calendar year period prior to the year in which the institution makes the disclosure.

Under § 668.50(b)(6), an institution will be required to disclose any refund policies for the return of unearned tuition and fees with which the institution is required to comply by any State in which the institution enrolls students in a distance education program or correspondence courses. This disclosure requires publication of the State-specific requirements on the refund policies as well as any institutional refund policies that would be applicable to students enrolled in programs offered through distance education or correspondence courses with which the institution must comply.

Under § 668.50(b)(7), an institution will be required to disclose the applicable educational prerequisites for professional licensure or certification which the program offered through distance education or correspondence course prepares the student to enter for each State in which students reside. The institution must also make this disclosure for any other State which the institution has made a determination regarding such prerequisites as well as if the institution's program meets those requirements. For any State for which an institution has not made a determination with respect to the licensure or certification requirement, an institution will be required to disclose a statement to that effect.

Burden Calculation: We anticipate that most institutions will provide this information electronically to enrolled and prospective students regarding their distance education or correspondence courses. We estimate that the six of the seven public disclosure requirements would take institutions an average of 15 hours to research, develop, and post on a Web site. We estimate that 1,172 public institutions will require 17,580 hours to research, develop, and post on a Web site the required public disclosures (1,172 institutions \times 15 hours). We estimate that 761 private, not-for-profit institutions will require 11,415 hours to research, develop, and post on a Web site the required public disclosures (761 institutions \times 15 hours). We estimate that 368 private, for-profit institutions will require 5,520 hours to research, develop, and post on a Web site the required public disclosures (368 institutions \times 15 hours).

The estimated burden for § 668.50(b)(1) through (6) is 34,515 hours under OMB Control Number 1845–0145.

After reviewing the comments that were received we are adding 100 hours of burden per program specifically pertaining to the disclosure requirements for the prerequisites for professional licensure or certification. We estimate that 1,172 programs or five percent of the 23,434 distance education or correspondence programs at the affected institutions will require the professional licensure or certification disclosure information. We estimate that there will be 564 programs at public institutions which will require 56,400 hours (564 × 100 hours = 56,400) for the research and development of this required public disclosure. We estimate that there will be 330 programs at private, not-for-profit institutions which will require 33,000 hours (330 × 100 hours = 33,000) for the research and development of this required public disclosure. We estimate that there will be 278 programs at private, for-profit institutions which will require 27,800 hours (278 × 100 hours = 27,800) for the research and development of this required public disclosure.

The estimated burden for § 668.50(b)(7) is 117,200 hours under OMB Control Number 1845–0145.

Individualized Disclosures

Under § 668.50(c)(1)(i), an institution will be required to provide an individualized disclosure to prospective students when it determines a program offered solely through distance education or correspondence courses

does not meet licensure or certification prerequisites in the State of the student’s residence.

Under § 668.50(c)(1)(ii), an institution will be required to provide an individualized disclosure to both enrolled and prospective students within 30 days of when it becomes aware of any adverse action initiated by a State or an accrediting agency related to the institution’s programs offered through distance education or correspondence courses; or within seven days of the institution’s determination that a program ceases to meet licensure or certification prerequisites of a State.

For prospective students who receive any individualized disclosure and subsequently enroll, § 668.50(c)(2) will require an institution to obtain an acknowledgment from the student that the communication was received prior to the student’s enrollment in the program.

Burden Calculation: We anticipate that institutions will provide this information electronically to enrolled and prospective students regarding their distance education or correspondence courses. We estimate that institutions will take an average of 2 hours to develop the language for the individualized disclosures. We estimate that it will take an additional average of 4 hours for the institution to individually disclose this information to enrolled and prospective students for a total of 6 hours of burden to the institutions. We estimate that five percent of institutions will meet the criteria to require these individual

disclosures. We estimate that 59 public institutions will require 354 hours to develop the language for the disclosures and to individually disclose this information to enrolled and prospective students (59 institutions × 6 hours). We estimate that 38 private, not-for-profit institutions will require 228 hours to develop the language for the disclosures and to individually disclose this information to enrolled and prospective students (38 institutions × 6 hours). We estimate that 18 private, for-profit institutions will require 108 hours to develop the language for the disclosures and to individually disclose this information to enrolled and prospective students (18 institutions × 6 hours).

The total estimated burden for § 668.50(c) is 690 hours under OMB Control Number 1845–0145.

The combined total estimated burden for § 668.50 is 152,405 (34,515 + 117,200 + 690) hours under OMB Control Number 1845–0145.

Consistent with the discussion above, the following chart describes the sections of the final regulations involving information collections, the information being collected, and the collections that the Department will submit to OMB for approval and public comment under the PRA, and the estimated costs associated with the information collections. The monetized net costs of the increased burden on institutions, lenders, guaranty agencies, and borrowers, using BLS wage data, available at www.bls.gov/ncs/ect/sp/ecsuphst.pdf, is \$5,576,251 as shown in the chart below. This cost was based on an hourly rate of \$36.55 for institutions.

COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB control number and estimated burden [change in burden]	Estimated costs
§ 600.9	The regulations specify that, for any foreign additional location at which 50 percent or more of an educational program is offered, or will be offered, and any foreign branch campus, an institution would be required to report the establishment or operation of the foreign additional location or branch campus to the State in which the main campus of the institution is located at least annually, or more frequently if required by the State.	1845–0144—This is a new collection. We estimate that the burden would increase by 160 hours.	\$5,848
§ 668.50(b)	The regulations require institutions to produce disclosures to enrolled and prospective students in the institution’s distance education programs or correspondence courses. Seven disclosures must be made publicly available. These disclosures include: (1) Whether the distance education programs are authorized by the State where the student resides, if the institution participate in a state authorization reciprocity agreement and explain consequences of moving to a State where the institution does not meet State authorization requirements; (2) The process for submitting a complaint to the appropriate State agency in the State where the main campus of the institution is located; (3) The process for submitting a complaint if the institution is covered by a State authorization reciprocity agreement and it has such a process;	1845–0145—This is a new collection. We estimate that the burden would increase by 151,715 hours.	5,545,183

COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	OMB control number and estimated burden [change in burden]	Estimated costs
§ 668.50(c)	<p>(4) The disclosure of any adverse action initiated by the institution's State entity related to the distance education program;</p> <p>(5) The disclosure of any adverse action initiated by the institution's accrediting agency related to the distance education program;</p> <p>(6) The disclosure of any refund policy required by any State in which the institution enrolls students;</p> <p>(7) The disclosure of any determination made regarding whether or not the distance education program meets applicable prerequisites for professional licensure or certification in the State where the student resides, if such a determination has been made. If such a determination has not been made, a statement to that effect would be required.</p> <p>The regulations require institutions to produce disclosures to enrolled and prospective students in the institution's distance education programs or correspondence courses. Three disclosures must be made available to individuals. These disclosures include:</p> <p>(1) Notice of an adverse action by the State or accrediting agency related to the distance education program. This disclosure must be provided within 30 days of when the institution becomes aware of the action;</p> <p>(2) Notice of the institution's determination that the distance education program no longer meets the prerequisites for licensure or certification of a State. This disclosure must be provided within 7 days of when the institution makes such a determination.</p>	1845-0145—This is a new collection. We estimate that the burden would increase by 690 hours..	25,220

The total burden hours and change in burden hours associated with each OMB Control number affected by the regulations follows:

Control No.	Total burden hours	Change in burden hours
1845-0144	160	+160
1845-0145	152,405	+152,405
Total ...	152,565	+152,565

Assessment of Educational Impact

In the NPRM we requested comments on whether the regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means 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.

In the NPRM we identified specific sections that may have federalism implications and encouraged State and local elected officials to review and provide comments on the regulations. In the *Public Comment* section of this preamble, we discuss any comments we received on this subject.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

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documents published by the Department.

(Catalog of Federal Domestic Assistance: 84.007 FSEOG; 84.033 Federal Work Study Program; 84.037 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 LEAP; 84.268 William D. Ford Federal Direct Loan Program; 84.379 TEACH Grant Program)

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Dated: December 5, 2016.

John B. King, Jr.,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends 34 CFR parts 600 and 668 as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

■ 2. Section 600.2 is amended by adding, in alphabetical order, a definition of “State authorization reciprocity agreement” to read as follows:

§ 600.2 Definitions.

* * * * *

State authorization reciprocity agreement: An agreement between two or more States that authorizes an institution located and legally authorized in a State covered by the agreement to provide postsecondary education through distance education or correspondence courses to students residing in other States covered by the agreement and does not prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.

* * * * *

■ 3. Section 600.9 is amended by revising paragraph (c) and adding paragraph (d) to read as follows:

§ 600.9 State authorization.

* * * * *

(c)(1)(i) If an institution that meets the requirements under paragraph (a)(1) of this section offers postsecondary education through distance education or correspondence courses to students residing in a State in which the institution is not physically located or in which the institution is otherwise subject to that State’s jurisdiction as determined by that State, except as provided in paragraph (c)(1)(ii) of this section, the institution must meet any of that State’s requirements for it to be legally offering postsecondary distance education or correspondence courses in that State. The institution must, upon request, document the State’s approval to the Secretary; or

(ii) If an institution that meets the requirements under paragraph (a)(1) of this section offers postsecondary education through distance education or correspondence courses in a State that participates in a State authorization reciprocity agreement, and the institution is covered by such agreement, the institution is considered to meet State requirements for it to be legally offering postsecondary distance

education or correspondence courses in that State, subject to any limitations in that agreement and to any additional requirements of that State. The institution must, upon request, document its coverage under such an agreement to the Secretary.

(2) If an institution that meets the requirements under paragraph (a)(1) of this section offers postsecondary education through distance education or correspondence courses to students residing in a State in which the institution is not physically located, for the institution to be considered legally authorized in that State, the institution must document that there is a State process for review and appropriate action on complaints from any of those enrolled students concerning the institution—

(i) In each State in which the institution’s enrolled students reside; or

(ii) Through a State authorization reciprocity agreement which designates for this purpose either the State in which the institution’s enrolled students reside or the State in which the institution’s main campus is located.

(d) An additional location or branch campus of an institution that meets the requirements under paragraph (a)(1) of this section and that is located in a foreign country, *i.e.*, not in a State, must comply with §§ 600.8, 600.10, 600.20, and 600.32, and the following requirements:

(1) For any additional location at which 50 percent or more of an educational program (as defined in § 600.2) is offered, or will be offered, or at a branch campus—

(i) The additional location or branch campus must be legally authorized by an appropriate government authority to operate in the country where the additional location or branch campus is physically located, unless the additional location or branch campus is physically located on a U.S. military base, facility, or area that the foreign country has granted the U.S. military to use and the institution can demonstrate that it is exempt from obtaining such authorization from the foreign country;

(ii) The institution must provide to the Secretary, upon request, documentation of such legal authorization to operate in the foreign country, demonstrating that the foreign governmental authority is aware that the additional location or branch campus provides postsecondary education and that the government authority does not object to those activities;

(iii) The additional location or branch campus must be approved by the institution’s recognized accrediting

agency in accordance with §§ 602.24(a) and 602.22(a)(2)(viii), as applicable;

(iv) The additional location or branch campus must meet any additional requirements for legal authorization in that foreign country as the foreign country may establish;

(v) The institution must report to the State in which the main campus of the institution is located at least annually, or more frequently if required by the State, the establishment or operation of each foreign additional location or branch campus; and

(vi) The institution must comply with any limitations the State places on the establishment or operation of the foreign additional location or branch campus.

(2) An additional location at which less than 50 percent of an educational program (as defined in § 600.2) is offered or will be offered must meet the requirements for legal authorization in that foreign country as the foreign country may establish.

(3) In accordance with the requirements of 34 CFR 668.41, the institution must disclose to enrolled and prospective students at foreign additional locations and foreign branch campuses the information regarding the student complaint process described in 34 CFR 668.43(b), of the State in which the main campus of the institution is located.

(4) If the State in which the main campus of the institution is located limits the authorization of the institution to exclude the foreign additional location or branch campus, the foreign additional location or branch campus is not considered to be legally authorized by the State.

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 4. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474, unless otherwise noted.

§ 668.2 [Amended]

■ 5. Section 668.2 is amended in paragraph (a) by adding to the list of definitions, in alphabetical order, “Distance education”.

■ 6. Section 668.50 is added to subpart D to read as follows:

§ 668.50 Institutional disclosures for distance or correspondence programs.

(a) *General.* In addition to the other institutional disclosure requirements established in this and other subparts, an institution described under 34 CFR 600.9(a)(1) or (b) that offers an

educational program that is provided, or can be completed solely through distance education or correspondence courses, excluding internships and practicums, must provide the information described in paragraphs (b) and (c) of this section to enrolled and prospective students in that program.

(b) *Public disclosures.* An institution described under 34 CFR 600.9(a)(1) that offers an educational program that is provided, or can be completed solely through distance education or correspondence courses, excluding internships and practicums, must make available the following information to enrolled and prospective students of such program, the form and content of which the Secretary may determine:

(1)(i) Whether the institution is authorized by each State in which enrolled students reside to provide the program;

(ii) Whether the institution is authorized through a State authorization reciprocity agreement, as defined in 34 CFR 600.2, to provide the program; and

(iii) An explanation of the consequences, including ineligibility for title IV, HEA funds, for a student who changes his or her State of residence to a State where the institution does not meet State requirements or, in the case of a GE program, as defined under § 668.402, where the program does not meet licensure or certification requirements in the State;

(2)(i) If the institution is required to provide a disclosure under paragraph (b)(1)(i) of this section, a description of the process for submitting complaints, including contact information for the receipt of consumer complaints at the appropriate State authorities in the State in which the institution's main campus is located, as required under § 668.43(b); and

(ii) If the institution is required to provide a disclosure under paragraph (b)(1)(ii) of this section, and that agreement establishes a complaint process as described in 34 CFR

600.9(c)(2)(ii), a description of the process for submitting complaints that was established in the reciprocity agreement, including contact information for receipt of consumer complaints at the appropriate State authorities;

(3) A description of the process for submitting consumer complaints in each State in which the program's enrolled students reside, including contact information for receipt of consumer complaints at the appropriate State authorities;

(4) Any adverse actions a State entity has initiated, and the years in which such actions were initiated, related to postsecondary education programs offered solely through distance education or correspondence courses at the institution for the five calendar years prior to the year in which the disclosure is made;

(5) Any adverse actions an accrediting agency has initiated, and the years in which such actions were initiated, related to postsecondary education programs offered solely through distance education or correspondence courses at the institution for the five calendar years prior to the year in which the disclosure is made;

(6) Refund policies with which the institution is required to comply by any State in which enrolled students reside for the return of unearned tuition and fees; and

(7)(i) The applicable educational prerequisites for professional licensure or certification for the occupation for which the program prepares students to enter in—

(A) Each State in which the program's enrolled students reside; and

(B) Any other State for which the institution has made a determination regarding such prerequisites;

(ii) If the institution makes a determination with respect to certification or licensure prerequisites in a State, whether the program does or does not satisfy the applicable

educational prerequisites for professional licensure or certification in that State; and

(iii) For any State as to which the institution has not made a determination with respect to the licensure or certification prerequisites, a statement to that effect.

(c) *Individualized disclosures.* (1) An institution described under 34 CFR 600.9(a)(1) or (b) that offers an educational program that is provided, or can be completed solely through distance education or correspondence courses, excluding internships or practicums, must disclose directly and individually—

(i) Prior to each prospective student's enrollment, any determination by the institution that the program does not meet licensure or certification prerequisites in the State of the student's residence; and

(ii) To each enrolled and prospective student—

(A) Any adverse action initiated by a State or an accrediting agency related to postsecondary education programs offered by the institution solely through distance education or correspondence study within 30 days of the institution's becoming aware of such action; or

(B) Any determination by the institution that the program ceases to meet licensure or certification prerequisites of a State within 14 calendar days of that determination.

(2) For a prospective student who received a disclosure under paragraph (c)(1)(i) of this section and who subsequently enrolls in the program, the institution must receive acknowledgment from that student that the student received the disclosure and be able to demonstrate that it received the student's acknowledgment.

(Authority: 20 U.S.C. 1092)

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Part V

Department of Homeland Security

8 CFR Parts 212, 214, 245, et al.

Classification for Victims of Severe Forms of Trafficking in Persons;
Eligibility for "T" Nonimmigrant Status; Final Rule

DEPARTMENT OF HOMELAND SECURITY**8 CFR Parts 212, 214, 245, and 274a**

[CIS No. 2507–11; DHS Docket No. USCIS–2011–0010]

RIN 1615–AA59

Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.**ACTION:** Interim rule with request for comments.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing the requirements and procedures for victims of human trafficking seeking T nonimmigrant status. The Secretary of Homeland Security (Secretary) may grant T nonimmigrant status (commonly known as a “T visa”) to aliens who are or were victims of severe forms of trafficking in persons, who are physically present in the United States on account of such trafficking, who have complied (unless under 18 years of age or unable to cooperate due to trauma) with any reasonable request by a Federal, State, or local law enforcement agency (LEA) for assistance in an investigation or prosecution of acts of trafficking in persons or the investigation of other crimes involving trafficking, and who would suffer extreme hardship involving unusual and severe harm if removed from the United States. In this interim rule, DHS is amending its regulations to conform with legislation enacted after the initial rule was published in 2002: the Trafficking Victims Protection Reauthorization Act of 2003 (TVPA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA 2008), and Titles VIII and XII of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).

DHS is also streamlining procedures, responding to public comments on the 2002 interim final rule, and providing guidance for the statutory requirements for T nonimmigrants. The intent is to make sure the T nonimmigrant status regulations are up to date and reflect USCIS adjudicative experience, as well as the input provided by stakeholders.

DATES: *Effective date.* This rule is effective January 18, 2017.

Comment date. Written comments must be submitted on or before February 17, 2017. Comments on the form, form instructions, and information collection revisions in this interim rule must be submitted on or before January 18, 2017.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2011–0010, by *one* of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* You may submit comments directly to U.S. Citizenship and Immigration Services (USCIS) by email at USCISFRComment@uscis.dhs.gov.

Include DHS Docket No. USCIS–2011–0010 in the subject line of the message.

- *Mail:* Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2140. To ensure proper handling, please reference DHS Docket No. USCIS–2011–0010 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.

- *Hand Delivery/Courier:* Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2140. Contact Telephone Number (202) 272–8377.

FOR FURTHER INFORMATION CONTACT:

Elizabeth Dallam, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2099, telephone (202) 272–8377 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

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I. Public Participation

DHS invites interested persons to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim rule. DHS particularly encourages comments from individuals, organizations, and agencies with direct experience handling T nonimmigrant cases or issues. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the interim rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name (U.S. Citizenship and Immigration Services) and DHS Docket No. USCIS–2011–0010 for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See the **ADDRESSES** section above for

information on how to submit comments. Those wishing to submit anonymously should do so electronically at <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received go to <http://www.regulations.gov>.

II. Executive Summary

A. Purpose of the Regulatory Action

The T nonimmigrant status regulations—which include eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant classification (commonly known as the “T visa”¹)—have been in effect since a 2002 interim rule. *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status*, 67 FR 4784 (Jan. 31, 2002) (2002 interim rule). Since the publication of that interim rule, the public has submitted comments on the regulations and Congress has enacted numerous pieces of related legislation. DHS is responding to the public comments on the 2002 interim rule, clarifying requirements based on experience operating the program for more than 14 years, and amending provisions as required by legislation.

1. Need for the Regulatory Action and How the Action Will Meet That Need

Statutory amendments to the Trafficking Victims Protection Act of 2000 (TVPA) require that DHS amend and clarify the eligibility and application requirements to conform to current law. In addition, DHS needs to respond to public comments on the 2002 interim rule. DHS accomplishes both actions in this interim rule.

2. Statement of Legal Authority for the Regulatory Action

The TVPA authorizes various means to combat trafficking in persons,

¹ T nonimmigrant status is known as the “T visa” colloquially, however “T visa” is not an entirely accurate term in light of the statutory scheme. Principal victims granted T–1 nonimmigrant status may seek derivative T nonimmigrant status for certain family members. 8 CFR 214.11(o)(1). Some of these family members may reside outside the United States and, if eligible, can join the victim in the United States. Before family members with approved derivative T nonimmigrant status can enter the United States, the family members must first undergo processing with the Department of State at a U.S. Embassy or Consulate to obtain a T visa abroad. This is known as consular processing. USCIS will decide on the basis of the application filed by the principal T–1 nonimmigrant whether an overseas family member qualifies for derivative T nonimmigrant status. The Department of State will then separately determine that family member’s eligibility to receive a visa in order to enter the United States.

including tools to effectively prosecute and punish perpetrators of trafficking in persons, and protection to victims of trafficking through immigration relief and access to Federal public benefits. See Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), div. A, TVPA, Public Law 106–386, 114 Stat. 1464 (Oct. 28, 2000), as amended by TVPRA 2003, Public Law 108–193, 117 Stat. 2875 (Dec. 19, 2003); VAWA 2005, Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006); Technical Corrections to VAWA 2005, Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006); TVPRA 2008, Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008), and VAWA 2013, Public Law 113–4, titles viii, xii, 127 Stat. 54 (Mar. 7, 2013); Justice for Victims of Trafficking Act of 2015 (JVTA), Public Law 114–22, 129 Stat. 227 (May 29, 2015). The Immigration and Nationality Act of 1952 (INA), as amended, permits the Secretary to grant T nonimmigrant status to aliens who are or were victims of a severe form of trafficking in persons, who have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime, or who are exempt from this compliance requirement, and who would suffer extreme hardship involving unusual and severe harm if removed from the United States. See INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T).

B. Summary of the Major Provisions of the Rule

1. Statutory Changes

The legislative changes to the T nonimmigrant statute addressed in this interim rule are as follows:

- Expanding the definition and discussion of LEA to include State and local law enforcement agencies (added by VAWA 2005). See INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa); new 8 CFR 214.11(a).
- Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons, from 15 years to 18 years of age (added by TVPRA 2003). See INA section 101(a)(15)(T)(i)(III)(cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(cc); new 8 CFR 214.11(b)(3)(i) and (h)(4)(ii).
- In cases where the applicant is unable, due to physical or psychological trauma, to comply with any reasonable request by an LEA, exempting the

applicant from the requirement to comply (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(b)(3)(ii) and (h)(4)(i).

- Expanding the regulatory definition of physical presence on account of trafficking to include those whose entry into the United States was for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); new 8 CFR 214.11(b)(2) and (g)(1).

- Allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members (added by TVPRA 2003). *See* INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I); new 8 CFR 214.11(k)(1)(ii).

- Providing age-out protection for a principal applicant's eligible family members under 21 years of age (added by TVPRA 2003). *See* INA section 214(o)(4), 8 U.S.C. 1184(o)(4); new 8 CFR 214.11(k)(5)(ii).

- Providing age-out protection for principal applicants under 21 years of age (added by TVPRA 2003). *See* INA section 214(o)(5), 8 U.S.C. 1184(o)(5); new 8 CFR 214.11(k)(5)(iii).

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years of age and parents as eligible family members if the family member faces a present danger of retaliation as a result of the principal applicant's escape from a severe form of trafficking or cooperation with law enforcement (added by TVPRA 2008). *See* INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii) and (k)(5)(iv).

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the principal's escape from a severe form of trafficking or cooperation with law enforcement (added by VAWA 2013). *See* INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii).

- Permitting all derivative T nonimmigrants, if otherwise eligible, to apply for adjustment of status under INA section 245(l), 8 U.S.C. 1255(l). *See* new 8 CFR 245.23(b)(2).

- Removing the requirement that eligible family members must face

extreme hardship if the family member is not admitted to the United States or was removed from the United States (removed by VAWA 2005). *See* previous INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii); 8 CFR 214.11(o)(1)(ii)

- Exempting T nonimmigrant applicants from the public charge ground of inadmissibility (added by TVPRA 2003). *See* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A); new 8 CFR 212.16(b).

- Limiting duration of T nonimmigrant status to 4 years but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status (VAWA 2005 and TVPRA 2008). *See* INA section 214(o)(7)(B), 8 U.S.C. 1184(o)(7)(B); new 8 CFR 214.11(c)(1) and (l).

- Implementing a technical fix to clarify that presence in the Commonwealth of the Northern Mariana Islands after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status (added by VAWA 2013). *See* VAWA 2013, tit. viii, section 809; section 705(c) of the Consolidated Natural Resources Act of 2008 (CNRA), Title VII, Public Law 110–229, 122 Stat. 754 (2008); new 8 CFR 245.23(a)(3)(ii).

- Conforming the regulatory definition of sex trafficking to the revised statutory definition in section 103(10) of the TVPA (22 U.S.C. 7102(10)), as amended by section 108(b) of the JVT A, 129 Stat. 239. *See* new 8 CFR 214.11(a).

2. Discretionary Changes

In addition to the necessary statutory changes, DHS makes the following changes and clarifications related to the T nonimmigrant classification in this interim rule:

- Specifies how USCIS will exercise its waiver authority with respect to criminal inadmissibility grounds; new 8 CFR 212.16(b)(3).

- Discontinues the practice of weighing evidence as primary and secondary in favor of an “any credible evidence” standard; 8 CFR 214.11(f); new 8 CFR 214.11(d)(2)(ii) and (3).

- Provides guidance on the definition of “severe form of trafficking in persons” where an individual has not performed labor or services, or a commercial sex act; new 8 CFR 214.11(f)(1).

- Removes the current regulatory “opportunity to depart” requirement for those who escaped traffickers before law enforcement became involved; 8 CFR 214.11(g)(2).

- Addresses situations where trafficking has occurred abroad, but the applicant can potentially meet the physical presence requirement; new 8 CFR 214.11(g)(3).

- Eliminates the requirement that an applicant provide three passport-style photographs; 8 CFR 214.11(d)(2)(ii); new 8 CFR 214.11(d)(4).

- Removes the filing deadline for applicants victimized prior to October 28, 2000; 8 CFR 214.11(d)(4).

- Announces forthcoming updates to the forms used to apply for T nonimmigrant status.

- Updates the regulation to reflect the creation of DHS, and to implement current standards of regulatory organization, plain language, and USCIS efforts to transform its customer service practices.

C. Costs and Benefits

With this interim rule, DHS incorporates in its regulations several statutory provisions associated with the T nonimmigrant status that have been enacted since 2002 and that DHS already has been implementing. While codifying these changes in the DHS regulations will not result in additional quantitative costs or benefits, ensuring that DHS regulations are consistent with applicable legislation will provide qualitative benefits. In addition, DHS will implement changes made necessary by VAWA 2013, and other discretionary changes. DHS estimates the changes made in this interim rule will result in the following costs:

- A per application opportunity cost for the T–1 principal alien of \$33.92 to complete and submit the Application for Family Member of T–1 Recipient, Form I–914 Supplement A, in order to apply for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the principal's escape from a severe form of trafficking and/or cooperation with law enforcement. The children of the principal's derivative relatives will be admitted under the T–6 classification. DHS has no basis to project the population of children of derivative family members that may be eligible for the new T–6 nonimmigrant classification.

- An individual total cost of \$89.70 for applicants who become eligible to apply for principal T–1 nonimmigrant status when the filing deadline for those trafficked before October 28, 2000 is removed. The total cost includes the opportunity cost associated with filing the Application for T Nonimmigrant Status, Form I–914, and the time and travel costs associated with submitting

biometrics. If the applicant includes the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS has no way of predicting how many individuals physically present in the United States may now be eligible for T-1 nonimmigrant status as a result of removing the filing deadline.

- An individual total cost of \$89.70 for those applicants trafficked abroad that will now become eligible to apply for T nonimmigrant status due to DHS's expanded interpretation of the physical presence requirement. As previously described, the total cost includes both the opportunity of time cost and estimated travel cost incurred with filing Form I-914 and submitting biometrics. If the applicant includes the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS is unable to project the size of this new eligible population.

Based on recent filing volumes, DHS estimates total cost savings of \$56,130 for T nonimmigrant applicants and their eligible family members as a result of no longer being required to submit three passport-style photographs with their T nonimmigrant applications. In addition, the interim rule will provide various qualitative benefits for victims of trafficking, their eligible family members, and law enforcement agencies investigating trafficking incidents. These qualitative benefits result from making the T nonimmigrant classification more accessible, reducing some burden involved in applying for this status in certain cases, and clarifying the process by which DHS adjudicates and administers the T nonimmigrant benefit.

D. Public Comments

DHS welcomes public comment on all aspects of this interim final rule.

III. Background and Legislative Authority

Congress created the T nonimmigrant status in the TVPA. See Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), div. A, TVPA, Public Law 106-386, 114 Stat. 1464 (Oct. 28, 2000). Congress has since amended the TVPA, including the T nonimmigrant status provisions, several times: TVPRA 2003, Public Law 108-193, 117 Stat. 2875 (Dec. 19, 2003); VAWA 2005, Public Law 109-162, 119 Stat. 2960

(Jan. 5, 2006); Technical Corrections to VAWA 2005, Public Law 109-271, 120 Stat. 750 (Aug. 12, 2006); TVPRA 2008, Public Law 110-457, 122 Stat. 5044 (Dec. 23, 2008); VAWA 2013, Public Law 113-4, titles viii, xii, 127 Stat. 54 (Mar. 7, 2013); JVTA, Public Law 114-22, 129 Stat. 227 (May 29, 2015).

The TVPA and subsequent reauthorizing legislation provide various means to combat trafficking in persons, including tools to effectively prosecute and punish perpetrators of trafficking in persons, and protect victims of trafficking through immigration relief and access to federal public benefits. The T nonimmigrant status is one type of immigration relief available to victims of severe forms of trafficking in persons who assisted LEAs in the investigation or prosecution of the perpetrators of these crimes.

The INA permits the Secretary to grant T nonimmigrant status to individuals who are or were victims of a severe form of trafficking in persons, who have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of crime involving acts of trafficking in persons (or who are under 18 years of age or are unable to cooperate due to physical or psychological trauma).² See INA Section 101(a)(15)(T)(i)(I), (III), 8 U.S.C. 1101(a)(15)(T)(i)(I), (III). Applicants for T nonimmigrant status must be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, on account of trafficking in persons, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking. See INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II). In addition, an applicant must demonstrate that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. See INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV). T nonimmigrant status allows eligible individuals to remain in the United States for a period of not more than 4 years (with the possibility for extensions), receive work

² The primary victim of trafficking is also referred to as the "principal T nonimmigrant" or "principal alien" and receives T-1 nonimmigrant status, if eligible. The principal alien may be permitted to apply for certain family members who are referred to as "eligible family members" or "derivative T nonimmigrants" and when approved those family members receive T-2, T-3, T-4, T-5, or T-6 nonimmigrant status. The term derivative is used in this context because the family member's eligibility derives from that of the primary nonimmigrant.

authorization, receive federal public benefits, and apply for derivative status for certain eligible family members. See INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii); INA section 214(o), 8 U.S.C. 1184(o); 8 U.S.C. 1641(c)(4).

On January 31, 2002, the former Immigration and Naturalization Service (INS)³ published an interim final rule in the **Federal Register** titled *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status* implementing the T nonimmigrant status provisions of the TVPA. 67 FR 4784. INS outlined the eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant status. *Id.* Most of the provisions in this rule have been in effect since the 2002 interim rule and have been the subject of extensive public comment.⁴ In this rule, DHS is responding to the 14 public submissions with comments on multiple provisions of the 2002 interim rule. No comments were received regarding the procedural aspects of the 2002 interim rule or the good cause arguments put forth in the rule for bypassing notice and comment.

As noted above, DHS also welcomes additional input by stakeholders in response to this action. As explained further in the Administrative Procedure Act section of this rule, DHS is publishing this rule as an interim final rule and requesting additional comment on all aspects of this rulemaking.

IV. Eligibility and Application Requirements, Procedures, and Changes in This Rule

DHS provides a summary of the changes made in this rule in Section II.B. of this preamble above. In this section, DHS describes the changes in greater detail. The discussion is organized generally in the same order as the relevant regulatory provisions in this interim rule, and proceeds as follows:

³ Various functions formerly performed by the INS, or otherwise vested in the Attorney General, were transferred to DHS in March 2003. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1103(a)(1), (g), 8 U.S.C. 1551 note. Even though INS published the 2002 interim rule, this rule refers to DHS because DHS is now the regulatory actor.

⁴ Since the publication of the 2002 interim rule, DHS has amended the core regulatory provision relating to T nonimmigrant status, 8 CFR 214.11, multiple times. Most of these changes have been minor conforming changes as parts of other actions. See, e.g., *Removal of the Standardized Request for Evidence Processing Timeframe*, 72 FR 19100, 19107 (Apr. 17, 2007); *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status*, 73 FR 75558 (Dec. 12, 2008); *Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands*, 74 FR 55738 (Oct. 28, 2009).

A. Eligibility Requirements for T Nonimmigrant Classification (including core eligibility factors such as victimization, physical presence on account of trafficking in persons, and extreme hardship involving unusual and severe harm upon removal),

B. Application Requirements (include filing deadlines, bona fide determinations, and processes and eligibility for derivative family members),

C. Adjudication and Post-Adjudication (including waivers of inadmissibility, confidentiality requirements, and duration of status), and

D. Filing and Biometric Services Fees. Throughout the discussion, DHS addresses and responds to the public comments received in connection with the 2002 interim rule.

A. Eligibility Requirements for T Nonimmigrant Classification

There are four statutory eligibility requirements for T nonimmigrant status. See INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T). To be eligible, the applicant must meet the following criteria:

- The applicant must be or have been a victim of a severe form of trafficking in persons, as defined in 22 U.S.C. 7102 (section 103 of the TVPA);

- The applicant must be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI),⁵ or at a port-of-entry thereto, on account of such trafficking, including physical presence based on the applicant having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking; and

- The applicant must meet one of the following criteria:

- Has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime; or

- Is under 18 years of age; or
- Is unable to cooperate with a request due to physical or psychological trauma; and

- The applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

Below DHS addresses each of these requirements in turn.

1. Victim of a Severe Form of Trafficking in Persons

First, an individual applying for classification as a T nonimmigrant must demonstrate that he or she is or was a victim of a severe form of trafficking in persons. See INA section 101(a)(15)(T)(i)(I), 8 U.S.C.

1101(a)(15)(T)(i)(I). In the 2002 interim rule, DHS defined “victim of a severe form of trafficking in persons” consistent with the statutory definitions in TVPA section 103(9) and (14), 22 U.S.C. 7102(9), (14). Under the interim rule, an applicant must show that he or she is a victim of one or more of the following:

- Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion;
- Sex trafficking in which the person induced to perform such an act is under the age of 18; or
- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

See 8 CFR 214.11(a); see also TVPA section 103(9), 22 U.S.C. 7102(9).

DHS received public comments on the definition of “victim of a severe form of trafficking in persons,” and responds as follows:

- DHS clarifies that the term “involuntary servitude,” as used in 22 U.S.C. 7102(9), encompasses the use of psychological coercion. See 8 CFR 214.11(a).

- DHS clarifies that an individual need not perform labor, services, or a commercial sex act to meet the definition of a “victim of a severe form of trafficking in persons.” New 8 CFR 214.11(f)(1).

- DHS explains how a victim can meet the evidentiary burden to show victimization, even when the victim did not perform labor, services or a commercial sex act.

In order to simplify the regulatory text, DHS used and defined the term “victim” in this rule as shorthand to refer to “an alien who is or has been subject to a severe form of trafficking in persons,” as defined by TVPA section 103 (22 U.S.C. 7102). See 8 CFR 214.11(a).

a. Definition of “Involuntary Servitude”

DHS received four comments about the definition of “involuntary servitude” in 8 CFR 214.11(a). Commenters maintained that the

definition appeared to be too narrow because it cited *United States v. Kozminski*, 487 U.S. 931, 952 (1988). In *Kozminski*, the Supreme Court had occasion to construe “involuntary servitude” as used in the criminal provisions at 18 U.S.C. 241 (conspiracy to interfere with free exercise of constitutional rights, including Thirteenth Amendment guarantee against involuntary servitude) and 1584 (knowingly and willfully holding to involuntary servitude . . . any other person for any term). The Court, considering the historical context of the term as used in those criminal provisions, held that involuntary servitude excluded compulsion by psychological coercion.

The commenters stated that Congress intended the definition of involuntary servitude as used in 22 U.S.C. 7102(9) and defined in part in 22 U.S.C. 7102(6), to go beyond the *Kozminski* construction, and recommended striking the citation from the definition. We agree. In the 2002 interim rule, DHS did not intend to exclude psychological coercion from the definition of involuntary servitude. The citation to *Kozminski* in the definition was qualified by the word “includes,” and therefore did not limit the definition of involuntary servitude by excluding psychological coercion. Additionally, in the 2002 interim rule’s preamble, DHS specifically said that the TVPA definition of “forced labor” was meant to “expand[] the definition of involuntary servitude contained in *Kozminski*.” 67 FR 4784, at 4786. To avoid the potential for confusion, DHS is removing the citation to *Kozminski* from the definition of “involuntary servitude.”

b. Performing Labor, Services, or Commercial Sex Is Not Necessary

In this interim rule, DHS is clarifying that an individual need not actually perform labor, services, or a commercial sex act to meet the definition of a “victim of a severe form of trafficking in persons.” See new 8 CFR 214.11(f)(1).

In the 2002 interim rule, DHS explained that it interpreted the term “severe form of trafficking in persons” to require a particular means (force, fraud, or coercion) and a particular end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery). See 67 FR at 4786 (construing the statutory definition at 22 U.S.C. 7102(9) and (14)). However, DHS did not discuss how it would address cases involving the means of force, fraud, or coercion and the intended ends of sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, where those illicit

⁵ The federalization of the CNMI immigration law took place on November 28, 2009. See Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110–229, title VII, 122 Stat. 754 (2008). This effectively replaced the CNMI’s immigration laws with the INA and other applicable United States immigration laws, with few exceptions.

ends are never realized. This would include, for example, a situation where the victim was recruited and came to the United States through force, fraud or coercion for the purpose of a commercial sex act, but the victim was rescued or escaped before performing a commercial sex act.

The definition of “severe form of trafficking in persons” at 22 U.S.C. 7102(9) includes the phrase “for the purpose of” subjection to a form of human trafficking; *i.e.*, the applicant may establish that he or she was recruited, transported, harbored, provided, or obtained through force, fraud, or coercion for the purpose of subjecting him or her to a commercial sex act, involuntary servitude, peonage, debt bondage, or slavery.⁶ The statutory

⁶Note that the labor trafficking prong of the statutory definition of “severe forms of trafficking in persons” at 22 U.S.C. 7102(9)(B) directly uses the phrase “for the purpose of,” whereas the sex trafficking prong of the statutory definition does not. The sex trafficking prong, however, incorporates the definition of “sex trafficking” at 22 U.S.C. 7102(10) (“The term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act”), which employs the phrase “for the purpose of.” Although the statute requires the commercial sex act to be “induced,” the statute does not expressly provide that the inducement must be successful in order for a victim to satisfy the definition, nor does the term “induce” necessarily require that the desired end be achieved. *See, e.g., United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004) (“We have previously held that the term ‘induce’ in [18 U.S.C.] § 2422 is not ambiguous and has a plain and ordinary meaning. . . . By negotiating with the purported father of a minor, Murrell attempted to stimulate or cause the minor to engage in sexual activity with him. Consequently, Murrell’s conduct fits squarely within the definition of ‘induce.’”) (citations omitted); *cf. NLRB v. Associated Musicians of N.Y.*, 226 F.2d 900, 904 (2d Cir. 1955) (holding that “common understanding of the meaning” of “induce,” as used in the National Labor Relations Act, does not require the inducement to be successful). Moreover, the two prongs of the statutory definition should be read to fit harmoniously as part of “a symmetrical and coherent statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). We can discern neither a logical reason nor any congressional design to designate inchoate labor trafficking offenses as “severe forms of trafficking in persons,” but not so designate inchoate sex trafficking offenses. To the extent there is ambiguity in the statutes, it is reasonable for the Department to adopt the more expansive conception of “victim” for purposes of the T visa regime given the protection and humanitarian aims of the statutory scheme. *Cf., e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (construing “any lingering ambiguities” in Refugee Act of 1980 so as to “increase[] . . . flexibility” in protecting refugees in light of statute’s humanitarian aims); *Flores v. USCIS*, 718 F.3d 548, 554 (6th Cir. 2013) (observing that court’s more expansive reading of temporary protected status (TPS) provision is supported by clear congressional intent “to protect a class of people . . . due to an extraordinary circumstance”); *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004) (observing that “[i]n determining congressional intent” when seeking to resolve ambiguities in LIFE Act (“V visa” program),

definition does not require a victim to have actually performed labor, services, or a commercial sex act to be considered a victim of a severe form of trafficking, for T nonimmigrant status eligibility purposes.

The TVPA did not elaborate on the term “for the purpose of subjection to” a form of human trafficking. We therefore consider common definitions of the key terms:

- *Purpose*: “something set up as an object or an end to be attained.” *See Merriam-Webster Online Dictionary*, 2011, <http://merriam-webster.com>. Also defined as “an objective, goal, or end; specifically the business activity that a corporation is chartered to engage in.” *See Black’s Law Dictionary* (7th ed. 2000).

- *Subjection*: “the act of subjecting someone to something.” *See Black’s Law Dictionary* (7th ed. 2000). “Subjecting” is also defined as “bringing under control or dominion” or “causing or forcing to undergo or endure.” *See Merriam-Webster Online Dictionary*, 2011, <http://merriam-webster.com>.

The concept of “for the purpose of” speaks to the process of attaining an object or end or the intention to attain something, but not the end result. The inclusion of the “for the purpose of” language may reasonably be construed as encompassing situations where labor or commercial sex act has not occurred.

Furthermore, Congress amended the federal criminal code to punish attempts to violate any trafficking-related criminal provision in the same manner as a completed act of trafficking would be punished. *See TVPA* section 112; 18 U.S.C. 1594. The criminal code thus specifically allows for attempts and conspiracy to commit trafficking to be prosecuted. *Id.* The T nonimmigrant status was intended to assist LEAs and provide a tool to, in part, allow for prosecution and stop the traffickers from continuing to enslave human beings. *See TVPA* section 102. Congress intended to provide an incentive for victims to report these crimes by providing for an immigration benefit connected to assistance to LEAs. *Id.*

If victims who have been recruited, harbored, transported, provided, or obtained for the purposes of trafficking (or patronized or solicited in the case of sex trafficking) and have not yet performed any labor, services, or commercial sex acts are not eligible for T nonimmigrant status, Congress’s

“we should adhere to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion”) (quotations marks omitted).

intent in the TVPA to prosecute traffickers would be thwarted. Such an interpretation would hinder victims from coming forward to report trafficking to LEAs and assist with investigations or prosecutions. This could amount to a chilling effect on LEAs’ ability to investigate and prosecute trafficking-related crimes. Since the 2002 interim rule, USCIS has seen far fewer filings than expected. However, based on the Federal Government estimates, the small number of filings is not due to a correspondingly small number of victims in the United States. *See U.S. Department of State, Trafficking in Persons Report* (June 2010). Victims already often find it difficult to report trafficking and work with law enforcement; excluding an entire class of potential victims from T nonimmigrant eligibility could thwart the purpose of the visa and hinder prosecutions. A narrow interpretation would also seem to punish a victim who was rescued by an LEA or escaped on their own before any labor, services or commercial sex acts were performed. That result is illogical and inconsistent with Congressional intent. Therefore, those who have been recruited, harbored, transported, provided, or obtained for the purposes of trafficking (or patronized or solicited in the case of sex trafficking) are eligible for T nonimmigrant status in this rule, irrespective of the actual performance of any labor, services or commercial sex acts.

Below, DHS includes a discussion of how victims can meet the evidentiary burden to show victimization when they did not perform labor, services or a commercial sex act.

c. Evidence of Victimization

An applicant can meet the victimization requirement in a number of ways. In the 2002 interim rule, DHS required the submission of primary or secondary evidence to establish victimization. *See* 8 CFR 214.11(f). Primary evidence of victimization included an LEA endorsement on the Declaration of a Law Enforcement Officer for Victim of Trafficking in Persons, Form I–914 Supplement B to the Application for T Nonimmigrant Status,⁷ Form I–914, and a grant of Continued Presence from U.S. Immigration and Customs Enforcement (ICE) under 28 CFR 1100.35. Secondary evidence included any credible evidence that demonstrated that the applicant is or has been a victim of a

⁷Currently USCIS Form I–914. Available online at <http://www.uscis.gov/files/form/i-914.pdf>.

severe form of trafficking in persons, including evidence that explained the nonexistence or unavailability of the primary evidence.

As discussed later in this preamble, DHS received comments suggesting that the interim rule made the LEA endorsement mandatory because it was “primary” evidence. Commenters also thought the LEA endorsement created an imbalance between the needs of law enforcement and the rights of victims.

DHS amends the regulations in this rule to discontinue giving the two types of evidence different and unequal weight. *See* new 8 CFR 214.11(d)(3). Under new 8 CFR 214.11(d)(2)(ii), USCIS will accept any credible evidence of victimization, including but not limited to an LEA endorsement or a grant of Continued Presence. Following this change, USCIS will review applications where there is no LEA endorsement or grant of Continued Presence and give equal weight to other credible evidence based on the TVPA goals of protecting victims and enhancing law enforcement’s ability to investigate and prosecute human trafficking. *See* TVPA section 102. By making the LEA endorsement just one type of evidence of victimization, DHS clarifies a misconception of the LEA role in the T nonimmigrant process. An LEA does not determine if the victim meets the “severe form of trafficking definition” under Federal law. That is a determination that is made by USCIS.

Except in instances of sex trafficking involving victims under 18 years of age, severe forms of trafficking in persons must involve both a particular means (force, fraud, or coercion) and a particular end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery) or intended particular end. *See* new 8 CFR 214.11(f)(1). The applicant must demonstrate both elements, regardless of the evidence submitted.

As noted above, if the victim has not yet actually performed labor, services or a commercial sex act, he or she must establish that the trafficker acted “for the purpose of” subjecting the victim to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery. *See* new 8 CFR 214.11(f)(1). The clearest evidence of this purpose would be that the victim did in fact perform labor, services, or commercial sex acts. In the absence of that evidence, a victim can submit any credible evidence from any reliable source that shows the purpose for which the victim was recruited, transported, harbored, provided or obtained. Examples of evidence that may be submitted to demonstrate the trafficker’s purpose include, but are not

limited to: Correspondence with the trafficker, evidence from an LEA, trial transcripts, court documents, police reports, news articles, and affidavits. *See* new 8 CFR 214.11(f)(1).

2. Physical Presence on Account of Trafficking in Persons

Second, an alien applying for T nonimmigrant status must demonstrate physical presence in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of trafficking. *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II).

In this interim rule, DHS makes the following changes and clarifications:

- If a victim departed from the United States but the victim is allowed reentry into the United States to participate in an investigative or judicial process⁸ associated with an act or a perpetrator of trafficking, USCIS will consider the victim to have met the physical presence requirement. New 8 CFR 214.11(g)(1)(v) and (2).

- If the trafficking occurred abroad, but the victim is allowed entry into the United States for the purpose of participating in an investigative or judicial process associated with an act or a perpetrator of trafficking, USCIS will consider the victim to have met the physical presence requirement. New 8 CFR 214.11(g)(1)(v) and (3).

- If the victim escaped a trafficker before an LEA became involved in the matter, DHS will no longer require the victim to show that he or she did not have a clear chance to leave the United States, or an “opportunity to depart.” New 8 CFR 214.11(g)(1).

- Where a victim is allowed entry into the United States to participate in

⁸ Congress used different language in INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II), than in INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), which specifically requires the LEA to “certify that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity.” Congress could have inserted “prosecution” in INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II), as it did in INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa), and INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), but did not. Instead it used the broader concept of “judicial processes.” DHS does not interpret the phrase “judicial processes” as referring only to criminal investigations or prosecutions, nor will DHS require LEA “sponsorship.” For example, if DHS were to parole a victim to pursue civil remedies associated with an act or perpetrator of trafficking, *see, e.g.*, 18 U.S.C. 1595, the applicant may potentially meet this physical presence requirement. DHS does not interpret this provision to require the victim enter the United States through an LEA sponsored entry, such as Significant Public Benefit Parole, although practical use of this parole may be the most common way these applicants enter the United States.

an investigative or judicial process associated with an act or a perpetrator of trafficking, the victim must show documentation of entry through a legal means such as parole and must submit evidence that the entry is for the purpose of participation in investigative or judicial processes associated with an act or perpetrator of trafficking. New 8 CFR 214.11(g)(3). DHS discusses each change in turn below.

a. LEA Returns a Victim to the United States

DHS received six comments suggesting that if a victim leaves the United States and then returns to the United States for an investigation or prosecution, USCIS should consider the victim to have met the physical presence requirement. DHS agrees that victims who left but who are allowed valid reentry into the United States for the purposes of an investigation or prosecution meet the physical presence requirement. Moreover, TVPRA 2008 amended section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), to include physical presence on account of the victim having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or perpetrator of trafficking. *See* TVPRA 2008 section 201(a)(1)(C). DHS codifies this change in this rule at new 8 CFR 214.11(b)(2) and 214.11(g)(1)(v).

In the 2002 interim rule, DHS presumed that individuals who have traveled outside of the United States and then returned are not here on account of trafficking in persons. To overcome this presumption, an applicant must show that his or her presence in the United States is the result of continued victimization or a new incident of a severe form of trafficking in persons. *See* 8 CFR 214.11(g)(3). DHS clarifies in this rule that the presumption does not apply when the victim who previously left the United States is allowed reentry in order for the victim to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking. *See* new 8 CFR 214.11(g)(2)(iii).

b. Victim Who Has Been Trafficked Abroad Is Allowed Entry Into the United States

The physical presence language introduced in TVPRA 2008 broadens the physical presence requirement. It applies not only to valid reentry to the United States as discussed above, but also to initial entry to the United States to participate in investigative or judicial processes associated with trafficking.

For these types of cases, DHS has identified two primary examples where a victim may qualify for T nonimmigrant status:

- When trafficking occurred in the United States or the victim was physically present in the United States on account of trafficking, but the victim has left the United States and is allowed valid reentry into the United States for participation in investigative or judicial processes associated with trafficking; or
- When trafficking occurred outside the United States, but the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes associated with trafficking.

DHS anticipates limited types of cases when trafficking occurred outside the United States that could lead to eligibility for T nonimmigrant status. One type could be when criminal activities occur outside the United States, but the relevant statutes provide for extraterritorial jurisdiction, and the activity involved would meet the Federal definition of “severe forms of trafficking in persons.” Statutes establishing extraterritorial jurisdiction generally require some nexus between the criminal activity and the United States’ interests. For example, under 18 U.S.C. 2423(c), the United States has jurisdiction to investigate and prosecute cases involving citizens or nationals who engage in illicit sexual conduct outside the United States, such as sexually abusing a minor. This offense is referred to as “sex tourism.”

Sex tourism often interplays with crimes of human trafficking. According to the Federal definition of “severe forms of trafficking in persons,” where a minor (*i.e.*, a person under the age of 18) engages in a commercial sex act, that minor meets the definition without having to show force, fraud, or coercion. See TVPA section 103(9), 22 U.S.C. 7102(9). The TVPA definition of “commercial sex act” is any sex act on account of which anything of value is given to or received by any person. TVPA section 103(4), 22 U.S.C. 7102(4). Violations of the sex tourism statute could involve commercial sex acts involving a minor. Such a minor would also meet the Federal definition of a victim of “severe forms of trafficking in persons,” and if the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes associated with trafficking, the victim may qualify for T nonimmigrant status.

Even absent extraterritorial jurisdiction, there are other cases which could lead to eligibility for T nonimmigrant status when the

trafficking occurred outside the United States. DHS understands that the nature of human trafficking crimes often means that traffickers operate internationally and may commit crimes in a number of countries. If the victim is allowed valid entry into the United States in order to participate in investigative or judicial processes, the victim could potentially qualify for T nonimmigrant status. DHS notes that the victim would need to meet every eligibility requirement in order to qualify for T nonimmigrant status and DHS adjudicates every application on a case-by-case basis.

Even before the statutory expansion of the physical presence requirement, it was possible that trafficking that occurred abroad could qualify a victim for T nonimmigrant status. INA section 101(a)(15)(T)(i)(II); 8 U.S.C. 1101(a)(15)(T)(i)(II), allows victims at a port of entry to qualify, so long as they can show that their presence at the port is on account of trafficking. This means that the recruitment, harboring, transportation, provision, or obtaining of a person for a severe form of trafficking that occurs abroad and results in the person’s presence at a port of entry of the United States qualifies a victim for T nonimmigrant status. INA section 101(a)(15)(T)(i)(II); 8 U.S.C. 1101(a)(15)(T)(i)(II). DHS notes that not every instance of trafficking occurring abroad would qualify a victim for T nonimmigrant status. The victim must establish that he or she is now in the United States or at a port of entry on account of trafficking or the victim was allowed valid entry into the United States to participate in a trafficking-related investigation or a prosecution or other judicial process. If a victim of trafficking abroad makes his or her way to the United States and the reason is not related to or on account of the trafficking and the victim was not allowed valid entry to participate in an investigative or judicial process related to trafficking or a trafficker, this victim cannot meet the physical presence requirement and would not be eligible for T nonimmigrant status on account of that trafficking incident.

c. Removal of the “Opportunity To Depart” Requirement

DHS is also amending the former “opportunity to depart” aspect of the physical presence requirement. DHS provided in the 2002 interim rule that the general physical presence requirement can cover applicants who are currently being trafficked, were recently liberated from trafficking, or were subject to trafficking in the past. For those who escaped a trafficker before an LEA became involved, DHS

required in the 2002 interim rule that the applicant show that, evaluated in light of the applicant’s circumstances, he or she did not have a clear chance to leave the United States, or an “opportunity to depart.” 8 CFR 214.11(g)(2). This requirement was intended to ensure that the applicant’s continuing presence in the United States is directly related to the trafficking.

Most commenters on the subject of physical presence objected to USCIS requiring a victim liberated from traffickers to demonstrate that his or her continuing presence in the United States is directly related to the trafficking. Commenters also opposed the requirement that a victim who escaped the traffickers and remains in the United States must show he or she had no clear chance to leave, asserting it is burdensome, vague, and may frustrate congressional intent to protect victims.

Although DHS has tempered this requirement by looking at the opportunity to depart in light of the individual’s circumstances such as trauma, injury, and lack of resources, DHS agrees that this requirement is unnecessary and may be counterproductive. DHS therefore is removing the requirement that an applicant must show that he or she did not have a clear chance to leave (*i.e.*, “opportunity to depart”) the United States.

Notwithstanding this change, every applicant must still establish that they are physically present in the United States on account of trafficking. Section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), requires that a victim be physically present “on account of such trafficking.” Unlike the requirement of victimization, which is phrased in both the present and past tense, the physical presence requirement is only phrased in the present tense. DHS interprets this language to require a consideration of the victim’s current situation, and a consideration of whether the victim can establish that his or her current presence in the United States is on account of trafficking. A victim who is liberated from trafficking is not exempt from the statutory requirement to show that his or her presence is on account of trafficking. Applicants who have not performed labor or services, or a commercial sex act also need to demonstrate physical presence in the United States on account of trafficking.

d. Evidence of Physical Presence on Account of Trafficking in Persons

For those victims demonstrating physical presence on account of “the alien having been allowed entry into the United States,” DHS interprets this language to require the victim’s entry through a lawful means. *See* INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); new 8 CFR 214.11(g)(3). The victim must provide evidence of the lawful entry. New 8 CFR 214.11(g)(3).

DHS does not interpret the phrase “judicial processes” as referring only to criminal investigations or prosecutions, nor will DHS require LEA “sponsorship.” For example, if DHS were to parole a victim to pursue civil remedies associated with an act or perpetrator of trafficking, *see, e.g.*, 18 U.S.C. 1595, the applicant may potentially meet this physical presence requirement. DHS does not interpret this provision to require the victim to enter the United States through an LEA sponsored entry, such as Significant Public Benefit Parole (SPBP).

Practically, SPBP may be the most common way these applicants enter the United States, because United States law enforcement may investigate or prosecute the trafficking crime, and law enforcement could sponsor an individual for SPBP for access to United States courts that would likely have jurisdiction over the related trafficking incidents. In these cases, the victim is in the United States on account of trafficking because DHS facilitated the victim’s entry into the United States for participation in an investigation or prosecution.

The lawful entry must be connected to the victim’s participation in an investigative or judicial process associated with an act or perpetrator of trafficking. The victim must include evidence of the lawful entry and of how he or she entered to participate in an investigative or judicial process associated with an act or perpetrator of trafficking. Evidence could include a Form I-914 Supplement B, or other evidence from an LEA to describe the victim’s participation. The victim can also provide other credible evidence, such as a personal statement, or attach supporting documentation.

When the physical presence requirement is met by the victim’s entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, the victim must still establish his or her eligibility for all the other requirements for T nonimmigrant status. The compliance with the any

reasonable request for assistance requirement would not be met simply by the entry into the United States with the intent to assist the LEA, but by the victim actually complying with any reasonable request by an LEA or meeting an exception to the compliance requirement. The requirement to comply with any reasonable request is an ongoing requirement, meaning that applicants must continue to cooperate with the LEA from the time of their initial application through the time they apply for adjustment of status to lawful permanent resident. *See* new 8 CFR 214.11(h)(1) and (m)(2)(ii)–(iii); 8 CFR 245.23(a)(6)(i). Failure to comply with any reasonable request from the LEA can result in revocation of the T nonimmigrant status. *See* new 8 CFR 214.11(m)(2)(ii)–(iii). However, if the LEA chooses not to pursue an investigation or prosecution, that decision will not affect the applicant’s eligibility so long as the applicant complied with any reasonable LEA request.

DHS notes that victims must also meet the other eligibility requirements, including the requirement that the victim establish that she or he would suffer extreme hardship involving unusual and severe harm upon removal from the United States. 8 CFR 214.11(i). The victim must include evidence of extreme hardship following the guidelines laid out in 8 CFR 214.11(i). One example of where this requirement may be met when the victimization occurred abroad is if the traffickers abroad are now threatening the victim or the victim’s family because the victim is no longer under the trafficker’s control or because the victim is cooperating with an LEA or judicial process in the United States. DHS will make “extreme hardship” determinations in accordance with the law and DHS policy, as discussed below in this preamble.

3. Compliance With Any Reasonable Request

Third, a victim is required to comply with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where an act of trafficking in persons is at least one central reason for the commission of that crime. *See* INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa); new 8 CFR 214.11(b)(3). A “reasonable request for assistance” is defined as “a reasonable request made by an LEA or prosecutor to a victim of a severe form of trafficking in persons to assist an LEA in the

investigation or prosecution of acts of trafficking in persons or the investigation of a crime where an act of trafficking in persons is at least one central reason for the commission of that crime.” 8 CFR 214.11(a).

In this rule, DHS makes the following changes and clarifications:

- Expanding the factors that DHS may consider in the totality of the circumstances test to determine the “reasonableness” of LEA requests. New 8 CFR 214.11(h)(2).
 - Clarifying that DHS will continue to use a “comparably situated crime victims” standard to determine reasonableness, rather than a “subjective trafficked persons” standard.
 - Clarifying that the proper standard to determine “reasonableness” is whether the LEA request was reasonable, not whether the victim’s refusal was unreasonable. New 8 CFR 214.11(m)(2)(ii).
 - Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons from 15 years to 18 years of age. New 8 CFR 214.11(h)(4)(ii).
 - According no special weight to an LEA endorsement and moving to an “any credible evidence” standard. New 8 CFR 214.11(h)(3).
 - In cases where the applicant is unable, due to physical or psychological trauma, to cooperate with any reasonable request by an LEA, exempting the applicant from the requirement to comply. New 8 CFR 214.11(h)(4)(i).
- DHS discusses each change in turn below.

a. Totality of the Circumstances Test To Determine the “Reasonableness” of LEA Requests

In the 2002 interim rule, DHS accounted for situations in which a request made to a victim was not reasonable. *See* 8 CFR 214.11(a). Under that rule, the reasonableness of a request depended on the totality of the circumstances, taking into account general law enforcement and prosecutorial practices, the nature of victimization, and the specific circumstances of the victim, including fear, severe traumatization (both mental and physical), and the age and maturity of young victims. *Id.*

In the 2002 interim rule, DHS sought specific comments on this requirement. Of the total 191 public comments received, 37 comments related to some aspect of this issue. Fifteen commenters commended DHS for adopting a totality

of the circumstances test to determine the reasonableness of an LEA request and for balancing law enforcement needs and the protection of victims. Some commenters appreciated the comprehensiveness of the totality of the circumstances test. Some commenters also provided a broad, non-exhaustive list of factors to be considered when implementing the totality of the circumstances test, including fear of retribution against family members outside the United States for whom foreign law enforcement cannot or will not provide protection. Six commenters also thought the regulations were too vague regarding how long a victim must comply with any reasonable requests for assistance. The commenters urged DHS to take into account circumstances that may delay or limit an applicant's compliance with LEA requests when determining whether an applicant meets the compliance requirement. These circumstances could include responses to trauma and psychological issues, delays necessary to ensure the safety of the applicant or the applicant's family members, delays or difficulties accessing social services, and the time it takes an applicant to build trust with law enforcement.

DHS appreciates the public's input with respect to the "reasonable requests for assistance" requirement. DHS strives to implement the aims of the TVPA while striking the proper balance between the law enforcement need to investigate and prosecute and the need to ensure that victims are not overburdened. DHS includes in this rule almost all of the commenters' suggested factors to consider when evaluating the reasonableness of an LEA request, including factors related to time. *See* new 8 CFR 214.11(h)(2). DHS will evaluate the totality of the circumstances using a broad range of factors, and is not limited by those listed in this rule. *Id.*

b. "Comparably-Situated Crime Victims" Standard

In the 2002 interim rule, DHS noted that it is generally reasonable for an LEA to ask a victim of a severe form of trafficking in persons similar things an LEA would ask other comparably-situated crime victims, thus articulating a "comparably-situated crime victims" standard. 67 FR 4784, at 4788. Some commenters suggested, however, that in the application of the test, DHS could go further by replacing the "comparably-situated crime victims" standard with a "subjective trafficked person" standard that would take into account the unique situation of the particular trafficking victim. DHS has determined, however,

that a "subjective trafficked persons" standard could actually be narrower than the existing "comparably-situated crime victims." 67 FR 4784, at 4788. DHS also notes that many factors of the totality of the circumstances test are unique to trafficking victims.

The definition of "severe forms of trafficking in persons" can be limiting in that elements of force, fraud, and coercion are required. By adopting a "subjective trafficked persons" standard, USCIS would be bound by the federal trafficking definition. The existing comparably-situated crime victim standard can go beyond the scope of the federal trafficking definition to victims of other crimes, such as domestic violence. Law enforcement practice regarding sensitivity to domestic violence victims is long standing and has evolved over the course of several decades. DHS did not limit who it envisioned as a comparably-situated crime victim, intending to keep the evaluation of reasonableness as broad as possible. After considering the comments, DHS has determined that it will retain the reasonableness test and use the comparably-situated crime victim standard in its application, as it properly focuses on the protection of victims and provides more flexibility than the alternative suggested by commenters.

In addition, DHS notes that when comments on the 2002 interim rule were submitted, Congress had not yet added the trauma exemption from compliance with any reasonable requests. In part because of the trauma exemption that Congress enacted following the 2002 interim rule and that is discussed later in this Preamble, DHS sees no need to amend current practice.

c. Proper Standard Is the Reasonableness of the LEA Request

DHS received six comments asserting that USCIS inconsistently implements the statutory requirement that a victim must comply with "any reasonable request for assistance" by sometimes trying to determine whether the victim's refusal to assist was reasonable, instead of whether the request itself was reasonable. The commenters pointed out that the 2002 interim rule discusses the victim's refusal to assist an LEA at page 4788 under, "What is the Law Enforcement Agency Endorsement?" and at 8 CFR 214.11(s)(1)(iv), *Grounds for notice of intent to revoke*. Commenters also suggested the word "reasonable" should be added to Part D (Cooperation of Victim) checklist item of the Declaration of Law Enforcement Officer for Victim of Trafficking in

Persons, Form I-914 Supplement B. The item would then read that the applicant "has complied with reasonable requests for assistance"

DHS agrees that the statute focuses on whether an LEA request was reasonable and not whether a victim unreasonably refused to assist. (DHS notes, however, that whether a request is reasonable can depend on victim-specific factors, such as whether the victim and the victim's family are sufficiently safe or emotionally able to assist law enforcement at any given time.) DHS is amending the revocation standards to reflect the statutory language. New 8 CFR 214.11(m)(2)(iii). DHS has also revised Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B to the Application for T Nonimmigrant Status, Form I-914, to add the term "reasonable" to refer to requests made to a victim.

d. Minors Exempt From Compliance With Any Reasonable Request

DHS received eight comments specific to minors and the requirement for compliance with any reasonable request. These commenters proposed that DHS consider the applicant's age and any developmental delays for minors above the age of 15. Persons under the age of 15 were not required to comply with any reasonable requests for assistance under the 2002 interim rule. The commenters requested special consideration for those between the ages of 15 and 18.

Since the 2002 interim rule, the statute has been amended to exempt from this requirement children under 18 years of age and those who cannot comply with a request for assistance due to physical or psychological trauma. *See* INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(1)(15)(T)(i)(III)(bb) and (cc); new 8 CFR 214.11(b)(3)(i) and (ii). Therefore, there is no longer a population of 15 to 18 year olds to which this comment would apply. *See* new 8 CFR 214.11(b)(3)(i) and 214.11(h)(4)(ii).

e. Evidence of Compliance With Any Reasonable Request

Under the 2002 interim rule, evidence of compliance was weighed as primary evidence or secondary evidence, similar to the evidentiary requirement for victimization. *See* 8 CFR 214.11(h). An LEA endorsement was primary evidence of compliance with reasonable requests. *Id.* Secondary evidence was any credible evidence submitted to explain the nonexistence or unavailability of the primary evidence and to demonstrate

compliance with any reasonable request. *Id.*

DHS received 10 comments relating to the creation of an LEA endorsement, an optional part of an application for T nonimmigrant status. Commenters believed that in practice the endorsement is mandatory since it is primary evidence, and that it creates an imbalance between the needs of law enforcement and the rights of victims. Commenters asserted that the use of an LEA endorsement is not specifically required by statute. Furthermore, commenters believed that Congress did not intend for the LEA endorsement to be required because an endorsement was required in the U nonimmigrant statute concerning victims of certain qualifying criminal activity under INA section 214(p)(1), which includes human trafficking, but not specifically required in the T nonimmigrant statute. Commenters also suggested allowing State or local LEAs to issue an endorsement in addition to Federal LEAs.

DHS is amending the regulations with this rule to discontinue the “primary” and “secondary” evidentiary distinctions in favor of an “any credible evidence” standard. *See* new 8 CFR 214.11(d)(2)(ii) and (3). Under new 8 CFR 214.11(h)(3), USCIS will accept any credible evidence of compliance with reasonable requests, including, but not limited to, an LEA endorsement. *See* new 8 CFR 214.11(d)(3). DHS notes that under the “any credible evidence” standard, the absence of an LEA endorsement will not adversely affect an applicant who can meet the evidentiary burden with the submission of other evidence of sufficient reliability and relevance.

Even though the statute creating T nonimmigrant status did not explicitly require an LEA endorsement, DHS considers such an endorsement a useful and convenient form of evidence, among other types of credible evidence. In TVPRA 2003, Congress added section 214(o)(6) of the INA, 8 U.S.C. 1184(o)(6), which instructs USCIS to consider statements from State and local LEAs that a victim has complied with any reasonable requests for assistance in investigations or prosecutions where trafficking appears to have been involved. *See* TVPRA 2003 section 4(b)(2)(B). TVPRA 2003 also added State and local LEAs to the compliance requirement at section 101(a)(15)(T)(i)(III)(aa) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa). *Id.* TVPRA 2003 endorsed and codified the LEA endorsement process by directing USCIS to consider statements from State and local LEAs. *See* TVPRA 2003

section 4(b)(2)(B), INA section 214(o)(6), 8 U.S.C. 1184(o)(6).

In creating the T nonimmigrant status, Congress intended to provide law enforcement with a tool to combat and prosecute human trafficking and to protect victims of human trafficking. DHS intends to equally balance the goals of law enforcement and victim protection by moving to an “any credible evidence” standard. DHS has amended the evidentiary standard as described above.

This change to an “any credible evidence” standard also clarifies some misconceptions of the LEA role in the T nonimmigrant process. Signing an endorsement does not grant T nonimmigrant status, nor does it lead to automatic approval. Only USCIS can grant T nonimmigrant status after reviewing evidence and completing security and background checks. An “any credible evidence” standard may assist LEAs in better understanding their role in the T nonimmigrant process. This new standard may also result in LEAs being more likely to sign endorsements, increasing the likelihood that T nonimmigrant status will be utilized as the law enforcement tool that it is intended to be. Even in the absence of an LEA endorsement, in order to determine whether a victim meets the “compliance with any reasonable request” requirement, DHS may contact the LEA that is involved in the case at its discretion to document the victim’s compliance (or inability to comply) with reasonable requests for assistance.

Consistent with DHS’ adoption of an any credible evidence standard, this rule also expands the definition of “Law Enforcement Agency (LEA)” to allow for any Federal, State or local law enforcement agency, prosecutor, judge, labor agency, or other authority that has responsibility for the detection, investigation, and/or prosecution of severe forms of trafficking in persons to complete an LEA endorsement. New 8 CFR 214.11(d)(2); 8 CFR 214.11(h)(3). Federal LEAs include but are not limited to: U.S. Attorneys’ Offices, Civil Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); and U.S. Department of Labor. State and local LEAs include but are not limited to: Police departments, sheriff’s offices, district attorney’s offices, human rights commissions, departments of labor, and child protective services. An agency that has the responsibility to detect severe forms of trafficking in persons may be

an LEA even if the agency does not investigate or prosecute acts of trafficking.

Further, commenters suggested that the act of filing an application for T nonimmigrant status amounts to contacting law enforcement and DHS should require no additional action. At a minimum, commenters asked USCIS to ensure that Federal LEAs issue LEA endorsements without undue delay if a prosecution does not proceed as originally charged, a prosecution moves forward for a lesser offense, or a State or local prosecution proceeds in lieu of a Federal prosecution.

Since the regulations were promulgated, INS was dissolved and its responsibilities transferred to several components of DHS. Unlike the Department of Justice (DOJ) or law enforcement components within DHS, such as ICE, USCIS has no authority to investigate or prosecute trafficking. Therefore, applying for T nonimmigrant status with USCIS is not the same as contacting an LEA to report a trafficking crime. DHS cannot assure applicants that LEAs will issue endorsements, but has clarified with this rule that a formal investigation or prosecution is not required in order for an LEA to complete an endorsement. *See* new 8 CFR 214.11(d)(3)(i). DHS has created awareness materials and training for LEAs that describe the LEA role in the process and emphasize that a formal investigation or prosecution is not required to complete an endorsement.

DHS is removing language that described how to obtain an LEA endorsement if the victim has not had contact with an LEA. *See* former 8 CFR 214.11(f)(4). That provision directed applicants to contact the DOJ hotline to file a complaint and be referred to an LEA. This level of specificity is overly-detailed for regulations and it does not provide sufficient flexibility to adapt to changes in the future. Since the publication of the 2002 regulations, DHS and many other Federal agencies and nongovernmental partners have engaged in various public education campaigns and posted information on Web sites, which are better vehicles than regulations for conveying this type of guidance.

Finally, the 2002 interim rule created a requirement that the LEA endorsement be signed by a supervising official responsible for the detection, investigation or prosecution of severe forms of trafficking in persons. *See* 8 CFR 214.11(f)(1). This interim final rule maintains that requirement at new 8 CFR 214.11(d)(3)(i). USCIS did not receive any comments on this requirement in connection with the

2002 interim rule. More recently, however, USCIS has received public feedback on a similar requirement in the U nonimmigrant status process. USCIS will consider any changes related to the U nonimmigrant status process in a separate rulemaking.

f. Trauma Exception

Legislation enacted since the publication of the 2002 interim rule exempts victims who cannot cooperate with an LEA request due to physical or psychological trauma from compliance with the any reasonable request requirement. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(b)(3)(ii). DHS adds this statutory change in this rule and provides guidance on how an applicant can demonstrate the requisite trauma. New 8 CFR 214.11(h)(4)(i). DHS welcomes comments on how it should evaluate whether an applicant cannot comply with a request for cooperation from an LEA due to trauma. DHS will require that an applicant submit an affirmative statement describing the trauma, and any other credible evidence. Other supporting evidence may include a signed attestation as to the victim's physical or psychological indicators of trauma from a person qualified to make such determinations in the course of his or her job, such as a medical professional, social worker, or victim advocate, or any medical, psychological, or other records that are relevant to the trauma. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); new 8 CFR 214.11(h)(4)(i). In order to show that the person providing the signed attestation is qualified to make such a determination in the course of his or her job, the applicant could provide a description of the person's qualifications or education or a description of the person's contact and experience with the applicant.

Although a victim's affidavit alone may suffice to satisfy the victim's evidentiary burden, USCIS encourages applicants to submit additional evidence that will assist them in establishing the trauma exception from the general requirement that they comply with any reasonable LEA request for assistance. In order to determine whether a victim meets the trauma exception, DHS may contact the LEA that is involved in the case at its discretion to document the victim's inability to assist in the law enforcement process. *See* new 8 CFR 214.11(h)(4)(i). In these trauma exception cases, the applicant is not required to have had contact with an

LEA, including reporting the trafficking. In those cases with no LEA contact, DHS will not contact an LEA because there will not be an LEA involved with the applicant's case.

Congress instructed DHS to consult with DOJ as appropriate when adjudicating the trauma exception from compliance with reasonable LEA requests. *See* INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb). USCIS already collaborates with DOJ on certain T nonimmigrant matters and it will follow a similar process for the trauma exception. USCIS may consult with DOJ regarding the trauma exception when the underlying criminal case is being handled by DOJ.

4. Extreme Hardship Involving Unusual and Severe Harm Upon Removal

The fourth and final eligibility requirement for T nonimmigrant status is that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States. *See* INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV); new 8 CFR 214.11(b)(4). When evaluating whether removal would result in such extreme hardship, USCIS considers a number of factors and uses an "any credible evidence" standard. *See* 8 CFR 214.11(i)(3); new 8 CFR 214.11(d)(5).

In this rule, DHS clarifies two points regarding the extreme hardship requirement based on public comment:

- Minors are not exempt from the extreme hardship requirement.
- The applicant bears the burden of proof for the extreme hardship requirement.

DHS discusses these in turn below.

Nine commenters suggested a rule that minors would always suffer extreme hardship involving unusual and severe harm on removal.

Congress did not exempt minors from the extreme hardship requirement. *See* INA section 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV). In contrast, Congress did exempt minors from compliance with reasonable LEA requests. *See* INA section 101(a)(15)(T)(i)(III)(cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(cc). As noted above, Federal law also defines "severe forms of trafficking in persons" differently with respect to victims under 18 years old than with respect to victims 18 years and older. *See* 22 U.S.C. 7102(9)(A). Consistent with the different treatment of minors with regard to certain eligibility criteria in the statute, DHS will not adopt a per se rule that minors would suffer extreme hardship. USCIS, however, considers an

applicant's age, maturity, and personal circumstances (among other factors) when evaluating the extreme hardship requirement. *See* new 8 CFR 214.11(i)(2).

One commenter stated that it is unrealistic to place the burden of proof on the applicant to show extreme hardship. This comment appears to be based on a lack of general understanding of USCIS immigration benefit processing. The applicant bears the burden of proving he or she is eligible to receive any immigration benefits requested; the government is not required to prove an applicant's ineligibility. *See* INA section 291, 8 U.S.C. 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); 8 CFR 103.2(b)(1). The applicant may document his or her extreme hardship through a personal statement or other evidence. New 8 CFR 214.11(i)(3). USCIS can consider relevant country condition reports and any other public or private sources of information, when appropriate. *Id.* By allowing such a broad "any credible evidence" standard, including the applicant's own statement, USCIS is recognizing and taking into account difficulties applicants may encounter in obtaining certain documents.

B. Application Requirements

1. Filing the Application

An applicant must submit a complete Application for T Nonimmigrant Status, Form I-914, in accordance with the form instructions. *See* new 8 CFR 214.11(d)(1). DHS is making the following changes and clarifications in this rule:

- Removing the filing deadline.
 - Amending the related forms to reflect public comments.
 - Continuing to require proof of identity and relationship for family members of minor applicants. New 8 CFR 214.11(k)(3).
 - Amending the law enforcement referral language to account for the creation of DHS. New 8 CFR 214.11(o).
- DHS discusses each of these in turn.

a. Filing Deadline

DHS required anyone victimized prior to October 28, 2000, to apply for T nonimmigrant status before January 31, 2003. 8 CFR 214.11(d)(4). DHS received seven comments against the adoption of this filing deadline. Commenters noted that Congress did not impose a deadline and further noted T nonimmigrant status is meant for a person who is or has been a victim of severe form of trafficking in persons. Commenters also

thought the deadline would hinder victims from coming forward and receiving protection, as well as LEA efforts to combat trafficking.

DHS acknowledges that Congress did not impose a filing deadline. At the time of the 2002 interim rule, DHS anticipated a large volume of applications for T nonimmigrant status. The deadline was intended to prevent application backlogs. T nonimmigrant application volume has not reached expected levels. To protect as many victims as possible, DHS is removing the deadline in this interim rule. As of January 18, 2017, USCIS will accept applications regardless of when the applicant was victimized.

b. Form-Related Changes

DHS received 11 specific comments about particular fields on the Application for T Nonimmigrant Status, Form I-914 and the Application for Family Member of T-1 Recipient, Form I-914 Supplement A. Commenters asked USCIS to change a question on victimization to allow for the past tense, remove a question on public benefits, and add a safe address for the eligible family members of an approved T-1 nonimmigrant.

USCIS has updated the Application for T Nonimmigrant Status, Form I-914, and Application for Family Member of T-1 Recipient, Form I-914 Supplement A, several times since the publication of the 2002 interim rule. The current version of the form allows victimization in the past tense. Forms I-914 and Supplement A for T nonimmigrant derivatives contain a safe address. In addition, the application no longer contains a question about public benefits. In the Paperwork Reduction Act (PRA) section of this rule, DHS requests public comments on the revised Application for T Nonimmigrant Status, Form I-914; Application for Family Member of T-1 Recipient, Form I-914 Supplement A; and Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B. 44 U.S.C. 3507. DHS is renaming the Application for Family Member of T-1 Recipient, Form I-914 Supplement A. DHS is removing the phrase "immediate family member" because, as explained in this preamble, the derivative categories have been statutorily expanded to include family members who are not traditionally thought of as "immediate family members"

Four comments suggested that USCIS should return incomplete forms to the applicant with a rejection notice and allow an applicant to re-file using the process USCIS established for VAWA

self-petitioners. USCIS is not aware of the process for VAWA self-petitioners to which the commenter is referring. Nonetheless, 8 CFR 103.2(a) requires benefit requests to be executed and filed in accordance with the form instructions and provides that a benefit request that is not executed may be rejected. Accordingly, USCIS properly returns substantially incomplete forms (including U nonimmigrant petitions and VAWA self-petitions) to the petitioner, who is instructed in the rejection notice that they may correct the deficiencies that are noted and refile their request.

c. Proof Required for Family Members of a Minor Applicant

One commenter also asserted that the standards for proving identity and eligibility for eligible family members of a minor principal are too burdensome and recommended approving the eligibility of family members of a minor principal regardless of the incomplete application. DHS declines to accept the commenter's proposal because all applicants for immigration benefits generally must submit all required initial evidence, and supporting documentation, with an application completed according to form instructions. 8 CFR 103.2(a). There are already allowances in regulations if original documentation to prove age and identity are not available. 8 CFR 103.2(b)(2) (permitting the submission of secondary evidence to overcome the unavailability of primary evidence, and affidavits to overcome the unavailability of both primary and secondary evidence).

In addition, many eligible family members are outside the United States and need to be processed by the Department of State (DOS) at a United States embassy or consulate in order to receive a T visa to apply for admission to the United States. These eligible family members must prove identity, age, and relationship during consular processing according to DOS standards. DHS does not believe it would be beneficial to applicants for DHS to relax the standard USCIS requires to prove identity because that may result in a situation where USCIS approves a Form I-914, but DOS will not grant a T visa for entry to the United States.

d. Referral to Law Enforcement and Department of Health and Human Services

One commenter also recommended that a filing from a victim under 18 years of age should trigger a proactive investigation by law enforcement and experts in child protective services.

USCIS cannot initiate this type of investigation because USCIS is not a law enforcement agency, but the 2002 interim rule contained provisions for referring cases to investigators. See 8 CFR 214.11(v). DHS is amending this language to account for the creation of DHS and will instruct USCIS officers who come into contact with a possible victim who is not already working with an LEA to refer the case to ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence, as appropriate. See new 8 CFR 214.11(o).

Furthermore, child protective services are generally under the jurisdiction of States, and USCIS cannot require States to investigate claims of crimes or abuse against children. TVPRA 2008 vested responsibility for the care and custody of unaccompanied alien children with the U.S. Department of Health and Human Services (HHS).⁹ See TVPRA 2008 section 235(b)(1), 8 U.S.C. 1232(b)(1). Federal agencies must notify HHS upon apprehension or discovery of an unaccompanied alien child or any claim or suspicion that an individual in custody is under 18 years of age. See TVPRA 2008 section 235(b)(2), 8 U.S.C. 1232(b)(2). TVPRA 2008 also provided that federal agencies would notify HHS to facilitate the provision of public benefits to trafficking victims. Minors are eligible to receive federally funded benefits and services to the same extent as a refugee as soon as they are identified by HHS as a possible victim of trafficking, unlike adults who are eligible for public benefits only upon a grant of continued presence by DHS under 28 CFR 1100.35, a bona fide determination, or approval of T nonimmigrant status. Federal officials also must notify HHS upon discovering that a person under the age of 18 may be a victim of a severe form of trafficking in persons to facilitate provision of interim assistance to the minor victim. See TVPRA 2008 section 212(a)(2), 22 U.S.C. 7105(b)(1)(H). Upon receiving a T nonimmigrant status application from a minor, USCIS will notify HHS in order for the minor to be advised of public benefits that may be available as a minor victim of trafficking. See new 8 CFR 214.11(d)(1)(iii).

⁹ An unaccompanied alien child is defined as one who has no lawful immigration status in the United States, has not attained 18 years of age, and has no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. 279(g)(2).

2. Initial Evidence

All applicants for immigration benefits generally must submit all required initial evidence, and supporting documentation, with an application completed according to form instructions. 8 CFR 103.2(a). DHS is amending what constitutes acceptable initial evidence that must accompany the application for T nonimmigrant status. *See* new 8 CFR 214.11(d)(2). DHS will allow the following initial evidence:

- A signed statement in the applicant's own words describing the victimization and cooperation with any LEA reasonable request for assistance or applicable exemptions from cooperation with such an LEA request, and any other eligibility requirements;
- Evidence that the applicant is or has been a victim of a severe form of trafficking in persons;
- Evidence that the applicant meets the physical presence requirement;
- Evidence of any one of the following:
 - The applicant has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of crime where acts of trafficking are at least one central reason for the commission of that crime;
 - The applicant is under 18 years of age; or
 - The applicant is unable to cooperate with a reasonable request due to physical or psychological trauma;
 - Evidence that the applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States; and
 - If the applicant is inadmissible, an Application for Advance Permission to Enter as Nonimmigrant, Form I-192, and supporting evidence to explain the inadmissibility.

As discussed above, DHS is removing the provisions requiring USCIS to weigh evidence as primary or secondary, and will accept any credible evidence to demonstrate each eligibility requirement for T nonimmigrant status. *See* new 8 CFR 214.11(d)(2)(ii). USCIS will determine the credibility and weight of evidence at its sole discretion. *See* new 8 CFR 214.11(d)(5). As is the case in all other immigration benefits, the applicant bears the burden of establishing eligibility. *Id.*

3. Bona Fide Determinations

Current regulations provide for USCIS to conduct an initial review of each T nonimmigrant status application package to determine if the application is a bona fide application. An application will be determined to be

bona fide if the application is complete and ready for adjudication. Among other requirements, the application must include biometrics, background checks, and prima facie evidence for each eligibility requirement. *See* 8 CFR 214.11(k). In conjunction with this pre-adjudication bona fide determination review, USCIS may grant the applicant deferred action when the application for T nonimmigrant status is bona fide, which allows the applicant to request employment authorization. *See* Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS, Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status (May 8, 2002).¹⁰

One commenter recommended that USCIS make a bona fide determination and grant deferred action within 90 days of the receipt of the application.

Since 2002, USCIS has received fewer applications for T nonimmigrant status than were expected. USCIS generally adjudicates the merits of T nonimmigrant applications as quickly as it can make a bona fide determination. Nevertheless, in the event of processing backlogs, DHS recognizes that a bona fide determination may offer a victim of trafficking some protection for immigration status purposes, employment authorization, and the availability of public benefits through HHS.

In reference to a 90-day deadline, USCIS cannot guarantee a bona fide determination within 90 days in every case because the bona fide determination is dependent on the unique circumstances of each case, and the completion of biometric and background checks. Typically, these checks will be completed within 90 days, but occasionally the checks will take longer than 90 days. The completion of biometric and background checks depends on several factors, such as the schedule of the applicant, the workload of the Federal Bureau of Investigation (FBI) and other factors over which USCIS does not have control. DHS will retain the current regulatory process for bona fide determinations and make no additional changes at this time. *See* new 8 CFR 214.11(e).

This commenter also asked USCIS to notify HHS of a bona fide determination so that HHS can facilitate federal public benefits available to trafficking victims, as well as amend the bona fide determination notice to include

information about the federal benefits. USCIS currently notifies HHS upon approval of an application or a bona fide determination. As discussed elsewhere in this preamble, DHS will also notify HHS in accordance with TVPRA 2008 section 212(a)(2), 22 U.S.C. 7105(b)(1)(G). *See* new 8 CFR 214.11(d)(1)(iii).

4. Derivative Family Members

An applicant may be permitted to apply for certain family members to receive derivative T nonimmigrant status. In this rule, DHS is making the following changes and clarifications:

- Defining terms used to refer to victims and their family members to provide clarity. New 8 CFR 214.11(a).
- Adding new derivative categories since publication of the 2002 interim rule. New 8 CFR 214.11(k)(1).

DHS will discuss each in turn.

a. Definitions

DHS is defining “principal T nonimmigrant,” “eligible family member” and “derivative T nonimmigrant” to clarify these terms used throughout the regulations. New 8 CFR 214.11(a). Principal T nonimmigrant means the victim of trafficking who has been granted T-1 nonimmigrant status. *Id.* DHS uses the term “victim” to refer to aliens who were subject to a severe form of trafficking in persons, and who may be eligible to apply for T-1 nonimmigrant status. *Id.* Eligible family member means someone who has the relationship to a principal applicant required for derivative T nonimmigrant status. *Id.* Derivative T nonimmigrant refers to an eligible family member in the United States who has been granted T-2, T-3, T-4, T-5, or T-6 nonimmigrant derivative status or an eligible family member who has been admitted to the United States as a T-2, T-3, T-4, T-5, or T-6 nonimmigrant. *Id.*

b. Eligibility of Certain Family Members

The law governing T nonimmigrant status was changed in 2003 to allow a principal alien under 21 years of age to apply for admission of his or her parents and unmarried siblings under 18 years of age. *See* TVPRA 2003 section 4(b)(1)(B) and (b)(2), INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). In 2008, the law was amended to allow any principal, regardless of age, to apply for derivative T nonimmigrant status for parents or unmarried siblings under 18 years of age if the family member faces a present danger of retaliation as a result of the principal's escape from the severe form of trafficking in persons or cooperation

¹⁰ Available for review in the rulemaking docket for this rule (DHS Docket No. USCIS-2011-0010) at <http://www.regulations.gov>.

with law enforcement. *See* TVPRA 2008 section 201(a)(2)(D), INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). In 2013, the derivative categories were further expanded to allow any principal, regardless of age, to apply for children (adult or minor) of the principal's derivative family members if the derivative's child (adult or minor) faces a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement. *See* VAWA 2013 section 1221, INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). DHS is amending the T nonimmigrant status regulations accordingly in this rule. New 8 CFR 214.11(k)(1)(ii)–(iii).

There are two general categories of family members eligible for T nonimmigrant status: those whose eligibility is based on the age of the principal and those whose eligibility is based on a showing of a present danger of retaliation. *See* INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii).

Under INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I), eligible family members of a principal alien under 21 years of age are the principal's:

- Spouse,
- Child(ren),¹¹
- Unmarried sibling(s) under 18 years of age; and/or
- Parent(s).

Under INA section 101(a)(15)(T)(ii)(II), 8 U.S.C.

1101(a)(15)(T)(ii)(II), eligible family members of a principal alien over 21 years of age are the principal's:

- Spouse, and/or
- Child(ren).

Under INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III), eligible family members whose eligibility is based on a showing of a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement (regardless of the age of the principal or, except where noted below, the age of the derivative) are the principal's:

- Parent(s) (added by TVPRA 2008),
- Unmarried sibling(s) under 18 years of age (added by TVPRA 2008),¹²

¹¹ See definition of child at INA section 101(b)(1), 8 U.S.C. 1101(b)(1), which includes stepchildren.

¹² Practically, the “parent(s)” and “unmarried sibling(s) under 18 years of age” derivative categories added by TVPRA 2008 benefit principal aliens who are over 21 years of age. This is because regardless of whether the family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of

• Child(ren) or stepchild(ren),¹³ namely the adult or minor child of the principal alien's spouse (added by VAWA 2013),

• Grandchild(ren), namely the adult or minor child of the principal alien's child (added by VAWA 2013),

• Niece or nephew, namely the adult or minor child of the principal alien's sibling (added by VAWA 2013), and/or

• Sibling(s) (regardless of age or marital status), namely the adult or minor child of the principal alien's parent (added by VAWA 2013).¹⁴

The VAWA 2013 derivative expansion for children (adult or minor) of the principal's derivative family members if the derivative's child (adult or minor) faces a present danger of retaliation does not extend to the family members of the adult or minor child. For example, the spouse of an adult niece would not be eligible for derivative T nonimmigrant status.

The principal applicant may file an Application for Family Member of T–1 Recipient, Form I–914 Supplement A on behalf of these eligible family members, in accordance with form instructions. When relevant, and as described below, evidence that demonstrates a present danger of retaliation to the eligible family member must be included.

New 8 CFR 214.1(a)(1)(viii) classifies the principal alien and eligible derivative family members as:

trafficking or cooperation with law enforcement, the parent(s) and unmarried sibling(s) under 18 years of age of a principal who is under 21 years of age qualify for derivative T nonimmigrant status under INA section 101(a)(15)(T)(ii)(II).

¹³ Stepchildren are eligible under the definition of child at INA section 101(b)(1). Delineating stepchildren in this list is not intended to mean stepchildren are not already eligible. DHS includes this because the new T–6 category is complex and this list is intended to aid the reader.

¹⁴ Section 1221 of VAWA 2013 provided, “Section 101(a)(15)(T)(ii)(III) of the Immigration and Nationality Act (8 U.S.C.

1101(a)(15)(T)(ii)(III)) is amended by inserting ‘, or any adult or minor children of a derivative beneficiary of the alien, as’ after ‘age.’” 127 Stat. 144. The resulting statutory text in INA section 101(a)(15)(T)(ii)(III) is awkwardly worded: “any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, *as of an alien* described in subclause (I) or (II) who the Secretary . . . determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or with law enforcement” (emphasis added). DHS believes that this provision is most reasonably construed as encompassing parents of principal T–1 nonimmigrants (regardless of the T–1's age), unmarried siblings of T–1 nonimmigrants (regardless of the T–1's age), and adult and minor children of derivative T nonimmigrants described in INA section 101(a)(15)(T)(ii)(I) or (II). A contrary reading would result in the inclusion of at-risk parents and unmarried siblings under 18 of derivative T nonimmigrants but the exclusion of at-risk parents and unmarried siblings under 18 of adult principal T–1 nonimmigrants. DHS does not believe that Congress intended such a counterintuitive outcome.

- T–1 (principal alien);
- T–2 (spouse);
- T–3 (child);
- T–4 (parent);
- T–5 (unmarried sibling under 18 years of age); and/or
- T–6 (adult or minor child of a principal's derivative).

VAWA 2013 did not amend INA section 245(l), 8 U.S.C. 1255(l) to explicitly provide for adjustment of status for individuals who were granted derivative T nonimmigrant status as the children (adult or minor) of the principal's derivative family members who face a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement.¹⁵ However, USCIS may adjust the status of the principal and any person admitted under INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii), as the spouse, parent, sibling or child. *See* INA section 245(l)(1), 8 U.S.C. 1255(l)(1). Even though section 245(l)(1) of the INA specifically names only the “spouse, parent, sibling or child” of the T–1 nonimmigrant, the statute is reasonably construed as allowing for the adjustment of status of any eligible derivative given its general reference to “any person admitted under section 101(a)(15)(T)(ii),” which as amended by VAWA 2013 includes the new derivative classes. The plain text, therefore, could reasonably be construed to encompass the new derivative class of children of derivative T nonimmigrants.

To conclude otherwise would be to impute to Congress, by virtue of this apparently inadvertent omission, an improbable intent to preclude the new class of derivatives from adjusting status, thwarting the very protection, family unity, and victim stabilization aims animating the expansion of derivative eligibility in the 2008 TVPRA and 2013 VAWA reauthorizations. *See, e.g., United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012) (“[W]e do not impute to Congress an intent to create a law that produces an unreasonable result.”). The practical effect of precluding adjustment of status would be to require these children of derivative T nonimmigrants to return, upon the expiration of their T nonimmigrant status, to the danger of retaliation that DHS and the LEA believed warranted their admission to the United States.

¹⁵ In section 809 of VAWA 2013, however, Congress did amend section 705(c) of the CNRA to clarify that physical presence in the CNMI on, before or after November 28, 2009 will be considered physical presence in the United States for purposes of INA section 245(l).

Nothing in the greater statutory scheme or the legislative history of either law suggests that such a result was congressionally designed or that the failure to provide a conforming amendment to section 245(l)(1) was intentional or due to anything other than oversight or inadvertence.¹⁶

Thus, individuals who were granted derivative T nonimmigrant status as the children (adult or minor) of the principal's derivative family members who face a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement, may apply for adjustment of status under INA section 245(l) provided they are otherwise eligible. *See* new 8 CFR 245.23(b)(2).

5. Age-Out Protection of Eligible Family Members

In some USCIS benefits, a principal alien is said to "age-out" if the alien was a certain age, generally under 21 years of age, at the time of filing, but then turns a certain age before USCIS adjudicates the application or petition. This type of age-out does not occur for principal aliens applying for T nonimmigrant status because they are protected by statute. *See* INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). However, as described in the following, DHS is addressing other types of age-out situations related to the ability of eligible family members to seek T nonimmigrant status.

In this rule, DHS makes the following changes and clarifications:

¹⁶This conclusion is bolstered by the fact that Congress similarly did not update the identical reference to "spouses, sons, daughters, siblings, or parents of such aliens [(T-1 nonimmigrants)]" in the provision establishing that the annual numerical limitation on grants of T nonimmigrant visas or status does not apply to derivative beneficiaries. INA section 214(o)(3), 8 U.S.C. 1184(o)(3); *cf.*, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489, 2495 (2015) (observing that court's "duty is to construe statutes, not isolated provisions," that the meaning of a phrase "may seem plain when viewed in isolation, [but] turns out to be untenable in light of the statute as a whole" and that "the context and structure of the [act may] compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase") (quotation marks and citation omitted); *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045–46 (D.C. Cir. 2015) (noting that courts "must . . . avoid statutory interpretations that bring about an anomalous result when other interpretations are available") (quotation marks omitted); *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 169 (4th Cir. 2014) ("Even the plain meaning of a statute is not conclusive 'in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (alteration in original)).

- A child principal can apply for all eligible family members, including parents and unmarried siblings under 18 years of age, so long as the child was under 21 years of age when he or she filed for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(ii).

- An unmarried sibling of a child principal need only be under 18 years of age at the time the principal files for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(ii).

- A child derivative need only be under 21 years of age at the time the principal parent filed for T-1 nonimmigrant status. New 8 CFR 214.11(k)(5)(iii).

- Clarifying the distinction between age-out protections and marital status of a child or a sibling. New 8 CFR 214.11(k)(5)(v).

a. Age-Out Protection for Child Principal To Apply for Eligible Family Members

Seven commenters noted that a principal applicant under 21 years of age could turn 21 years of age before adjudication of the T nonimmigrant application, or age-out, and not be able to apply for a parent as a T-4 derivative. These commenters urged DHS to adopt the standard that if a principal applicant is under 21 years of age at the time of filing an application for T-1 nonimmigrant status, the ability to include a parent as a T-4 derivative is preserved. One commenter wrote that DHS should lock in the child's age for purposes of eligibility as of the date the child comes to the attention of law enforcement.

TVPR 2003 fixed this potential age-out problem. *See* TVPR 2003 section 4(b)(2)(B). A principal who files an application for T nonimmigrant status while under 21 years of age will continue to be treated as an alien described in INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I) (a principal alien under 21 years of age), even if the alien attains 21 years of age while the T-1 application is pending. *See* INA section 214(o)(5), 8 U.S.C. 1184(o)(5). This means that as long as a principal applicant was under 21 years of age at the time of filing for T-1 status, he or she can still file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, to include T-4 parents or T-5 unmarried siblings under 18 years of age, even if the principal applicant turns 21 years of age before the principal alien's T-1 application is adjudicated. *See* new 8 CFR 214.11(k)(5)(ii).

b. Age-Out Protection for Unmarried Sibling Derivative of Child Principal

Similarly, TVPR 2003 provides that an unmarried sibling of a principal T-1 applicant under 21 years of age need only be under the age of 18 at the time the principal T-1 applicant files the Application for T Nonimmigrant Status, Form I-914 for T-1 nonimmigrant status. *See* TVPR 2003 section 4(b)(1)(B), INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I); new 8 CFR 214.11(k)(5)(ii). It does not matter if the unmarried sibling turns 18 years of age before the principal applicant files an Application for Family Member of T-1 Recipient, Form I-914 Supplement A.

c. Age-Out Protection for Child Derivative

In addition, INA section 214(o)(4), 8 U.S.C. 1184(o)(4) was revised to provide that as long as a child T-3 derivative was under 21 years of age on the date the principal T-1 parent applied for T-1 nonimmigrant status, he or she will continue to be classified as a child and allowed entry as a derivative child. *See* TVPR 2003 section 4(b)(2)(B). This means that age at the time of classification, entry into the United States, or the date the child came to the attention of law enforcement, does not matter. Therefore, DHS has provided in this rule that for a child to be T-3 derivative, he or she must be under the age of 21 when the parent T-1 filed the Application for T Nonimmigrant Status, Form I-914 for T-1 nonimmigrant status. *See* new 8 CFR 214.11(k)(5)(iii).

d. Marriage of Eligible Family Members

In order to be eligible for T-3 or T-5 status, this interim rule requires a child or a sibling under the age of 18 to be unmarried:

- At the time the Application for T Nonimmigrant Status, Form I-914 for the principal is filed and adjudicated;
- At the time the Application for Family Member of T-1 Recipient, Form I-914 Supplement A for the eligible family member is filed and adjudicated; and
- At the time of admission to the United States (if an eligible family member is outside the United States). *See* new 8 CFR 214.11(k)(5)(v).

The law uses the term "children" in the derivative categories for family members. *See* INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii). The term "child" is defined as a person who is under 21 years of age and unmarried. *See* INA section 101(b)(1), 8 U.S.C. 1101(b)(1). The derivative category for siblings

clarifies that the sibling must be unmarried and under the age of 18 years. See INA section 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii).

The age-out protections described above are linked specifically to age, but are not linked to marital status. For example, INA section 214(o)(4), 8 U.S.C. 1184(o)(4), specifies that an “unmarried alien,” who is the eligible family member of a parent and was under 21 years of age when the parent applied for T-1 status, can continue to be classified as a child if he or she turns 21 before adjudication. DHS believes that in giving a specific time frame related to age only and by using the term “unmarried alien,” Congress did not intend a similar time-of-filing standard with respect to marital status.

Similarly, Congress used the phrase “children, unmarried siblings under 18 years of age on the date on which such alien applied for status” in listing eligible family members for a principal who is under 21 years of age. See INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). Congress provided a specific time frame related to when siblings need to be under the age of 18, but does not give a time frame for marriage of either children or siblings. DHS believes that Congress intended that derivative status for T-3 children and T-5 unmarried siblings under the age of 18 should be limited to unmarried children and unmarried siblings through time of adjudication of both the principal’s and derivative’s T nonimmigrant application, as well as the admission into the United States of the family member. See new 8 CFR 214.11(k)(5)(v); *cf.*, *e.g.*, *Akhtar v. Gonzales*, 406 F.3d 399, 407–08 (6th Cir. 2005) (concluding that Congress’ provision of special age-out protections for derivative asylees but not similar protections based on marital status is reasonable and “easily withstand[s] constitutional scrutiny”).

e. Evidence for Eligible Family Members

The principal applicant must submit an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, for each eligible family member with all required initial evidence and supporting documentation according to form instructions. See new 8 CFR 214.11(k)(2) and (3). DHS will require the following initial and supporting evidence:

- Evidence demonstrating the relationship of the eligible family member to the principal applicant;
- If seeking T-4, T-5, or T-6 status based on present danger of retaliation to the eligible family member, evidence of this danger; and

- If the eligible family member is inadmissible, a copy of the eligible family member’s Application for Advance Permission to Enter as Nonimmigrant, Form I-192 and attachments.

As discussed above, DHS has removed the provisions weighing evidence as primary or secondary and will accept any credible evidence to demonstrate each eligibility requirement for derivative T nonimmigrant status. As is the case in all other immigration benefits, the applicant bears the burden of establishing eligibility. See 8 CFR 103.2(b). USCIS will consider any credible evidence relevant to the application for derivative T nonimmigrant status. See new 8 CFR 214.11(k)(7) and (d)(2)(ii). USCIS will exercise its sole discretion to determine what evidence is credible and the weight of such evidence. *Id.*

DHS is removing regulatory language that required demonstration of extreme hardship to an eligible family member if the eligible family member was not allowed to accompany or follow to join the T-1 principal applicant. See 8 CFR 214.11(o)(1)(ii) and (5). This was a statutory requirement that was removed by VAWA 2005. See VAWA 2005 section 801(a)(2).

The provisions under new 8 CFR 214.11(k)(6) describe how an applicant can demonstrate a present danger of retaliation to an eligible parent or unmarried sibling under the age of 18, or to a child (adult or minor) of a derivative applying for derivative T nonimmigrant status. USCIS will consider any credible evidence of a present danger of retaliation to the eligible family member. Present danger will be evaluated on a case-by-case basis. An applicant may submit a statement describing the danger the family member faces and how the danger is linked to the victim’s escape from trafficking or cooperation with law enforcement. An applicant’s statement alone, however, may not be sufficient. Other examples of evidence include, but are not limited to: a previous grant of advance parole to a family member; a signed statement from an LEA describing the danger of retaliation; trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court; documentation from their country of origin or place of residence (*e.g.* foreign government agencies, local law enforcement, social services), and affidavits from other witnesses. Regardless of whether the applicant submits a statement from an LEA, USCIS reserves the right to contact the LEA most likely to be involved in the

criminal case, if appropriate. Applicants who believe such contact could further endanger them or their family member should indicate that in a cover letter in the application for the family member’s T derivative status or otherwise contact USCIS.

C. Adjudication and Post-Adjudication

1. Prohibitions on Use of Information

In this rule, DHS makes the following changes and clarifications relating to the disclosure and use of an applicant’s information provided to USCIS:

- Updating the regulations to account for statutory confidentiality provisions applicable to T nonimmigrants. See new 8 CFR 214.11(p)
- Confirming the legal requirement to turn over information to prosecutors. *Id.*
- Confirming the warning on the T nonimmigrant application that information an applicant provides could be used to remove the applicant.

DHS discusses each in turn.

a. Applicability of Confidentiality Provisions

The confidentiality provisions of section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified at 8 U.S.C. 1367, apply to applicants for T nonimmigrant status. See IIRIRA section 384, 8 U.S.C. 1367. DHS issued the 2002 interim rule before the confidentiality provisions were applicable to those seeking T nonimmigrant status. Congress extended the confidentiality provisions to T nonimmigrant applicants in VAWA 2005. See VAWA 2005 section 817. In the 2002 interim rule, DHS did include some information about disclosure of an applicant’s information. For example, DHS allowed for disclosure of information to LEAs with the authority to detect, investigate, or prosecute severe forms of trafficking in persons. See 8 CFR 214.11(e). In this rule, DHS is incorporating the confidentiality provisions provided at 8 U.S.C. 1367, as amended, and including implementing provisions similar to those provided in the DHS U nonimmigrant status regulations. See new 8 CFR 214.11(p).

DHS, however, does not see a need to include the full list of protections and exceptions, as it would essentially reiterate the language of 8 U.S.C. 1367(a)(2) and (b). By citing to the statutory confidentiality provisions, DHS is protecting applicants while also ensuring that the regulations remain up to date. DHS has issued department-wide guidance on how these confidentiality provisions are interpreted and how they will be

implemented. *See, e.g.*, Department of Homeland Security Directive 002–02 and Instruction 002–02–001, Implementation of Section 1367 Information Provisions. DHS components plan to issue further guidance specific to component operations.

T nonimmigrant applicants are protected under 8 U.S.C. 1367 in two ways. First, adverse determinations of admissibility or deportability against an applicant for T nonimmigrant status, with a limited exception for individuals convicted of certain crimes, cannot be made based on information furnished solely by the perpetrator of the acts of trafficking in persons. *See* IIRIRA section 384(a)(1)(F), 8 U.S.C. 1367(a)(1)(F). Second, the statute prohibits the use or disclosure to anyone of any information relating to the beneficiary of a pending or approved application for T nonimmigrant status except in certain limited circumstances. *See* IIRIRA section 384(a)(2), (b), 8 U.S.C. 1367(a)(2), (b). Section 1367(a)(2) allows the release of information to a sworn officer or employee of DHS, DOJ, DOS, or a bureau or agency of either of those Departments for legitimate Department, bureau, or agency purposes. *Id.* Section 1367(b) also enumerates specific exceptions to confidentiality. The statute permits, for example, disclosure of protected information, in certain limited circumstances, to law enforcement and national security officials and nongovernmental victim services providers.

This rule, at new 8 CFR 214.11(p), also essentially reflects the same restrictions on use and disclosure of information relating to applicants for and beneficiaries of T nonimmigrant status that are described in DHS' interim U nonimmigrant status regulations at 8 CFR 214.14(e). *See* New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 FR 53014, 53039 (Sept. 17, 2007). These restrictions are based on the statutory directive that DHS not "permit use by or disclosure to anyone" (other than a sworn officer or employee of DHS, DOJ, or DOS) of "any information which relates to" an applicant for or beneficiary of T or U nonimmigrant status or VAWA immigration relief, with limited exceptions (*e.g.*, law enforcement or national security purposes). *See* 8 U.S.C. 1367(a)(2), (b). The intent of the restrictions in 8 U.S.C. 1367(a) on the use and disclosure of protected information was to "ensure that abusers and perpetrators of crime cannot use the immigration system against their victims," either to silence

them or to commit further abuse. 151 Cong. Rec. E2605, E2607 (statement of Rep. John Conyers in support of VAWA 2005 amendments to 8 U.S.C. 1367).

b. Disclosure Required in Relation to Criminal Prosecution

In the 2002 interim rule, DHS allowed for disclosure of information to DOJ officials responsible for prosecution in all cases involving an ongoing or impending prosecution of any defendants who are or may be charged with severe forms of trafficking in persons in connection with the victimization of the applicant. *Id.* This provision complies with constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. *See, e.g.*, U.S. Const. amends. V, VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

DHS received seven comments relating to the provision that allows federal authorities and defendants in criminal proceedings to review any information from an application for T nonimmigrant status. Commenters suggested that the standard for disseminating information should be that:

1. Federal authorities should have to make a request in writing for release of information;

2. Prosecutors should be prohibited from releasing information to a defendant unless the information is needed for impeachment; and

3. In the event a prosecutor determines evidence to be exculpatory, a judge should review the information and give time for victim safety planning before information will be released.

In the 2002 interim rule, DHS explained its position on timely disclosure of information, including DOJ's obligation to provide statements by witnesses and certain other documents to defendants in pending criminal proceedings. *See* 67 FR at 4789. These obligations stem from constitutional, statutory and other legal requirements pertaining to the duty to disclose exculpatory evidence or impeachment material to a criminal defendant in order to prepare a defense. *Id.* DHS appreciates the need for confidentiality and especially the desire to protect the safety of victims. However, we must balance the need to take measures to protect victims from perpetrators with the need to comply with constitutional requirements, and DHS believes that the regulations as currently drafted reflects the best way to balance these considerations. In

addition, the determination of whether constitutional or other legal obligations require disclosure in a criminal matter is a determination reserved to prosecuting attorneys. DHS therefore declines to amend its regulation regarding the dissemination of information, other than some minor edits to account for the creation of DHS and streamline the language.

c. Use of Information on the T Nonimmigrant Status Application

Commenters also raised concerns that the Application for T Nonimmigrant Status, Form I-914 warns that any information provided could be used to remove an unsuccessful applicant. The commenters asserted that this policy would hinder applications because victims may be reluctant to work with law enforcement if a victim thought he or she would be removed. USCIS does not have a policy to refer applicants for T nonimmigrant status for removal proceedings absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is implicit in the trafficking. USCIS includes a standard warning on many applications that information within the application could lead to removal. USCIS believes it is a sound practice to warn applicants of this fact, and not including it would be unfair to applicants for whom such a warning could prove important.

2. Waivers of Grounds of Inadmissibility

An applicant for T nonimmigrant status must be admissible to the United States, or otherwise obtain a waiver of any grounds of inadmissibility. In this rule, DHS is making the following changes and clarifications:

- Clarifying the waiver authority for T nonimmigrants and the public charge exemption. New 8 CFR 212.16(b).

- Changing the standard for exercising waiver authority only in "extraordinary circumstances" over criminal grounds of inadmissibility when the crime does not relate to the trafficking victimization. New 8 CFR 212.16(b)(2).

- Removing language that waiver authority should not be exercised for inadmissibility grounds that may limit the ability of the applicant to adjust status. 8 CFR 212.16(b)(3).

- Clarifying that DHS takes into account trafficking victimization when exercising waiver authority. New 8 CFR 212.16(b)(2).

- Retaining the current separate waiver application process. New 8 CFR 212.16(a).

• Clarifying the waiver process at adjustment of status.

a. Waiver Authority for T Nonimmigrants

Under INA section 212(d)(13), 8 U.S.C. 1182(d)(13), DHS has broad discretionary authority to waive grounds of inadmissibility.¹⁷ DHS may waive INA section 212(a)(1) (health-related grounds), 8 U.S.C. 1182(a)(1), if DHS considers it to be in the national interest to grant a waiver. *See* INA section 212(d)(13)(B)(i), 8 U.S.C. 1182(d)(13)(B)(i). DHS may waive almost any other ground of INA section 212(a), 8 U.S.C. 1182(a), if DHS considers it to be in the national interest to grant a waiver and determines that the activities rendering the applicant inadmissible were caused by, or were incident to, the trafficking victimization. *See* INA section 212(d)(13)(B)(ii), 8 U.S.C. 1182(d)(13)(B)(ii). DHS, however, may not waive INA sections 212(a)(3) (security and related grounds), (10)(C) (international child abduction), or (10)(E) (former U.S. citizens who renounced citizenship to avoid taxation), 8 U.S.C. 1182(a)(3), (10)(C), (10)(E).

In addition, because INA section 212(a)(4) (public charge), 8 U.S.C. 1182(a)(4), does not apply to an applicant for T nonimmigrant status (but would apply at the time of adjustment of status to lawful permanent resident), *see* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A), no waiver of that ground is necessary. TVPRA 2003 added INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A), to eliminate the public charge ground at the time the applicant seeks T nonimmigrant status. TVPRA 2003 section 4(b)(4), codified at INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A). DHS is amending the regulations as necessary in this interim rule. *See* new 8 CFR 212.16(b).

b. Criminal Grounds of Inadmissibility

DHS received 21 comments relating to different aspects of waivers of inadmissibility. Eight commenters objected to the language of 8 CFR 212.16(b)(2), stating that USCIS will exercise its discretion to waive criminal grounds of inadmissibility under INA

section 212(a)(2), 8 U.S.C. 1182(a)(2) (criminal and related grounds), only in “exceptional cases” where the criminal activity was not caused by or was not incident to the trafficking in persons. Commenters thought the language about “exceptional cases” was not statutorily required, replaced a simple exercise of discretion, and was unnecessary. In addition, commenters encouraged DHS to consider the type of crimes and the seriousness of the offenses when exercising discretion based on criminal grounds. DHS has the discretionary authority to waive the criminal grounds of inadmissibility for T nonimmigrant status applicants if the criminal activities were caused by or incident to the trafficking victimization. *See* INA section 212(d)(13)(B)(ii), 8 U.S.C. 1182(d)(13)(B)(ii). DHS implemented this provision in the 2002 interim rule and explained that it was choosing to exercise its discretion in cases where the criminal grounds of inadmissibility were not caused by or incident to trafficking, only in “exceptional cases.” *See* 67 FR 4789; 8 CFR 212.16(b)(2). In this interim rule, DHS is revising its regulations to describe how USCIS will consider the nature and seriousness of the offenses and the number of convictions in exercising its discretion. *See* new 8 CFR 212.16(b)(3). In this rule, DHS is replacing the general “exceptional cases” limitation. Instead, in cases where the applicant has a conviction for a violent or otherwise dangerous crime, DHS will allow waivers, in its discretion, in “extraordinary circumstances” only. *See* new 8 CFR 212.16(b)(3). A similar standard applies in the related U nonimmigrant status regulations at 8 CFR 212.17.¹⁸

c. Waivers Relating to Adjustment of Status

Five commenters expressed concern with the language of 8 CFR 212.16(b)(3), stating that USCIS will exercise its discretion to waive grounds of inadmissibility that would prevent or limit the applicant from adjusting to permanent resident status only in exceptional cases. Commenters objected to the connection between inadmissibility at the application phase of T nonimmigrant status with inadmissibility at the adjustment of status phase. Commenters urged DHS to take note of INA section 245(l)(2), 8 U.S.C. 1255(l)(2), which provides a waiver authority for the adjustment of

status phase that is similar to the authority contained at INA section 212(d)(13), 8 U.S.C. 1182(d)(13). Since the publication of the 2002 interim rule, DHS published a rule on adjustment of status to permanent resident for T nonimmigrants. *See* 8 CFR 245.23 and *Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status*, 73 FR 75540 (Dec. 12, 2008). The regulations at 8 CFR 245.23 clarify that any grounds of inadmissibility waived at the time USCIS grants T nonimmigrant status will be considered waived for purposes of adjustment of status under INA section 245(l) and that any grounds of inadmissibility that an applicant acquires while in T nonimmigrant status require a new waiver. In this interim rule, DHS is removing 8 CFR 212.16(b)(3), as it is no longer necessary in light of the adjustment of status regulations.

d. Waivers of Inadmissibility Grounds Related to the Trafficking Victimization

A number of commenters expressed general concerns over particular grounds of inadmissibility that relate to victimization based on trafficking in persons. DHS received two comments about waivers of inadmissibility for those with the human immunodeficiency virus (HIV), one comment about waivers of inadmissibility for those engaged in prostitution, and one comment about waivers of inadmissibility for drug users. Commenters stated that victims may become HIV positive as a result of trafficking. Commenters noted that often trafficking victims are forced to engage in prostitution by traffickers, or continue in prostitution for basic survival. Commenters also expressed concern about victims who self-medicate with illegal drugs to ease the effects of trauma and/or other psychological conditions due to the victimization they suffered. These commenters did not provide specific recommendations, beyond asking DHS to take special note of those concerns.

DHS acknowledges that victims of trafficking in persons are an especially vulnerable population, and therefore considers the special circumstances of victims when exercising its waiver authority. As of January 4, 2010, HIV infection is no longer defined as a “communicable disease of public health significance” according to HHS regulations. *See* 74 FR 56547 (Nov. 2, 2009) (effective Jan. 4, 2010). Therefore, HIV infection does not make an applicant inadmissible on health-related grounds for any immigration benefit. In addition, USCIS personnel who

¹⁷ Section 212(d)(13)(B) of the INA states, in part, “[I]f the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General’s discretion, may waive the application of” various grounds of inadmissibility. 8 U.S.C. 1182(d)(13)(B) (emphasis added). The vestigial reference to the Attorney General in that sentence is clearly a drafting oversight. DHS therefore reads the provision as referring, instead, to the Secretary’s discretion.

¹⁸ This approach also is consistent with DHS and DOJ practice in other immigration contexts. *See, e.g.,* 8 CFR 212.7(d) (INA section 212(h)(2) waivers); *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002) (INA section 209(c) waivers).

adjudicate applications for T nonimmigrant status and waivers of inadmissibility are trained on various aspects of the dynamics of victimization. DHS has not made any changes to the regulation as a result of these comments.

e. Requesting a Waiver

In the 2002 interim rule, DHS directed applicants to file the form designated by USCIS to request a waiver of inadmissibility. *See* 8 CFR 212.16(a). This form is the Application for Advance Permission to Enter as Nonimmigrant, Form I-192.¹⁹ Five commenters asserted that this waiver application procedure was overly complicated and suggested a simpler procedure of providing space on the Application for T Nonimmigrant Status, Form I-914, itself for victims to explain any grounds of inadmissibility and attach evidence.

DHS is not adopting the suggestion. DHS is concerned that additional inadmissibility concerns can arise after an application for T nonimmigrant status is approved. Without a waiver of inadmissibility on a separate form, USCIS would be unable to address inadmissibility concerns other than to revisit the underlying approval itself, which could cause problems for the applicant. In addition, USCIS has developed a process with DOS for eligible family members abroad so that DOS officers are made aware of the inadmissibility grounds waived by USCIS. This process might be compromised if a separate waiver form were not used, resulting in potential delays or problems for eligible family members consular processing to apply for admission to the United States. DHS believes the Application for Advance Permission to Enter as Nonimmigrant, Form I-192 process is working well and does not need to be modified at this time; however, DHS welcomes further comments on this process.

In addition, one commenter asserted that the waiver application process at the time of adjustment was burdensome. The commenter recommended sparing victims from applying for a waiver of inadmissibility both at the time of application and the time of adjustment of status.

Since publication of the 2002 interim rule, DHS published an interim rule with request for comments on adjustment of status to lawful

permanent resident for T nonimmigrants. *See* 8 CFR 245.23 and 73 FR 75540. The regulations only require a new request for a waiver of inadmissibility at the adjustment of status phase for any new ground of inadmissibility that has arisen since the grant of T nonimmigrant status. Typically, T nonimmigrants applying for adjustment of status do not need to file a request for a new waiver of inadmissibility for inadmissibility grounds that were waived at the T nonimmigrant stage. In this interim rule, DHS is mainly addressing the T nonimmigrant application phase; DHS will consider comments and recommendations that relate to adjustment of status in a separate rulemaking.

3. Decisions

At new 8 CFR 214.11(d)(8)–(10), DHS describes approval and denial procedures for applications for T nonimmigrant status. USCIS will issue written decisions to grant or deny T nonimmigrant status. If USCIS denies an application, it will provide written reasons for the denial. In any case where USCIS denies an application for T nonimmigrant status, an applicant may appeal to the USCIS Administrative Appeals Office (AAO) under established procedures in 8 CFR 103.3.

4. Benefits

DHS provides for employment authorization incident to a grant of principal T nonimmigrant status. *See* 8 CFR 214.11(l)(4). One commenter pointed out that even after a bona fide determination is made, the applicant would not receive an employment authorization document (EAD) until T nonimmigrant status is granted. This commenter highlighted this fact because, even though a victim could be certified by HHS on the basis of a bona fide application, he or she would not be eligible for certain types of cash assistance and would not be accepted into the federal Matching Grant Program. This commenter recommended granting an EAD when USCIS determined that an application is bona fide. DHS is authorized to grant an EAD in connection with a bona fide determination. *See* Memorandum from Stuart Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002). In its discretion, USCIS may grant deferred action to an applicant when a T nonimmigrant application is deemed bona fide, while awaiting final adjudication. *Id.* Once an application is

deemed bona fide and USCIS grants deferred action, the applicant can request employment authorization based on the grant of deferred action. *See* 8 CFR 274a.12(c)(14).

5. Duration of Status

Originally, T nonimmigrant status was granted for a period of 3 years from the date of approval. *See* 8 CFR 214.11(p) (2002). Upon approval, USCIS would notify the recipient of the future expiration of his or her nonimmigrant status and of a requirement to apply for adjustment of status to permanent resident within the 90 days immediately preceding the third anniversary of the approval. *Id.* At the time of the 2002 interim rule, there was no ability to extend T nonimmigrant status. *Id.* DHS provided that an applicant who properly applied for adjustment of status would remain in T nonimmigrant status until a final decision was rendered on the application. *Id.* DHS received seven comments related to the 90 day adjustment of status application period requirement.

In 2008, DHS published an interim rule implementing adjustment of status procedures for T and U nonimmigrants. *See* 73 FR 75540. DHS amended 8 CFR 214.11(p) to incorporate VAWA 2005 legislative changes that lengthened the duration of status from 3 years to 4 years, but also limited the status to 4 years unless an applicant could qualify for an extension. *See* VAWA 2005 section 821(a), INA section 214(o)(7)(A), 8 U.S.C. 1184(o)(7)(A). DHS also removed the 90-day adjustment of status application period requirement; instead, a T nonimmigrant may apply for adjustment of status after accruing three years in valid T nonimmigrant status. *See* 8 CFR 245.23(a)(3).

6. Extension of Status

Commenters on the 2002 interim rule also objected to the lack of extensions available for T nonimmigrant status. Since the publication of the 2002 interim rule, legislation allowed for extensions of T nonimmigrant status in the following circumstances:

- An LEA, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the presence of the victim in the United States is necessary to assist in the investigation or prosecution of such activity;²⁰

²⁰ *See* VAWA 2005 section 821(a); INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i).

¹⁹ On August 29, 2011, as part of USCIS's business transformation initiative, USCIS replaced specific references to Form I-192 to read, "the form designated by USCIS." Immigration Benefits Business Transformation, Increment I, Final Rule, 76 FR 53764 (Aug. 29, 2013), at 53788.

• DHS determines that an extension is warranted due to exceptional circumstances;²¹ or

• During the pendency of an application for adjustment of status under INA section 245(l), 8 U.S.C. 1255(l).²²

INA section 214(o)(7)(B) and (C), 8 U.S.C. 1184(o)(7)(B) and (C). DHS is implementing the extension of status provisions at new 8 CFR 214.11(l).²³ Below, DHS discusses each extension category in turn.

a. Extension of Status for Law Enforcement Need

In this interim rule, DHS is implementing the discretionary extensions for law enforcement need at new 8 CFR 214.11(l)(1)(i). The T nonimmigrant bears the burden of establishing eligibility for an extension of status. *Id.* As outlined in new 8 CFR 214.11(l)(2), to request an extension, the T nonimmigrant will file an Application to Extend/Change Nonimmigrant Status, Form I-539, along with supporting evidence. The Application to Extend/Change Nonimmigrant Status should be filed before the individual's T nonimmigrant status expires.

To establish law enforcement need, supporting evidence may include a newly executed Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form 914 Supplement B, or other evidence from a law enforcement official, prosecutor, judge, or other authority who can investigate or prosecute human trafficking activity and was involved in the applicable case (*e.g.*, a letter on the agency's letterhead, emails, or faxes). *See* new 8 CFR 214.11(l)(5). The applicant must include evidence that comes directly from an LEA (as listed above). *Id.* The applicant may also submit any other credible evidence. *Id.* DHS believes this is necessary under INA section 214(o)(7)(B)(i), 8 U.S.C. 1184(o)(7)(B)(i), because that section allows for an extension only if a law

enforcement official (which includes prosecutors, judges, and others with the authority to investigate or prosecute human trafficking) at the Federal, State, or local level "certifies" that the presence of the victim is necessary. The use of the word "certifies" does not allow for the substitution of evidence that does not come directly from an LEA. Applicants are not required to use Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B, to seek an extension of T nonimmigrant status.

b. Extension of Status for Exceptional Circumstances

In this interim rule, DHS is implementing the discretionary extensions for exceptional circumstances at new 8 CFR 214.11(l)(1)(ii). As described above, to request an extension, the T nonimmigrant will file an Application to Extend/Change Nonimmigrant Status, Form I-539, along with supporting evidence. New 8 CFR 214.11(l)(2).

An applicant may submit his or her own statement and any other credible evidence to establish exceptional circumstances for an extension of status. Such evidence could include, but is not limited to, medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses. *See* new 8 CFR 214.11(l)(6). An exceptional circumstance could exist when a principal T nonimmigrant's status will expire and an approved family member had not yet received a T visa from a consulate to apply for admission to the United States. In this example, without an extension, if the principal T nonimmigrant's status expires, the family member could not apply for a T visa to apply for admission to the United States. In the evidence submitted to establish exceptional circumstances in this example, the principal should explain what exceptional circumstances prevented the family member(s) from applying for admission to the United States.

Applicants should apply for an extension before the T nonimmigrant status has expired. USCIS, however, has discretion to grant an extension after T nonimmigrant status expires. *See* new 8 CFR 214.11(l)(3). The T nonimmigrant should explain in writing, in accordance with 8 CFR 214.1(c)(4), why he or she is filing the Application to Extend/Change Nonimmigrant Status, Form I-539, after the T nonimmigrant status has expired. If USCIS grants an extension of T nonimmigrant status, USCIS will issue a new Notice of Action valid from the date the previous status expired

until 1 year after approval of the extension. Once an applicant receives this new Notice of Action, he or she may then file an Application to Register Permanent Residence or Adjust Status, Form I-485, to adjust status to lawful permanent resident before the extension expires.

c. Extension of Status While an Application for Adjustment of Status Is Pending

In this interim rule, DHS implements a mandatory extension for those who apply for adjustment of status at new 8 CFR 214.11(l)(7), and does not require a separate application or additional supporting evidence to request an extension of status when an application for adjustment of status has been properly filed. INA section 214(o)(7)(C), 8 U.S.C. 1184(o)(7)(C), requires USCIS to grant this extension; therefore no evidentiary burden rests on the applicant.

7. Waiting List

Congress has established a 5,000-person limit on the number of grants of T-1 nonimmigrant status per fiscal year (from October 1 through September 30). *See* INA section 214(o)(2)-(3), 8 U.S.C. 1184(o)(2)-(3). In the 2002 interim rule, DHS implemented a waiting list procedure in the event that the numerical limit is reached in a particular fiscal year. *See* former 8 CFR 214.11(m)(2). USCIS has not had to utilize the waiting list procedure created in the 2002 interim rule because approvals have not approached 5,000 in any given fiscal year. The 2002 interim rule provided that an applicant on the waiting list would "maintain his or her current means to prevent removal." *Id.*

DHS received three comments pointing out that DHS did not address protection from removal for those without current means. The commenters urged DHS to provide protection from removal or a legal means to stay in the United States for this population of applicants.

DHS agrees with this comment, and has determined that this provision is superfluous and confusing. DHS has therefore removed the provision, to clarify that applicants who may be placed on the waiting list for T nonimmigrant status can either maintain their "current means" to prevent removal (deferred action, parole, or stay of removal) and any employment authorization, or attain "new means." *See* new 8 CFR 214.11(j)(2).

Although DHS retains the authority to protect applicants on the waiting list from being removed, the 2002 interim

²¹ *See* TVPRA 2008 section 201(b)(1); INA section 214(o)(7)(B)(iii), 8 U.S.C. 1184(o)(7)(B)(iii).

²² *See* TVPRA 2008 section 201(b)(2); INA section 214(o)(7)(C), 8 U.S.C. 1184(o)(7)(C).

²³ In addition, TVPRA 2008 provided an extension of status for T nonimmigrants who were eligible for adjustment of status relief under INA section 245(l), 8 U.S.C. 1255(l), but could not obtain adjustment of status relief because DHS had not issued implementing regulations. *See* TVPRA 2008 section 201(b)(1); INA section 214(o)(7)(B)(ii), 8 U.S.C. 1184(o)(7)(B)(ii). TVPRA 2008 was enacted on December 23, 2008. DHS issued regulations on adjustment of status on December 12, 2008. *See* 73 FR 75540. Therefore, when TVPRA 2008 was enacted, regulations on adjustment of status existed. Because INA section 214(o)(7)(B)(ii), 8 U.S.C. 1184(o)(7)(B)(ii), is obsolete, DHS will not reference this language in this interim rule.

rule's implication that the applicant may not seek other means to prevent removal was problematic. DHS has existing policies, procedures, and regulations for exercising its discretion in providing parole, deferred action, or a stay of removal to individuals on a case-by-case basis. *See, e.g.*, 8 CFR 241.6 (administrative stay of removal); 8 CFR 274a.12(c)(14) (employment authorization for deferred action grantees demonstrating economic necessity); 8 CFR 212.5 (parole of aliens into the United States). DHS will consider providing temporary relief on a case by case basis to applicants on the waiting-list who are participating in law-enforcement investigations in the United States pursuant to those policies, regulations and procedures.

This change maintains the protections in the previous regulation while providing DHS and the applicant with more flexibility, particularly as to those applicants who may have no "current means" to prevent removal, and allows applicants the flexibility to seek alternate avenues of relief if their "current means" may not be sustainable or the most beneficial.

8. Revocation

In the 2002 interim rule, DHS created several grounds for revocation on notice at 8 CFR 214.11(s). T nonimmigrant status could be revoked on notice if:

- The T nonimmigrant violated the requirements of T nonimmigrant status;
- The approval of the T nonimmigrant application violated 8 CFR 214.11 or involved an error in preparation, procedure, or adjudication;
- In the case of a T-2 spouse, the T-2 spouse's divorce from the T-1 principal became final;
- The LEA notifies USCIS that the principal T nonimmigrant has unreasonably refused to cooperate with the investigation or prosecution and provides USCIS with a detailed explanation in writing; or
- The LEA withdraws its endorsement or disavows the contents of the endorsement in a detailed written explanation.

a. Streamlining Revocation Based on Violation of the Requirements of T Nonimmigrant Status

Six commenters asserted that the ground of revocation at 8 CFR 214.11(s)(1)(i), based on a violation of the requirements of the status by the T nonimmigrant, needs clarification. Commenters suggested that the meaning is unclear because if the applicant satisfied the eligibility requirements, the status should not be revoked, unless there was an error in granting the status

(which is provided for in another ground of revocation).

DHS agrees that the ground of revocation on notice at 8 CFR 214.11(s)(1)(i) could benefit from greater clarification. The requirements of INA section 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T) generally are victimization, physical presence, compliance with any reasonable LEA request for assistance, and extreme hardship involving unusual and severe harm if the applicant is removed. If USCIS has evidence that one of these requirements was not met, it could revoke under 8 CFR 214.11(s)(1)(ii). If the violation is based on a victim not complying with reasonable requests, USCIS could revoke under 8 CFR 214.11(s)(1)(iv) or (v), based on information from an LEA or a withdrawal or disavowal of an LEA endorsement (bullets 4 and 5 above, respectively). In this interim rule, DHS is therefore removing 8 CFR 214.11(s)(1)(i). *See* new 8 CFR 214.11(m)(2). Relatedly, for clarity, DHS is incorporating a statutory citation into the "errant approval" ground of revocation (bullet 2 above). *Id.*

b. Revocation Based on Information Provided by Law Enforcement

Commenters were also concerned that an LEA could provide information to USCIS that a victim is no longer cooperating and this information could serve as the basis for revocation. The commenters noted that revocation could be problematic in these cases, because USCIS would have already determined the individual would face extreme hardship involving unusual and severe harm if removed.

DHS is not persuaded that there is a problem with receiving information from an LEA about a victim with T nonimmigrant status. Consistent with the goals of the TVPA, DHS must balance law enforcement needs with the protection of victims of trafficking. Law enforcement may provide USCIS with valuable probative information, and it would be illogical for USCIS to reject this information solely because it came from an LEA or because USCIS made a prior adjudication of eligibility. USCIS does not revoke automatically upon receiving this LEA information; rather, it can revoke after providing notice to the T nonimmigrant of the intent to revoke and an opportunity for the victim to respond. As new 8 CFR 214.11(m)(2) and 8 CFR 103.3 explain, USCIS will issue a notice of intent to revoke in writing, providing the applicant with an opportunity to respond, and potentially provide additional evidence to rebut the

information provided by the LEA. USCIS will accept any relevant evidence under new 8 CFR 214.11(d)(2)(ii) and (3). Evidence could include, but is not limited to, information about the mental or physical health of the applicant, including any ongoing trauma, information about the safety concerns involved for the applicant or his or her family, information about how the victim has been cooperative, information about the disposition of the case, or information about how the LEA requests were not reasonable. *Id.*

USCIS will then review all the evidence considering the totality of the circumstances, and will not revoke based solely on any one factor or piece of evidence, including the information provided by the LEA. When USCIS initially approves the T nonimmigrant status, including making the determination that the victim would face extreme hardship upon removal, USCIS also accounts for victimization and compliance with reasonable requests. If USCIS learns after approval that there are grounds sufficient for revocation under new 8 CFR 214.11(m), USCIS may exercise its discretion to revoke the T nonimmigrant status.

c. Revocation of Derivative Nonimmigrant Status

In this interim rule, DHS is adding a ground for automatic revocation applicable only to family members outside of the United States. DHS will revoke an approved derivative application if the family member notifies USCIS that he or she will not apply for admission into the United States. *See* new 8 CFR 214.11(m)(1). This provision closely mirrors a provision in the U nonimmigrant status regulations at 8 CFR 214.14(h)(1).

9. Technical Fix for T Nonimmigrants Residing in the CNMI

Physical presence in the CNMI will be considered in determining whether an applicant for T nonimmigrant status meets the physical presence requirement. *See* INA section 101(a)(15)(T)(i)(II); 8 CFR 214.11(b)(2); *see also* INA section 101(a)(38) (defining "United States" for immigration purposes as including the CNMI).

Prior to the federalization of CNMI immigration law on November 28, 2009, victims in the CNMI had to travel to Guam or elsewhere in the United States to actually be admitted as a T nonimmigrant. *See* Title VII of the Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229, 122 Stat. 754 (2008) (effectively replacing the CNMI's immigration laws with the INA and other applicable U.S.

immigration laws, with few exceptions). The adjustment of status provisions for T nonimmigrants require 3 years of continuous physical presence in the United States since admission as a T nonimmigrant. See INA section 245(l)(1)(A), 8 U.S.C. 1255(l)(1)(A). An approved T nonimmigrant in the CNMI would not accrue this time in the United States for purposes of adjustment of status until on or after November 28, 2009, when the CNRA took effect, and only if he or she was actually admitted to the United States. The CNRA included a rule of construction that time in the CNMI before November 28, 2009 does not count as time in the United States (except for limited purposes). See CNRA section 705(c).

VAWA 2013 added a new exception to this rule, so that time in the CNMI, whether before or after November 28, 2009, counts as time admitted as a T nonimmigrant for establishing physical presence for purposes of adjustment of status to lawful permanent residence, so long as the applicant was granted T nonimmigrant status. See VAWA 2013, tit. viii, section 809. DHS interprets this to mean that when T nonimmigrant status was granted to an individual in the CNMI, the 3-year continuous physical presence required for adjustment of status began to run at that time, even if he or she was not actually admitted in T nonimmigrant status. See new 8 CFR 245.23(a)(3)(ii).

D. Filing and Biometric Services Fees

DHS received 17 comments on the interim rule regarding fees. Commenters thought application fees for T nonimmigrant status, derivative T nonimmigrant status, and waivers of inadmissibility were excessive and burdensome. Some commenters recommended eliminating or greatly reducing fees associated with applying for T nonimmigrant status, especially for minor victims.

Since the publication of the 2002 interim rule, intervening events resolved commenters' concerns. In 2007, DHS eliminated the fee to file the Application for T Nonimmigrant Status, Form I-914, and the Application for Family Member of a T-1 Recipient, Form I-914 Supplement A. See *Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule*, 72 FR 29851, at 29865 (Feb. 1, 2007). Further, USCIS may waive the fee for any request from the time of application for T nonimmigrant status until USCIS adjudicates an application for adjustment of status. See TVPRA 2008 section 201(d)(3); INA section 245(l)(7),

8 U.S.C. 1255(l)(7). DHS added this waiver authority at 8 CFR 103.7(c)(3)(xviii). See *U.S. Citizenship and Immigration Services Fee Schedule*, 75 FR 58961 (Sept. 24, 2010). Thus, an applicant may request a fee waiver for any other form associated with the application for T nonimmigrant status.

DHS will require biometric services for all applicants for T nonimmigrant status between the ages of 14 and 79. See new 8 CFR 214.11(d)(4) and 8 CFR 103.16 (providing that any individual may be required to submit biometric information if the regulations or form instructions require such information).²⁴ In addition, regarding the biometric services fee, at the time of the 2002 interim rule, DHS charged applicants for biometric services. DHS regulations now provide that no fee will be charged for biometric services for T nonimmigrant applicants. See 8 CFR 103.7(b)(1)(i)(C)(3); *U.S. Citizenship and Immigration Services Fee Schedule; Final Rule*, 75 FR 58962, 58991, 58967, 58986 (Sept. 24, 2010).

One commenter suggested that taking fingerprints as part of the application process was duplicative since many victims have already had fingerprints taken. Biometric capture is a necessary measure in any USCIS application process to ensure identity and prevent fraud. USCIS must determine the identity of the individual through biometric capture. In addition, not all victims of trafficking or all applicants for T nonimmigrant status will have had contact with law enforcement or have had fingerprints taken by law enforcement and USCIS will not have access to the applicant's fingerprints from those who do.

DHS will not amend its general biometric capture requirements as requested by the commenter. DHS, however, is removing the requirement at 8 CFR 214.11(d)(2)(ii) that applicants submit three photographs with an application for T nonimmigrant status. At the time of the 2002 interim rule, the DHS biometric process did not include taking photographs of applicants. USCIS now takes photographs when capturing biometrics, so this requirement is no longer necessary.

²⁴ Any individual may be required to submit biometric information if the regulations or form instructions require such information or if requested in accordance with 8 CFR 103.2(b)(9). DHS may collect and store for present or future use, by electronic or other means, the biometric information submitted by an individual. DHS may use this biometric information to conduct background and security checks, adjudicate immigration and naturalization benefits, and perform other functions related to administering and enforcing the immigration and naturalization laws. 8 CFR 103.16(a).

V. Regulatory Requirements

A. Administrative Procedure Act

As explained below, the changes made in this interim rule do not require advance notice and opportunity for public comment, because they are (1) required by various legislative revisions, (2) exempt as procedural under 5 U.S.C. 553(b)(A), (3) logical outgrowths of the 2002 interim rule, or (4) exempt from public comment under the "good cause" exception to notice-and-comment under 5 U.S.C. 553(b)(B). DHS nevertheless invites written comments on this interim rule, and will consider any timely submitted comments in preparing a final rule.

1. Statutorily Required Changes

As noted elsewhere in the preamble, DHS is conforming its T nonimmigrant regulations to statutory changes that provide little agency discretion in their interpretation and promulgation. When regulations merely restate the statute they implement (*i.e.*, when the rule does not change the established legal order), the APA does not require the agency to use notice-and-comment procedures. See 5 U.S.C. 553(b)(B); *Gray Panthers Advocacy Comm. v. Sullivan*, 936 F.2d 1284, 1291 (D.C. Cir. 1991). So long as the agency does not expand the substantive reach of the statute to impose new obligations, penalties, or substantive eligibility requirements—*i.e.*, so long as the agency "merely restate[s]" the statute—notice and comment are unnecessary. See *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 65 (D.D.C. 2000). The following changes meet these criteria:

(a) Victims who leave the United States and are allowed reentry for participation in investigative or judicial processes are eligible. New 8 CFR 214.11(b)(2), (g)(1)(v), (g)(2)(iii), INA 101(a)(15)(T)(i)(II), *as amended by* TVPRA 2008 section 201(a)(1)(C). As discussed above in the preamble, section 201(a)(1)(C) of TVPRA 2008 amended section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), to include physical presence on account of the victim having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or perpetrator of trafficking. DHS codifies this change in this rule at new 8 CFR 214.11(b)(2) and 214.11(g)(1)(v), which provide, respectively, that, "the alien is physically present in the United States," and the presence requirement reaches an alien who is present, "on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes

associated with an act or perpetrator of trafficking.” This change in regulation merely codifies intervening statutory changes. Advance notice and opportunity for public comment are therefore unnecessary.

Incident to expanding the definition of presence as described above, this rule also establishes that applicants claiming entry into the United States for participation in investigative or judicial processes must document that their entry was valid and that it was for participation in investigative or judicial processes associated with trafficking. New 8 CFR 214.11(g)(3). This provision makes no changes to the established legal order, other than to reiterate the public’s statutory rights and establish procedures for adjudication. Similar to a number of other evidentiary requirements in this rule, the documentation requirement affords the public maximum flexibility in presenting their case to the agency. The change does not impose any limitation on the types of evidence that would be acceptable to show valid entry. Advance notice and opportunity for public comment are therefore unnecessary.

(b) Victims of trafficking which occurred abroad, who have been allowed entry for investigative or judicial processes, are eligible. New 8 CFR 214.11(b)(2), (g)(1)(v), (g)(3). INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i).

As noted above, DHS is revising its regulations at new 8 CFR 214.11(g)(3) to provide that the victim may be physically present in the United States on account of having been allowed initial entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking that did not occur in the United States. This change expands the scope of the regulation as required by section 201(a)(1)(C) of TVPRA 2008 to account for eligibility when the trafficking occurred abroad but the victim was allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking. Similar to the change described directly above, this change in regulation merely codifies intervening statutory changes. Advance notice and opportunity for public comment are therefore unnecessary.

(c) Exemption for victims under 18 years old from compliance with any reasonable request for assistance. INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb) and (cc); new 8 CFR 214.11(b)(3)(i), (ii).

Under the 2002 interim rule, persons under the age of 15 were not required

to comply with any reasonable request for assistance in a prosecution or investigation from an LEA. Former 8 CFR 214.11(b)(3)(ii). The statute was amended by TVPRA 2008 to exempt from this requirement children under 18 years of age. See INA section 101(a)(15)(T)(i)(III)(bb) and (cc), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb) and (cc). In this rule, DHS is codifying the intervening statutory changes without modification.²⁵ New 8 CFR 214.11(b)(3)(i) and (ii).

(d) Exemption for victims who suffer trauma from compliance with reasonable requests for assistance. INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb); New 8 CFR 214.11(h)(4)(i).

INA section 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa) requires that victims comply with any reasonable request for assistance from an LEA, but the INA exempts victims who are, “unable to cooperate with a request described in item (aa) due to physical or psychological trauma.” INA section 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb). DHS provides in this rule that, if the applicant is unable to cooperate with a reasonable request due to physical or psychological trauma or age, an applicant who has not had contact with an LEA or who has not complied with any reasonable request may be exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution. New 8 CFR 214.11(h)(4)(i). In this rule, DHS is codifying the intervening statutory changes without modification.²⁶

This rule also establishes general procedures for an applicant to demonstrate the trauma necessary for this exception. The victim will be required to submit evidence of the trauma by submitting an affirmative statement describing the trauma and any other credible evidence. This includes, for instance, a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim’s mental state, and medical, psychological, or other records which are relevant to the trauma. *Id.* USCIS reserves the authority and discretion to contact the law enforcement agency

²⁵ USCIS has implemented this change in practice. See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

²⁶ USCIS has implemented the trauma exception in practice. See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

involved in the case, if appropriate. *Id.* These provisions are procedural and make no changes to the established legal order, other than to reiterate the public’s statutory rights. Although notice-and-comment requirements do not apply to this provision, DHS welcomes comments from the public on this matter.

(e) Requirement to notify HHS upon discovering that a person under the age of 18 may be a victim of trafficking. TVPRA 2008 section 212(a)(2); New 8 CFR 214.11(d)(1)(iii).

Federal agencies must notify HHS within 48 hours upon (1) apprehension or discovery of an unaccompanied alien child or (2) any claim or suspicion that an alien in custody is under 18 years of age. See TVPRA 2008 section 235(b)(2), codified at 8 U.S.C. 1232(b)(2). In addition, to facilitate the provision of public benefits to trafficking victims, federal agencies must notify HHS not later than 24 hours after discovering that a person under the age of 18 may be a victim of a severe form of trafficking in persons. See TVPRA 2008 section 212(a)(2), codified at 22 U.S.C. 7105(b)(1)(G). In this rule, DHS is codifying the statutory changes without modification; receipt of a T nonimmigrant status application from a minor will result in DHS notifying HHS. See new 8 CFR 214.11(d)(1)(iii).

(f) Expansion of family members an alien victim is permitted to apply for derivative T nonimmigrant status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). New 8 CFR 214.11(k)(1)(ii), (iii).

The INA allows a principal applicant under 21 years of age to apply for admission in T nonimmigrant status of his or her parents and unmarried siblings under 18 years of age. See INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). In addition, the INA allows any principal, regardless of age, to apply for parents or unmarried siblings under 18 years of age if the family member faces a present danger of retaliation as a result of the principal’s escape from the severe form of trafficking in persons or his or her cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III). Finally, any principal, regardless of age, may apply for the adult or minor children of the principal’s derivative family members if the derivative’s child faces a present danger of retaliation as a result of the principal’s escape from the severe form of trafficking or cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III).

In this rule, DHS is codifying the change made by TVPRA 2003 to expand eligibility by allowing a victim granted T-1 nonimmigrant status (principal) to apply for the admission of his or her spouse, child, and, if the principal is under 21 years of age, his or her parent, or unmarried sibling under the age of 18. New 8 CFR 214.11(k)(1)(ii). In addition, DHS is codifying the change made by TVPRA 2003 that provides that, regardless of the age of the principal, if the eligible family member faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement, the principal alien can apply for the admission of his or her parents. New 8 CFR 214.11(k)(1)(iii). Finally, DHS is codifying the change made in VAWA 2013 that permits the adult or minor children of a principal's derivative family member to be an eligible family member if he or she faces a present danger of retaliation. *Id.* DHS is codifying these statutory changes without modification; notice and comment thereon are therefore unnecessary.²⁷

Finally, this rule includes a procedural provision at new 8 CFR 214.11(k)(3) requiring the principal applicant to demonstrate that the derivative applicant is a family member who meets one of the categories in new 8 CFR 214.11(k)(1)(ii)-(iii), *i.e.*, that the family member meets statutory eligibility requirements as a family member accompanying or following to join the principal applicant. Similar to a number of other evidentiary requirements in this rule, the documentation requirement concerning eligible family members affords the public maximum flexibility in presenting their case to the agency. DHS nonetheless invites public comment on this matter.

²⁷ USCIS implemented the statutory directive to allow a T-1 to apply for their spouse, child, and, if the principal is under 21 years of age, their parent, or unmarried sibling under the age of 18 in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004). USCIS has also implemented the change allowing the principal, regardless of his or her age, to apply for the admission of parents, unmarried siblings under the age of 18, or the adult or minor children of their derivative family members if the family member faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement was implemented by USCIS in a memorandum dated July 21, 2010. *See* Mem., USCIS, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions*; Revisions to Adjudicators Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38) (July 21, 2010).

(g) Age-out protection for child principal applicant to petition for eligible family members. INA section 214(o)(5), 8 U.S.C. 1184(o)(5). New 8 CFR 214.11(k)(5)(ii).

TVPRA 2003 section 4(b)(2)(B) revised the INA to provide that a principal who files an application for T nonimmigrant status while under 21 years of age will continue to be eligible even if the principal turns 21 while the application is pending. INA section 214(o)(5), 8 U.S.C. 1184(o)(5). DHS has revised the regulations in this rule to provide that a principal who was under 21 years of age at the time of filing for T-1 status can file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, to include T-4 parents even if the principal turns 21 years of age before the principal's T-1 application is adjudicated. *See* new 8 CFR 214.11(k)(5)(ii). DHS is codifying this statutory change without modification; notice and comment thereon are therefore unnecessary.²⁸

(h) The unmarried sibling of a child principal need only be under 18 years of age when the child principal files for T-1 status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). New 8 CFR 214.11(k)(5)(ii).

TVPRA 2003 sections 4(b)(1)(B) and (b)(2) provide that a principal under 21 years of age may apply for admission of his or her parents and unmarried siblings under 18 years of age. Thus, the INA now provides that an unmarried sibling who is seeking status as a T-5 derivative of a principal T-1 applicant under 21 years of age need only be under the age of 18 at the time the principal T-1 applicant files for T-1 nonimmigrant status. INA section 101(a)(15)(T)(ii)(I), 8 U.S.C. 1101(a)(15)(T)(ii)(I). It does not matter if the unmarried sibling turns 18 years of age between the time the principal files his or her own application and before the principal files the application for his or her sibling. *Id.* The age of an unmarried sibling when USCIS adjudicates the T-1 application, when the unmarried sibling files the derivative application, when USCIS adjudicates the derivative application, or when the unmarried sibling is admitted to the United States does not affect eligibility. 8 CFR 214.11(k)(5)(ii). DHS is codifying this statutory change without modification; notice and

²⁸ USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

comment thereon are therefore unnecessary.²⁹

(i) A child derivative only needs to be under 21 at the time the principal parent filed for T-1 status. INA section 214(o)(4), 8 U.S.C. 1184(o)(4); New 8 CFR 214.11(k)(5)(iii).

TVPRA 2003 section 4(b)(2)(B) revised INA section 214(o)(4), 8 U.S.C. 1184(o)(4), to provide that as long as a child derivative (T-3) was under 21 years of age on the date the principal T-1 parent applied for T-1 nonimmigrant status, he or she will continue to be classified as a child and allowed entry as a derivative child. DHS implements this statutory requirement in this rule by providing that the derivative's age at the time of classification or entry does not matter as long as the child T-3 derivative was under the age of 21 when the parent T-1 filed for T nonimmigrant status. *See* new 8 CFR 214.11(k)(5)(iii). DHS is codifying this statutory change without modification; notice and comment thereon are therefore unnecessary.³⁰

(j) Exemption for the public charge ground of inadmissibility. INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A); New 8 CFR 212.16(b).

The INA generally prohibits DHS and immigration judges from admitting as an immigrant or granting adjustment of status to lawful permanent residence to any alien who is likely to become a public charge at any time. *See* INA section 212(a)(4), 8 U.S.C. 1182(a)(4). TVPRA 2003 section 4(b)(4), however, provided that inadmissibility as a public charge does not apply to an applicant for T nonimmigrant status. *See* INA section 212(d)(13)(A), 8 U.S.C. 1182(d)(13)(A). DHS is amending the regulations in this interim rule and on the form to comply with the statutory requirements. *See* new 8 CFR 212.16(b). DHS is codifying these statutory provisions without modification; notice and comment thereon are therefore unnecessary.³¹

(k) Allowing extensions of status and the process to request them for LEA need, exceptional circumstances, and applying for adjustment of status. INA

²⁹ USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

³⁰ USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

³¹ USCIS has already implemented this change in a policy memorandum dated April 15, 2004. *See* Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004).

section 214(o)(7), 8 U.S.C. 1184(o)(7); New 8 CFR 214.11(l).

VAWA 2005 section 821(a) requires DHS to allow extensions of T nonimmigrant status for law enforcement need. TVPRA 2008, section 201(b)(1), requires DHS to allow extensions of T nonimmigrant status in cases of exceptional circumstances, and TVPRA 2008 section 201(b)(2) requires extensions for T nonimmigrants who apply for adjustment of status. INA section 214(o)(7), 8 U.S.C. 1184(o)(7). DHS provides in this rule that USCIS may grant extensions of T-1 nonimmigrant status beyond 4 years from the date of approval in 1-year periods from the date the T-1 nonimmigrant status ends, if the presence of the victim in the United States is necessary to assist in the investigation or prosecution of such activity, an extension is warranted due to exceptional circumstances, or the T-1 nonimmigrant has a pending application for adjustment of status to lawful permanent resident. New 8 CFR 214.11(l)(1). DHS is codifying this statutory change without substantive modification; notice and comment thereon are therefore unnecessary.

This rule also establishes general procedures for an applicant to demonstrate that he or she has met the requirements for an extension of stay including prescribing an application and supporting evidence to establish eligibility. New 8 CFR 214.11(l)(2)–(7). The victim will be required to document his or her eligibility by submitting the form designated by USCIS with the prescribed fee in accordance with form instructions before the expiration of T-1 nonimmigrant status, including: Evidence to support why USCIS should grant the extension; evidence of law enforcement need that comes directly from a law enforcement agency, including a new LEA endorsement; evidence from a law enforcement official, prosecutor, judge, or appropriate authority; or any other credible evidence. New 8 CFR 214.11(l)(2)–(5). An applicant may demonstrate exceptional circumstances by submitting an affirmative statement or any other credible evidence, including medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses. New 8 CFR 214.11(l)(6). USCIS will automatically extend T nonimmigrant status when a T nonimmigrant properly files an application for adjustment of status, and a separate application for extension of T nonimmigrant status is not required. New 8 CFR 214.11(l)(7). These broad procedural provisions

make no changes to the established legal order, other than to reiterate the public's statutory rights, and to allow the applicants to exercise such rights. DHS has therefore determined it is not required to publish these procedures for public notice and comment. DHS nevertheless welcomes comments from the public on these changes.³²

(l) Time of physical presence in the CNMI counts as time admitted as a T nonimmigrant for establishing physical presence required at adjustment of status. INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II); New 8 CFR 214.11(b)(2), 245.23(a)(3)(ii).

Title VIII, section 809 of VAWA 2013 provides that aliens in the CNMI are eligible for T nonimmigrant status because status in the CNMI meets the requirement for an alien to be physically present in the United States. INA section 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II) (aliens eligible for T nonimmigrant status include those who are “physically present in the . . . [CNMI] . . . on account of such trafficking”). This means that under the statute, when T nonimmigrant status was granted for someone in the CNMI, the 3-year continuous physical presence required for adjustment of status began to toll at that time, even if he or she was not actually admitted in T nonimmigrant status. DHS provides in this rule that if the individual was granted T nonimmigrant status under 8 CFR 214.11, such individual's physical presence in the CNMI before, on, or after November 28, 2009, including physical presence subsequent to the grant of T nonimmigrant status, is considered as equivalent to presence in the United States pursuant to an admission in T nonimmigrant status. New 8 CFR 245.23(a)(3)(ii). DHS is codifying this statutory directive without substantive modification; notice and comment thereon are therefore unnecessary.

(m) The definition of sex trafficking includes patronizing or soliciting of a person for the purpose of a commercial sex act. *See* INA 101(a)(15)(T)(i)(I), 22 U.S.C. 7102.

The Justice for Victims of Trafficking Act of 2015 (JVTA), Public Law 114–22, 129 Stat 227 (May 29, 2015), expanded the definition of sex trafficking at 22 U.S.C. 7102(10) to add “patronizing or soliciting of a person for the purpose of a commercial sex act” to the list of activities constituting sex trafficking. DHS believes the terms “patronizing or

soliciting of a person for the purpose of a commercial sex act” are clear both in terms of USCIS adjudications and LEA certification and do not require clarification of their intent or meaning in regulatory text. Because DHS is codifying this statutory change without modification, notice and comment on those provisions are unnecessary. New 8 CFR 214.11(a), (f)(1).

2. Procedural Changes Only

Binding agency rules that do not themselves alter the substantive rights or interests of parties are exempt from the APA notice and comment requirements. 5 U.S.C. 553(b)(A); *Public Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002). Although the exception for procedural rules is to be construed narrowly, its purpose is clear: to provide agencies with flexibility to implement and modify administrative procedures efficiently, so long as such procedures do not intrude on the public's substantive rights or interests. Above, DHS notes that in revising its regulation to codify intervening statutory changes, DHS has included a number of procedural provisions that provide the public with maximum flexibility to exercise statutory rights. In addition to such provisions, DHS is also making a number of procedural changes, as described below and in the succeeding sections.

This rule includes at least one change to reflect changes to agency organization. The 2002 interim rule provided that any Service officer who receives a request for T nonimmigrant status shall be referred to the local Service office with responsibility for investigations relating to victims of severe forms of trafficking in persons for a consultation. Former 8 CFR 214.11(v). DHS provides in this rule that a USCIS employee who comes into contact with an alien believed to be a victim of a severe form of trafficking in persons should consult with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence, as appropriate. New 8 CFR 214.11(o). This change is necessary because the former INS was split into separate components responsible for the adjudication of immigration benefits and investigations and enforcement.

3. Logical Outgrowth

A number of the changes made in this interim rule are logical outgrowths of the 2002 rule, and made in response to the public comments on that rule. When issuing a final or interim final rule following an interim rule, an agency must maintain “a flexible and open-

³²In addition, USCIS has already implemented these statutory requirements through policy guidance. *See* Mem., USCIS, *Extension of Status for T and U Nonimmigrants*; Revisions to AFM Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11–28) (Apr. 19, 2011).

minded attitude” toward comments that support changing the original interim rule. *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (quoting *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), and citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994)). The agency should change its original rule if the data before the agency justify the change. Substantial changes may be made so long as the interim final rule provided a clear signal to the affected public as to what changes may be made, they are in character with the original scheme, and they are a logical outgrowth of the notice provided. See *id.*; *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225 (D.C. Cir. 1994); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979).

The following changes made in this rule are logical outgrowths of the 2002 interim rule because they were suggested by commenters or they are clearly within the scope and in character with the original scheme of the interim rule. Notwithstanding the passage of time since the 2002 interim rule was published and intervening legislation that affects the T nonimmigrant visa program, comments provided, the factual circumstances surrounding the rule, and the administration of the T nonimmigrant visa program have not changed to an extent that would render the comments on the 2002 rule not germane or otherwise inapplicable. As described more fully in the section-by-section analysis above, in each case, the justification for the change is either as strong as or stronger than it was in 2002. Among these changes are the following:

(a) No need to actually perform labor or services to qualify as victim. New 8 CFR 214.11(f)(1); TVPA sections 103(9), (10), (14); 22 U.S.C. 7102(9), (10), (14).

(b) Removal of filing deadline. Former 8 CFR 214.11(d)(4).

(c) Eliminating citation to *United States v. Kozminski*, 487 U.S. 931 (1998), and otherwise clarifying the definition of “involuntary servitude” for purposes of TVPA section 103(9), 22 U.S.C. 7102(9). New 8 CFR 214.11(a).

(d) For evidence of victimization, accept LEA endorsements as any credible evidence. New 8 CFR 214.11(f)(1).

(e) Remove the requirement to show no clear chance to depart the United States. Former 8 CFR 214.11(g)(2).

(f) Provide a non-exhaustive list of factors used in the “totality of the circumstances” test to determine reasonableness of failure to cooperate

with law enforcement. New 8 CFR 214.11(h)(2).

(g) Consolidate the grounds for revocation of status for violation of requirements of T status from two into one ground. New 8 CFR 214.11(m)(2)(i).

(h) Provide for revocation of derivative nonimmigrant status if the family member will not apply for admission to the United States. New 8 CFR 214.11(m)(1).

(i) Clarify that the standard for judging a victim’s refusal to satisfy an LEA request is not whether the victim’s refusal was reasonable, but whether the LEA request was reasonable. New 8 CFR 214.11(m)(2)(iii).

(j) For evidence of compliance with an LEA request, accept any credible evidence and ascribe no special weight to the LEA endorsement. New 8 CFR 214.11(h)(3).

(k) Changing the standard for when DHS will exercise its discretionary criminal waiver authority with respect to crimes that do not involve a link to the victimization; whereas the former standard allowed for discretionary waiver in “exceptional cases” only, the new standard allows for discretionary waiver in a broader category of cases (and in cases involving violent or dangerous crimes, only in “extraordinary circumstances”). New 8 CFR 212.16(b)(2).

(l) Revise 8 CFR 212.16(b)(3), which previously provides that USCIS would waive a ground of inadmissibility only in exceptional cases when the ground of inadmissibility would prevent or limit the ability of the applicant to adjust to permanent resident status after the conclusion of 3 years. Former 8 CFR 212.16(b)(3). DHS is replacing “exceptional cases” with the term “extraordinary circumstances.” New 8 CFR 212.16(b)(3).

(m) Remove language that applicants on the wait list would maintain current means to prevent removal, to clarify that people can maintain current means or attain new means to prevent removal, in accordance with existing practice. Former 8 CFR 214.11(m)(2); new 8 CFR 214.11(j)(2).

(n) Updating nondisclosure protections for information relating to an applicant or beneficiary of an application for T nonimmigrant status. 8 U.S.C. 1367; New 8 CFR 214.11(p)(1).

4. Contrary to the Public Interest

Finally, public notice and comment is also not required when an agency for good cause finds that notice and public comment procedure are contrary to the public interest. The good cause exception is an important safety valve to be used where delay would do real

harm. *N. Am. Coal Corp. v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 854 F.2d 386, 389 (10th Cir. 1988). To the extent DHS is filling any gaps in promulgating provisions to implement the new statutory provisions, DHS has determined that delaying the effect of this rule during the period of public comment is contrary to the public interest. Congress created the T nonimmigrant classification to protect victims of human trafficking in the United States and encourage victims to fully participate in the investigation or the prosecution of the traffickers. See TVPA, sec. 102(b). Since the 2002 interim rule, Congress enacted legislation to encourage victims of human trafficking to assist law enforcement. Public Law 108–193, 117 Stat. 2875 (Dec. 19, 2003); Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006); Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006); Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008), Public Law 113–4, 127 Stat. 54 (Mar. 7, 2013), and Public Law 114–22, 129 Stat. 227 (May 29, 2015). Even if DHS has some remaining discretion in their execution, each of the specific changes made in the underlying law were intended to reduce the number of people who will be exposed to the dangers associated with human trafficking.

It is contrary to the public interest to delay the changes made by this rule to provide for pre-promulgation public comment. For example, adult or minor children of the principal’s derivative family members who face a present danger of retaliation as a result of the victim’s escape from a severe form of trafficking or cooperation with law enforcement may now qualify for adjustment of status after expiration of their T nonimmigrant derivative status. Without this change taking effect immediately, family members of victims who can get nonimmigrant status would not be able to adjust status to that of a lawful permanent resident and could be required to depart the United States after their nonimmigrant status runs out. This would expose them to danger from traffickers in their home country as a result of the principal’s cooperation with law enforcement. In order to be eligible to adjust status, the family member must continue to hold status at the time of the application. 8 CFR 245.23(b)(2). If this provision is delayed, there is a risk the T–6 derivative status period will expire and the family member will not be able to adjust status, as his or her time in T–6 status will have ended.

USCIS does not have another source of authority to preserve the eligibility of the T–6 status of the family member to

adjust status in lieu of implementing this provision immediately. In addition to potential harm to family members and reduced incentive for principals to participate in the T nonimmigrant visa program, delaying this change would also harm law enforcement's ability to leverage the knowledge and experience of family members themselves. Family members coming to the United States from abroad may have knowledge of the actions of the trafficker that even the victim cooperating with the LEA may not know. DHS has seen situations where the assistance of the family members has greatly furthered the investigation. DHS has decided to avoid these harms by not delaying this change for a period of public notice and comment.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. As a result, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States companies to compete with foreign-based companies in domestic and export markets.

D. Executive Orders 12866 and 13563

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS considers this to be a "significant regulatory action," although not an

economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

1. Summary

With this interim rule, DHS incorporates in its regulations several statutory provisions associated with the T nonimmigrant status that have been passed since 2002. All statutory changes made before VAWA 2013 have already been implemented by DHS, and codifying these changes in the DHS regulations will result in no additional quantitative costs or benefits to impacted stakeholders nor the Federal government in administering the T nonimmigrant status program. Ensuring that DHS regulations are consistent with applicable legislation will provide qualitative benefits. Additionally, with the enactment of VAWA 2013, the following legislative changes were made to the statute and later implemented into DHS policy: (a) Expanding the derivative categories of family members that are eligible for derivative T nonimmigrant status; and (b) providing a technical fix to clarify that physical presence in the CNMI while in T nonimmigrant status will count as continuous presence in the United States for purposes of adjustment of status. DHS will assess the impact of the statutory provisions that will be codified into regulation in this interim rule. In addition, DHS is making several discretionary changes that will: (1) Clarify DHS policy in adjudicating T nonimmigrant applications; (2) eliminate a redundant requirement to include three passport-style photographs with applications; and, (3) make the T nonimmigrant status more accessible to victims of severe forms of trafficking in persons and their eligible family members. DHS estimates the statutory and discretionary changes made in this interim rule will result in the following impacts:

- A per application opportunity cost of time of \$33.92 for the T-1 nonimmigrant principal alien to complete and submit the Application for Family Member of T-1 Recipient, Form I-914 Supplement A, in order to apply for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking and/or cooperation with law enforcement.³³ The cost is due

³³ There is no filing fee for the Form I-914 and its supplements. The opportunity cost of time refers to the estimated cost associated with the time it

to the VAWA 2013 statutory change that permits eligible children of the principal's derivative relatives to be admitted under the T-6 classification. DHS has no basis to project the population of children of derivative family members that may be eligible for the new T-6 nonimmigrant classification. Like current T nonimmigrant derivative classifications, the new T-6 visa classification is not subject to a statutory cap.

- An individual total cost of \$89.70 for aliens who become eligible to apply for principal T-1 nonimmigrant status due to the discretionary change that removes the filing deadline for aliens trafficked before October 28, 2000. The total cost includes the opportunity cost associated with pulling together supporting evidence and filing the Application for T Nonimmigrant Status, Form I-914, and the time and travel costs associated with submitting biometrics. If the applicant includes the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS has no way of predicting how many victims physically present in the United States may now be eligible for T-1 nonimmigrant status as a result of removing the filing deadline. Those that are newly eligible for T-1 nonimmigrant status as a result of removing the date restriction will still be subject to the statutory cap of 5,000 T-1 nonimmigrant visas allotted per fiscal year.

- An individual total cost of \$89.70 for victims trafficked abroad that will now become eligible to apply for T nonimmigrant status due to the discretionary change that expands DHS's interpretation of the physical presence requirement. As previously described, the total cost includes both the opportunity of time cost and estimated travel cost incurred with filing Form I-914 and submitting biometrics. If the applicant includes the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B in the application, there is an opportunity cost of \$149.70 for the law enforcement worker that completes that form. DHS is unable to project the size of this new eligible population, but note that all victims newly eligible for T-1 nonimmigrant status due to this change are still subject to the statutory cap of

takes for an individual to complete and file the Form I-914 and its supplements.

5,000 T-1 nonimmigrant visas allotted per fiscal year.

Based on recent filing volumes, DHS estimates total cost savings of \$56,130 for T nonimmigrant applicants and their eligible family members as a result of the discretionary change that eliminates the requirement to submit three passport-style photographs with their T nonimmigrant applications. In addition, the interim rule will provide various qualitative benefits for victims of trafficking, their eligible family members, and law enforcement agencies investigating trafficking incidents. These qualitative benefits result from making the T nonimmigrant classification more accessible, reducing some burden involved in applying for this status in certain cases, and clarifying the process by which DHS adjudicates and administers the T nonimmigrant benefit.

2. Background

Congress created the T nonimmigrant status in the TVPA of 2000. The TVPA provides various means to combat trafficking in persons, including tools for LEAs to effectively investigate and prosecute perpetrators of trafficking in persons. The TVPA also provides protection to victims of trafficking through immigration relief and access to federal public benefits. DHS published an interim final rule on January 31, 2002 implementing the T nonimmigrant status and the provisions put forth by the TVPA 2000.³⁴ The 2002 interim final rule established the eligibility criteria, application process, evidentiary standards, and benefits associated with obtaining T nonimmigrant status.

T nonimmigrant status is available to victims of severe forms of trafficking in persons who comply with any reasonable request for assistance from LEAs in investigating and prosecuting

the perpetrators of these crimes. T nonimmigrant status provides temporary immigration benefits (nonimmigrant status and employment authorization) and a pathway to permanent resident status, provided that established criteria are met. Additionally, if a victim obtains T nonimmigrant status then certain eligible family members may also apply to obtain T nonimmigrant status.³⁵

Table 1 provides the number of T nonimmigrant application receipts, approvals, and denials for principal victims and derivative family members for fiscal year 2005 through fiscal year 2015. Although the maximum annual number of T nonimmigrant visas that may be granted is 5,000 for T-1 principal aliens per fiscal year, this maximum number has never been reached and is not projected to be reached in the foreseeable future under current practice.³⁶

TABLE 1—USCIS PROCESSING STATISTICS FOR FORM I-914³⁷

FY	Victims (T-1)			Family of victims (T-2,3,4,5)			I-914 Totals		
	Receipts	Approved	Denied	Receipts	Approved	Denied	Receipts	Approved	Denied
2005	379	113	321	34	73	21	413	186	342
2006	384	212	127	19	95	45	403	307	172
2007	269	287	106	24	257	64	293	544	170
2008	408	243	78	118	228	40	526	471	118
2009	475	313	77	235	273	54	710	586	131
2010	574	447	138	463	349	105	1,037	796	243
2011	967	557	223	795	722	137	1,762	1,279	360
2012	885	674	194	795	758	117	1,680	1,432	311
2013	799	848	104	1,021	975	91	1,820	1,823	195
2014	944	613	153	925	788	105	1,869	1,401	258
2015	1,062	610	294	1,162	694	192	2,224	1,304	486

From the publication of the interim final rule in 2002 through 2016, Congress passed various statutes amending the original TVPA 2000. These include: The Trafficking Victims Protection Reauthorization Act of 2003 (TVRA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVRA 2008), and the Violence Against Women

Reauthorization Act of 2013 (VAWA 2013). After the passage of each of the statutes, as noted in section I.A.1 of this preamble, USCIS issued policy and guidance memorandum to both implement the provisions of the Acts and to ensure compliance with the legal requirements of the Acts.³⁸

This interim final rule codifies DHS policy and guidance from these statutes into the Code of Federal Regulations (CFR). The statutory changes from TVRA 2003, TVRA 2008, and VAWA

2005 are reflected in Table 2, below. Codifying existing USCIS policy and guidance ensures that the regulations are consistent with the applicable legislation, and that the general public has access to these policies through the CFR without locating and reviewing multiple policy memoranda. DHS provides the impact of these provisions in Table 2 assuming a pre-statutory baseline per OMB Circular A-4 requirements.

³⁴ See 67 FR 4784.

³⁵ The current T nonimmigrant categories are: T-1 (principal alien), T-2 (spouse), T-3 (child), T-4 (parent), and T-5 (unmarried sibling under 18 years of age). This interim rule creates a new T nonimmigrant category, T-6 (adult or minor child of a principal's derivative).

³⁶ There is no statutory cap for grants of T nonimmigrant derivative status or visas.

³⁷ Approved and denied volumes may not sum to the receipts in a given fiscal year because the processing and final decision for T nonimmigrant

status applications may overlap fiscal years. USCIS records indicate that processing an application for T nonimmigrant status requires an estimated 6 to 9 months. Data source for the table: Performance Analysis System (PAS), USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (DARB).

³⁸ See Mem. from Paul Novak, Director, Vermont Service Center, USCIS, *Trafficking Victims Protection Reauthorization Act of 2003* (Apr. 15, 2004); see also Mem., USCIS, *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status*

and Adjustment of Status Provisions; Revisions to AFM Chapters 23.5 and 39 (AFM Update AD10-38) (July 21, 2010); Mem., USCIS, *Extension of Status for T and U Nonimmigrants; Revisions to AFM Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-28)* (Apr. 19, 2011); Mem., USCIS, *New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands; Revisions to Chapters 23.5 and Chapter 39.2 (AFM Update AD14-05)* (Apr. 15, 2015).

TABLE 2—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF TVPRA 2003, TVPRA 2008 AND VAWA 2005 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE

Provision	Current policy	Expected cost of the interim rule	Expected benefit of the interim rule
Expanding the definition and discussion of LEA (added by VAWA 2005).	LEA includes State and local law enforcement agencies.	None	Provides clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit providing transparency to both the victims of trafficking and USCIS adjudicators.
Removing the requirement that eligible family members must face extreme hardship if the family member is not admitted to the United States or was removed from the United States (removed by VAWA 2005).	Family members may be eligible for T nonimmigrant status without having to show extreme hardship.	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A. However, DHS reiterates that this is a voluntary provision.	Provides a broader definition of an eligible family member and may increase the number of eligible family members.
Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons (added by TVPRA 2003).	The provision increased the minimum age requirement from 15 years to 18 years of age.	None	Provides a benefit by acknowledging the significance of an applicant's maturity in understanding the importance of participating with an LEA.
Exempting T nonimmigrant applicants from the public charge ground of inadmissibility (added by TVPRA 2003).	DHS may grant T nonimmigrant status to applicants even if they are likely to become a public charge.	No additional costs, other than the opportunity cost of time to file Form I-914 and if necessary Supplement B.	Victims who are likely to become a public charge are able to apply for T nonimmigrant status and receive the benefits associated with that status.
Exemptions to an applicant's requirement, to comply with any reasonable request by an LEA (added by TVPRA 2008).	Applicants are exempt from the requirement to comply with any reasonable request by an LEA in cases where the applicant is unable to comply, due to physical or psychological trauma.	None	Provides a benefit by acknowledging the significance of an applicant's mental capacity in understanding the importance of participating with an LEA.
Limiting duration of T nonimmigrant status but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status (VAWA 2005 and TVPRA 2008).	Extends the duration of T nonimmigrant status from 3 years to 4 years, but limits the status to 4 years unless an applicant can qualify for an extension.	None	Provides T nonimmigrants status for an additional year with the possibility of extension.
Expanding the regulatory definition of physical presence on account of trafficking (added by TVPRA 2008).	DHS will consider victims as having met the physical presence requirement if they were allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator trafficking for purposes of eligibility for T nonimmigrant classification.	None	Provides a broader definition of physical presence on account of trafficking and may increase the number of eligible applicants.
Allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members (added by TVPRA 2003).	Unmarried siblings under 18 years of age and parents of the principal applicant may now be eligible for T nonimmigrant status under the T-4 and T-5 derivative category, if the principal applicant is under age 21.	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A on behalf of the principal's unmarried siblings under 18 years of age and parents.	Provides a broader definition of eligible family member and may increase the number of eligible family members.
Providing age-out protection for child principal applicants to apply for eligible family members (added by TVPRA 2003).	A principal applicant who was under 21 years of age at the time of filing the Form I-914 can file Form I-914 Supplement A on behalf of eligible family members, including parents and unmarried siblings under age 18, even if the principal alien turns 21 years of age before the principal T-1 application is adjudicated.	None	Provides a qualitative benefit by removing an age-out restriction, allowing principal applicants to apply for parents and unmarried siblings under age 18, even if the principal applicant turns 21 years of age before the T-1 application is adjudicated.

TABLE 2—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF TVPRA 2003, TVPRA 2008 AND VAWA 2005 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE—Continued

Provision	Current policy	Expected cost of the interim rule	Expected benefit of the interim rule
Providing age-out protection for child derivatives (added by TVPRA 2003).	An unmarried child of the principal who was under age 21 on the date the principal applied for T-1 nonimmigrant status may continue to qualify as an eligible family member, even if he or she reaches age 21 while the T-1 application is pending.	None	Provides a qualitative benefit by removing an age-out restriction, allowing a principal applicant parent to apply for a child as a derivative beneficiary, even if the child reaches age 21 while the principal's T-1 application is pending.
Allowing principal applicants of any age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years of age and parents as eligible family members if the family member faces a present danger of retaliation as a result of the principal applicant's escape from a severe form of trafficking or cooperation with law enforcement (added by TVPRA 2008).	Allows any principal applicant, regardless of age, to apply for derivative T nonimmigrant status for parents or unmarried siblings under 18 years of age if they face a present danger of retaliation.	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A, on behalf of the derivative's unmarried siblings under 18 years of age and parents.	If eligible, unmarried siblings under 18 years of age and parents of principal applicants may qualify for T-4 and T-5 nonimmigrant status, and obtain the immigration benefits that accompany that status. In addition, LEAs may benefit if more victims come forward to report trafficking crimes.
Care and custody of unaccompanied children with the HHS (added by TVPRA 2008).	Federal agencies must notify HHS upon apprehension or discovery of an unaccompanied child or any claim or suspicion that an individual in custody is under 18 years of age. Minors are eligible to receive federally funded benefits and services as soon as they are identified by HHS as a possible victim of trafficking.	DHS may have some additional administrative costs associated with informing HHS of unaccompanied children. As a result, HHS may have some additional costs in providing benefits and services to the affected minors.	Provides a qualitative benefit by enabling the health and well-being of a minor victimized by trafficking. These victims also obtain federally funded benefits and services.

3. Changes Implemented in This Interim Rule

This regulatory evaluation will provide a more in-depth analysis of the costs and benefits of the two statutory provisions added by VAWA 2013 and implemented in this interim rule. In addition, this analysis will address the impacts of several new discretionary provisions DHS is making in this interim rule.

a. Statutory Provisions

The legislative changes to the T nonimmigrant statutes added by VAWA 2013 and addressed in this analysis include:

- Allowing principal applicants of any age to apply for derivative T nonimmigrant status for children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the applicant's escape from a severe form of trafficking or cooperation with law enforcement. See INA section 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III); new 8 CFR 214.11(k)(1)(iii). Harmonizing with current allowances for T derivatives, this interim rule will also permit those classified as children of derivative

aliens to apply for adjustment of status under INA section 245(l), 8 U.S.C 1255(1); new 8 CFR 245.23(b)(2).

- Implementing a technical fix to clarify that presence in the Commonwealth of the Northern Mariana Islands (CNMI) after being granted T nonimmigrant status qualifies toward the requisite physical presence requirement for adjustment of status to lawful permanent resident. See section 705(c) of the Consolidated Natural Resources Act of 2008 (CNRA), Title VII, Public Law 110-229, 122 Stat. 754 (May 8, 2008); new 8 CFR 245.23(a)(3)(ii).

VAWA 2013 expanded the eligibility of family members who may qualify for T nonimmigrant derivative status. The new statutory provision allows for the eligibility of the children (adult or minor) of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking or cooperation with law enforcement. Family members that may be eligible as a result of this new provision could, for example, include: Stepchild(ren) (the adult or minor child(ren) of the principal's spouse); grandchild(ren) (the adult or minor child(ren) of the principal's

child); niece(s) or nephew(s) (the adult or minor child(ren) of the principal's sibling); and/or sibling(s) (the adult or minor child of the principal's parent). The principal must file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, on behalf of these eligible family members, in accordance with form instructions. Evidence that demonstrates a present danger of retaliation to the family member must be included with the application.

New 8 CFR 214.1(a)(7) classifies the principal and eligible family members (including the new category as set forth by VAWA 2013) as:

- T-1 (principal alien);
- T-2 (spouse);
- T-3 (child);
- T-4 (parent);
- T-5 (unmarried sibling under 18 years of age); or
- T-6 (adult or minor child of a principal's derivative).

The final relevant provision in VAWA 2013 is a clarification that presence in the CNMI after being granted T nonimmigrant status qualifies toward the physical presence requirement for adjustment of status. T nonimmigrants may adjust to lawful permanent resident status after three years of continuous

physical presence in the United States. See INA section 245(l)(1)(A), 8 U.S.C. 1255(l)(1)(A). Prior to the enactment of VAWA 2013, an approved T nonimmigrant in the CNMI would not accrue time that counts toward the three year continuous physical presence requirement for adjustment of status until on or after November 28, 2009. Title VII of the CNRA extended, with limited exceptions, the U.S. immigration laws to the CNMI, effective November 28, 2009. Before the U.S. immigration laws were in effect in the CNMI, aliens in the CNMI had to travel to Guam or the United States to be admitted as a T nonimmigrant. In addition, the CNRA noted that time in the CNMI prior to the date the U.S. immigration laws became effective would not count as time in the United States. DHS data does not track aliens who were admitted as T nonimmigrants in the United States or Guam who relocated to the CNMI, and who may have been unable to adjust to lawful permanent resident because their time in the CNMI prior to November 28, 2009 did not qualify towards the three year physical presence requirement. VAWA 2013 added an exception to this provision so that time in the CNMI prior to November 28, 2009 would count as time admitted as a T nonimmigrant for establishing physical presence for purposes of adjustment of status to lawful permanent resident. See new 8 CFR 245.23(a)(3)(ii).

b. Discretionary Changes

In addition to the statutory provisions, DHS will make the following discretionary changes to DHS regulations governing the T nonimmigrant classification:

- Specify how USCIS will exercise its waiver authority over criminal inadmissibility grounds; new 8 CFR 212.16(b)(3).
- Discontinue the practice of weighing evidence as primary and secondary in favor of an “any credible evidence” standard; 8 CFR 214.11(f); new 8 CFR 214.11(d)(2)(ii) and (3).
- Eliminate the requirement that an applicant provide three passport-style photographs; 8 CFR 214.11(d)(2)(ii); new 8 CFR 214.11(d)(4).
- Remove the filing deadline for those victimized prior to October 28, 2000; 8 CFR 214.11(d)(4).
- Removes the restriction in the 2002 interim rule that an eligible applicant who is placed on the waiting list shall maintain his or her current means to prevent removal (deferred action, parole, or stay of removal) and any employment authorization, subject to any limits imposed on that. See former

8 CFR 214.11(m)(2). DHS will clarify that applicants on the waiting-list can either maintain their “current means” to prevent removal or find a “new means” to attain relief from removal. This will provide USCIS with avenues to exercise its discretion to provide temporary assistance to applicants on a case-by-case basis, even if applicants have no current means of protection if the statutory cap is met in a given fiscal year; new 8 CFR 214.11(j)(1).

- Remove the current regulatory “opportunity to depart” requirement for those who escaped traffickers before law enforcement became involved; former 8 CFR 214.11(g)(2).

- Provide guidance on meeting the definition of “severe forms of trafficking in persons” in those cases where an individual has not actually performed labor or services, or a commercial sex act; new 8 CFR 214.11(f)(1).

- Addresses situations where trafficking has occurred abroad, but the victim can potentially meet the physical presence eligibility requirement; new 8 CFR 214.11(g)(3).

- Update DHS regulations to reflect the creation of DHS, and to implement current standards of regulatory organization, plain language, and USCIS efforts to transform its customer service practices.

4. Benefits

a. Benefits of Statutory Provisions

A qualitative benefit is realized by incorporating all the statutory provisions that are current USCIS practice in DHS regulations. The addition of these provisions to DHS regulations is necessary to ensure: That DHS regulations are consistent with applicable legislation; that no ambiguity exists between current DHS practices and the CFR; and that the general public is able to access DHS practices via the CFR without having to consult multiple policy memoranda.

The VAWA 2013 provision expanding the derivative eligibility to the children (adult or minor) of the principal’s derivative family members provides an additional qualitative benefit for trafficking victims and their eligible family members. Specifically, incorporating this statutory change in DHS regulations upholds the United States Federal Government’s commitment to promoting family unity in its immigration laws. Additionally, this provision may provide a qualitative benefit to law enforcement agencies that are investigating trafficking crimes, as it provides them with another method to incentivize victims to report these crimes who otherwise may not have

because they feared retaliation against their family members.

In the event the adult or minor children of the principal’s derivative family members face a present danger of retaliation as a result of the victim’s escape from a severe form of trafficking or cooperation with law enforcement, they may now qualify for T nonimmigrant derivative status. Prior to this expansion of derivative eligibility these family members may have been exposed to danger as a result of the victims coming forward to report the trafficking incidents. This may have acted as a disincentive for victims to report these crimes and to seek assistance. Expanding derivative eligibility to these family members may induce trafficking victims to seek LEA assistance and to cooperate with investigations of trafficking crimes. As a result, trafficking victims, their eligible family members, and law enforcement agencies investigating trafficking abuses all benefit from this statutory expansion.

The final VAWA 2013 provision provides a benefit by addressing a gap in immigration law as it pertains to the CNMI to clarify that presence as a T nonimmigrant in the CNMI before or after November 28, 2009 qualifies toward the three-year physical presence requirement for adjustment of status to lawful permanent residence. Prior to this technical fix, the CNRA provision stated that time in the CNMI before November 28, 2009 did not count as time in the United States. This may have been a barrier to T nonimmigrants residing in the CNMI who wished to adjust status but whose time in the CNMI prior to this date did not qualify toward the three year physical presence requirement. With the enactment of VAWA 2013, time spent as a T nonimmigrant in the CNMI before November 28, 2009 counts toward the physical presence requirement for adjustment of status to lawful permanent residence.

DHS is unable to determine how many T nonimmigrants may have been unable to adjust to permanent residence status as a result of the prior CNRA provision. Those in the CNMI had to travel to Guam or other parts of the United States to be admitted as a T nonimmigrant prior to the replacement of the immigration laws of the CNMI with those of the United States under the CNRA. DHS data does not track individuals who were admitted as T nonimmigrants in the United States (including Guam) who relocated to the CNMI, and who may have been unable to adjust to lawful permanent resident because their time in the CNMI prior to November 28, 2009 did not qualify

towards the three-year physical presence requirement. DHS believes this to have been a rare occurrence, however, and therefore anticipates that any additional population adjusting status solely as a result of this change will be small, if any.

b. Benefits of Discretionary Changes

DHS will eliminate the current requirement that three passport-style photographs be submitted with T nonimmigrant applications. This is a requirement for both principal alien victims and their eligible family members. Enhancements in USCIS operations as it pertains to collecting biometrics make the requirement to submit these photographs redundant. T nonimmigrant applicants have their photographs taken when they visit an application support center (ASC) to submit biometrics. The photographs taken at the ASC replaces the current requirement to submit three passport-style photographs with T nonimmigrant applications. DHS, in our ongoing efforts to review our regulations and reduce unnecessary and/or redundant burdens, is eliminating the requirement to submit these photographs, resulting in quantitative savings for applicants. According to the findings of Department of State (DOS), a passport-style photograph has an average cost of \$10.00.³⁹ Therefore, each T nonimmigrant status applicant would save an estimated \$30.00, the cost of three photographs.

This \$30.00 savings would benefit all future T nonimmigrant principal and derivative applicants. As noted throughout this analysis, DHS is unable to reasonably project how future filing volumes may be affected by the statutory and discretionary changes implemented by this interim rule. In an effort, however, to calculate total cost savings to applicants by no longer having to submit three photographs DHS averaged total annual receipts for Fiscal Years 2011 through 2015. (Refer to Table 1 in this analysis to view all T nonimmigrant receipts since Fiscal Year 2005.) DHS assumes that average filing volumes for Fiscal Years 11 through 15 offer a reasonable expectation of what future receipts would be under current DHS process. DHS does not have the information to forecast populations that may result from the changes made in this interim rule. Using the average of

Fiscal Years 11 through 15 receipts, DHS estimates expects that annual receipts for T nonimmigrant status applications (both principal and derivative applicants) would be approximately 1,871.⁴⁰ Again, the assumed volume of 1,871 is calculated without considering any unforeseeable increases in receipts that may result from new population groups that will be eligible for T nonimmigrant status in this interim rule. Therefore, at a minimum, DHS expects the cost savings from eliminating the photograph requirement to be \$56,130.⁴¹

In addition to this quantitative benefit, the remaining discretionary changes result in qualitative benefits for victims of trafficking and their eligible family members, and also for law enforcement agencies in their efforts to combat and investigate trafficking crimes. The provision relating to the discretion of USCIS to administer its waiver authority over criminal inadmissibility grounds provides benefits by clarifying USCIS policy as it relates to USCIS waiver authority and the granting of deferred action. Additionally, removing the regulatory restrictions on methods available to protect applicants on the waiting list from removal will allow DHS the discretion to grant deferred action to applicants on the waiting list who currently have no current means to prevent removal.

Additionally, amending DHS regulations to clarify that a trafficked individual may be eligible for T nonimmigrant status even though he or she did not perform labor or services, or a commercial sex act will also provide benefits for the impacted population. This amendatory language is meant to clarify when an individual can satisfy the definition of being a victim of "severe forms of trafficking in persons," even if the victim escaped his or her traffickers prior to performing the labor, services, or commercial sex acts intended. This clarification will be a qualitative benefit to applicants who, prior to the clarification, may have experienced confusion as to whether they are eligible for T nonimmigrant status if they have not performed the services mentioned. Likewise, the clarification will provide clear guidance to DHS adjudicators in their evaluations of applications in which this might occur.

DHS is also eliminating the filing deadline for those who were victimized prior to October 28, 2000. See 8 CFR 214.11(d)(4). According to current DHS

regulations, victims of a severe form of trafficking in persons whose victimization occurred prior to this deadline must have filed a completed application for T nonimmigrant status within one year of March 4, 2002, the effective date of the 2002 interim final rule. The deadline was originally put in place because of uncertainty of how many victims may come forward to apply for T nonimmigrant benefits. The reasoning at the time was that there could be a large influx of applicants for T nonimmigrant benefits, which could have adversely impacted timely administration and adjudication of the program if no deadline were in place. This concern never materialized, however, and annual T nonimmigrant application receipts have remained well under the cap of 5,000 T-1 principal aliens. Therefore, DHS will remove the filing deadline for those victims that were trafficked before October 28, 2000. This will make the T nonimmigrant status accessible to those victimized prior to the enactment of TVPA that were unable to apply for T nonimmigrant status prior to the filing deadline. DHS is unable to estimate how many individuals may apply once the deadline is removed, although it is believed the receipts would be small given the amount of time that has passed.

The discretionary provision eliminating the requirement that victims of trafficking must show they had no clear opportunity to depart from the United States will provide another benefit to potential applicants. Currently, victims of trafficking who escaped their traffickers prior to LEA involvement in the matter must submit evidence showing they had no clear chance to leave the United States once they became free of their traffickers. Such evidence may include, but is not limited to, demonstrating the victim had limited ability to depart due to circumstances attributable to the trafficking, such as trauma, injury, lack of funds, or seizure of travel documents by the traffickers. See 8 CFR 214.11(g)(2). DHS has determined that this requirement places an unnecessary additional burden on victims of trafficking who wish to apply for T nonimmigrant status. Removing this evidentiary requirement will provide time and cost savings to the applicant by not having to procure and provide such evidence to USCIS; additionally, USCIS may realize some time savings by not having to review these documents during case adjudication. DHS did not have the necessary data to estimate the monetary value of such savings.

³⁹ DOS estimates an average cost of \$10 per passport photo in the PRA Supporting Statement found under OMB control number 1450-0004. A copy of the Supporting Statement is found on [Reginfo.gov](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001) at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001 (see question #13 of the Supporting Statement).

⁴⁰ Average of FY 11 through 15 total receipts.

⁴¹ Calculation: 1,871 × \$30.00 = \$56,130.

DHS also will discontinue the practice of labeling evidence as primary and secondary, in favor of requiring “any credible evidence” the applicant may possess to show that they were a victim of a severe form of trafficking and have complied with any reasonable request to assist an LEA. Currently, DHS considers only the submission of the Declaration of Law Enforcement Officer, Form I-914 Supplement B, to be primary evidence. All other evidence the applicant may submit is labeled as secondary evidence. This distinction has proven to be confusing for both applicants and law enforcement officials, because the Supplement B is not a required form to be submitted by applicants. Furthermore, LEAs have expressed concern that because the Supplement B is the only evidence considered by DHS to be “primary evidence,” the mere fact that an LEA completes the form may be the primary ground relied on by DHS in granting status to an applicant seeking T nonimmigrant benefits. As a result of this misinterpretation, some LEAs have been reluctant to complete a Supplement B on behalf of applicants. DHS believes removing the “primary evidence” and “secondary evidence” labels currently in place will reduce confusion for applicants and alleviate the concerns of LEAs. LEAs may then be more likely to complete the Supplement B for an applicant, which, although it would no longer have the label of “primary evidence,” would still contribute to the alien’s overall application for T nonimmigrant benefits. In turn, the victim may be more willing to cooperate if he or she feels more confident the LEA will recognize this assistance.

Lastly, DHS will amend the regulations to provide guidance on how victims may still qualify for T nonimmigrant status in instances when the trafficking occurred abroad. Though DHS anticipates there will be limited circumstances when trafficking occurred abroad that could still lead to T nonimmigrant eligibility, it has identified some instances when this might occur and discusses them in this interim rule. This expanded interpretation of the physical presence

requirement will be a benefit to any additional aliens and their eligible family members who may now become eligible for T nonimmigrant status. In addition, LEAs will benefit from having access to additional eligible populations that can provide key information and assistance to those investigating trafficking crimes. DHS is unable to project how many victims may become eligible for T nonimmigrant status as a result of this change.

5. Costs

a. Costs of Statutory Provisions

The majority of the changes to DHS regulations made to incorporate statutory provisions result in no additional costs to victims of severe forms of trafficking or their eligible family members. Since the application volume for the T nonimmigrant program has never reached capacity, we expect that any additional costs to DHS in its administration of the T nonimmigrant program will be minimal. The provisions created as a result of congressional action in the years following the 2002 interim final rule and prior to the VAWA 2013 are current DHS policy and therefore no changes or amendments to current practice are necessary as a result of codifying them in DHS regulations. Likewise, the provision in VAWA 2013 clarifying that presence in the CNMI qualifies toward the requisite physical presence requirement for adjustment of status will result in no additional costs.

The VAWA 2013 provision expanding T nonimmigrant derivative status eligibility to the children (adult or minor) of the principal’s derivative family members is currently reflected in DHS policy and includes certain associated costs. In order for family members to be eligible for the new T-6 derivative categories, the T-1 principal must file an Application for Family Member of T-1 Recipient, Form I-914 Supplement A, on behalf of each of these family members, in accordance with form instructions. There is no fee to file the Form I-914 Supplement A; therefore, the associated cost to the T-1 principal is the opportunity cost of time to file the form. DHS uses the time

burden of one hour for Form I-914 Supplement A to calculate the opportunity cost associated with this provision.⁴²

Consistent with other DHS rulemakings, we use wage rates as the mechanism to calculate opportunity or time valuation costs associated with submitting required information to USCIS in order to apply for immigration benefits. Since T-1 principals must file one Application for Immediate Family Member of T-1 Recipient, Form 914 Supplement A, on behalf of each of their eligible family members and are authorized to work when they are granted T nonimmigrant status, DHS employs the mean hourly wage rate of all occupations in the United States, \$23.23.⁴³ The mean hourly wage rate is multiplied by 1.46 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, bringing the total burdened wage rate to \$33.92.⁴⁴ Therefore, the T-1 principal is subject to a per application opportunity cost of \$33.92 to complete and file an Application for Immediate Family Member of T-1 Recipient, Form I-914 Supplement A with USCIS.⁴⁵

The opportunity cost of time for T-1 principals to file the Application for Family Member of a T-1 Recipient, Form I-914 Supplement A, as presented here are individual per application costs only; applying these costs to an entire population is not possible at this time. DHS has no way to estimate the additional population of eligible family members who may qualify for status under the new T-6 nonimmigrant derivative classification. Current statutory authority offers no comparable immigration benefits to family members of nonimmigrant aliens outside of those considered immediate relatives, such as spouses, children, parents, and in some cases siblings. Making benefits eligible to the children (adult or minor) of derivatives will be a new practice for DHS; therefore, an informed estimation of this population is not possible.

Table 3 provides a summary of the costs and benefits to the regulated population that are associated with the statutory changes as put forth by VAWA 2013.

⁴² Currently, the PRA time burden for Application for T-1 Nonimmigrant Status, Form I-914 and Application for Immediate Family Member of T-1 Recipient, Form I-914 Supplement A are not reported separately. The current time burden is reported in aggregate as 3 hours 15 min. The information collection instrument is being revised slightly, and as part of those revisions, the time burden for each form, Form I-914 (2.25 hours) and Form I-914A (1 hour), will be reported separately.

The information collection request will be reviewed by OMB concurrent with the interim final rule.

⁴³ U.S. Department of Labor, Bureau of Labor Statistics. *May 2015 National Occupational Employment and Wage Estimates*, Mean Hourly Wage (all occupations), available at: http://www.bls.gov/oes/current/oes_nat.htm#00-0000.

⁴⁴ Calculation: $\$23.23 \times 1.46 = \33.92 . Bureau of Labor Statistics, *Economic News Release*, Table 1.

Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2016, available at: <http://www.bls.gov/news.release/ecec.t01.htm>.

⁴⁵ $(\$33.92 \text{ hourly burdened wage rate}) \times (1 \text{ hour estimated time burden}) = \33.92 .

TABLE 3—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF VAWA 2013 STATUTORY CHANGES CODIFIED BY THIS INTERIM RULE

Provision	Current policy	Expected cost of the interim rule	Expected benefit of the interim rule
Allowing principals to apply for derivative T nonimmigrant status for children of the principal's derivative family members if the derivative's child faces a present danger of retaliation as a result of the victim's escape from a severe form of trafficking or cooperation with law enforcement.	Adult or minor children of the principal's derivative family members may now be eligible for T nonimmigrant status under the new T-6 derivative category.	T-1 principals will face an opportunity cost of \$33.92 to file Form I-914 Supplement A on behalf of the derivative's adult or minor child.	If eligible, the children of the principal's derivative relatives may qualify for T-6 nonimmigrant status, and obtain the immigration benefits that accompany that status. In addition, LEAs may benefit if more victims come forward to report trafficking crimes.
Implementing a clarification that presence in the Commonwealth of the Northern Mariana Islands (CNMI) after being granted T nonimmigrant status prior to November 28, 2009 qualifies toward the requisite physical presence requirement for adjustment of status.	Time in the CNMI as a T nonimmigrant, whether before, on or after November 28, 2009, now counts as physical presence for purposes of establishing eligibility for adjustment of status as a T nonimmigrant to lawful permanent residence.	None	Provides a benefit in that it addresses a gap in immigration law as it pertains to the CNMI and removes a provision that may have been a bar to adjustment of status to lawful permanent resident.

b. Costs of Discretionary Changes

Most of the discretionary changes included in the interim rule will require no additional costs to either victims of severe forms of trafficking or to DHS in its administration of T nonimmigrant status benefits. The two provisions related to USCIS's waiver authority over criminal inadmissibility grounds and its discretion to grant deferred action to those victims placed on the waiting list simply clarify current USCIS practice and do not result in changes to the process of handling and adjudicating T nonimmigrant applications. Likewise, the guidance provided in the interim rule for meeting the definition of "severe forms of trafficking in persons" where an individual has not performed labor or service, or a commercial sex act is simply a clarification of current DHS interpretation of the definition and will not result in additional costs or changes to the process of handling and the adjudication of T nonimmigrant applications. The remaining discretionary changes that result in no additional costs include:

- No longer weighing evidence as either primary or secondary in favor of an "any credible evidence" standard;
- Eliminating the requirement that applicants provide three passport-style photographs as part of his or her application;
- Discontinuing the current practice of requiring victims who escaped from traffickers prior to LEA involvement to submit evidence to show that he or she had no clear opportunity to depart from the United States; and
- Providing guidance on physical presence as it relates to eligibility for T

nonimmigrant status when the trafficking has occurred abroad.

Though these provisions do amend current DHS practice, they place no further burden or cost on victims of trafficking who wish to apply for T nonimmigrant status. Furthermore, DHS does not expect these changes to have an impact on staffing plans or adjudication timeframes in processing T nonimmigrant applications. The change to remove the filing deadline for individuals victimized prior to October 28, 2000 will result in costs for any additional victims that may now be eligible to apply for principal T-1 nonimmigrant status. In addition, if the victim wishes to provide evidence in their application that they are cooperating with law enforcement, there will be an opportunity cost for the law enforcement officer completing the Declaration of Law Enforcement Office for Victim of Trafficking in Persons, Form I-914 Supplement B.

Since there are no fees associated with either the T nonimmigrant application or providing required biometrics, the newly eligible population would be responsible only for the opportunity cost of time to file the Form I-914 and to submit the required biometrics.

DHS estimates the time burden to file the Form I-914 to be 2.25 hours. Generally, trafficked individuals applying for T-1 nonimmigrant status are not eligible to work in the United States until after USCIS has made a decision on their application (either a grant of bona fide determination or an approval). There could, however, be instances where a victim may have received other forms of immigration

relief which allowed them to legally work, although DHS does not collect the data necessary to estimate the number of victims that may fall into this category.⁴⁶ Consistent with other DHS rulemakings, we use wage rates as a mechanism to estimate the opportunity or time valuation costs for these aliens to file the Application for T Nonimmigrant Status, Form I-914 and to submit the required biometrics.

Assuming that most individuals applying for T-1 nonimmigrant status on the basis of removing the October 28, 2000 filing deadline are not yet authorized to work in the United States, DHS will use the Federal minimum wage as a proxy to estimate the opportunity cost understanding these individuals are not currently eligible to participate in the workforce. The Federal minimum wage is currently \$7.25 per hour.⁴⁷ To anticipate the full opportunity costs faced by the applicants, the minimum hourly wage rate is multiplied by 1.46 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, which equals \$10.59 per hour.⁴⁸ DHS

⁴⁶ For example, some in this population could have received a grant of continued presence from DHS, U.S. Immigration and Customs Enforcement, which would permit them work authorization. See 22 U.S.C. 7105(c)(3)(A)(i).

⁴⁷ U.S. Department of Labor, Wage and Hour Division. *Minimum Wage* effective July 24, 2009, available at: <http://www.dol.gov/dol/topic/wages/minimumwage.htm>.

⁴⁸ U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release*, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, May 2016, available at <http://www.bls.gov/news.release/ecec.t01>.

multiplied the fully burdened wage rate of \$10.59 per hour by the 2.25 hours estimated to file the Form I-914 to get an opportunity cost of \$23.83 to file the Application for T Nonimmigrant Status.⁴⁹

Applicants seeking T-1 nonimmigrant status will be required to travel to an ASC to submit biometrics. In past rulemaking, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.⁵⁰ DHS also estimates that applicants will wait an average of 1.17 hours for service, bringing the total time to submit biometrics to 3.67 hours.^{51 52} In addition, the cost of travel includes a mileage charge based on the estimated 50 mile round trip at the 2016 General Services Administration rate of \$0.54 per mile, which equals \$27.00 for each applicant.⁵³ Using an opportunity cost of time of \$10.59 per hour and the 3.67 hours estimated time for travel and service and the mileage charge of \$27.00, DHS estimates the cost per T-1 principal applicant to be \$65.87 for travel to and service at the ASC.⁵⁴ Therefore, the full cost for a T nonimmigrant applicant victimized

prior to October 28, 2000, including the total costs of filing the Form I-914 and submitting biometrics, is \$89.70.⁵⁵

Lastly, there is an opportunity cost for law enforcement to complete Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B if the applicant decides to include that evidence in their application. DHS estimates the time burden to complete Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B is 3.75 hours. In 2015, the mean hourly wage rate for law enforcement workers was \$27.34, which when accounting for non-salaried benefits equals \$39.92.⁵⁶ Using this total hourly wage rate, DHS estimates the opportunity costs for law enforcement to complete the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B is \$149.70.⁵⁷ DHS is unable to estimate how many individuals victimized prior to October 28, 2000 may apply once the filing deadline is removed. Due to the passage of time, we anticipate filing volumes for those that were victimized prior to October 28, 2000 to be minimal.

Additionally, individuals who may now become eligible for T nonimmigrant status as a result of the expanded interpretation of the physical presence requirement will face the same opportunity cost of \$89.70 to file the Form I-914 and submit the required biometrics. Likewise, if the applicant decides to include evidence of law enforcement cooperation, the law enforcement official completing Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B will face an opportunity cost of \$149.70. DHS is unable to estimate how many individuals may become eligible as a result of this provision but anticipates there will be a limited number of cases where the trafficking occurred outside of the United States and the alien will now meet the physical presence requirement.

Table 4 provides a summary of the costs and benefits associated with each discretionary change made in this interim rule. The discretionary change that updates terminology and organizational structure in DHS regulations is not included in the table as it results in no additional impacts.

TABLE 4—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF THE DISCRETIONARY CHANGES IMPLEMENTED IN THIS INTERIM RULE

Provision	Changes to current policy resulting from the interim rule	Expected cost of the interim rule	Expected benefit of the interim rule
Specifies how USCIS exercises its waiver authority over criminal inadmissibility grounds.	None. This will simply be a clarification of current DHS practice and align T nonimmigrant regulations with those currently governing the U nonimmigrant status.	None	Providing clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit to both the victims of trafficking and USCIS staff adjudicating these cases.
Discontinues weighing evidence as primary and secondary in favor of a standard that reviews any credible evidence in making the determination to approve or disapprove an application for T nonimmigrant status.	Evidence will no longer be labeled primary or secondary. DHS will accept any credible evidence of compliance with any reasonable request to assist LEAs.	None	Removes confusion associated with labeling evidence as primary and secondary, and will result in qualitative benefits for both the victims of trafficking and LEAs.
Eliminates the requirement that an applicant provide three passport-style photographs.	The applicant will no longer be responsible for submitting three passport-style photographs with his/her application. DHS will continue to take photographs at Application Support Centers at the time of fingerprint collection.	None	Results in total quantitative savings of \$56,130 for principal applicants and their derivatives.

⁴⁹ (\$10.59 per hour) × (2.25 hours) = \$23.83.

⁵⁰ See, e.g., *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 535 (Jan. 3, 2013) (DHS final rule).

⁵¹ See "Paperwork Reduction Act (PRA) Supporting Statement for Application for Employment Authorization, Form I-765 (OMB control number 1615-0040), Question 13. The Supporting Statement can be found on [Reginfo.gov](http://www.Reginfo.gov)

at http://www.reginfo.gov/public/do/PRAViewGR?ref_nbr=201502-1615-004."

⁵² Calculation: 2.5 hours + 1.17 average of service wait time = 3.67 total time to submit biometrics.

⁵³ The General Services Administration mileage rate of \$0.54, effective January 1, 2016, available at: <http://www.gsa.gov/portal/content/100715>.

⁵⁴ (\$10.46 per hour × 3.67 hours) + (\$0.54 per mile × 50 miles) = \$65.87.

⁵⁵ \$23.83 + \$65.87 = \$89.70.

⁵⁶ U.S. Department of Labor, Bureau of Labor Statistics. *May 2015 National Occupational Employment and Wage Estimates*, Law Enforcement Workers (occupational group code 33-3000), http://www.bls.gov/oes/current/oes_nat.htm#33-0000. The calculation to load the wage is: \$27.34 × 1.46 = \$39.92 (rounded).

⁵⁷ (\$39.92 hourly burdened wage rate) × (3.75 hours in estimated time burden) = \$149.70.

TABLE 4—SUMMARY OF IMPACTS TO THE REGULATED POPULATION OF THE DISCRETIONARY CHANGES IMPLEMENTED IN THIS INTERIM RULE—Continued

Provision	Changes to current policy resulting from the interim rule	Expected cost of the interim rule	Expected benefit of the interim rule
Removes the filing deadline for applicants victimized prior to October 28, 2000.	Those victimized prior to October 28, 2000 will be able to apply for T nonimmigrant status.	Any new eligible applicants will be responsible for the full cost of \$89.70 for applying and submitting fingerprints. If included in the application, the cost for law enforcement to complete Form I-914 Supplement B is \$149.70.	Those victimized prior to October 28, 2000, and their eligible derivative family members, will be able to apply for T nonimmigrant status and receive the immigration benefits associated with that status.
Permits USCIS to take a discretionary action to protect applicants from removal who are placed on the waiting list if the statutory cap is met in a given fiscal year.	None. This will simply be a clarification of current DHS practice and align T nonimmigrant regulations with those currently governing the U nonimmigrant status.	None	Providing clarity and consistency in DHS practice will lead to a qualitative benefit to both the victims of trafficking and DHS staff adjudicating these cases.
Removes the current regulatory “opportunity to depart” requirement for those victims who escaped traffickers before law enforcement became involved.	DHS will no longer require additional evidence to show the victim had no opportunity to depart the United States after he/she escaped traffickers prior to LEA involvement.	None	Provides a qualitative benefit by removing an additional evidentiary burden for those victims of trafficking who escaped prior to LEA involvement.
Provides guidance on meeting the definition of “severe forms of trafficking in persons” where an individual has not performed labor or services, or a commercial sex act.	None. This will clarify current DHS practice as regards the definition of “severe forms of trafficking in persons”.	None	Providing clarity and consistency in DHS practice will lead to a qualitative benefit to both the victims of trafficking and DHS staff adjudicating these cases.
Addresses situations where trafficking has occurred abroad and whether the applicant can potentially meet the physical presence requirement.	DHS may consider victims as having met the physical presence requirement for certain instances when the trafficking occurred outside the United States.	Any new eligible applicants will be responsible for the full cost of \$89.70 for applying and submitting fingerprints. If included in the application, the cost for law enforcement to complete Form I-914 Supplement B is \$149.70.	Individuals victimized abroad, and their eligible derivative family members, can apply for T nonimmigrant status. These victims will also help in investigations of trafficking crimes, which will benefit LEAs.

c. Costs to the Federal Government

If the changes implemented in this interim rule increase the volume of applications for T nonimmigrant status, USCIS could face increased costs to administer the T nonimmigrant status program. The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other immigrant applicants. INA section 286(m), 8 U.S.C. 1356(m). Recognizing the economic needs and hardships of this vulnerable population, as a matter of policy USCIS exempted the fee for applying for T nonimmigrant status and for submitting biometrics. Likewise, the fees for any additional applications needed for T nonimmigrants, from the time the alien victim applies for initial T nonimmigrant status (e.g. for submitting waivers of inadmissibility requests) through applications to adjust status, are eligible for fee waiver requests. Accordingly, the costs incurred by USCIS to process T nonimmigrant applications and biometrics are an insignificant portion

of the total USCIS adjudication costs compared to other fee paying immigrant benefit requests. These costs are insignificant due to the small number of receipts of Form I-914. In FY 2015, USCIS received 2,224 Form I-914 applications (see Table 1) out of a total of 7,650,475 applications received agency wide, making Form I-914 receipts less than 0.03% of total agency-wide receipts.⁵⁸ Therefore, to the extent that the changes implemented in this interim rule may result in additional applications, or even reach the statutory cap of 5,000 applications, in the short term we expect those costs to be insignificant and absorbed by the current fee structure for immigration benefits. In the long term, USCIS will continue to monitor the costs of administering the T nonimmigrant program as a normal part of its biennial fee review. The biennial fee review determines if fees for immigration

⁵⁸ Source: USCIS, Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2015 available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performeddata_fy2015_qtr4.pdf.

benefits are sufficient in light resource needs and filing trends. As previously mentioned, beneficiaries of T nonimmigrant status are also eligible for federal public benefits from the Department of Health and Human Services, so the changes implemented in this interim rule could result in increased transfer payments if there are increases in the number of persons granted T nonimmigrant status.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. DHS has determined that this rule is exempt from notice and comment rulemaking. Therefore, a regulatory flexibility analysis is not required for this rule. Nonetheless, USCIS examined the

impact of this rule on small entities under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6). The individual victims of trafficking and their derivative family members to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6).

F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

H. Family Assessment

This regulation may affect family well-being as that term is defined in section 654 of the Treasury General Appropriations Act, 1999, Public Law 105-277, Div. A. This action has been assessed in accordance with the criteria specified by section 654(c)(1). This regulation will enhance family well-being by encouraging vulnerable individuals who have been victims of severe forms of trafficking in persons to report the criminal activity and by providing critical assistance and benefits. Additionally, this regulation allows certain family members to obtain T nonimmigrant status once the principal applicant has received status.

I. Paperwork Reduction Act

Under the PRA of 1995, 44 U.S.C. 3501 *et seq.*, all Departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. DHS is amending application requirements and procedures for aliens to receive T nonimmigrant status, defined in section 101(a)(15)(T) of the INA, 8 U.S.C. 1101(a)(15)(T). DHS has revised the Application for T Nonimmigrant Status, Form I-914; the Application for Family Member of T-1 Recipient, Form I-914 Supplement A; and the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B, and the associated form instructions to conform with the new regulations (OMB Control Number 1615-0099). These forms are considered

information collections and are covered under the PRA. USCIS previously requested public comments on the revised forms and form instructions for 60 days. 60-day notice, *Agency Information Collection Activities: Application for T Nonimmigrant Status, Form I-914, Application for Immediate Family Member of T-1 Recipient, Supplement A, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Supplement B; Revision of a Currently Approved Collection*, 79 FR 6209-10 (Feb. 3, 2014). One comment was received that expressed general opposition to the T nonimmigrant program but provided no input on the information collection instruments. No changes were made in response to the comment.

The revised information collection has been submitted for approval to the Office of Management and Budget (OMB) for review and approval under procedures covered under the PRA. USCIS is requesting comments on this information collection for 30 days until January 18, 2017. When submitting comments on the information collection, your comments should address one or more of the following four points.

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of information collection:
(a) *Type of information collection:* Revised information collection.

(b) *Abstract:* This information collection will be used by individuals (aliens who are victims of severe forms of trafficking in persons and certain family members, as appropriate) to file a request for USCIS approval for T nonimmigrant status.

(c) *Title of Form/Collection:* Application for T Nonimmigrant Status, Application for Family Member of T-1 Recipient, and Declaration of Law

Enforcement Officer for Victim of Trafficking in Persons.

(d) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-914, Form I-914 Supplement A, and Form I-914 Supplement B; USCIS.

(e) *Affected public who will be asked or required to respond:* Individuals and households.

(f) *An estimate of the total number of annual respondents:* 1,871 respondents.

(g) *Hours per response:* Application for T Nonimmigrant Status, Form I-914 at 2.25 hours per response; Application for Family Member of T-1 Recipient, Form I-914 Supplement A at 1 hour per response; Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, Form I-914 Supplement B at 3.75 hours per response; and biometric services processing at 1.17 hours per response.

(h) *Total annual reporting burden:* 9,921 annual burden hours.

Comments should refer to the proposal by name and/or the OMB Control Number and should be sent to DHS using *one* of the methods provided under the **ADDRESSES** and I. Public Participation sections of this interim rule. Comments should also be submitted to USCIS Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202-395-5806. Email: OIRA_Submission@omb.eop.gov.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); 8 CFR part 2. Section 212.1(q) also issued under section 702, Pub. L. 110–229, 122 Stat. 754, 854.

■ 2. Section 212.1 is amended by revising paragraph (o) to read as follows:

§ 212.1 Documentary requirements for nonimmigrants.

* * * * *

(o) *Alien in T–2 through T–6 classification.* USCIS may apply paragraph (g) of this section to individuals seeking T–2, T–3, T–4, T–5, or T–6 nonimmigrant status upon request by the applicant.

* * * * *

■ 3. Section 212.16 is revised to read as follows:

§ 212.16 Applications for exercise of discretion relating to T nonimmigrant status.

(a) *Requesting the waiver.* An alien requesting a waiver of inadmissibility under section 212(d)(3)(B) or (d)(13) of the Act must submit a waiver form as designated by USCIS in accordance with 8 CFR 103.2.

(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on sections 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) *National interest.* USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) *Connection to victimization.* An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering him or her inadmissible were caused by, or were incident to, the

victimization described in section 101(a)(15)(T)(i)(I) of the Act.

(3) *Criminal grounds.* In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.

(c) *No appeal.* There is no appeal of a decision to deny a waiver request. Nothing in this section is intended to prevent an applicant from re-filing a request for a waiver of a ground of inadmissibility in appropriate cases.

(d) *Revocation.* USCIS, at any time, may revoke a waiver previously authorized under section 212(d) of the Act. There is no appeal of a decision to revoke a waiver.

PART 214—NONIMMIGRANT CLASSES

■ 4. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 111 and 202; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372 and 1762; Sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; Pub. L. 107–173, 116 Stat. 543; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 5. Section 214.1 is amended by:
 ■ a. Revising paragraph (a)(1)(viii); and
 ■ b. Adding entries for “101(a)(15)(T)(v)” and “101(a)(15)(T)(vi)” in alpha/numeric sequence in the table in paragraph (a)(2).

The revision and additions read as follows:

§ 214.1 Nonimmigrant classifications.

(a) * * *
 (1) * * *
 (viii) Section 101(a)(15)(T)(ii) is divided into (T)(ii), (T)(iii), (T)(iv), and (T)(v) for the spouse, child, parent, and unmarried sibling under 18 years of age, respectively, of a principal nonimmigrant classified under section 101(a)(15)(T)(i); and T(vi) for the adult or minor child of a derivative nonimmigrant classified under section 101(a)(15)(T)(ii); and
 * * * * *
 (2) * * *

Section		Designation	
*	*	*	*
101(a)(15)(T)(v)	.....	T-5.	
101(a)(15)(T)(vi)	.....	T-6.	
*	*	*	*
* * * * *			

■ 6. Section 214.11 is revised to read as follows:

§ 214.11 Alien victims of severe forms of trafficking in persons.

(a) *Definitions.* Where applicable, USCIS will apply the definitions provided in section 103 and 107(e) of the Trafficking Victims Protection Act (TVPA) with due regard for the definitions and application of these terms in 28 CFR part 1100 and the provisions of 18 U.S.C. 77. As used in this section the term:

Application for derivative T nonimmigrant status means a request by a principal alien on behalf of an eligible family member for derivative T–2, T–3, T–4, T–5, or T–6 nonimmigrant status on the form designated by USCIS for that purpose.

Application for T nonimmigrant status means a request by a principal alien for T–1 nonimmigrant status on the form designated by USCIS for that purpose.

Bona fide determination means a USCIS determination that an application for T–1 nonimmigrant status has been initially reviewed and determined that the application does not appear to be fraudulent, is complete and properly filed, includes completed fingerprint and background checks, and presents prima facie evidence of eligibility for T–1 nonimmigrant status including admissibility.

Child means a person described in section 101(b)(1) of the Act.

Coercion means threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied

toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Derivative T nonimmigrant means an eligible family member who has been granted T-2, T-3, T-4, T-5, or T-6 derivative status. A family member outside of the United States is not a derivative T nonimmigrant until he or she is granted a T-2, T-3, T-4, T-5, or T-6 visa by the Department of State and is admitted to the United States in derivative T nonimmigrant status.

Eligible family member means a family member who may be eligible for derivative T nonimmigrant status based on his or her relationship to an alien victim and, if required, upon a showing of a present danger or retaliation; and:

(1) In the case of an alien victim who is 21 years of age or older, means the spouse and children of such alien;

(2) In the case of an alien victim under 21 years of age, means the spouse, children, unmarried siblings under 18 years of age, and parents of such alien; and

(3) Regardless of the age of an alien victim, means any parent or unmarried sibling under 18 years of age, or adult or minor child of a derivative of such alien where the family member faces a present danger of retaliation as a result of the alien victim's escape from a severe form of trafficking or cooperation with law enforcement.

Involuntary servitude means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or a condition of servitude induced by the abuse or threatened abuse of legal process. Involuntary servitude includes a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.

Law Enforcement Agency (LEA) means a Federal, State, or local law enforcement agency, prosecutor, judge, labor agency, children's protective services agency, or other authority that has the responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons. Federal LEAs include but are not limited to the following: U.S. Attorneys' Offices, Civil

Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (Department of Justice); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Diplomatic Security Service (Department of State); and Department of Labor.

Law Enforcement Agency (LEA) endorsement means an official LEA endorsement on the form designated by USCIS for such purpose.

Peonage means a status or condition of involuntary servitude based upon real or alleged indebtedness.

Principal T nonimmigrant means the victim of a severe form of trafficking in persons who has been granted T-1 nonimmigrant status.

Reasonable request for assistance means a request made by an LEA to a victim to assist in the investigation or prosecution of the acts of trafficking in persons or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime. The "reasonableness" of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to: General law enforcement and prosecutorial practices; the nature of the victimization; the specific circumstances of the victim; severe trauma (both mental and physical); access to support services; whether the request would cause further trauma: The safety of the victim or the victim's family; compliance with other requests and the extent of such compliance; whether the request would yield essential information; whether the information could be obtained without the victim's compliance; whether an interpreter or attorney was present to help the victim understand the request; cultural, religious, or moral objections to the request; the time the victim had to comply with the request; and the age and maturity of the victim.

Severe form of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

United States means the fifty States of the United States, the District of

Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

Victim of a severe form of trafficking in persons (victim) means an alien who is or has been subject to a severe form of trafficking in persons.

(b) *Eligibility for T-1 status.* An alien is eligible for T-1 nonimmigrant status under section 101(a)(15)(T)(i) of the Act if he or she demonstrates all of the following, subject to section 214(o) of the Act:

(1) *Victim.* The alien is or has been a victim of a severe form of trafficking in persons.

(2) *Physical presence.* The alien is physically present in the United States or at a port-of-entry thereto, according to paragraph (g) of this section.

(3) *Compliance with any reasonable request for assistance.* The alien has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, or meets one of the conditions described below.

(i) *Exemption for minor victims.* An alien under 18 years of age is not required to comply with any reasonable request.

(ii) *Exception for trauma.* An alien who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request.

(4) *Hardship.* The alien would suffer extreme hardship involving unusual and severe harm upon removal.

(5) *Prohibition against traffickers in persons.* No alien will be eligible to receive T nonimmigrant status under section 101(a)(15)(T) of the Act if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons.

(c) *Period of admission.* (1) *T-1 Principal.* T-1 nonimmigrant status may be approved for a period not to exceed 4 years, except as provided in section 214(o)(7) of the Act.

(2) *Derivative family members.* A derivative family member who is otherwise eligible for admission may be granted T-2, T-3, T-4, T-5, or T-6 nonimmigrant status for an initial period that does not exceed the

expiration date of the initial period approved for the T-1 principal alien, except as provided in section 214(o)(7) of the Act.

(3) *Notice.* At the time an alien is approved for T nonimmigrant status or receives an extension of T nonimmigrant status, USCIS will notify the alien when his or her T nonimmigrant status will expire. USCIS also will notify the alien that the failure to apply for adjustment of status to lawful permanent resident, as set forth in 8 CFR 245.23, will result in termination of the alien's T nonimmigrant status in the United States at the end of the 4-year period or any extension.

(d) *Application.* USCIS has sole jurisdiction over all applications for T nonimmigrant status.

(1) *Filing an application.* An alien seeking T-1 nonimmigrant status must submit an application for T nonimmigrant status on the form designated by USCIS in accordance with 8 CFR 103.2 and with the evidence described in paragraph (d) of this section.

(i) *Applicants in pending immigration proceedings.* An alien in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), and who wishes to apply for T-1 nonimmigrant status must file an application for T nonimmigrant status directly with USCIS. In its discretion, DHS may agree to the alien's request to file with the immigration judge or the Board a joint motion to administratively close or terminate proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS.

(ii) *Applicants with final orders of removal, deportation, or exclusion.* An alien subject to a final order of removal, deportation, or exclusion may file an application for T-1 nonimmigrant status directly with USCIS. The filing of an application for T nonimmigrant status has no effect on DHS authority or discretion to execute a final order of removal, although the alien may request an administrative stay of removal pursuant to 8 CFR 241.6(a). If the alien is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) reasonably necessary to bring about the applicant's removal will be extended during the period the stay is in effect. If USCIS subsequently determines under the procedures in paragraph (e) of this section that the application is bona fide, DHS will automatically grant an

administrative stay of the final order of removal, deportation, or exclusion, and the stay will remain in effect until a final decision is made on the application for T nonimmigrant status.

(iii) *Minor applicants.* When USCIS receives an application from a minor principal alien under the age of 18, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance.

(2) *Initial evidence.* An application for T nonimmigrant status must include:

(i) The applicant's signed statement describing the facts of the victimization and compliance with any reasonable law enforcement request (or a basis for why he or she has not complied) and any other eligibility requirements in his or her own words;

(ii) Any credible evidence that the applicant would like USCIS to consider supporting any of the eligibility requirements set out in paragraphs (f), (g), (h) and (i) of this section; and

(iii) *Inadmissible applicants.* If an applicant is inadmissible based on a ground that may be waived, he or she must also submit a request for a waiver of inadmissibility on the form designated by USCIS with the fee prescribed by 8 CFR 103.7(b)(1), in accordance with form instructions and 8 CFR 212.16, and accompanied by supporting evidence.

(3) *Evidence from law enforcement.*

An applicant may wish to submit evidence from an LEA to help establish certain eligibility requirements for T nonimmigrant status. Evidence from an LEA is optional and is not given any special evidentiary weight.

(i) *Law Enforcement Agency (LEA) endorsement.* An LEA endorsement is optional evidence that can be submitted to help demonstrate victimization and/or compliance with reasonable requests. An LEA endorsement is not mandatory and is not given any special evidentiary weight. An LEA endorsement itself does not grant a benefit and is one form of possible evidence but it does not lead to automatic approval of the application for T nonimmigrant status by USCIS. If provided, the LEA endorsement must be submitted on the form designated by USCIS in accordance with the form instructions and must be signed by a supervising official responsible for the detection, investigation or prosecution of severe forms of trafficking in persons. The LEA endorsement must attach the results of any name or database inquiries performed and describe the victimization (including dates where known) and the cooperation of the victim. USCIS, not the LEA, will determine if the applicant was or is a victim of a severe form of trafficking in

persons, and otherwise meets the eligibility requirements for T nonimmigrant status. The decision whether to complete an LEA endorsement is at the discretion of the LEA. A formal investigation or prosecution is not required to complete an LEA endorsement.

(ii) *Disavowed or revoked LEA endorsement.* An LEA may revoke or disavow the contents of a previously submitted endorsement in writing. After revocation or disavowal, the LEA endorsement will no longer be considered as evidence.

(iii) *Continued Presence.* An applicant granted Continued Presence under 28 CFR 110.35 should submit documentation of the grant of Continued Presence. If Continued Presence has been revoked, it will no longer be considered as evidence.

(iv) *Other evidence.* An applicant may also submit any evidence regarding entry or admission into the United States or permission to remain in the United States or note that such evidence is contained in an applicant's immigration file.

(4) *Biometric services.* All applicants for T-1 nonimmigrant status must submit biometrics in accordance with 8 CFR 103.16.

(5) *Evidentiary standards and burden of proof.* The burden is on the applicant to demonstrate eligibility for T-1 nonimmigrant status. The applicant may submit any credible evidence relating to a T nonimmigrant application for consideration by USCIS. USCIS will conduct a de novo review of all evidence and may investigate any aspect of the application. Evidence previously submitted by the applicant for any immigration benefit or relief may be used by USCIS in evaluating the eligibility of an applicant for T-1 nonimmigrant status. USCIS will not be bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.

(6) *Interview.* USCIS may require an applicant for T nonimmigrant status to participate in a personal interview. The necessity and location of the interview is determined solely by USCIS in accordance with 8 CFR part 103. Every effort will be made to schedule the interview in a location convenient to the applicant.

(7) *Bona fide determination.* Once an alien submits an application for T-1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide

application for T–1 nonimmigrant status under the provisions of paragraph (e) of this section.

(8) *Decision.* After completing its de novo review of the application and evidence, USCIS will issue a decision approving or denying the application in accordance with 8 CFR 103.3.

(9) *Approval.* If USCIS determines that the applicant is eligible for T–1 nonimmigrant status, USCIS will approve the application and grant T–1 nonimmigrant status, subject to the annual limitation as provided in paragraph (j) of this section. USCIS will provide the applicant with evidence of T–1 nonimmigrant status. USCIS may also notify other parties and entities of the approval as it determines appropriate, including any LEA providing an LEA endorsement and the Department of Health and Human Service's Office of Refugee Resettlement, consistent with 8 U.S.C. 1367.

(i) *Applicants with an outstanding order of removal, deportation or exclusion issued by DHS.* For an applicant who is the subject of an order of removal, deportation or exclusion issued by DHS, the order will be deemed cancelled by operation of law as of the date of the USCIS approval of the application.

(ii) *Applicants with an outstanding order of removal, deportation or exclusion issued by the Department of Justice.* An applicant who is the subject of an order of removal, deportation or exclusion issued by an immigration judge or the Board may seek cancellation of such order by filing a motion to reopen and terminate removal proceedings with the immigration judge or the Board. ICE may agree, as a matter of discretion, to join such motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23.

(10) *Denial.* Upon denial of an application, USCIS will notify the applicant in accordance with 8 CFR 103.3. USCIS may also notify any LEA providing an LEA endorsement and the Department of Health and Human Service's Office of Refugee Resettlement. If an applicant appeals a denial in accordance with 8 CFR 103.3, the denial will not become final until the administrative appeal is decided.

(i) *Effect on bona fide determination.* Upon denial of an application, any benefits derived from a bona fide determination will automatically be revoked when the denial becomes final.

(ii) *Applicants previously in removal proceedings.* In the case of an applicant who was previously in removal proceedings that were terminated on the

basis of a pending application for T nonimmigrant status, once a denial becomes final, DHS may file a new Notice to Appear to place the individual in removal proceedings again.

(iii) *Applicants subject to an order of removal, deportation or exclusion.* In the case of an applicant who is subject to an order of removal, deportation or exclusion that had been stayed due to the pending application for T nonimmigrant status, the stay will be automatically lifted as of the date the denial becomes final.

(11) *Employment authorization.* An alien granted T–1 nonimmigrant status is authorized to work incident to status. There is no need for an alien to file a separate form to be granted employment authorization. USCIS will issue an initial Employment Authorization Document (EAD) to such aliens, which will be valid for the duration of the alien's T–1 nonimmigrant status. An alien granted T–1 nonimmigrant status seeking to replace an EAD that was lost, stolen, or destroyed must file an application on the form designated by USCIS in accordance with form instructions.

(e) *Bona fide determination.* Once an alien submits an application for T–1 nonimmigrant status, USCIS will conduct an initial review to determine if the application is a bona fide application for T–1 nonimmigrant status.

(1) *Criteria.* After initial review, an application will be determined to be bona fide if:

- (i) The application is properly filed and is complete;
- (ii) The application does not appear to be fraudulent;
- (iii) The application presents prima facie evidence of each eligibility requirement for T–1 nonimmigrant status;
- (iv) Biometrics and background checks are complete; and
- (v) The applicant is:
 - (A) Admissible to the United States; or

(B) Inadmissible to the United States based on a ground that may be waived (other than section 212(a)(4) of the Act); and either the applicant has filed a waiver of a ground of inadmissibility described in section 212(d)(13) of the Act concurrently with the application for T nonimmigrant status, or USCIS has already granted a waiver with respect to any ground of inadmissibility that applies to the applicant. USCIS may request further evidence from the applicant. All waivers are discretionary and require a request for waiver, on the form designated by USCIS.

(2) *USCIS determination.* An application will not be treated as bona fide until USCIS provides notice to the applicant.

(i) *Incomplete or insufficient application.* If an application is incomplete or if an application is complete but does not present sufficient evidence to establish prima facie eligibility for each eligibility requirement for T–1 nonimmigrant status, USCIS may request additional information, issue a notice of intent to deny as provided in 8 CFR 103.2(b)(8), or may adjudicate the application on the basis of the evidence presented under the procedures of this section.

(ii) *Notice.* Once USCIS determines an application is bona fide, USCIS will notify the applicant. An application will be treated as a bona fide application as of the date of the notice.

(3) *Stay of final order of removal, deportation, or exclusion.* If USCIS determines that an application is bona fide it automatically stays the execution of any final order of removal, deportation, or exclusion. This administrative stay will remain in effect until any adverse decision becomes final. The filing of an application for T nonimmigrant status does not automatically stay the execution of a final order unless USCIS has determined that the application is bona fide. Neither an immigration judge nor the Board has jurisdiction to adjudicate an application for a stay of removal, deportation, or exclusion on the basis of the filing of an application for T nonimmigrant status.

(f) *Victim of a severe form of trafficking in persons.* To be eligible for T–1 nonimmigrant status an applicant must meet the definition of a victim of a severe form of trafficking in persons described in paragraph (a) of this section.

(1) *Evidence.* The applicant must submit evidence that demonstrates that he or she is or has been a victim of a severe form of trafficking in persons. Except in instances of sex trafficking involving victims under 18 years of age, severe forms of trafficking in persons must involve both a particular means (force, fraud, or coercion) and a particular end or a particular intended end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery). If a victim has not performed labor or services, or a commercial sex act, the victim must establish that he or she was recruited, transported, harbored, provided, or obtained for the purposes of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection

to sex trafficking. The applicant may satisfy this requirement by submitting:

- (i) An LEA endorsement as described in paragraph (d)(3) of this section;
- (ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or

(iii) Any other evidence, including but not limited to, trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and/or affidavits. In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should describe what the alien has done to report the crime to an LEA and indicate whether criminal records relating to the trafficking crime are available.

(2) If the Continued Presence has been revoked or the contents of the LEA endorsement have been disavowed based on a determination that the applicant is not or was not a victim of a severe form of trafficking in persons, it will no longer be considered as evidence.

(g) *Physical presence.* To be eligible for T-1 nonimmigrant status an applicant must be physically present in the United States, American Samoa, or at a port-of-entry thereto on account of such trafficking.

(1) *Applicability.* The physical presence requirement requires USCIS to consider the alien's presence in the United States at the time of application. The requirement reaches an alien who:

- (i) Is present because he or she is currently being subjected to a severe form of trafficking in persons;
- (ii) Was liberated from a severe form of trafficking in persons by an LEA;
- (iii) Escaped a severe form of trafficking in persons before an LEA was involved, subject to paragraph (g)(2) of this section;

(iv) Was subject to a severe form of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons; or

(v) Is present on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.

(2) *Departure from the United States.* An alien who has voluntarily departed from (or has been removed from) the United States at any time after the act of a severe form of trafficking in persons is deemed not to be present in the United States as a result of such trafficking in persons unless:

(i) The alien's reentry into the United States was the result of the continued victimization of the alien;

(ii) The alien is a victim of a new incident of a severe form of trafficking in persons; or

(iii) The alien has been allowed reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking, described in paragraph (g)(4) of this section.

(3) *Presence for participation in investigative or judicial processes.* An alien who was allowed initial entry or reentry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking will be deemed to be physically present in the United States on account of trafficking in persons, regardless of where such trafficking occurred. To satisfy this section, an alien must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.

(4) *Evidence.* The applicant must submit evidence that demonstrates that his or her physical presence in the United States or at a port-of-entry thereto, is on account of trafficking in persons, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking. USCIS will consider all evidence presented to determine the physical presence requirement, including the alien's responses to questions on the application for T nonimmigrant status about when he or she escaped from the trafficker, what activities he or she has undertaken since that time including the steps he or she may have taken to deal with the consequences of having been trafficked, and the applicant's ability to leave the United States. The applicant may satisfy this requirement by submitting:

(i) An LEA endorsement, described in paragraph (d)(3) of this section;

(ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35;

(iii) Any other documentation of entry into the United States or permission to remain in the United States, such as parole under section 212(d)(5) of the Act, or a notation that such evidence is contained in the applicant's immigration file; or

(iv) Any other credible evidence, including a personal statement from the applicant, stating the date and place (if known) and the manner and purpose (if known) for which the applicant entered

the United States and demonstrating that the applicant is now present on account of the trafficking.

(h) *Compliance with any reasonable request for assistance in an investigation or prosecution.* To be eligible for T-1 nonimmigrant status, an applicant must have complied with any reasonable request for assistance from an LEA in an investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime, unless the applicant meets an exemption described in paragraph (h)(4) of this section.

(1) *Applicability.* An applicant must have had, at a minimum, contact with an LEA regarding the acts of a severe form of trafficking in persons. An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T-1 nonimmigrant status, unless he or she meets an exemption described in paragraph (h)(4) of this section.

(2) *Unreasonable requests.* An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

- (i) General law enforcement and prosecutorial practices;
- (ii) The nature of the victimization;
- (iii) The specific circumstances of the victim;
- (iv) Severity of trauma suffered (both mental and physical) or whether the request would cause further trauma;
- (v) Access to support services;
- (vi) The safety of the victim or the victim's family;

(vii) Compliance with previous requests and the extent of such compliance;

(viii) Whether the request would yield essential information;

(ix) Whether the information could be obtained without the victim's compliance;

(x) Whether an interpreter or attorney was present to help the victim understand the request;

(xi) Cultural, religious, or moral objections to the request;

(xii) The time the victim had to comply with the request; and

(xiii) The age and maturity of the victim.

(3) *Evidence.* An applicant must submit evidence that demonstrates that he or she has complied with any reasonable request for assistance in a

Federal, State, or local investigation or prosecution of trafficking in persons, or a crime where trafficking in persons is at least one central reason for the commission of that crime. In the alternative, an applicant can submit evidence to demonstrate that he or she should be exempt under paragraph (h)(4) of this section. If USCIS has any question about whether the applicant has complied with a reasonable request for assistance, USCIS may contact the LEA. The applicant may satisfy this requirement by submitting any of the following:

(i) An LEA endorsement as described in paragraph (d)(3) of this section;

(ii) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or

(iii) Any other evidence, including affidavits of witnesses. In the victim's statement prescribed by paragraph (d)(2) of this section, the applicant should show that an LEA that has responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons has information about such trafficking in persons, that the victim has complied with any reasonable request for assistance in the investigation or prosecution of such acts of trafficking, and, if the victim did not report the crime, why the crime was not previously reported.

(4) An applicant who has not had contact with an LEA or who has not complied with any reasonable request may be exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution if either of the following two circumstances applies:

(i) *Trauma*. The applicant is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons due to physical or psychological trauma. An applicant must submit evidence of the trauma. An applicant may satisfy this by submitting an affirmative statement describing the trauma and any other credible evidence. "Any other credible evidence" includes, for instance, a signed statement from a qualified professional, such as a medical professional, social worker, or victim advocate, who attests to the victim's mental state, and medical, psychological, or other records which are relevant to the trauma. USCIS reserves the authority and discretion to contact the LEA involved in the case, if appropriate; or

(ii) *Age*. The applicant is under 18 years of age. An applicant under 18 years of age is exempt from the requirement to comply with any

reasonable request for assistance in an investigation or prosecution, but he or she must submit evidence of age. Applicants should include, where available, an official copy of the alien's birth certificate, a passport, or a certified medical opinion. Other evidence regarding the age of the applicant may be submitted in accordance with 8 CFR 103.2(b)(2)(i).

(i) *Extreme hardship involving unusual and severe harm*. To be eligible for T-1 nonimmigrant status, an applicant must demonstrate that removal from the United States would subject the applicant to extreme hardship involving unusual and severe harm.

(1) *Standard*. Extreme hardship involving unusual and severe harm is a higher standard than extreme hardship as described in 8 CFR 240.58. A finding of extreme hardship involving unusual and severe harm may not be based solely upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities. The determination of extreme hardship is made solely by USCIS.

(2) *Factors*. Factors that may be considered in evaluating whether removal would result in extreme hardship involving unusual and severe harm should include both traditional extreme hardship factors and factors associated with having been a victim of a severe form of trafficking in persons. These factors include, but are not limited to:

(i) The age, maturity, and personal circumstances of the applicant;

(ii) Any physical or psychological issues the applicant has which necessitates medical or psychological care not reasonably available in the foreign country;

(iii) The nature and extent of the physical and psychological consequences of having been a victim of a severe form of trafficking in persons;

(iv) The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of a severe form of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;

(v) The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;

(vi) The likelihood of re-victimization and the need, ability, and willingness of

foreign authorities to protect the applicant;

(vii) The likelihood of harm that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would cause the applicant; or

(viii) The likelihood that the applicant's individual safety would be threatened by the existence of civil unrest or armed conflict.

(3) *Evidence*. An applicant must submit evidence that demonstrates he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. An applicant is encouraged to describe and document all factors that may be relevant to the case, as there is no guarantee that a particular reason(s) will satisfy the requirement. Hardship to persons other than the alien victim cannot be considered in determining whether an applicant would suffer the requisite hardship. The applicant may satisfy this requirement by submitting any credible evidence regarding the nature and scope of the hardship if the applicant was removed from the United States, including evidence of hardship arising from circumstances surrounding the victimization and any other circumstances. An applicant may submit a personal statement or other evidence, including evidence from relevant country condition reports and any other public or private sources of information.

(j) *Annual cap*. In accordance with section 214(o)(2) of the Act, DHS may not grant T-1 nonimmigrant status to more than 5,000 aliens in any fiscal year.

(1) *Waiting list*. All eligible applicants who, due solely to the cap, are not granted T-1 nonimmigrant status will be placed on a waiting list and will receive written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority. In the next fiscal year, USCIS will issue a number to each application on the waiting list, in the order of the highest priority, providing the applicant remains admissible and eligible for T nonimmigrant status. After T-1 nonimmigrant status has been issued to qualifying applicants on the waiting list, any remaining T-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

(2) *Unlawful presence*. While an applicant for T nonimmigrant status who was granted deferred action or parole is on the waiting list, the applicant will not accrue unlawful

presence under section 212(a)(9)(B) of the Act while maintaining parole or deferred action.

(3) *Removal from the waiting list.* An applicant may be removed from the waiting list and the deferred action or parole may be terminated consistent with law and policy. Applicants on the waiting list must remain admissible to the United States and otherwise eligible for T nonimmigrant status. If at any time prior to final adjudication USCIS receives information that an applicant is no longer eligible for nonimmigrant status, the applicant may be removed from the waiting list and the deferred action or parole may be terminated. USCIS will provide notice to the applicant of that decision.

(k) *Application for eligible family members.* (1) *Eligibility.* Subject to section 214(o) of the Act, an alien who has applied for or has been granted T-1 nonimmigrant status (principal alien) may apply for the admission of an eligible family member, who is otherwise admissible to the United States, in derivative T nonimmigrant status if accompanying or following to join the principal alien.

(i) *Principal alien 21 years of age or older.* For a principal alien who is 21 years of age or over, eligible family member means a T-2 (spouse) or T-3 (child).

(ii) *Principal alien under 21 years of age.* For a principal alien who is under 21 years of age, eligible family member means a T-2 (spouse), T-3 (child), T-4 (parent), or T-5 (unmarried sibling under the age of 18).

(iii) *Family member facing danger of retaliation.* Regardless of the age of the principal alien, if the eligible family member faces a present danger of retaliation as a result of the principal alien's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement officer investigating a severe form of trafficking, eligible family member means a T-4 (parent), T-5 (unmarried sibling under the age of 18), or T-6 (adult or minor child of a derivative of the principal alien).

(iv) *Admission requirements.* The principal applicant must demonstrate that the alien for whom derivative T nonimmigrant status is being sought is an eligible family member of the T-1 principal alien, as defined in paragraph (a) of this section, and is otherwise eligible for that status.

(2) *Application.* A T-1 principal alien may submit an application for derivative T nonimmigrant status on the form designated by USCIS in accordance with the form instructions. The application for derivative T

nonimmigrant status for an eligible family member may be filed with the T-1 application, or separately. Derivative T nonimmigrant status is dependent on the principal alien having been granted T-1 nonimmigrant status and the principal alien maintaining T-1 nonimmigrant status. If a principal alien granted T-1 nonimmigrant status cannot maintain status due to his or her death, the provisions of section 204(l) of the Act may apply.

(i) *Eligible family members in pending immigration proceedings.* If an eligible family member is in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), the principal alien must file an application for derivative T nonimmigrant status directly with USCIS. In its discretion and at the request of the eligible family member, ICE may agree to file a joint motion to administratively close or terminate proceedings without prejudice with the immigration judge or the Board, whichever is appropriate, while USCIS adjudicates an application for derivative T nonimmigrant status.

(ii) *Eligible family members with final orders of removal, deportation, or exclusion.* If an eligible family member is the subject of a final order of removal, deportation, or exclusion, the principal alien may file an application for derivative T nonimmigrant status directly with USCIS. The filing of an application for derivative T nonimmigrant status has no effect on ICE's authority or discretion to execute a final order, although the alien may file a request for an administrative stay of removal pursuant to 8 CFR 241.6(a). If the eligible family member is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) will be extended while a stay is in effect for the period reasonably necessary to bring about the applicant's removal.

(3) *Required supporting evidence.* In addition to the form, an application for derivative T nonimmigrant status must include the following:

(i) Biometrics submitted in accordance with 8 CFR 103.16;

(ii) Evidence demonstrating the relationship of an eligible family member, as provided in paragraph (k)(4) of this section;

(iii) In the case of an alien seeking derivative T nonimmigrant status on the basis of danger of retaliation, evidence demonstrating this danger as provided in paragraph (k)(6) of this section.

(iv) *Inadmissible applicants.* If an eligible family member is inadmissible

based on a ground that may be waived, a request for a waiver of inadmissibility under section 212(d)(13) or section 212(d)(3) of the Act must be filed in accordance with 8 CFR 212.16 and submitted with the completed application package.

(4) *Relationship.* Except as described in paragraphs (k)(5) of this section, the family relationship must exist at the time:

(i) The application for the T-1 nonimmigrant status is filed;

(ii) The application for the T-1 nonimmigrant status is adjudicated;

(iii) The application for derivative T nonimmigrant status is filed;

(iv) The application for derivative T nonimmigrant status is adjudicated; and

(v) The eligible family member is admitted to the United States if residing abroad.

(5) *Relationship and age-out protections.* (i) *Protection for new child of a principal alien.* If the T-1 principal alien proves that he or she had a child after filing the application for T-1 nonimmigrant status, the child will be deemed to be an eligible family member eligible to accompany or follow to join the T-1 principal alien.

(ii) *Age-out protection for eligible family members of a principal alien under 21 years of age.* If the T-1 principal alien was under 21 years of age when he or she filed for T-1 nonimmigrant status, USCIS will continue to consider a parent or unmarried sibling as an eligible family member. A parent or unmarried sibling will remain eligible even if the principal alien turns 21 years of age before adjudication of the T-1 application. An unmarried sibling will remain eligible even if the unmarried sibling is over 18 years of age at the time of adjudication of the T-1 application, so long as the unmarried sibling was under 18 years of age at the time of the T-1 application. The age of an unmarried sibling when USCIS adjudicates the T-1 application, when the unmarried sibling files the derivative application, when USCIS adjudicates the derivative application, or when the unmarried sibling is admitted to the United States does not affect eligibility.

(iii) *Age-out protection for child of a principal alien 21 years of age or older.* If a T-1 principal alien was 21 years of age or older when he or she filed for T-1 nonimmigrant status, USCIS will continue to consider a child as an eligible family member if the child was under 21 years of age at the time the principal filed for T-1 nonimmigrant status. The child will remain eligible even if the child is over 21 years of age at the time of adjudication of the T-1

application. The age of the child when USCIS adjudicates the T-1 application, when the child files the derivative application, when USCIS adjudicates the derivative application, or when the child is admitted to the United States does not affect eligibility.

(iv) *Marriage of an eligible family member.* An eligible family member seeking T-3 or T-5 status must be unmarried when the principal files an application for T-1 status, when USCIS adjudicates the T-1 application, when the eligible family member files for T-3 or T-5 status, when USCIS adjudicates the T-3 or T-5 application, and when the family member is admitted to the United States. If a T-1 marries subsequent to filing the application for T-1 status, USCIS will not consider the spouse eligible as a T-2 eligible family member.

(6) *Evidence demonstrating a present danger of retaliation.* An alien seeking derivative T nonimmigrant status on the basis of facing a present danger of retaliation as a result of the T-1 victim's escape from a severe form of trafficking or cooperation with law enforcement, must demonstrate the basis of this danger. USCIS may contact the LEA involved, if appropriate. An applicant may satisfy this requirement by submitting:

(i) Documentation of a previous grant of advance parole to an eligible family member;

(ii) A signed statement from a law enforcement official describing the danger of retaliation;

(iii) An affirmative statement from the applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement (ordinarily an applicant's statement alone is not sufficient to prove present danger); and/or

(iv) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses.

(7) *Biometric collection; evidentiary standards.* The provisions for biometric capture and evidentiary standards described in paragraph (d)(2) and (d)(4) of this section apply to an eligible family member's application for derivative T nonimmigrant status.

(8) *Review and decision.* USCIS will review the application and issue a decision in accordance with paragraph (d) of this section.

(9) *Derivative approvals.* Aliens whose applications for derivative T nonimmigrant status are approved are not subject to the annual cap described

in paragraph (j) of this section. USCIS will not approve applications for derivative T nonimmigrant status until USCIS has approved T-1 nonimmigrant status to the related principal alien.

(i) *Approvals for eligible family members in the United States.* When USCIS approves an application for derivative T nonimmigrant status for an eligible family member in the United States, USCIS will concurrently approve derivative T nonimmigrant status. USCIS will notify the T-1 principal alien of such approval and provide evidence of derivative T nonimmigrant status to the derivative.

(ii) *Approvals for eligible family members outside the United States.* When USCIS approves an application for an eligible family member outside the United States, USCIS will notify the T-1 principal alien of such approval and provide the necessary documentation to the Department of State for consideration of visa issuance.

(10) *Employment authorization.* An alien granted derivative T nonimmigrant status may apply for employment authorization by filing an application on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) in accordance with form instructions. For derivatives in the United States, the application may be filed concurrently with the application for derivative T nonimmigrant status or at any later time. For derivatives outside the United States, an application for employment authorization may only be filed after admission to the United States in T nonimmigrant status. If the application for employment authorization is approved, the derivative alien will be granted employment authorization pursuant to 8 CFR 274a.12(c)(25) for the period remaining in derivative T nonimmigrant status.

(1) *Extension of T nonimmigrant status.* (1) *Eligibility.* USCIS may grant extensions of T-1 nonimmigrant status beyond 4 years from the date of approval in 1-year periods from the date the T-1 nonimmigrant status ends if:

(i) An LEA investigating or prosecuting activity related to human trafficking certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity;

(ii) The Secretary of Homeland Security determines that an extension is warranted due to exceptional circumstances; or

(iii) The alien has a pending application for adjustment of status to that of a lawful permanent resident.

(2) *Application for a discretionary extension of status.* Upon application, USCIS may extend T-1 nonimmigrant

status based on law enforcement need or exceptional circumstances. A T-1 nonimmigrant may apply for an extension by submitting the form designated by USCIS with the prescribed fee and in accordance with form instructions. A T-1 nonimmigrant should indicate on the application whether USCIS should apply the extension to any family member holding derivative T nonimmigrant status.

(3) *Timely filing.* An alien should file the application to extend nonimmigrant status before the expiration of T-1 nonimmigrant status. If T-1 nonimmigrant status has expired, the applicant must explain in writing the reason for the untimely filing. USCIS may exercise its discretion to approve an untimely filed application for extension of T nonimmigrant status.

(4) *Evidence.* In addition to the application, a T-1 nonimmigrant must include evidence to support why USCIS should grant an extension of T nonimmigrant status. The nonimmigrant bears the burden of establishing eligibility for an extension of status.

(5) *Evidence of law enforcement need.* An applicant may demonstrate law enforcement need by submitting evidence that comes directly from an LEA, including:

(i) A new LEA endorsement;

(ii) Evidence from a law enforcement official, prosecutor, judge, or other authority who can investigate or prosecute human trafficking activity, such as a letter on the agency's letterhead, email, or fax; or

(iii) Any other credible evidence.

(6) *Evidence of exceptional circumstances.* An applicant may demonstrate exceptional circumstances by submitting:

(i) The applicant's affirmative statement; or

(ii) Any other credible evidence, including medical records, police or court records, news articles, correspondence with an embassy or consulate, and affidavits of witnesses.

(7) *Mandatory extensions of status for adjustment of status applicants.* USCIS will automatically extend T-1 nonimmigrant status when a T nonimmigrant properly files an application for adjustment of status in accordance with 8 CFR 245.23. No separate application for extension of T nonimmigrant status, or supporting evidence, is required.

(m) *Revocation of approved T nonimmigrant status.* (1) *Automatic revocation of derivative status.* An approved application for derivative T nonimmigrant status will be revoked automatically if the beneficiary of the approved derivative application notifies

USCIS that he or she will not apply for admission to the United States.

(2) *Revocation on notice/grounds for revocation.* USCIS may revoke an approved application for T nonimmigrant status following issuance of a notice of intent to revoke. USCIS may revoke an approved application for T nonimmigrant status based on one or more of the following reasons:

(i) The approval of the application violated the requirements of section 101(a)(15)(T) of the Act or 8 CFR 214.11 or involved error in preparation, procedure, or adjudication that affects the outcome;

(ii) In the case of a T-2 spouse, the alien's divorce from the T-1 principal alien has become final;

(iii) In the case of a T-1 principal alien, an LEA with jurisdiction to detect or investigate the acts of severe forms of trafficking in persons notifies USCIS that the alien has refused to comply with reasonable requests to assist with the investigation or prosecution of the trafficking in persons and provides USCIS with a detailed explanation in writing; or

(iv) The LEA that signed the LEA endorsement withdraws it or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing.

(3) *Procedures.* Procedures for revocation and appeal follow 8 CFR 103.3. If USCIS revokes approval of the previously granted T nonimmigrant status application, USCIS may notify the LEA who signed the LEA endorsement, any consular officer having jurisdiction over the applicant, or the Office of Refugee Resettlement of the Department of Health and Human Services.

(4) *Effect of revocation.* Revocation of a principal alien's application for T-1 nonimmigrant status will result in termination of T-1 status for the principal alien and, consequently, the automatic termination of the derivative T nonimmigrant status for all derivatives. If a derivative application is pending at the time of revocation, it will be denied. Revocation of an approved application for T-1 nonimmigrant status or an application for derivative T nonimmigrant status also revokes any waiver of inadmissibility granted in conjunction with such application. The revocation of an alien's T-1 status will have no effect on the annual cap described in paragraph (j) of this section.

(n) *Removal proceedings.* Nothing in this section prohibits DHS from instituting removal proceedings for conduct committed after admission, or for conduct or a condition that was not disclosed prior to the granting of T

nonimmigrant status, including misrepresentations of material facts in the application for T-1 nonimmigrant status or in an application for derivative T nonimmigrant status, or after revocation of T nonimmigrant status.

(o) *USCIS employee referral.* Any USCIS employee who, while carrying out his or her official duties, comes into contact with an alien believed to be a victim of a severe form of trafficking in persons and is not already working with an LEA should consult, as necessary, with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence. The ICE office may, in turn, refer the victim to another LEA with responsibility for investigating or prosecuting severe forms of trafficking in persons. If the alien has a credible claim to victimization, USCIS may advise the alien that he or she can submit an application for T nonimmigrant status and seek any other benefit or protection for which he or she may be eligible, provided doing so would not compromise the alien's safety.

(p) *Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification.* (1) The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved application for T nonimmigrant status is prohibited unless the disclosure is made in accordance with an exception described in 8 U.S.C. 1367(b).

(2) Information protected under 8 U.S.C. 1367(a)(2) may be disclosed to federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending federal criminal proceedings.

(3) Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.

(4) DHS officials are prohibited from making adverse determinations of admissibility or deportability based on information obtained solely from the trafficker, unless the alien has been convicted of a crime or crimes listed in section 237(a)(2) of the Act.

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 7. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 8. Section 245.23(a)(3) and (b)(2) are revised to read as follows:

§ 245.23 Adjustment of aliens in T nonimmigrant classification.

(a) * * *

(3) Has been physically present in the United States for a continuous period of at least 3 years since the first date of lawful admission as a T-1 nonimmigrant, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete, whichever period is less; except

(i) If the applicant has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant shall be considered to have failed to maintain continuous physical presence in the United States for purposes of section 245(l)(1)(A) of the Act; and

(ii) If the alien was granted T nonimmigrant status under 8 CFR 214.11, such alien's physical presence in the CNMI before, on, or after November 28, 2009, and subsequent to the grant of T nonimmigrant status, is considered as equivalent to presence in the United States pursuant to an admission in T nonimmigrant status.

* * * * *

(b) * * *

(2) The derivative family member was lawfully admitted to the United States in derivative T nonimmigrant status under section 101(a)(15)(T)(ii) of the Act, and continues to hold such status at the time of application;

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 9. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 10. Section 274a.12 is amended by revising paragraphs (a)(16) and (c)(25) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(a) * * *

(16) Any alien in T-1 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an

employment authorization document issued by USCIS to the alien.

* * * * *

(c) * * *

(25) Any alien in T-2, T-3, T-4, T-5, or T-6 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an employment

authorization document issued by USCIS to the alien.

* * * * *

Jeh Charles Johnson,
Secretary.

[FR Doc. 2016-29900 Filed 12-16-16; 8:45 am]

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Part VI

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2560

Claims Procedure for Plans Providing Disability Benefits; Final Rule

DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Part 2560**

RIN 1210-AB39

Claims Procedure for Plans Providing Disability Benefits**AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Final rule.

SUMMARY: This document contains a final regulation revising the claims procedure regulations under the Employee Retirement Income Security Act of 1974 (ERISA) for employee benefit plans providing disability benefits. The final rule revises and strengthens the current rules primarily by adopting certain procedural protections and safeguards for disability benefit claims that are currently applicable to claims for group health benefits pursuant to the Affordable Care Act. This rule affects plan administrators and participants and beneficiaries of plans providing disability benefits, and others who assist in the provision of these benefits, such as third-party benefits administrators and other service providers.

DATES: *Effective Date:* This rule is effective January 18, 2017.

Applicability Date: This regulation applies to all claims for disability benefits filed on or after January 1, 2018.

FOR FURTHER INFORMATION CONTACT: Frances P. Steen, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll free number.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 503 of ERISA requires every employee benefit plan, in accordance with regulations of the Department, to “provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant” and “afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.”

In 1977, the Department published a regulation pursuant to section 503, at 29 CFR 2560.503-1, establishing minimum requirements for benefit claims procedures for employee benefit plans

covered by title I of ERISA (hereinafter “Section 503 Regulation”).¹ The Department revised and updated the Section 503 Regulation in 2000 by improving and strengthening the minimum requirements for employee benefit plan claims procedures.² As revised in 2000, the Section 503 Regulation provided new time frames and enhanced requirements for notices and disclosure with respect to decisions at both the initial claims decision stage and on review for group health and disability benefits. The regulations were designed to help reduce lawsuits over benefit disputes, promote consistency in handling benefit claims, and provide participants and beneficiaries a non-adversarial method of having a plan fiduciary review and settle claims disputes. Although the Section 503 Regulation applies to all covered employee benefit plans, including pension plans, group health plans, and plans that provide disability benefits, the more stringent procedural protections under the Section 503 Regulation apply to claims for group health benefits and disability benefits.³

The Department’s experience since 2000 with the Section 503 Regulation and related changes in the governing law for group health benefits led the Department to conclude that it was appropriate to re-examine the rules governing disability benefit claims. Even though fewer private-sector employees participate in disability plans than in group health and other types of plans,⁴ disability cases dominate the ERISA litigation landscape today. An empirical study of ERISA employee benefits litigation from 2006 to 2010 concluded that cases involving

long-term disability claims accounted for 64.5% of benefits litigation whereas lawsuits involving health care plans and pension plans accounted for only 14.4% and 9.3%, respectively.⁵ Insurers and plans looking to contain disability benefit costs may be motivated to aggressively dispute disability claims.⁶ Concerns exist regarding conflicts of interest impairing the objectivity and fairness of the process for deciding claims for group health benefits. Those concerns resulted in the Affordable Care Act recognizing the need to enhance the Section 503 Regulation with added procedural protections and consumer safeguards for claims for group health benefits.⁷ The Departments of Health and Human Services, Labor, and the Department of the Treasury issued regulations improving the internal claims and appeals process and establishing rules for the external review processes required under the Affordable Care Act (“ACA”).⁸ These additional protections for a fair process include the right of claimants to respond to new and additional evidence and rationales and the requirement for independence and impartiality of the persons involved in making benefit determinations.

The Department’s independent ERISA advisory group also urged the

⁵ See Sean M. Anderson, *ERISA Benefits Litigation: An Empirical Picture*, 28 ABA J. Lab. & Emp. L. 1 (2012).

⁶ See, e.g., *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 678 (9th Cir. 2011) (“The plan’s reasons for denial were shifting and inconsistent as well as illogical. . . . Failing to pay out money owed based on a false statement of reasons for denying is cheating, every bit as much as making a false claim.”); *Lauder v. First Unum Life Ins. Co.*, 76 F. App’x 348, 350 (2d Cir. 2003) (reversing district court’s denial of attorneys’ fees to plaintiff-insured and describing “ample demonstration of bad faith on First Unum’s part, including . . . the frivolous nature of virtually every position it has advocated in the litigation.”); *Schully v. Continental Cas. Co.*, 634 F. Supp. 2d 663, 687 (E.D. La. 2009) (“In concluding that plaintiff was not disabled, the Hartford not only disregarded considerable objective medical evidence, but it also relied heavily on inconclusive and irrelevant evidence. . . . Hartford’s denial of coverage results from its preferential and predetermined conclusions.”); *Rabuck v. Hartford Life and Accident Ins. Co.*, 522 F. Supp. 2d 844, 882 (W.D. Mich. 2007) (insurer “obviously motivated by its own self-interest, engaged in an unprincipled and overly aggressive campaign to cut off benefits for a gravely ill insured who could not possibly have endured the rigors of his former occupation on a full-time basis.”); *Curtin v. Unum Life Ins. Co. of America*, 298 F. Supp. 2d 149, 159 (D. Me. 2004) (“[T]his Court finds that Defendants exhibited a low level of care to avoid improper denial of claims at great human expense.”).

⁷ The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111-152, was enacted on March 30, 2010. (These statutes are collectively known as the “Affordable Care Act.”)

⁸ 80 FR 72192 (Nov. 18, 2015).

¹ 42 FR 27426 (May 27, 1977).

² 65 FR 70246 (Nov. 21, 2000), amended at 66 FR 35887 (July 9, 2001).

³ A benefit is a disability benefit, subject to the special rules for disability claims under the Section 503 Regulation, if the plan conditions its availability to the claimant upon a showing of disability. If the claims adjudicator must make a determination of disability in order to decide a claim, the claim must be treated as a disability claim for purposes of the Section 503 Regulation, and it does not matter how the benefit is characterized by the plan or whether the plan as a whole is a pension plan or a welfare plan. On the other hand, when a plan, including a pension plan, provides a benefit the availability of which is conditioned on a finding of disability made by a party other than the plan, (e.g., the Social Security Administration or the employer’s long-term disability plan), then a claim for such benefits is not treated as a disability claim for purposes of the Section 503 Regulation. See FAQs About The Benefit Claims Procedure Regulation, A-9 (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf).

⁴ BLS National Compensation Survey, March 2014, at www.bls.gov/ncs/ebs/benefits/2014/ebb10055.pdf.

Department to re-examine the disability claims process. Specifically, in 2012, the ERISA Advisory Council undertook a study on issues relating to managing disability in an environment of individual responsibility. The Council concluded based on the public input it received that “[n]ot all results have been positive for the participant under ERISA-covered plans and the implementing claim procedures regulations, even though these rules were intended to protect participants” and noted that “[t]he Council was made aware of reoccurring issues and administrative practices that participants and beneficiaries face when appealing a claim that may be inconsistent with the existing regulations.” The Advisory Council’s report included the following recommendation for the Department:

Review current claims regulations to determine updates and modifications, drawing upon analogous processes described in health care regulations where appropriate, for disability benefit claims including: (a) Content for denials of such claims; (b) rule regarding full and fair review, addressing what is an adequate opportunity to develop the record and address retroactive rescission of an approved benefit; (c) alternatives that would resolve any conflict between the administrative claims and appeals process and the participants’ ability to timely bring suit; (d) the applicability of the ERISA claim procedures to offsets and eligibility determinations.

2012 ERISA Advisory Council Report, *Managing Disability Risks in an Environment of Individual Responsibility*, available at www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2012ACreport2.pdf.

The Department agreed that the amendments to the claims regulation for group health plans could serve as an appropriate model for improvements to the claims process for disability claims. Those amendments aimed to ensure full and fair consideration of health benefit claims by giving claimants ready access to the relevant evidence and standards; ensuring the impartiality of persons involved in benefit determinations; giving claimants notice and a fair opportunity to respond to the evidence, rationales, and guidelines for decision; and making sure that the bases for decisions are fully and fairly communicated to the claimant. In the Department’s view, these basic safeguards are just as necessary for a full and fair process in the disability context as in the health context. Moreover, as in the group health plan context, disability claims are often reviewed by a court under an abuse of discretion standard

based on the administrative record. Because the claimant may have limited opportunities to supplement the record, the Department concluded that it is particularly important that the claimant be given a full opportunity to develop the record that will serve as the basis for review and to respond to the evidence, rationales, and guidelines relevant to the decision.

The Department’s determination to revise the claims procedures was additionally affected by the aggressive posture insurers and plans can take to disability claims as described above coupled with the judicially recognized conflicts of interest insurers and plans often have in deciding benefit claims.⁹ In light of these concerns, the Department concluded that enhancements in procedural safeguards and protections similar to those required for group health plans under the Affordable Care Act were as important, if not more important, in the case of claims for disability benefits.

The Department decided to start by proposing to amend the current standards applicable to the processing of claims and appeals for disability benefits so that they included improvements to certain basic procedural protections in the current Section 503 Regulation, many of which already apply to ERISA-covered group health plans pursuant to the Department’s regulations implementing the requirements of the Affordable Care Act.

On November 18, 2015, the Department published in the **Federal Register** a proposed rule revising the claims procedure regulations for plans providing disability benefits under ERISA.¹⁰ The Department received 145 public comments in response to the proposed rule from plan participants, consumer groups representing disability benefit claimants, employer groups, individual insurers and trade groups representing disability insurance providers. The comments were posted on the Department’s Web site at www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB39. After careful consideration of the issues raised by the written public comments, the Department decided to adopt the improvements in procedural protections and other safeguards largely as set forth in the November 2015 proposal. The

⁹ *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (insurance company plan administrator of an ERISA long-term disability plan that both evaluates and pays claims for the employer has a conflict of interest that courts must consider in reviewing denials of benefit claims).

¹⁰ 80 FR 72014.

Department revised some of the requirements in response to public comments as part of its overall effort to strike a balance between improving a claimant’s reasonable opportunity to pursue a full and fair review and the attendant costs and administrative burdens on plans providing disability benefits.

The Department believes that this action is necessary to ensure that disability claimants receive a full and fair review of their claims, as required by ERISA section 503, under the more stringent procedural protections that Congress established for group health care claimants under the ACA and the Department’s implementing regulation at 29 CFR 2590.715–2719 (“ACA Claims and Appeals Final Rule”).¹¹ This final rule will promote fairness and accuracy in the claims review process and protect participants and beneficiaries in ERISA-covered disability plans by ensuring they receive benefits that otherwise might have been denied by plan administrators in the absence of the fuller protections provided by this final regulation. The final rule also will help alleviate the financial and emotional hardship suffered by many individuals when they are unable to work after becoming disabled and their claims are denied.

II. Overview of Final Rule

A. Comments on Overall Need To Improve Claims Procedure Rules for Disability Benefits

Numerous disabled claimants and their representatives submitted comments stating general support for the proposed rule. For example, some commenters described the proposal as reinforcing the integrity of disability benefit plan administration and markedly improving the claims process by strengthening notice and disclosure protections, prescribing more exacting standards of conduct for review of denied claims, ensuring claimants’ more effective access to the claims process, and providing safeguards to ensure full court review of adverse benefit determinations. Some commenters supported the proposed amendments as “good first steps” towards providing more transparency and accountability, but advocated additional steps to strengthen, improve, and update the current rules. Some commenters emphasized that disability and lost earnings impose severe hardship on many individuals, arguing that disability claimants have a “poor” prospect of fair review under the current

¹¹ 80 FR 72192 (Nov. 18, 2015).

regulation primarily because of the economic incentive for insurance companies to deny otherwise valid claims and because plans are often able to secure a deferential standard of review in court.

Commenters, primarily disability insurers and benefit providers, commented that the disability claims regulation should not mirror Affordable Care Act requirements because unlike disability claims: (i) The vast majority of medical claims are determined electronically with little or no human involvement, *i.e.*, no reviewers studying materials and consulting with varied professionals; (ii) medical claims typically involve only a limited treatment over a relatively short period of time, whereas disability claims require a series of determinations over a period of several years; (iii) medical claims rarely involve a need to consult with outside professionals; (iv) medical claims involve an isolated issue, whereas disability claims involve a more complex, multi-layered analysis; and (v) medical claim files may consist of only a few pages of materials, whereas disability claim files can consist of hundreds, sometimes thousands of pages of information. As a result of these factors, the commenters stressed that it can take significant time to review and render a decision. Some of those commenters argued that applying ACA protections to disability benefit claims was contrary to Congressional intent because disability plans were not subject to the ACA's group health plan provisions. Some claimed that the proposed rules in their current form will have unintended consequences (undue delay and increased costs and litigation), and will result in expenses and burdens that will increase the cost of coverage and discourage employers from sponsoring disability benefit plans. Finally, some claimed that the increased protections and transparency that would be required under the proposal would weaken protection against disability fraud and were unnecessary because the current regulations provide ample protections for claimants, are written to benefit the insured, and have worked well for more than a decade as evidenced by the asserted fact that the vast majority of disability claims incurred by insurers are paid, and, of the claims denied, only a very small percentage are ultimately litigated. Some argued that technological advances that have expedited processing of health care claims do not apply to disability claims adjudication, contended that the Department had not

properly quantified or qualified the benefits associated with the proposed regulations or provided a sufficient cost analysis associated with the proposed regulations, and commented that the Department should withdraw the proposal until better data is collected.

After careful consideration of the issues raised by the written comments, the Department does not agree with the commenters' assertion that the ACA changes for group health plans are not an appropriate model for improving claims procedures for disability benefits. The enactment of the ACA, and the issuance of the implementing regulations, has resulted in disability benefit claimants receiving fewer procedural protections than group health plan participants even though litigation regarding disability benefit claims is prevalent today. As noted above, the Department's Section 503 Regulation imposes more stringent procedural protections on claims for group health and disability benefits than on claims for other types of benefits. The Department believes that disability benefit claimants should continue to receive procedural protections similar to those that apply to group health plans, and that it makes sense to model the final rule on the procedural protections and consumer safeguards that Congress and the President established for group health care claimants under the ACA. These protections and safeguards will allow some participants to receive benefits that might have been incorrectly denied in the absence of the fuller protections provided by the regulation. It will also help alleviate the financial and emotional hardship suffered by many individuals when they lose earnings due to their becoming disabled.

Moreover, the Department carefully selected among the ACA amendments to the claims procedures for group health plans, and incorporated into the proposal only certain of the basic improvements in procedural protections and consumer safeguards. The proposal, and final rule, also include several adjustments to the ACA requirements to account for the different features and characteristics of disability benefit claims.

The Department agrees with the commenters who supported the proposed changes who emphasized that disability and lost earnings impose severe hardship on many individuals. Under those circumstances, and considering the judicially recognized economic incentive for insurance companies to deny otherwise valid claims, the Department views enhancements in procedural safeguards

and protections similar to those required for group health plans under the Affordable Care Act as being just as important, if not more important, in the case of claims for disability benefits. This view was supported by the assertions by some plans and disability insurance providers that disability claims processing involves more human involvement, with reviewers studying pages of materials and consulting with varied professionals on claims that involve a more complex, multi-layered analysis. Even assuming the characteristics cited by the commenter fairly describe a percentage of processed disability claims, the Department does not believe those characteristics support a decision to treat the processing of disability benefits more leniently than group health benefits. The Department believes there is potential for error and opportunity for the insurer's conflict of interest to inappropriately influence a benefit determination under highly automated claims processing, as well as claims processing with more human involvement.¹² Increased transparency and accountability in all claims processes is important if claimants of disability benefits are to have a reasonable opportunity to pursue a full and fair review of a benefit denial, as required by ERISA section 503. Also, and as more fully discussed in the Regulatory Impact Analysis section of this document, the Department does not agree that the adoption of these basic procedural protections will cause excessive increases in costs and litigation, or result in expenses and burdens that will discourage employers from sponsoring plans providing disability benefits. In fact, comments from some industry groups support the conclusion that the protections adopted in the final rule reflect best practices that many insurers and benefit providers already follow on a voluntary basis.

Thus, while the Department has made some changes and clarifications in response to comments, the final rule, described below, is substantially the same as the proposal. Specifically, the major provisions in the final rule

¹² While commenters contended that disability claim files are larger than health benefit claim files, in the Department's view, this is not a reason for denying claimants the same procedural protections and safeguards that the ACA provided for group health benefit claims. Furthermore, in the 2000 claims regulation, the Department already accommodated differences between health and disability claims by allowing more time for decisions on disability claims. See 29 CFR 2560.503-1(f)(2)(iii)(B) (up to 30 days after receipt of claim with up to 15 days for an extension for post-service health claims); *id.* § 2560.503-1(f)(3) (up to 45 days after receipt of claim with two possible 30-day extensions for disability claims).

require that: (1) Claims and appeals must be adjudicated in a manner designed to ensure independence and impartiality of the persons involved in making the benefit determination; (2) benefit denial notices must contain a complete discussion of why the plan denied the claim and the standards applied in reaching the decision, including the basis for disagreeing with the views of health care professionals, vocational professionals, or with disability benefit determinations by the Social Security Administration (SSA); (3) claimants must be given timely notice of their right to access to their entire claim file and other relevant documents and be guaranteed the right to present evidence and testimony in support of their claim during the review process; (4) claimants must be given notice and a fair opportunity to respond before denials at the appeals stage are based on new or additional evidence or rationales; (5) plans cannot prohibit a claimant from seeking court review of a claim denial based on a failure to exhaust administrative remedies under the plan if the plan failed to comply with the claims procedure requirements unless the violation was the result of a minor error; (6) certain rescissions of coverage are to be treated as adverse benefit determinations triggering the plan's appeals procedures; and (7) required notices and disclosures issued under the claims procedure regulation must be written in a culturally and linguistically appropriate manner.

B. Comments on Major Provisions of Final Rule

1. Independence and Impartiality—Avoiding Conflicts of Interest

Consistent with the ACA Claims and Appeals Final Rule governing group health plans, paragraph (b)(7) of this final rule explicitly provides that plans providing disability benefits “must ensure that all claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision.” Therefore, this final rule requires that decisions regarding hiring, compensation, termination, promotion, or similar matters with respect to any individual must not be made based upon the likelihood that the individual will support the denial of disability benefits. For example, a plan cannot provide bonuses based on the number of denials made by a claims adjudicator. Similarly, a plan cannot contract with a medical expert based on the expert's reputation for outcomes in contested cases, rather than based on the expert's

professional qualifications. These added criteria for disability benefit claims address practices and behavior which cannot be reconciled with the “full and fair review” guarantee in section 503 of ERISA, and with the basic fiduciary standards that must be followed in implementing the plan's claims procedures. For the reasons described below, paragraph (b)(7) of the final rule therefore remains largely unchanged from the proposal.

The Department received numerous comments either generally supporting or not objecting to the idea that the independence and impartiality requirements for claims procedures for disability claims should be consistent with the ACA's claims procedure requirements for group health plans. Several commenters pointed out that even prior to the proposal, many disability plans had already taken affirmative steps to ensure the independence and impartiality of the persons involved in the decision-making process. Other commenters who opposed the provision as unnecessary similarly cited the fact that the proposed amendments reflect current industry practice and argued that issues regarding the independence and impartiality of the appeal process is already the subject of the well-developed body of case law. Although the Department agrees that the proposal was intended to be consistent with industry best practice trends and developing case law in the area, the Department does not believe that industry trends or court decisions are an acceptable substitute for including these provisions in a generally applicable regulation.

Several commenters suggested that the examples of individuals covered by this provision should include vocational experts. The commenters pointed out that vocational experts are often actively involved in the decision-making process for disability claims and play a role in the claims process similar to the role of a medical or health care professional. They noted that opinions of vocational experts are often relied on in making determinations on eligibility for and the amount of disability benefits. Although the list in the proposed provision was intended to merely reflect examples, not be an exhaustive list, the Department nonetheless agrees that it would be appropriate to add vocational experts to avoid disputes regarding their status under this provision of the final rule. This clarification of the provision from its proposed form is also consistent with the current regulation's express acknowledgement of the important role of vocational experts in the disability

claims process. Specifically, paragraph (h)(3)(iv) of the current regulation already requires that the claims procedure for disability benefit claims must provide for the identification of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination. Accordingly, the final rule adds “vocational expert” to the examples of persons involved in the decision-making process who must be insulated from the plan's or issuer's conflicts of interest. Decisions regarding hiring, compensation, termination, promotion, or other similar matters must not be based upon the likelihood that the individual will support the denial of benefits.

Commenters also asked the Department to clarify whether “consulting experts” are “involved in making the decision” for purposes of the independence and impartiality requirements. Some commenters were concerned that consulting experts would fall outside of these requirements because plans or claims administrators might assert that consulting experts merely supply information and do not decide claims. In the Department's view, the text of paragraph (b)(7) is clear that the independence and impartiality requirements are not limited to persons responsible for making the decision. For example, paragraph (b)(7) of the final rule, as in the proposal, refers to a “medical expert” as an example of a person covered by the provision. The text also refers to individuals who may “support the denial of benefits.” Thus, in the Department's view, the independence and impartiality requirements apply to plans' decisions regarding hiring, compensation, termination, promotion, or other similar matters with respect to consulting experts. Although some commenters suggested that the Department expand the regulatory text to expressly include “consulting experts,” in the Department's view, the regulatory text is sufficiently clear to address commenters' concerns especially with the inclusion of “vocational experts” in this provision of the final rule as described above. The Department also believes that it should avoid creating differences in the text of parallel provisions in the rules for group health benefits under the ACA Claims and Appeals Final Rule and disability benefits absent a reason that addresses a specific issue for disability claims

(like the vocational expert issue discussed above).

Several commenters asked the Department to clarify that the independence and impartiality requirements apply even where the plan does not directly hire or compensate the individuals “involved in making the decision” on a claim. The text of the rule does not limit its scope to individuals that the plan directly hires. Rather, the rule’s coverage extends to individuals hired or compensated by third parties engaged by the plan with respect to claims. Thus, for example, if a plan’s service provider is responsible for hiring, compensating, terminating, or promoting an individual involved in making a decision, this final rule requires the plan to take steps (*e.g.*, in the terms of its service contract and ongoing monitoring) to ensure that the service provider’s policies, practices, and decisions regarding hiring, compensating, terminating, or promoting covered individuals are not based upon the likelihood that the individual will support the denial of benefits.

One commenter, who supported applying independence and impartiality requirements, expressed concern about a statement in the preamble to the proposed rule that a plan cannot contract with a medical expert based on the expert’s reputation for outcomes in contested cases rather than based on the expert’s professional qualifications. The commenter did not object to the prohibition on hiring a medical expert based on a reputation for denying claims, but expressed concern that the statement in the preamble might result in claimants requesting statistics and other information on cases in which the medical expert expressed opinions in support of denying rather than granting a disability benefit claims. Another commenter who opposed the provision also expressed concern about court litigation and discovery regarding “reputation” issues arising from the text in the preamble. In the Department’s view, the preamble statement accurately describes one way that the independence and impartiality standard could be violated. That said, the independence and impartiality requirements in the rule do not modify the scope of “relevant documents” subject to the disclosure requirements in paragraphs (g)(1)(vii)(C) and (h)(2)(iii) of the Section 503 Regulation, as amended by this rule. Nor do the independence and impartiality requirements in the rule prescribe limits on the extent to which information about consulting experts would be discoverable in a court proceeding as part of an evaluation of

the extent to which the claims administrator or insurer was acting under a conflict of interest that should be considered in evaluating an adverse benefit determination.

Several commenters urged the Department to implement the independence and impartiality requirements with specific quantifiable limitations on the relationship between plans and consultants. For example, one commenter suggested a medical consultant be required to certify that no more than 20% of the consultant’s income is derived from reviewing files for insurance companies and/or self-funded disability benefit plans. Several commenters recommended that plans be required to disclose to claimants a range of quantifiable information regarding its relationship with certain consultants (*e.g.*, number of times a plan has relied upon the third-party vendor who hired the expert in the past year). A few commenters suggested that the Department establish rules on the qualifications, credentials, or licensing of an expert and the nature and type of such expert’s professional practice. For example, one commenter suggested that the rule provide that when a fiduciary relies on a physician or psychologist or other professional, such as a vocational specialist, the person must be licensed in the same jurisdiction where the plan beneficiary resides. Although the Department agrees that more specific quantifiable or other standards relating to the nature and type of an expert’s professional practice might provide additional protections against conflicts of interest, the parallel provisions in the claims procedure rule for group health plans under the ACA Claims and Appeals Final Rule do not contain such provisions. Moreover, an attempt to establish specific measures or other standards would benefit from a further proposal and public input. Accordingly, the final rule does not adopt the commenters’ suggestions.

2. Improvements to Disclosure Requirements

The Department proposed to improve the disclosure requirements for disability benefit claims in three respects. First, the proposal included a provision that expressly required adverse benefit determinations on disability benefit claims to contain a “discussion of the decision,” including the basis for disagreeing with any disability determination by the SSA or other third party disability payer, or any views of health care professionals treating a claimant to the extent the determination or views were presented by the claimant to the plan. Second,

notices of adverse benefit determinations must contain the internal rules, guidelines, protocols, standards or other similar criteria of the plan that were relied upon in denying the claim (or a statement that such criteria do not exist). Third, consistent with the current rule applicable to notices of adverse benefit determinations at the review stage, a notice of adverse benefit determination at the initial claims stage must contain a statement that the claimant is entitled to receive, upon request, relevant documents.

In the Department’s view, the existing claims procedure regulation for disability claims already imposes a requirement that denial notices include a reasoned explanation for the denial.¹³ For example, the rule requires that the notice must be written in a manner calculated to be understood by the claimant, must include any specific reasons for the adverse determination, must reference the specific provision in governing plan documents on which the determination is based, must include a description of any additional information required to perfect the claim, must include a description of the internal appeal process, and must include the plan’s rules, if any, that were used in denying the claim (or a statement that such rules are available upon request).

The Department’s experience in enforcing the claims procedure requirements and its review of litigation activity, however, leads it to conclude that some plans are providing disability claim notices that are not consistent with the letter or spirit of the Section 503 Regulation. Accordingly, the Department believes that expressly setting forth additional requirements in the regulation, even if some may already apply under the current rule, is an appropriate way of reinforcing the need for plan fiduciaries to administer the plan’s claims procedure in a way that is transparent and that encourages an appropriate dialogue between a claimant and the plan regarding adverse benefit determinations that ERISA and the current claims procedure regulation contemplate.

Commenters generally either supported or did not object to the requirement to explain a disagreement with a treating health care professional in adverse benefit determinations. The

¹³ For example, the Department noted in the preamble to the proposed rule the fact that several federal courts concluded that a failure to provide a discussion of the decision or the specific criteria relied upon in making the adverse benefit determination could make a claim denial arbitrary and capricious.

Department, accordingly, is adopting this provision from the proposal. This provision in the final rule would not be satisfied merely by stating that the plan or a reviewing physician disagrees with the treating physician or health care professional. Rather, the rule requires that the adverse benefit determination must include a discussion of the basis for disagreeing with the health care professional's views. Several commenters suggested, similar to their comments described above on the need to subject vocational experts to the independence and impartiality requirements, that this disclosure provision should also apply to vocational professionals. As noted above, the commenters pointed out that vocational experts have a role somewhat similar to the role of a medical or health care professional in the claims determination process. The Department agrees, and, accordingly, added "vocational professional" to this provision.

An issue raised in the comments related to whether the plan is required to address only third party views presented to the plan by the claimant. The concern was that plans may not know whether other third party views even exist so that any requirement to address third party views should be limited to third party findings where they are presented by the claimant. Although the Department does not believe it would be appropriate to require plans to address views that they were not aware of and had no obligation to discover, the Department's consideration of this comment led it to conclude that the provision needed to be revised to include medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination. The Department's experience enforcing the current regulation has revealed circumstances where claims adjudicators may consult several experts and deny a claim based on the view of one expert when advice from other experts who were consulted supported a decision to grant the claim. Some of these cases may have involved intentional "expert shopping." Requiring plans to explain the basis for disagreeing with experts whose advice the plan sought would not present the problem raised in the comments of addressing third party views the plan does not know even exist, but it would be consistent with and enhance the requirement in paragraph (h)(3)(iv) of the current regulation which already requires that the claims procedure for disability benefit claims must provide

for the identification of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination. In fact, the Department believes that a request for relevant documents under the current regulation would require the plan to disclose materials related to such a consultation. The plan would also be required under the current regulation to explain its basis for not adopting views of an expert the plan consulted who supported granting the claim if the claimant raised the expert's views as part of an appeal of an adverse benefit determination. In the Department's view, this is not a new substantive element of the requirement that plans explain the reasons for a denial, but rather is a process enhancement that removes unnecessary procedural steps for claimants to get an explanation of the reasons the plan disagrees with the views of its own consulting experts.

Accordingly, the final rule revises paragraphs (g)(1)(vii)(A) and (j)(6)(i) to require that adverse benefit determinations on disability benefit claims contain a discussion of the basis for disagreeing with the views of health care professionals who treated the claimant or vocational professionals who evaluated the claimant, when the claimant presents those views to the plan. The final rule also revises paragraphs (g)(1)(vii)(A) and (j)(6)(i) to clarify that adverse benefit determinations on disability benefit claims must contain a discussion of the basis for disagreeing with the views of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination.

One commenter suggested that references to the "views" of treating health care professionals is very broad and that it is not clear what is intended to be covered by this reference. The commenter argued that "views" is not synonymous with an opinion or conclusion about whether a claimant is disabled, and that, in many cases, health care professionals do not provide an opinion on the claimant's disability at all, and if they do, they are not providing an opinion on disability as defined by the plan. Another commenter asserted that a health care professional's focus is on the patient's diagnosis and treatment and that the claims adjudicator considers the long-

term effect of the individual's condition on their ability to work. These commenters argued that claims adjudicators are not necessarily agreeing or disagreeing with medical findings by a treating health care provider, rather they are considering if the claimant's disease or illness significantly impairs their work skills. The commenters said that to require a plan to discuss why it did not agree with the views expressed by a myriad of health care professionals does nothing to help explain why a claims administrator found that the claimant was not disabled under the terms of the plan.

The Department does not believe it is appropriate to limit the scope of the final rule to opinions or conclusions about whether a claimant is disabled. Medical and vocational professionals provide views that may be important to the ultimate determination of whether a person is disabled. In the Department's view, to the extent the claims adjudicator disagrees with foundational information in denying a claim, the claimant has a right to know that fact to the same extent the claimant should be made aware that the claims adjudicator disagrees with an opinion from a medical or vocational expert that the claimant is disabled. Further, it is part of the fiduciary role of the ERISA claims adjudicator to weigh input from medical and vocational experts in reaching a conclusion on a benefit claim. When the claims adjudicator acting in a fiduciary capacity disagrees with the judgments of medical and vocational professionals in denying a claim, the claims adjudicator as a matter of basic fiduciary accountability should be able to identify those circumstances and explain the basis for that decision. The Department also notes that the final rule requires this explanation in cases where the plan or claims adjudicator disagrees with the views of the medical or vocational expert. There is no disagreement to explain if, as the commenter posed, a treating health care consultant expresses a view only on a diagnosis or treatment which the plan fully accepts in evaluating the question of whether the claimant meets the definition of a disability under the plan. Rather, in such a case, the plan would be under the same obligation that exists under the current regulation to explain why it reached the conclusion that the diagnosed illness or treatment did not impair the claimant's work skills or ability to work or otherwise failed to satisfy the plan's definition of disability. In summary, the Department believes that an explanation of the basis for disagreement with the judgments of

health care and vocational professionals is required in order to be responsive to the information submitted by the claimant or developed during evaluation of the claim, and is also necessary for a reasoned explanation of a denial.

With respect to the requirement to explain the basis for disagreeing with or not following disability determinations by the SSA and other payers of disability benefits, several commenters who supported the requirement pointed out that reviewing courts in evaluating whether a plan's adverse benefit determination was arbitrary and capricious have found an SSA determination to award benefits to be a factor that the plan fiduciary deciding a benefit should consider. Courts have criticized the failure to consider the SSA determination, especially if a plan's administrator operates under a conflict of interest and if the plan requires or encourages claimants to pursue SSA decisions in order to offset any SSA award against the amount they pay in disability benefits. *See, e.g., Montour v. Hartford Life and Accident Ins. Co.*, 588 F.3d 623, 637 (9th Cir. 2009) ("failure to explain why it reached a different conclusion than the SSA is yet another factor to consider in reviewing the administrator's decision for abuse of discretion, particularly where, as here, a plan administrator operating with a conflict of interest requires a claimant to apply and then benefits financially from the SSA's disability finding."); *Brown v. Hartford Life Ins. Co.*, 301 F. App'x 772, 776 (10th Cir. 2008) (insurer's discussion was "conclusory" and "provided no specific discussion of how the rationale for the SSA's decision, or the evidence the SSA considered, differed from its own policy criteria or the medical documentation it considered"). Other commenters, however, urged the Department to remove the requirement to discuss the basis for disagreeing with the disability determinations of the SSA or other payers of benefits. Those commenters argued that it would not be reasonable to require an ERISA plan fiduciary to go outside the plan's governing document and make a judgment about a disability determination made by some other party that is based upon another plan or program's definition of disability, which may have entirely different or inconsistent definitions of disability or conditions. The commenters further argued that the plan fiduciary might not be able to get from the SSA or other payer of benefits the documents, case file or other information necessary even

to try to conduct such an evaluation. Those commenters also requested that, if such a requirement was to be included in the final rule, then the rule should allow plans to take into account in the discussion of its decision the extent to which the claimant provided the plan, or gave the plan a way to obtain, sufficient documentation from the SSA or other third party to allow a meaningful review of such third-party findings.

The Department is persuaded that the final rule should limit the category of "other payers of benefits" to disability benefit determinations by the SSA. The Department accepts for purposes of this final rule that claims adjudicators generally are trained to understand their own plan or insurance policy requirements and apply those standards to claims in accordance with the internal rules, guidelines, policies, and procedures governing the plan. The Department also agrees that a determination that an individual is entitled to benefits under another employee benefit plan or other insurance coverage may not be governed by the same definitions or criteria, and that it may be difficult for the adjudicator to obtain a comprehensive explanation of the determination or relevant underlying information that was relied on by the other payer in making its determination.

The Department does not believe, however, that those same difficulties are involved in the case of SSA determinations. SSA determinations may include a written decision from an ALJ, and the definitions and presumptions are set forth in publicly available regulations and SSA guidance. Accordingly, the final rule revises paragraphs (g)(1)(vii)(A) and (j)(6)(i) to require that adverse benefit determinations on disability benefit claims contain a discussion of the basis for disagreeing with an SSA disability determination regarding the claimant presented by the claimant to the plan. Although the plan's claims procedures may place the burden on the claimant to submit any SSA determination that the claimant wants the plan to consider, claims administrators working with an apparently deficient administrative record must inform claimants of the alleged deficiency and provide them with an opportunity to resolve the stated problem by furnishing missing information. It also would not be sufficient for the benefit determination merely to include boilerplate text about possible differences in applicable definitions, presumptions, or evidence. A discussion of the actual differences would be necessary. Further, although

the final rule does not, as some commenters requested, require that plans defer to a favorable SSA determination, a more detailed justification would be required in a case where the SSA definitions were functionally equivalent to those under the plan.

Several commenters requested that the Department adopt a rule requiring deference to a treating physician's opinion for disability determinations, with some commenters suggesting a rule identical to the one applied under the SSA disability program. Nothing in ERISA or the Department's regulations mandates that a plan administrator give special weight to the opinions of a claimant's treating physician when rendering a benefit determination. The Department also does not believe the public record on this rulemaking supports the Department imposing such a rule. In the Department's view, a treating physician rule is not necessary to guard against arbitrary decision-making by plan administrators. In addition to the various improvements in safeguards and procedural protections being adopted as part of this final rule, courts can review adverse benefit determinations to determine whether the claims adjudicator acted unreasonably in disregarding evidence of a claimant's disability, including the opinions of treating physicians. Nor does the Department believe it would be appropriate to adopt the treating physician rule applicable under the Social Security disability program. That rule was adopted by the Commissioner of Social Security in regulations issued in 1991, to bring nationwide uniformity to a vast statutory benefits program and to address varying decisions by courts of appeals addressing the question. ERISA, by contrast, governs a broad range of private benefit plans to which both the statute and implementing regulations issued by the Secretary of Labor permit significant flexibility in the processing of claims. Moreover, the SSA's treating physician rule has not been uniformly or generally applied even under statutory disability programs other than Social Security. *See* Brief for the United States as amicus curiae supporting petitioner, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

Under the current Section 503 Regulation, if a claim is denied based on a medical necessity, experimental treatment, or similar exclusion or limit, the adverse benefit determination must include either an explanation of the scientific or clinical judgment for the determination, applying the terms of the plan to the claimant's medical circumstances, or a statement that such

explanation will be provided free of charge upon request. These requirements in paragraphs (g)(1)(v)(B) and (j)(5)(ii) apply to notices of adverse benefit determinations for both group health and disability claims. In proposing new paragraphs (g)(1)(vii) and (j)(6) applicable to disability claims, these requirements were intended to be subsumed in the general requirement in the proposal that adverse benefit determinations include a “discussion of the decision.” The Department is concerned, however, that removing the explicit requirement in the disability claims procedure to explain a denial based on medical necessity, experimental treatment, or similar exclusion may be misinterpreted by some as eliminating that requirement (especially with the group health plan claims procedures continuing to have that explicit requirement). That clearly was not the Department’s intention, and, accordingly, the final rule expressly sets forth in paragraphs (g)(1)(vii)(B) and (j)(6)(ii) the requirement of an explanation of the scientific or clinical judgment for such denials.¹⁴

The Department received numerous comments in favor of the disclosure requirement in paragraphs (g)(1)(vii)(B) and (j)(6)(ii) of the proposal that notices of adverse benefit determinations include the internal rules, guidelines, protocols, standards or other similar criteria of the plan that were relied upon in denying the claim (or a statement that such criteria do not exist). Commenters who supported the proposal noted that the proposed requirement should not be onerous given that adverse benefit determinations are already required to include the reasons for the denial and the applicable plan terms, and also argued that this further level of

transparency would promote the dialogue between claimant and plan regarding adverse benefit determinations that ERISA contemplates. These commenters also pointed out that this requirement would address a problem confronted by some claimants where a plan or claims adjudicator says it is relying on an internal rule in denying a claim, and then refuses to disclose it to the claimant based on an assertion that the internal rule is confidential or proprietary. Commenters who opposed the provision argued that the proposal would be overly burdensome for plans and insurers. They read the provision as requiring disclosure of “details of internal processes that are irrelevant to the claim decision and that would provide little in the way of useful information to claimants.” The comments included concerns about the time and cost to review claims manuals and other internal documents that may include rules, guidelines, protocols, standards or other similar criteria to determine that no provision has any application to a claim in order to make the statement that such internal rules, *etc.* do not exist.

The final rule, like the proposal, provides that internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making an adverse benefit determination must be provided with the adverse benefit determination. The Department does not agree with commenters who asserted that the requirement will be overly burdensome to plans. Even under the existing claims procedure regulation, internal rules, guidelines, protocols, standards or similar criteria relied upon in denying the claim already must be provided to the claimant upon request. Although the additional requirement to affirmatively include them in the adverse benefit determination adds an incremental paperwork burden, where a plan utilizes a specific internal rule or protocol, understanding the terms of the specific protocol may be crucial to a claimant’s ability to successfully contest the denial on review. With respect to the comments about disclosing an internal process that is irrelevant to the claim decision, it is hard to see how something that is in fact “irrelevant” can be something that was “relied upon” in denying the claim. Furthermore, the Department does not agree that it should change the proposed text based on expressed concerns about the time and cost to review claims manuals and other internal documents to determine that nothing in those

materials have application to a claim. Aside from the fact that this provision of the final rule requires the plan to affirmatively include only rules, guidelines, protocols, standards or other similar criteria that were relied on in denying the claim, in the Department’s view, it would present substantial questions about whether the plan or claims adjudicator complied with ERISA’s fiduciary standards if a claim was denied without the claims adjudicator having considered a rule, guideline, protocol or standard that was intended to govern the determination of the claim. Moreover, the current Section 503 regulation for disability plans gives claimants the right to reasonable access to and copies of documents, records, and other information “relevant” to the claimant’s claim for benefits. In addition to capturing documents, records, and other information “relied upon” in making the benefit determination, the definition of “relevant” also captures information submitted, considered or generated in the course of making the benefit determination or that demonstrates compliance with the administrative processes and safeguards designed to ensure and verify that benefit claim determinations have been made in accordance with governing plan documents and that those provisions have been applied consistently with respect to similarly situated claimants. In the case of plans providing group health or disability benefits, “relevant” also includes documents, records, or other information that constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit, without regard to whether such advice or statement was relied upon in making the benefit determination. Such a statement of policy or guidance would include any policy or guidance generated or commissioned by the plan or issuer concerning the denied benefit that would or should contribute to deciding generally whether to pay the claim (*e.g.*, studies, surveys or assessments generated or commissioned by the plan or issuer that implicate a denied treatment option or benefit but do not relate specifically to the plan itself). Thus, in the Department’s view, even under the current rule, plans would be required, on request, to verify that the plan has produced all the internal rules, guidelines, protocols, standards or other similar criteria concerning the denied claim that were or should have been considered in deciding the claim.

Another commenter argued that it did not make sense to require plans to

¹⁴ The current Section 503 Regulation in paragraph (j)(5)(iii) requires a statement concerning voluntary dispute resolution options in notices of adverse benefit determinations on review for both group health and disability claims. The Department previously issued an FAQ on that provision noting that information on the specific voluntary appeal procedures offered under the plan must be provided under paragraph (j)(4) of the regulation in the notice of adverse benefit determination, along with a statement of the claimant’s right to bring a civil action under section 502(a) of ERISA. The Department, therefore, stated in the FAQ that, pending further review, it will not seek to enforce compliance with the requirements of paragraph (j)(5)(iii). See FAQs About The Benefit Claims Procedure Regulation, D-13 (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf). In light of the fact that this proposal was limited to disability benefit claims, the Department does not believe it would be appropriate to modify the requirement in paragraph (j)(5)(iii) as part of this final rule. Accordingly, the Department will continue the enforcement position articulated in FAQ D-13.

affirmatively state in an adverse benefit determination that plans did not rely on any rule or guideline. They argued that, if the adverse benefit determination failed to cite reliance on such a rule or guideline, the claimant could ask and the plan would respond with a statement that none were relied on. They argued that such a process gives the claimant the ability to obtain that information in cases where the claimant believes that information is important to understanding or contesting the basis for the denial. It is the Department's view, however, that an affirmative statement would be helpful to the claimant by providing certainty about the existence of any applicable rule or guideline. The Department also does not believe the absence of a statement of reliance in an adverse benefit statement fairly puts a claimant on notice to request confirmation that no rule or guideline was relied upon. Further, the Department does not believe merely requiring such an affirmative statement is burdensome on plans because the plan should know whether it relied on a rule or guideline in denying a claim.

Finally, the existing Section 503 regulation already requires that rules, guidelines, protocols, standards or other similar criteria that were relied on in denying the claim must be disclosed to claimants on request. Nothing in the current regulation allows a plan fiduciary to decline to comply with that requirement based on an assertion that the information is proprietary or confidential. Indeed, the Department has taken the position that internal rules, guidelines, protocols, or similar criteria would constitute instruments under which a plan is established or operated within the meaning of section 104(b)(4) of ERISA and, as such, must be disclosed to participants and beneficiaries. See *FAQs About The Benefit Claims Procedure Regulation, C-17* (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf).¹⁵

¹⁵ FAQ C-17 states: "It is the view of the department that where a rule, guideline, protocol, or similar criterion serves as a basis for making a benefit determination, either at the initial level or upon review, the rule, guideline, protocol, or criterion must be set forth in the notice of adverse benefit determination or, following disclosure of reliance and availability, provided to the claimant upon request. However, the underlying data or information used to develop any such rule, guideline, protocol, or similar criterion would not be required to be provided in order to satisfy this requirement. The department also has taken the position that internal rules, guidelines, protocols, or similar criteria would constitute instruments under which a plan is established or operated within the meaning of section 104(b)(4) of ERISA and, as such, must be disclosed to participants and beneficiaries.

Similarly, this final rule does not permit a plan to conceal such information from the claimant under an assertion that the information is proprietary or constitutes confidential business information.

The third new disclosure requirement, set forth in paragraph (g)(1)(vii)(C) of the proposal, adds a requirement that an adverse benefit determination at the initial claims stage must include a statement that the claimant is entitled to receive, upon request, documents relevant to the claim for benefits. Although the current Section 503 Regulation provides that claimants challenging an initial denial of a claim have a right to request relevant documents, a statement advising claimants of their right to relevant documents currently is required only in notices of an adverse benefit determination on appeal. No commenters objected to the addition of this statement to the adverse benefit determination at the initial claims stage. The Department believes such a statement in the initial denial notice simply confirms rights claimants already have under the current claims regulation and will help ensure claimants understand their right of access to the information needed to understand the reasons for the denial and decide whether and how they may challenge the denial on appeal. Accordingly, this provision was adopted without change in the final rule.

3. Right To Review and Respond to New Information Before Final Decision

The Department continues to believe that a full and fair review requires that claimants have a right to review and respond to new evidence or rationales developed by the plan during the pendency of the appeal and have the opportunity to fully and fairly present his or her case at the administrative appeal level, as opposed merely to having a right to review such information on request only after the claim has already been denied on appeal. Accordingly, the final rule adopts those provisions of the proposal with certain modifications described below.

Paragraph (h)(4) of the final rule, consistent with the proposal, requires that plans provide claimants, free of charge, with new or additional evidence considered, relied upon, or generated by the plan, insurer, or other person making the benefit determination (or at the direction of the plan, insurer or such

See § 2560.503-1(g)(v) (A) and (j)(5)(i); 65 FR at 70251. Also see § 2560.503-1(h)(2)(iii) and 2560.503-1(m)(8)(i); Advisory Opinion 96-14A (July 31, 1996).

other person) during the pendency of the appeal in connection with the claim. Consistent with the proposal, paragraph (h)(4) also provides a similar disclosure requirement for an adverse benefit determination based on a new or additional rationale. The evidence or rationale must be provided as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination on review is required to be provided to give the claimant a reasonable opportunity to address the evidence or rationale prior to that date. These requirements already apply to claims involving group health benefits under the ACA Claims and Appeals Final Rule. Further, the Department has interpreted ERISA section 503 and the current Section 503 Regulation as already requiring that plans provide claimants with new or additional evidence or rationales upon request and provide them an opportunity to respond in at least certain circumstances.¹⁶

The objective of these provisions is to ensure the claimant's ability to obtain a full and fair review of denied disability claims by explicitly providing that claimants have a right to review and respond to new or additional evidence or rationales developed by the plan during the pendency of the appeal, as opposed merely to having a right to such information on request only after the claim has already been denied on appeal, as some courts have held under the Section 503 Regulation. These protections are direct imports from the ACA Claims and Appeals Final Rule, and they would correct procedural problems evidenced in litigation even predating the ACA.¹⁷ It was and continues to be the view of the Department that claimants are deprived of a full and fair review, as required by

¹⁶ As a practical matter, these requirements to provide claimants with evidence or rationales that were relied on or used as a basis for an adverse benefit determination largely conforms the rule to the existing process by which benefits claims should be handled in such cases. *E.g.*, *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 511 F.3d 1206, 1215 (9th Cir. 2008) (finding that a full and fair review requires a plan administrator to disclose the reasons for denial in the administrative process); 75 FR at 43333 n.7 (noting the DOL's position that the existing claims procedure regulation already requires plans to provide claimants with new or additional evidence or rationale upon request and an opportunity to respond in certain circumstances).

¹⁷ See, *e.g.*, *Metzger v. Unum Life Ins. Co. of America*, 476 F.3d 1161, 1165-67 (10th Cir. 2007) (holding that "subsection (h)(2)(iii) does not require a plan administrator to provide a claimant with access to the medical opinion reports of appeal-level reviewers prior to a final decision on appeal."); *Accord Glazer v. Reliance Standard Life Ins. Co.*, 524 F.3d 1241 (11th Cir. 2008); *Midgett v. Washington Group Int'l Long Term Disability Plan*, 561 F.3d 887 (8th Cir. 2009).

section 503 of ERISA, when they are prevented from responding, at the administrative stage level, to all evidence and rationales.¹⁸

As an example of how these new provisions would work, assume the plan denies a claim at the initial stage based on a medical report generated by the plan administrator. Also assume the claimant appeals the adverse benefit determination and, during the 45-day period the plan has to make its decision on appeal, the plan administrator causes a new medical report to be generated. The proposal and the final rule would require the plan to automatically furnish to the claimant any new or additional evidence in the second report. The obligation applies to any new or additional evidence, including, in particular, evidence that may support granting the claim. The plan would have to furnish the new or additional evidence to the claimant before the expiration of the 45-day period. The evidence would have to be furnished as soon as possible and sufficiently in advance of the applicable deadline (including an extension if available) in order to give the claimant a reasonable opportunity to address the new or additional evidence. The plan would be required to consider any response from the claimant. If the claimant's response happened to cause the plan to generate a third medical report containing new or additional evidence, the plan would have to automatically furnish to the claimant any new or additional evidence in the third report. The new or additional evidence would have to be furnished as soon as possible and sufficiently in advance of the applicable deadline to allow the claimant a reasonable opportunity to respond to the new or additional evidence in the third report.

Several commenters asked for clarification regarding the application of the rights in paragraph (h)(4)(i) of the proposal which would have required that the plan's claims procedures must allow a claimant to review the claim file and to present evidence and testimony as part of the "disability benefit *claims* and appeals process." The commenters noted that, although subsection (h) deals with the appeals portion of the claim process, use of the phrase "*claims and appeals process*" could cause confusion as to whether the requirements of that subsection are intended to apply only to the appeals portion of the process or also to the initial stage of the claim

process. Those commenters also suggested that this provision be deleted in its entirety because it was redundant and unnecessary. They pointed out that paragraph (g)(1)(vii)(C) of the proposal already added a requirement that claimants be notified as part of a denial at the initial claims stage of their right to review copies of documents and other information relevant to the claim for benefits. They pointed to the definition of "relevant" in the current regulation at paragraph (m)(8), which includes documents, records or other information that were relied upon in making the benefit determination, submitted, considered or generated in the course of making the benefit determination, demonstrates compliance with the certain administrative safeguards and requirements required under the regulation, or constitutes a statement of policy or guidance with respect to the plan concerning a denied treatment option or benefit or the claimant's diagnosis. The commenters also noted that paragraph (h)(2)(ii) of the regulation currently gives claimants the right to "submit written comments, documents, records, and other information" as part of an initial claim. Consequently, they asserted that a provision stating that they can also submit "evidence" and "testimony" does not appear to add to the current requirements.

The text in paragraph (h)(4)(i) was intended to parallel text in the regulation for group health plans under the ACA Claims and Appeals Final Rule. The ACA Claims and Appeals Final Rule specifically addressed rights to review and respond to new or additional evidence or rationales during the appeal stage. The Department agrees with the commenters that the provision is intended to be limited to the appeal stage. The Department also agrees that the new text in proposed paragraph (h)(4)(i) on rights to review the claims file and to present evidence is unnecessary in the disability claims procedure regulation because those rights already exist under the current Section 503 regulation. Accordingly, because that provision in the proposal would not have added new substantive requirements, the Department has deleted the provision from the final rule. In light of the deletion of proposed paragraph (h)(4)(i) from the final rule, the definition in the proposal of "claim file" is also unnecessary, and, accordingly, the Department is not including that definitional provision in the final rule. The changes from the proposal should not be viewed, however, as in any way restricting claimant's rights to documents, records,

or other information under the regulation, or to restrict claimant's rights to present evidence. For example, in the Department's view, if the plan or claims adjudicator maintains a claims file or other similar compilation of documents, records, and other information, such a file by definition would constitute relevant materials and be subject to mandatory disclosure under the final rule.

In response to the paragraph (h)(4)(i) as drafted in the proposal, several commenters expressed concern that some plans would have read the language as imposing courtroom evidentiary standards for claimants submitting proof of their claim. Others expressed concern about a statement in the proposal's preamble that referenced "written" testimony because they thought some plans might rely on that reference to prohibit claimants from submitting audio or video evidence. The Department did not intend that the provision be read to limit the types of evidence that claimants can submit or otherwise put claimants in a worse position than they face under the current regulation. For example, the Department does not believe that plans could refuse to accept evidence submitted in the form of video, audio or other electronic media. Further, in the Department's view, even under the current regulation, it would not be permissible for a plan to impose courtroom evidentiary standards in determining whether the plan will accept or consider information or materials submitted by a claimant.

Several commenters argued that giving claimants new or additional evidence or rationales developed during the pendency of the appeal and requiring plans to consider and address claimant submissions regarding the new or additional evidence or rationale would set up an unnecessary cycle of review and re-review leading to delay and increased costs. The Department is not persuaded by this argument. The requirement conforms the disability claims regulation to the group health plan claims process requirements under the ACA Claims and Appeals Final Rule. Granting both parties (the claimant and the plan) the opportunity to address the other side's evidence has not resulted in an endless loop of submissions in group health claims under the ACA Claims and Appeals Final Rule, and there is no reason to believe that this would occur in the disability claims administrative process. The Department also has previously stated its view that the supposed "endless loop" is necessarily limited by claimants' ability to generate new or

¹⁸ Brief of the Secretary of Labor, Hilda L. Solis, as *Amicus Curiae* in Support of Plaintiff-Appellant's Petition for Rehearing, *Midgett v. Washington Group Int'l Long Term Disability Plan*, 561 F.3d 887 (8th Cir. 2009) (No. 08-2523).

additional evidence requiring further review by the plan. Such submissions ordinarily become repetitive in short order, and are further circumscribed by the limited financial resources of most claimants. If a claimant's assertions do not include new factual information or medical diagnoses, a plan need not generate report after report rather than relying on the reports it already has in hand merely because a claimant objects to or disagrees with the evidence or rationale. The process also necessarily resolves itself when the plan decides it has enough evidence to properly decide the claim and does not generate new or additional evidence or rationales to support its decision.¹⁹ The fiduciary obligation to pay benefits in accordance with the terms of the plan does not require a fiduciary to endlessly rebut credible evidence supplied by a claimant that, if accepted, would be sufficient to justify granting the claim. In fact, an aggressive claims processing practice of routinely rejecting or seeking to undermine credible evidence supplied by a claimant raises questions about whether a fiduciary, especially one operating under a conflict of interest, is violating the fiduciary's loyalty obligation under ERISA to act solely in the interest of the plan's participants and beneficiaries.

Several commenters complained about the possibility of claimants arguing that plans failed to comply with the claims procedure whenever any additional evidence was relied on to support a rationale that was already used as a basis for denying a claim. They expressed similar concerns about determining whether a rationale relied on in denying a claim on review was a "new" or "additional" rationale. They asked the Department to include in the final rule a definition of what constitutes "new or additional" evidence or a "new or additional" rationale. They asserted that the rule might be read to permit a claimant to receive and rebut medical opinion reports generated in the course of an administrative appeal, even when those reports contain no new factual information and deny benefits on the same basis as the initial decision.

The Department does not believe it is necessary or appropriate to include definitions of the terms "new evidence" or "new rationale" in the final rule. Those same terms exist in the parallel claims procedure requirement applicable to group health plans under

the ACA Claims and Appeals Final Rule, and have been part of the claims procedure requirements for those plans for several years. The Department does, however, intend that the terms be applied broadly so that claimants have the opportunity to respond at the administrative stage level to all evidence and rationales. Many federal courts have held that in reviewing a plan administrator's decision for abuse of discretion, the courts are limited to the "administrative record"—the materials compiled by the administrator in the course of making his or her decision. *See Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir.1995) (compiling cases and stating that "[m]ost circuits have declared that, in reviewing decisions of plan fiduciaries under the arbitrary and capricious standard, district courts may consider only the evidence that the fiduciaries themselves considered"). While some courts have held that when conducting a de novo review, any party may be free to submit additional evidence outside the administrative record,²⁰ most circuits have adopted rules allowing the admission of additional evidence in de novo cases only in limited circumstances. In addition to requiring the deciding fiduciary to consider the claimant's response to new or additional evidence or rationales, the Department believes it is important that the claimant have the right and opportunity to ensure that a full administrative record is before a reviewing court when new or additional evidence or rationales are introduced into the record by the plan or deciding fiduciary.²¹

The Department requested comments on whether, and to what extent, modifications to the existing timing rules are needed to ensure that disability benefit claimants and plans will have ample time to engage in the back-and-forth dialogue that is contemplated by these new review and response rights. The current Section 503

²⁰ *See Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir.1989).

²¹ Some commenters suggested that the Department define "new or additional evidence" to be "new and additional medical reviews, including independent medical reports." As noted above, these requirements already apply to claims involving group health benefits under the ACA Claims and Appeals Final Rule and we do not think that it is appropriate to restrict this rule to medical reviews since other types of evidence, if new, would clearly need to be provided to claimants to ensure the full and fair review as described above. For example, if a plan were to obtain video evidence of a disability benefit claimant during the pendency of the appeal, but only provide the claimant with a portion of that video evidence, e.g., the portion that supports the denial of benefits, while withholding the portions that favor the claimant, that would be a failure by the plan to provide new evidence developed to the claimant.

Regulation requires that the plan must decide claims and appeals within a reasonable period, taking into account all circumstances. The following timeframes reflect the maximum period by which a plan must make a determination: (1) *Initial claim*: 45 days after submission; additional 30 days with prior notice for circumstances beyond control of the plan; and (2) *Appeal*: 45 days after receipt of appeal; additional 45 days with prior notice for "special circumstances." A special deadline for deciding appeals applies when the named fiduciary is a board or committee of a multiemployer plan that meets at least quarterly. The Department received several comments with suggestions on possible new timing requirements for the claimant to respond to the new evidence and a time deadline for the claims administrator to make its final decision. Other commenters asserted that the current regulations are sufficient for the needs of consumers covered under this final regulation and provide "ample" time for plans and claimants to engage in the necessary dialogue. One commenter raised an issue concerning this rule and its impact on the prompt administration of disability claims. The commenter described, by way of example, that the plan would have to send claimants new or additional evidence before the plan may have determined whether and how the evidence may contribute to an adverse appeal decision, claimants would receive new or additional evidence piecemeal as the appeals process continues and claimants could be required to provide comments back without necessarily knowing how that information may, if at all, affect the decision. The Department does not believe that the rule envisions this kind of process. This provision by its terms does not apply if a plan grants the claim on appeal. Instead, when the plan has decided that it is going to deny the claim on appeal, that is the point at which the rule requires new or additional evidence must be provided to the claimant, sufficiently in advance of final decision so that the claimant can address such evidence. The provision does not require that the plan provide the claimant with information in a piecemeal fashion without knowing whether, and if so how, that information may affect the decision.

The Department noted in the preamble to the proposal that the group health plan claims regulation provides that if the new or additional evidence or rationale is received by a plan so late that it would be impossible to provide it to the claimant in time for the

¹⁹ Brief of the Secretary of Labor, Hilda L. Solis, as *Amicus Curiae* in Support of Plaintiff-Appellant's Petition for Rehearing, *Midgett v. Washington Group Int'l Long Term Disability Plan*, 561 F.3d 887 (8th Cir. 2009) (No. 08-2523), p. 13.

claimant to have a reasonable opportunity to respond, the period for providing a notice of final internal adverse benefit determination is tolled until such time as the claimant has a reasonable opportunity to respond. The Department did not include this special tolling provision in the proposed amendments because the current disability claims regulation, as described above, already permits plans to take extensions at the appeals stage. In the Department's view, the current disability claims regulation "special circumstances" provision permits the extension and tolling expressly added to the group health plan rule under the ACA Claims and Appeals Final Rule.²² Although the Department is not including special timing provisions in the final rule, the Department is open to considering comments on whether sub-regulatory guidance regarding the current provisions on extensions and tolling would be helpful in the context of the new review and response rights.

Commenters asked the Department to confirm that a plan could satisfy the new review and response requirements through a current procedure, which was described as "universal and a result of established case law." Specifically the commenters stated that some plans currently provide claimants with a voluntary opportunity to appeal any rationale raised for the first time in an appeal denial letter. They contended that this process works well because it gives the claimant a choice of whether to appeal and supplement the administrative record based on a challenge to the new evidence or rationale. They also asserted that the procedure would address commenters' concern that this requirement may conflict with claims administrator's obligation to meet the requisite time requirements for deciding claims and appeals. In fact, a few other commenters specifically asked that the new requirement not apply to plans that currently offer a voluntary additional

level of appeal. The Department does not agree that a voluntary additional level of appeal provides the same rights to claimants because the additional level of appeal is not subject to the rule's provisions on timing of notification of benefit determinations on appeal. In the Department's view, it would not be appropriate to condition a claimant's right to review and respond to new evidence on the claimant effectively being required to give up rights to a timely review and decision at the appeal stage.

Finally, the Department's experience enforcing the current regulation for group health plans has revealed circumstances where claims adjudicators assert that they are satisfying this requirement by providing claimants with a notice informing them that the plan relied on new or additional evidence or a new or additional rationale in denying the claim, and offering to provide the new evidence or rationale on request. As the Department explained in the preamble to the ACA Claims and Appeals Final Rule for group health plans,²³ in order to comply with this requirement, a plan or issuer must send the new or additional evidence or rationale automatically to the claimant as soon as it becomes available to the plan. Merely sending a notice informing claimants of the availability of such information fails to satisfy the requirement, and if a plan's claims procedure says the plan will send a notice of the availability of such information, the responsible plan fiduciary similarly would fail to have met the requirement under ERISA section 503 for the plan to establish and

maintain a reasonable procedure governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations.

4. Deemed Exhaustion of Claims and Appeals Processes

The final rule tracks the proposal and provides that if a plan fails to adhere to all the requirements in the claims procedure regulation, the claimant would be deemed to have exhausted administrative remedies, with a limited exception where the violation was (i) *de minimis*; (ii) non-prejudicial; (iii) attributable to good cause or matters beyond the plan's control; (iv) in the context of an ongoing good-faith exchange of information; and (v) not reflective of a pattern or practice of non-compliance. The rule thus mirrors the existing standard applicable to group health plans under the ACA Claims and Appeals Final Rule and is stricter than a mere "substantial compliance" requirement.

The Department received a number of generally favorable comments regarding the deemed exhaustion provisions in paragraphs (l)(1) and (2) of the proposal. Those commenters argued that claimants should not have to follow a claims and appeals process that is less than full, fair, and timely. Some of those commenters expressed concern that the language in proposed paragraph (l)(2)(i) was potentially inconsistent with language in the preamble. The commenters noted that the preamble stated that "in those situations when the minor errors exception does not apply, the proposal clarifies that the reviewing tribunal should not give special deference to the plan's decision, but rather should review the dispute *de novo*." By contrast, they point out that proposed paragraph (l)(2)(i) provides that "[i]f a claimant chooses to pursue remedies under section 502(a) of ERISA under such circumstances, the claim or appeal is deemed denied on review without the exercise of discretion by an appropriate fiduciary." According to the commenters, plans could argue that the language in proposed paragraph (l)(2)(i) does not go far enough and suggested that the regulation should expressly require *de novo* review.

The Department does not intend to establish a general rule regarding the level of deference that a reviewing court may choose to give a fiduciary's decision interpreting benefit provisions in the plan's governing documents. However, the cases reviewing a plan fiduciary's decision under a deferential arbitrary or capricious standard are based on the idea that the plan

²² In connection with the ACA Claims and Appeals Final Rule, the Department explained the process as follows: "To address the narrow circumstance raised by some comments that the new or additional information could be first received so late that it would be impossible to provide it, these final regulations provide that if the new or additional evidence is received so late that it would be impossible to provide it to the claimant in time for the claimant to have a reasonable opportunity to respond, the period for providing a notice of final internal adverse benefit determination is tolled until such time as the claimant has a reasonable opportunity to respond. After the claimant responds, or has a reasonable opportunity to respond but fails to do so, the plan or issuer must notify the claimant of the benefit determination as soon as a plan or issuer acting in a reasonable and prompt fashion can provide the notice, taking into account the medical exigencies."

²³ That rulemaking notice (at 80 FR 72207) included the following explanation in responding to public comments on that rule: "Commenters requested additional guidance related to the timing and amount of information required to be provided in order to satisfy this requirement. Specifically, individuals asked whether such information actually must be provided automatically to participants and whether or not it would be sufficient to send participants a notice informing them of the availability of new or additional evidence or rationale. The Departments retain the requirement that plans and issuers provide the new or additional evidence or rationale automatically. In the Departments' view, fundamental fairness requires that participants and beneficiaries have an opportunity to rebut or respond to any new or additional evidence upon which a plan or issuer may rely. Therefore, plans and issuers that wish to rely on any new or additional evidence or rationale in making a benefit determination must send such new or additional evidence or rationale to participants as soon as it becomes available to the plan or issuer. In order to comply with this requirement, a plan or issuer must send the new or additional evidence or rationale to the participant. Merely sending a notice informing participants of the availability of such information fails to satisfy this requirement." This same explanation applies with equal force to the identical requirement in this final rule applicable to disability benefit claims.

documents give the fiduciary discretionary authority to interpret the plan documents. By providing that the claim is deemed denied without the exercise of fiduciary discretion, the regulation relies on the regulatory authority granted the Department in ERISA sections 503 and 505 and is intended to define what constitutes a denial of a claim. The legal effect of the definition may be that a court would conclude that de novo review is appropriate because of the regulation that determines as a matter of law that no fiduciary discretion was exercised in denying the claim.

A number of commenters expressed concern with proposed paragraph (l)(2)(i), arguing that the proposal encourages claimants to circumvent a plan's claims and appeals process, to seek remedies in court in the case of insignificant missteps in claims management practices that have no impact on claim outcomes, and, therefore, will result in increased litigation. One commenter asked that the proposal be deleted. A few commenters suggested alternative approaches to the proposal. For example, they suggested that the Department consider a rule which first requires claimants to notify the plan that they intend to pursue judicial review based upon the plan's procedural error, and provide plans with a reasonable period of time to cure the error before the claimant can dispense with further administrative review. The Department does not believe that the typical participant pursuing a disability benefit claim in the context of a fair and timely review process will, as the commenters claimed, seek remedies in court in the case of insignificant missteps in claims management processes that have no impact on the ultimate decision on the claim. Further, the Department does not believe it would be appropriate to create a rule that could create incentives for plans and insurers to violate procedural requirements designed to protect claimants and ensure transparency in the decision-making process knowing that before the claimant could seek redress that the claimant would have to identify the violation, notify the plan of the violation, and give the plan time to cure the error. Rather, after careful consideration of these comments, the Department continues to believe that claimants should not have to follow a claims and appeals process that is less than full, fair, and timely. Accordingly, the Department decided to retain the deemed exhaustion provisions as proposed, including the exception to the

strict compliance standard for errors that are minor and that meet certain other specified conditions.²⁴

5. Coverage Rescissions—Adverse Benefit Determinations

Paragraph (m)(4) of the final rule amends the definition of an adverse benefit determination to include, for plans providing disability benefits, a rescission of disability benefit coverage that has a retroactive effect, except to the extent it is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage. The Department did not receive any comments objecting to this provision in the proposed rule, and, accordingly, the provision is adopted without change in the final rule.

Several commenters suggested that the provision be expanded to expressly include situations, particularly in cases involving mental health and substance use disorder claims, where a plan approves treatment for a period less than that requested, but defers the right to appeal until the date the approved benefits end. The Department did not make such a modification to paragraph (m)(4) in the final rule because the Department does not agree that such cases should be addressed as rescissions.

Rather, it appears that the commenters were making a more general point that the claims procedure regulation should expressly define an adverse benefit determination to include instances in which such a limitation is invoked. In that regard, the current regulation provides that the term "adverse benefit determination" includes any denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit. The Department issued a set of FAQs under the current regulation explaining the application of that definition to various situations. One FAQ stated that if a plan provides for the payment of disability benefits for a pre-determined, fixed period (e.g., a specified number of weeks or months or until a specified date), the termination of benefits at the end of the specified period would not constitute an adverse benefit determination under the regulation. Rather, the Department concluded that any request by a

²⁴ The provisions in this final rule supersede any and all prior Departmental guidance with respect to disability benefit claims to the extent such guidance is contrary to this final rule, including but not limited to the deemed exhaustion discussion in FAQ F-2 in FAQs About The Benefit Claims Procedure Regulation. (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf).

claimant for payment of disability benefits beyond the specified period would constitute a new claim.²⁵ Another FAQ, however, addressed the different situation where the plan pays less than the total amount of expenses submitted with regard to a post-service claim. We explained that, while the plan is paying out the benefits to which the claimant is entitled under its terms, the claimant is nonetheless receiving less than full reimbursement of the submitted expenses. Therefore, in order to permit the claimant to challenge the plan's calculation of how much it is required to pay, that decision is required to be treated as an adverse benefit determination under the regulation.²⁶ Whether the situation presented by the commenters should be treated more like the former or latter FAQ will depend on the terms of the plan and the particular facts and circumstances.

One commenter asked whether the proposed rule regarding rescissions of coverage applies to adjustments or suspensions of benefits that reduce or eliminate a disability pension benefit under section 305 of ERISA, which corresponds to section 432 of the Internal Revenue Code of 1986 (Code). It is the Department's view that a retroactive reduction or elimination of disability pension benefits pursuant to section 305 of ERISA is not a rescission of coverage under paragraph (m)(4)(ii) of the final rule. However, a retroactive reduction or elimination of disability pension benefits, that results from a finding by the plan that the claimant was not disabled within the meaning of the plan when the disability pension benefits were reduced or eliminated under ERISA section 305, would be an adverse benefit determination under the claims procedure regulation. If the claims adjudicator must make a determination of disability in order to decide a claim, the claim must be treated as a disability claim for purposes of the Section 503 Regulation.²⁷

²⁵ See FAQs About The Benefit Claims Procedure Regulation, C-18 (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf).

²⁶ See FAQs About The Benefit Claims Procedure Regulation, C-12 (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf).

²⁷ See footnote 3, supra, and FAQs About The Benefit Claims Procedure Regulation, A-9 (www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf) discussing when a benefit is a disability benefit, subject to the special rules for disability claims under the Section 503 Regulation.

6. Culturally & Linguistically Appropriate Notices

Paragraphs (g)(1)(vii)(C), (j)(7) and (o) of the final rule require plans to provide notice to claimants in a culturally and linguistically appropriate manner. The final rule adopts the standards already applicable to group health plans under the ACA Claims and Appeals Final Rule. Specifically, if a claimant's address is in a county where ten percent or more of the population residing in that county are literate only in the same non-English language as determined in guidance based on American Community Survey data published by the United States Census Bureau, notices of adverse benefit determinations to the claimant would have to include a statement prominently displayed in the applicable non-English language clearly indicating how to access language services provided by the plan. In addition, plans must provide a customer assistance process (such as a telephone hotline) with oral language services in the non-English language and provide written notices in the non-English language upon request.²⁸

A few commenters requested clarification that the culturally and linguistically appropriate standards (CLAS) requirements in the regulation apply only to notices of adverse benefit determinations and not to other communications regarding disability claims. In the Department's view, the text of paragraphs (g)(1)(vii)(C) and (j)(7) is clear that the CLAS requirements are applicable to notices of adverse benefit determinations. The final rule does not address whether, and under what circumstances, the fiduciary duty or other provisions in ERISA would require plans to provide plan participants and beneficiaries with access to language services (see, for example, the discussion below regarding summary plan description (SPD) requirements).

A few commenters requested that the Department remove the CLAS standards. Other commenters supported the CLAS requirements but requested that the Department provide a reasonable time for compliance with this provision, citing operational changes and costs associated with the CLAS requirements. Other commenters requested that the threshold percentage

that triggers the CLAS requirements be reduced to a lower percentage to capture a greater number of counties or to reflect a percentage of plan participants as opposed to the population of a relevant county. One commenter suggested that the Department may have unintentionally reduced protections for non-English speaking participants. The commenter pointed out that although a particular county may not meet the threshold under this rule, particular workforces may meet the Department's thresholds under section § 2520.102–2(c).

In light of all the comments received, this final rule retains the CLAS requirements as set forth in the proposal. The Department believes that the CLAS requirements impose reasonable language access requirements on plans and appropriately balance the objective of protecting claimants by providing reasonable language assistance to individuals who communicate in languages other than English with the goal of mitigating administrative burdens on plans. The Department continues to believe that it is important to provide claims denial notices in a culturally and linguistically appropriate manner to ensure that individuals get the important information needed to properly evaluate the decision denying a claim and to allow for an informed decision on options for seeking review of a denial. Therefore, the final rule adopts the requirements in the proposal without change.

The Department does not agree that the final rule supersedes the summary plan description foreign language rules in § 2520.102–2(c) which include a requirement to offer assistance (which could include language services) calculated to provide participants with a reasonable opportunity to become informed as to their rights and obligations under the plan. Non-English speaking participants could be eligible for language services under either this final rule or § 2520.102–2(c), depending on the circumstances.

Finally, one commenter asked that the Department clarify that the English version of the notices takes precedence in the event of any conflict with the translated documents. Another commenter asked for clarification that the requirement to provide “assistance with filing claims and appeals in any applicable non-English language” is limited to procedural, not substantive, assistance. The Department was not persuaded that including such provisions in the final rule is necessary or appropriate. Notices provided to participants or beneficiaries should be

complete and accurate notwithstanding the language used. Further, a “substantive versus procedural” distinction between the type of assistance required is not, in the Department's view, particularly meaningful or helpful. Rather, the final rule requires plan fiduciaries to provide disability benefit claimants with the requisite level and amount of assistance necessary to assist the claimants in understanding their rights and obligations so that they can effectively file claims and appeals in pursuing a claim for disability benefits.

7. Miscellaneous

a. Technical Correction

The Department determined that a minor technical fix to the Section 503 Regulation is required with respect to disability claims. The Department proposed to clarify that the extended time frames for deciding disability claims, provided by the quarterly meeting rule found in the current regulation at 29 CFR 2560.503–1(i)(1)(ii), are applicable only to multiemployer plans. The Department did not receive any adverse comments on the proposed technical fix, and, accordingly, the final rule amends paragraph (i)(3) to correctly refer to the appropriate subparagraph in (i)(1) of the Section 503 Regulation.

b. Contractual Limitations Periods for Challenging Benefit Denials

In the proposal, the Department asked for comments on whether the claims procedure rule should address limitations periods in plans that govern the period after a final adverse benefit determination within which a civil action may be filed under section 502(a)(1)(B) of ERISA. We pointed out that ERISA does not specify that period and noted that the federal courts have generally looked to analogous state laws to determine an appropriate limitations period. Analogous state law limitations periods vary, but they generally start with the same event, the plan's final benefit determination. We acknowledged that the Supreme Court recently upheld the use of contractual limitations periods in plan documents and insurance contracts which may override analogous state laws so long as they are reasonable. *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S.Ct. 604, 611 (2013). We pointed out that contractual limitations periods are not uniform, the events that trigger the clock vary, and the documents in which the limitations periods are embedded may be difficult for claimants to obtain and understand. We also highlighted a

²⁸ Each year the U.S. Census Bureau publishes a list of counties that meet the 10% threshold. For 2016, the applicable languages are Chinese, Tagalog, Navajo and Spanish. A complete list of counties is available at www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/internal-claims-and-appeals.

separate issue, not before the Supreme Court in *Heimeshoff*, of whether plans must provide participants notice with respect to contractual limitations periods in adverse benefit determinations on review. Although many federal courts have held that plans should provide such notice under the Section 503 Regulation, the court decisions are not uniform.²⁹

²⁹ See *Moyer v. Metropolitan Life Ins. Co.*, 762 F.3d 503, 505 (6th Cir. 2014) (“The claimant’s right to bring a civil action is expressly included as a part of those procedures for which applicable time limits must be provided” in the notice of adverse benefit determination on review) and *Kienstra v. Carpenters’ Health & Welfare Trust Fund of St. Louis*, 2014 WL 562557, at *4 (E.D. Mo. Feb. 13, 2014), aff’d sub nom. *Munro-Kienstra v. Carpenters’ Health & Welfare Trust Fund of St. Louis*, 790 F.3d 799 (8th Cir. 2015) (“an adverse benefit determination must include [a] description of the plan’s review procedures and the time limits applicable to such procedures, including a statement of the claimant’s right to bring a civil action under section 502(a) of [ERISA] following an adverse benefit determination on review.”); *Ortega Candelaria v. Orthobiologics LLC*, 661 F.3d 675, 680 (1st Cir.2011) (“[The employer] was required by [29 CFR 2560.503–1(g)(1)(iv)] to provide [the employee] with notice of his right to bring suit under ERISA, and the time frame for doing so, when it denied his request for benefits.”); *McGowan v. New Orleans Empl’rs Int’l Longshoremen’s Ass’n*, 538 F. App’x 495, 498 (5th Cir.2013) (finding that a benefit termination letter substantially complied with 29 CFR 2560.503–1(g)(1)(iv) because, in addition to enclosing the benefit booklet and specifying the pages containing the review procedures and time limits, the letter “mentioned McGowan’s right to file suit under § 502(a) of ERISA, as well as the one-year time limit”); *White v. Sun Life Assurance Co. of Canada*, 488 F.3d 240, 247 n. 2 (4th Cir.2007) (emphasizing that the right to bring a civil action is an integral part of a full and fair benefit review and that the adverse benefit determination letter must include the relevant information related to that right) (abrogated on other grounds by *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S.Ct. 604, 612 (2013)); *Novick v. Metropolitan Life Ins. Co.*, 764 F.Supp.2d 653, 660–64 (S.D.N.Y.2011) (concluding that 29 CFR 2560.503–1(g) requires that the adverse benefit determination letter include the time limits for judicial review); *Solien v. Raytheon Long Term Disability Plan # 590*, 2008 WL 2323915, at 8 (D.Ariz. June 2, 2008) (holding that “[j]udicial review is an appeal procedure for an adverse benefit determination and is therefore a part of the claim procedures covered by these regulations, especially when the time limit for filing a judicial action is established contractually by the Plan”). But see *Wilson v. Standard Ins. Co.*, 613 F. App’x 841, 844 n.3 (11th Cir. 2015) (unpublished) (finding that 29 CFR 2560.503–1(g)(1)(iv) “can also be reasonably read to mean that notice must be given of the time limits applicable to the ‘plan’s review procedures,’ and the letter must also inform the claimant of her right to bring a civil action without requiring notice of the time period for doing so”); *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 907–08 (9th Cir. 2009) (declining to supplement ERISA’s comprehensive scheme for regulating disclosures to participants with a California law requiring the express disclosure of a statute of limitations). In an unpublished decision, the Tenth Circuit similarly interpreted language in a plan that was virtually identical to section 2560.503–1(g)(1)(iv) as only requiring denial letters to include time limits applicable to internal review procedures. See *Young v. United Parcel Services*, 416 F. App’x 734, 740 (10th Cir. 2011)

Accordingly, the Department solicited comments on whether the final regulation should require plans to provide claimants with a clear and prominent statement of any applicable contractual limitations period and its expiration date for the claim at issue in the final notice of adverse benefit determination on appeal and with an updated notice of that expiration date if tolling or some other event causes that date to change.

In response, the Department received many comments from claimants and participant advocates supporting a contractual limitations period notice requirement. Numerous commenters further requested that any required notice include the date on which the relevant contractual limitations period expires. They also asked the Department to include a definition of a “reasonable limitations period.” One commenter argued to the contrary that a rule requiring inclusion of a specific date would create confusion for claimants and carries a risk that the insurer or other administrative entity is seen as providing legal advice. Another commenter urged that such a rule should not be adopted because the date by which suit must be filed may be subject to dispute in litigation. A commenter expressed concern that such a notice requirement is largely unnecessary as the information is generally already included in plan documents, (e.g., the summary plan description), and that it could impose significant administrative burden. The commenter suggested that a more appropriate rule would be to require that the notice of adverse benefit determination on review include a statement alerting participants that they should review the terms of the applicable plan documents to determine any deadline by which they must file a civil action. Finally, a number of commenters asked the Department to specifically address whether it is allowable for a contractual limitations period to be structured so that it could actually expire before the plan’s appeals process is completed.

In light of the issues identified regarding contractual limitations periods, the Department concluded that it was appropriate in this final rule to address certain basic points.

First, section 503 of ERISA requires that a plan afford a reasonable opportunity to any participant whose claim for benefits has been denied for a

(unpublished) (concluding that requiring a notification of the time limit for filing suit “conflates the internal appeals process, and its associated deadlines, with the filing of a legal action after that process has been fully exhausted”).

full and fair review of that decision by an appropriate named fiduciary. The Department does not believe that a claims procedure would satisfy the statutory requirement if the plan included a contractual limitations period that expired before the review was concluded. In the Department’s view, this is clear from the Supreme Court’s holding in *Heimeshoff*. In that case, the Supreme Court held that an ERISA disability plan’s three-year limitations period, running from the date of proof of loss, was enforceable even though the statute of limitations began to run before the participant’s cause of action accrued. The Court pointed out that there was nothing to suggest the 3-year contractual limitations period was not “reasonable” in light of the Department’s regulation that would require the internal claims and appeals process to be completed well inside a three-year period. *Heimeshoff*, 134 S.Ct. at 612 (citing *Order of United Commercial Travelers of America v. Wolfe*, 67 S.Ct. 1355 (1947)). A limitations period that expires before the conclusion of the plan’s internal appeals process on its face violates ERISA section 503’s requirement of a full and fair review process. A process that effectively requires the claimant to forego the right to judicial review and thereby insulates the administrator from impartial judicial review falls far short of the statutory fairness standard and undermines the claims administrator’s incentives to decide claims correctly.

Further, in rejecting the challenge to the contractual limitations period at issue in *Heimeshoff*, the Court emphasized that the claimant was allowed a year or more to bring suit after the close of the internal claims review process.³⁰ A contractual limitations period that does not allow such a reasonable period after the conclusion of the appeal in which to bring a lawsuit is unenforceable.³¹ Moreover, as the

³⁰ *Heimeshoff*, 134 S.Ct. at 612 (“Neither *Heimeshoff* nor the United States claims that the Plan’s 3-year limitations provision is unreasonably short on its face. And with good reason: the United States acknowledges that the regulations governing internal review mean for ‘mainstream’ claims to be resolved in about one year, Tr. of Oral Arg. 22, leaving the participant with two years to file suit. Even in this case, where the administrative review process required more time than usual, *Heimeshoff* was left with approximately one year in which to file suit. *Heimeshoff* does not dispute that a hypothetical 1-year limitations period commencing at the conclusion of internal review would be reasonable. Id., at 4”) (footnote omitted).

³¹ The Department also believes that additional public input beyond the public record for this rulemaking would be needed for the Department to define a minimum period of time necessary for such a period to constitute a reasonable period in which to bring an action under ERISA section 502(a).

Supreme Court also recognized in *Heimeshoff*, even in cases with an otherwise enforceable contractual limitations period, traditional doctrines, such as waiver and estoppel, may apply if a plan's internal review prevents a claimant from bringing section 502(a)(1)(B) actions within the contractual period. *Heimeshoff*, 134 S.Ct. at 615. In addition to such traditional remedies, plans that offer appeals or dispute resolution beyond what is contemplated in the claims procedure regulations must agree to toll the limitations provision during that time. See 29 CFR 2560.503-1(c)(3)(ii).

Second, the Department agrees with the conclusion of those federal courts that have found that the current regulation fairly read requires some basic disclosure of contractual limitations periods in adverse benefit determinations. In fact, in the Department's view, the statement of the claimant's right to bring a civil action under section 502(a) of ERISA following an adverse benefit determination on review would be incomplete and potentially misleading if it failed to include limitations or restrictions in the documents governing the plan on the right to bring such a civil action. Accordingly, this final rule includes in new paragraph (j)(4)(ii) a requirement that the notice of an adverse benefit determination on review must include a description of any applicable contractual limitations period and its expiration date.

The Department is not persuaded that inclusion in the notice of adverse benefit determination on review of any applicable contractual limitations period and its expiration date will result in confusion. The Department also does not agree that a statement of the plan's view as to the exact date the limitations period expires will somehow inappropriately foreclose or otherwise prejudice legitimate arguments about application of the limitations period in individual cases. Nor does the Department believe that disclosure of a contractual limitations period requires the plan to provide legal advice. Additionally, as described below, the Department does not believe that including a description of any contractual limitations period, including the date by which the claimant must bring a lawsuit, would impose more than a minimal additional burden. Although the final rule provision is technically applicable only to disability benefit claims, as explained above, the Department believes that notices of adverse benefit determinations on review for other benefit types would be required to

include some disclosure about any applicable contractual limitations period. What would be sufficient will depend on the controlling judicial precedent and the individual facts and circumstances, but the Department would consider the inclusion of the information in paragraph (j)(4)(ii) to be an appropriate disclosure for all plan types.

Several comments raised other issues pertaining to the disclosure of contractual and statutory limitations on a claimant's right to bring a civil action under section 502(a) of ERISA. Issues beyond this final rule may be addressed in a future regulatory action or other guidance by the Department.

c. Comments Beyond the Scope of the Rulemaking

Some commenters raised disability claims procedure issues pertaining to matters that the Department considers to be beyond the scope of this rulemaking. For example, one commenter suggested that the Department amend its Model Statement of ERISA Rights for SPDs for disability plans to include notification of eligibility for language services. Other commenters requested that the Department propose a rule requiring that adverse benefit determinations on review notify disability benefit claimants of the ERISA venue provisions. Other issues raised by some commenters relate to substantive limitations on recoupment of benefit overpayments, rights to supplement the administrative record for court review, and the validity of discretionary clauses in plans that are used as a basis for seeking a deferential "arbitrary or capricious" standard for court review of benefit denials. Although the Department agrees that the issues raised by the commenters may merit an evaluation of additional regulatory actions on procedural safeguards and protections, those subjects are beyond the scope of this rulemaking. As the Department noted in the preamble to the proposal, this rulemaking was a start to improving the current standards applicable to the processing of claims and appeals for disability benefits so that they include improvements to certain basic procedural protections in the current Section 503 Regulation. Issues beyond this final rule may be addressed in a future regulatory action or other guidance by the Department.

III. Economic Impact and Paperwork Burden

A. Background and Need for Regulatory Action

As discussed in Section I of this preamble, the final amendments would revise and strengthen the current rules regarding claims and appeals applicable to ERISA-covered plans providing disability benefits primarily by adopting several of the new procedural protections and safeguards made applicable to ERISA-covered group health plans by the Affordable Care Act. Before the enactment of the ACA, group health plan sponsors and sponsors of ERISA-covered plans providing disability benefits were required to implement claims and appeal processes that complied with the Department's regulation establishing minimum requirements for benefit claims procedures for employee benefit plans covered by Title I of ERISA.³² The enactment of the ACA and the issuance of the implementing interim final regulations in 2010 resulted in disability benefit claimants receiving fewer procedural protections than group health plan participants even though disputes and litigation regarding disability benefit claims are more prevalent than health care benefit claims.³³ In order to ensure fundamental fairness in the claim and appeals procedure process, health and disability plan claimants are entitled to receive the same procedural protections as they did when the 2000 regulation was issued.

The Department believes this action is necessary to ensure that disability claimants receive a full and fair review of their claims under the more stringent procedural protections that Congress established for group health care claimants under the ACA. The final rule will promote fairness and accuracy in the claims review process and protect participants and beneficiaries in ERISA-covered disability plans by ensuring they receive benefits that otherwise might have been denied by plan administrators in the absence of the fuller protections provided by this final regulation. The final rule also will help alleviate the financial and emotional hardship suffered by many individuals when they are unable to work after becoming disabled and their claims are denied.

As stated earlier in this preamble, this action also is necessary to correct

³² 65 FR 70246 (Nov. 21, 2000), amended at 66 FR 35877 (July 9, 2001).

³³ See Sean M. Anderson, *ERISA Benefits Litigation: An Empirical Picture*, 28 ABA J. Lab. & Emp. L. 1(2012).

procedural problems evidenced in litigation under the 2000 regulation predating the ACA, which in the Department's view, resulted in claimants not receiving a full and fair review as required by ERISA section 503. Specifically, some courts held that under the 2000 regulation, claimants only have the right to review and respond to new evidence or rationales developed during the pendency of an appeal after the claim has been denied on appeal. The final rule levels the playing field by explicitly requiring plan administrators to provide claimants, free of charge, with any new evidence or rationale relied upon, considered, or generated by the plan in connection with the claim and a reasonable opportunity for the claimant to respond.

The Department disagrees with commenters' assertion that disability plan claim procedures should not mirror the ACA group health plan amendments because of the difference between health and disability claims. For reasons discussed earlier in this preamble, after careful consideration, the Department incorporated into the final rule only certain of the ACA group health plan claims procedure amendments to ensure that disability plan claimants receive the same opportunity to pursue a full and fair review of their claims as required by ERISA section 503 with the procedural safeguards and consumer protections that are aligned with those required by group health plans under the ACA and the Department's implementing

regulation at 29 CFR 2590.715–2719. This final rule aligns the disability claims procedures with the ACA procedural safeguards and consumer protections for group health plans. The Department did not amend other provisions of the 2000 regulation that affect how disability plan claims are processed or the timing requirements. Therefore, as discussed more fully below, the Department does not expect that the final rule will lead to delays and significant increased cost for disability claims and appeals processes. The Department considered comments asserting that some of its cost estimates in the proposed Regulatory Impact Analysis ("RIA") were underestimated and made adjustments where appropriate.

The Department has crafted these final regulations to secure the protections of those submitting disability benefit claims. In accordance with OMB Circular A–4, the Department has quantified the costs where possible and provided a qualitative discussion of the benefits that are associated with these final regulations.

B. Executive Order 12866 and 13563

Executive Orders 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). Executive Order 13563 emphasizes the importance of

quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866 (58 FR 51735), "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting 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) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this rule is significant within the meaning of section 3(f) (4) of the Executive Order. Therefore, OMB has reviewed the final rule pursuant to the Executive Order. The Department provides an assessment of the potential costs and benefits of the final rule below, as summarized in Table 1, below. The Department concludes that the economic benefits of these final regulations justify their costs.

TABLE 1—ACCOUNTING TABLE

Category	Estimate	Year dollar	Discount rate	Period covered
Benefits—Qualitative	The Department expects that these final regulations will improve the procedural protections for workers who become disabled and make claims for disability benefits from ERISA-covered employee benefit plans. This would result in some participants receiving benefits they might otherwise have been denied absent the fuller protections provided by the final regulation. Greater certainty and consistency in the handling of disability benefit claims and appeals and improved access to information about the manner in which claims and appeals are adjudicated will be achieved. Fairness and accuracy will increase as fuller and fairer disability claims processes provide claimants with sufficient information to evaluate the claims process and defend their rights under their plan.			
Costs:				
Annualized	\$15,806,000	2016	7%	2018–2027
Monetized	15,806,000	2016	3%	2018–2027

TABLE 1—ACCOUNTING TABLE—Continued

Category	Estimate	Year dollar	Discount rate	Period covered
Qualitative	The Department believes that these requirements have modest costs associated with them, since many chiefly clarify provisions of the current DOL claims procedure regulation. As discussed in detail in the cost section below, the Department quantified the costs associated with two provisions of the final regulations for which it had sufficient data: The requirements to provide (1) additional information to claimants in the appeals process and (2) information in a culturally and linguistically appropriate manner.			

1. Estimated Number of Affected Entities

The Department does not have complete data on the number of plans providing disability benefits or the total number of participants covered by such plans. ERISA-covered welfare benefit plans with more than 100 participants generally are required to file the Form 5500 Annual Return/Report. Currently, only a small number of ERISA-covered welfare benefit plans with less than 100 participants are required to file the form. Based on current trends in the establishment of pension and health plans, there are many more small plans than large plans, but the majority of participants are covered by the large plans.

Data from the 2014 Form 5500 Schedule A indicates that there are 39,135 plans reporting a code indicating they provide temporary disability benefits covering 40.1 million participants, and 26,171 plans reporting a code indicating they provide long-term disability benefits covering 22.4 million participants.³⁴ To put the number of large and small plans in perspective, the Department estimates that there are 150,000 large group health plans and 2.1 million small group health plans using 2016 Medical Expenditure Panel Survey-Insurance Component. While most plans are small plans most participants are in large plans.

2. Benefits

In developing these final regulations, the Department closely considered their potential economic effects, including both benefits and costs. The Department does not have sufficient data to quantify the benefits associated with these final regulations due to data limitations and a lack of effective measures. Therefore, the Department provides a qualitative discussion of the benefits below.

These final regulations implement a more uniform, rigorous, and fair

disability claims and appeals process as required by ERISA section 503 that conforms to a carefully selected set of the requirements applicable to group health plans under the ACA Claims and Appeals Final Rule. In general, the Department expects that these final regulations will improve the procedural protections for disabled workers who make claims for disability benefits from ERISA-covered employee benefit plans. This will cause some participants to receive benefits that, absent the fuller protections of the regulation, they might otherwise have been incorrectly denied. In other circumstances, expenditures in the claims process incurred by plans may be reduced as a fuller and fairer system of claims and appeals processing helps facilitate participant acceptance of cost management efforts. The Department expects that greater certainty and consistency in the handling of disability benefit claims and appeals and improved access to information about the manner in which claims and appeals are adjudicated will lead to efficiency gains in the system, both in terms of the allocation of spending at a macro-economic level as well as operational efficiencies among individual plans. This certainty and consistency also are expected to benefit, to varying degrees, all parties within the system and lead to broader social welfare gains, particularly for disability benefit plan claimants.

The Department expects that these final regulations also will improve the efficiency of disability benefit plans by improving their transparency and fostering participants' confidence in their fairness. The enhanced disclosure and notice requirements contained in these final regulations will help ensure that benefit participants and beneficiaries have a clear understanding of the reasons underlying adverse benefit determinations and their appeal rights.

For example, the final regulations require all adverse benefit determinations to contain a discussion of the decision, including an

explanation of the basis for disagreeing with the views of a treating health care professional or vocational professional who evaluated the claimant or any disability determination regarding the claimant made by the Social Security Administration and presented to the plan by the claimant. This provision would address the confusion often experienced by claimants when there is little or no explanation provided for their plan's determination and/or their plan's determination is contrary to their treating professional's opinion or their SSA award of disability benefits.

The final rule also requires adverse benefit determinations to contain the internal rules, guidelines, protocols, standards or other similar criteria of the plan that were relied upon in denying the claim (or a statement that these do not exist), and a notice of adverse benefit determination at the claims stage must contain a statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's benefit claim. These provisions will benefit claimants by ensuring that they fully understand the reasons why their claim was denied so they are able to meaningfully evaluate the merits of pursuing an appeal or litigation.

The requirement to include a discussion of the decision, as well as the requirement to include specific internal rules, guideline, protocols, standards, or similar criteria relied upon by the plan will improve the accuracy of claims determinations. The process of documenting and explaining the reasoning of the decision will help ensure that plans' terms are followed and accurate information is used, and will enable plan participants to challenge inadequate or faulty evidence or reasoning.

Under the final rule, adverse benefit determinations must be provided in a culturally and linguistically appropriate manner for certain participants and beneficiaries that are not fluent in

³⁴ Almost all plans reporting this code are welfare plans.

English. Specifically, if a claimant's address is in a county where 10 percent or more of the population residing in that county, as determined based on American Community Survey (ACS) data published by the United States Census Bureau, are literate only in the same non-English language, notices of adverse benefit determinations to the claimant would have to include a prominent one-sentence statement in the relevant non-English language about the availability of language services. This provision will ensure that certain disability claimants that are not fluent in English understand the notices received from the plan regarding their disability claims and their right to appeal denied claims.

These important protections would benefit participants and beneficiaries by correcting procedural wrongs evidenced in the litigation even predating the ACA.

The voluntary nature of the employment-based benefit system in conjunction with the open and dynamic character of labor markets make explicit as well as implicit negotiations on compensation a key determinant of the prevalence of employee benefits coverage. The prevalence of benefits is therefore largely dependent on the efficacy of this exchange. If workers perceive that there is the potential for inappropriate denial of benefits or handling of appeals, they will discount the value of such benefits to adjust for this risk. This discount drives a wedge in compensation negotiation, limiting its efficiency. If workers undervalue the full benefit of disability coverage, fewer employers will provide such coverage or fewer participants will enroll. To the extent that workers perceive that the final rule, supported by the Department's enforcement authority, will reduce the risk of inappropriate denials of disability benefits, the differential between the employers' costs and workers' willingness to accept wage offsets is minimized.

These final regulations would reduce the likelihood of inappropriate benefit denials by requiring all disability claims and appeals to be adjudicated by persons that are independent and impartial. Specifically, the final rule would prohibit hiring, compensation, termination, promotion, or other similar decisions with respect to any individual (such as a claims adjudicator or a medical or vocational expert) to be made based upon the likelihood that the individual will support the plan's benefits denial. This will ensure that all disability benefit plan claims and appeals processes are adjudicated in a manner designed to ensure the

independence and impartiality of persons involved in making the decisions and enhance participants' perception that their disability plan's claims and appeals processes are operated in a fair manner.

As stated above, the final rule requires claimants to have the right to review and respond to new evidence or rationales developed by the plan during the pendency of an appeal, as opposed merely to having a right to such information upon request only after the claim has already been denied on appeal, as some courts have held under the Section 503 Regulation. These provisions will benefit claimants by correcting certain procedural flaws that currently occur when disability benefit claims are litigated and ensuring that they have a right to review and respond to new evidence or rationales developed by the plan during the pendency of the appeal.

In summary, the final rules provide more uniform standards for handling disability benefit claims and appeals that are comparable to the rules applicable to group health plans under the ACA Claims and Appeals Final Rule. These rules will reduce the incidence of inappropriate denials, averting serious financial hardship and emotional distress for participants and beneficiaries that are impacted by a disability. They also would enhance participants' confidence in the fairness of their plans' claims and appeals processes. Finally, by improving the transparency and flow of information between plans and claimants, the final regulations will enhance the efficiency of labor and insurance markets.

3. Costs and Transfers

The Department has quantified the costs related to the final regulations' requirements to (1) provide the claimant free of charge with any new or additional evidence considered, and (2) to providing notices of adverse benefit determinations in a culturally and linguistically appropriate manner. These requirements and their associated costs are discussed below

Provision of new or additional evidence or rationale: As stated earlier in this preamble, before a plan providing disability benefits can issue an adverse benefit determination on review on a disability benefit claim, these final regulations require such plans to provide the claimant, free of charge, with any new or additional evidence considered, relied upon, or generated by (or at the direction of) the plan or any new or additional rationale upon which the adverse determination is based as soon as possible and

sufficiently in advance of the date the notice of adverse benefit determination on review is required to be provided. This requirement may increase the administrative burden on plans to prepare and deliver the enhanced information to claimants. The Department is not aware of a data source substantiating how often plans rely on new or additional evidence or rationale during the appeals process or the volume of materials that comprise the new evidence or rationale. Based on comments and discussions with the regulated community, the Department understands that few plans base adverse benefit determinations on appeal on new evidence or rationales. The Department also understands that the most critical new information relied on by plans when issuing adverse benefit determinations on review are new independent medical reports, and that at least some plans and insurers have a practice of providing claimants with rights to a voluntary additional level of appeal to respond to the new independent medical report if they disagree with its findings.

These final rules further require adverse benefit determinations on review for disability benefit plans to include a description of any contractual limitations period, including the date by which the claimant must bring a lawsuit. In the regulatory impact analysis for the proposal, the Department estimated these costs by assuming that compliance will require medical office staff, or other similar staff for another service provider with a labor rate of \$30, five minutes³⁵ to collect and distribute the additional evidence or rationale considered, relied upon, or generated by (or at the direction of) the plan during the appeals process. Additionally, including a description of any contractual limitations period, including the date by which the claimant must bring a lawsuit would have minimal additional burden as plans already maintain such information in the ordinary course of their claims administration process and would just need to add it to the notice.

One commenter questioned the Department's assumption asserting that it does not account for time to identify the additional or new information or rationale and for staff to respond. Commenters also asserted that providing the information will trigger a response by the claimant to which they

³⁵ For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf>.

will have to respond. The commenter provided no alternative estimates or data supporting their assertions that the Department could use to revise its cost estimate.

In the absence of such data, the Department disagrees with the comments. While some effort is required to provide claimants with the new information or rationale, the Department does not find the commenters' assertion of significant burden to be credible. As part of its customary and usual business practices, the insurer or TPA should have an existing system in place to track any new information or rationale it relies on in making an adverse benefit determination in order to identify, document, and evaluate the information during its claim adjudication process. The Department acknowledges, however, that an average of five minutes may be inadequate time to collect the information and provide it to the claimants; therefore, it has increased the estimate to an average of 30 minutes, which should provide a reasonable amount of time to perform this task.

The Department also agrees that making the new or additional information or rationale available to the claimant may trigger a response from the claimant. However, the Department does not have sufficient data to estimate the number of claimants that will respond with information that the insurer or TPA will need to evaluate or how much time will be required to evaluate the information. Moreover, the Department's consultations with EBSA field investigators that investigate disability plan issues indicate that many disability plans already allow claimants to respond to the new information or rationale in a back-and-forth process. The requirement imposes no new costs on these plans, insurers, and TPAs. The requirement does impose an additional burden on plans that do not allow claimants to respond to the new information or rationale, but the Department does not have sufficient data to estimate the increased costs. One industry commenter agreed that that it would be difficult to estimate the burden associated with responding to claimants.

Commenters also raised concern regarding a potentially endless cycle of appeals, responses, and reconsiderations that would extend the claim determination process and substantially increase costs. As discussed elsewhere in the preamble, the Department also does not find this claim to be credible. The requirement only requires action if the insurer or TPA produces new or additional information or rationale after reviewing

the new information submitted by the claimant, not if it just evaluates the information submitted by the claimant, and the Department's consultations with its investigators indicated that this occurs infrequently.

Additionally, while a plan fiduciary has a responsibility to ensure the accurate evaluation of all claims, that responsibility does not require the fiduciary to rebut every piece of evidence submitted or seek to deny every claim. Indeed, an endless effort to rebut every piece of evidence submitted by the claimant would call into question whether the fiduciary was impartially resolving claims as required by the duties of prudence and loyalty.

Furthermore, the Department has interpreted ERISA section 503 and the current Section 503 Regulation as already requiring that plans provide claimants with new or additional evidence or rationales upon request and an opportunity to respond in certain circumstances. See Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellant's Petition for Rehearing, *Midgett v. Washington Group Int'l Long Term Disability Plan*, 561 F.3d 887 (8th Cir. 2009) (No. 08–2523), (expressing disagreement with cases holding that there is no such requirement). The supposed "endless loop" is necessarily limited by claimants' ability to generate new evidence requiring further review by the plan. Such submissions ordinarily become repetitive in short order, and are further circumscribed by the limited financial resources of most claimants.

For purposes of this regulatory impact analysis, the Department assumes, as an upper bound, that all appealed claims will involve a reliance on additional evidence or rationale. Based on that assumption, the Department assumes that this requirement will impose an annual aggregate cost of \$14.5 million. The Department estimates this cost by assuming that compliance will require medical office staff, or another service providers' similar staff with a labor rate of \$42.08, thirty minutes³⁶ to collect and distribute the additional evidence considered, relied upon, or generated by (or at the direction of) the plan during the appeals process. The Department estimates that on average, material, printing and postage costs will total \$2.15 per mailing (20 pages * 0.05 cents per copy + \$1.15 postage). The

³⁶ For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf>.

Department further assumes that 30 percent of all mailings will be distributed electronically with no associated material, printing or postage costs.³⁷

The Department does not have sufficient data on the number of disability claims that are filed or denied. Therefore, the Department estimates the number of short- and long-term disability claims based on the percentage of private sector employees (122 million)³⁸ that participate in short- and long-term disability programs (approximately 39 and 33 percent respectively).³⁹ The Department estimates the number of claims per covered life for long-term disability benefits based on the percentage of covered individuals that file claims under the Social Security Disability Insurance Program (SSDI) (two percent of covered individuals). The Department notes that SSDI uses a standard for disability determinations that is stricter than the standard used in many long-term disability plans offered by private employers. However, the number of claims filed with the SSDI is an acceptable proxy as most employer plans require claimants to file with the SSDI as a condition of receiving benefits from the plan as they offset the benefits paid by plan with the amount received from SSDI.

The Department does not have sufficient data to estimate the percentage of covered individuals that file short-term disability claims. Therefore, for purposes of this analysis, the Department estimates, as it did in

³⁷ Commenters disagreed in general with the estimates of the burden for providing the notice in a culturally and linguistically appropriate manner. Their concern was that most notices would be delivered on paper and not electronically. While one commenter did not provide any supporting evidence for this assertion, another commenter reported that a large company's past experience was that 30 percent of the claims filed under its disability plan were electronic. For purposes of this regulatory impact analysis, the Department accepted the suggestion posited in the comment that a significant percentage of disability benefit claimants are at home without access to an electronic means of communication at work that is required by the Department's electronic disclosure rule. Therefore, the Department assumes that a higher percentage of notices will be transmitted via mail even though data was provided only for a single company.

³⁸ BLS Employment, Hours, and Earnings from the Current Employment Statistics survey (National) Table B–1, May 2016. It should be noted that this estimate differs from the estimates from the Form 5500 reported in the affected entities section. The Form 55000 numbers only include large plans, and some filings could combine estimates for both short and long term disability.

³⁹ "Beyond the Numbers: Disability Insurance Plans Trends in Employee Access and Employer Cost," February 2015 Vol. 4 No. 4. <http://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm>.

the proposal, that six percent of covered lives file such claims, because it believes that short-term disability claims rates are higher than long-term disability claim rates. The Department received no comments regarding this assumption.

The Department estimates the number of denied claims that would be covered by the rule in the following manner: For long-term disability, the percent of

claims denied is estimated using the percent of denied claims for the SSDI Program (75 percent). This estimate may overstate the denial rates for ERISA-covered long-term disability plans, because as discussed above, many plans require claimants to file for SSDI benefits as a requirement to receive benefits from their plan. Plans often have a lower benefit determination standard, at least initially, than the SSDI

Program resulting in less denied claims. Therefore, using the SSDI denied claims rate as a proxy for the ERISA-covered plan claims denial rate may overstate the number of private long-term disability plan denied claims. For short-term disability, the estimate of denied claims (three percent) is an assumption based on previous regulations and feedback. The estimates are provided in the table below.

TABLE 2—FAIR AND FULL REVIEW BURDEN
[In thousands]

	Short-term		Long-term		Total		
	Electronic	Paper	Electronic	Paper	Electronic	Paper	All
Denied Claims and lost Appeals with Additional Information	26	60	168	391	193	451	644
Mailing cost per event	\$0.00	\$2.15	\$0.00	\$2.15	\$0.00	\$2.15	.....
Total Mailing Cost	\$0.00	\$129	\$0.00	\$841	\$0.00	\$969	\$969
Preparation Cost per event	\$21.04	\$21.04	\$21.04	\$21.04	\$21.04	\$21.04	\$21.04
Total Preparation cost	\$540	\$1,260	\$3,526	\$8,227	\$4,066	\$9,487	\$13,553
Total	\$540	\$1,388	\$3,526	\$9,068	\$4,066	\$10,456	\$14,522

Adverse benefit determinations on disability benefit claims would have to contain a discussion of the decision, including the basis for disagreeing with SSA Disability Determination and Views of Treating Physician: Commenters on the proposal noted that costs were not quantified for the added burden of including in the benefit determination a discussion of why the plan did not follow the determination of the SSA or views of health care professionals that treated the claimant. Commenters did not provide data or information that would provide the Department with sufficient data to quantify such costs. Thus, while the Department agrees that there could be added burden imposed on plans to provide this discussion in adverse benefit determinations, the Department is unable to estimate the burden because it does not have sufficient data on the number or percent of claims that would need to contain this discussion.

Departmental investigators reviewing disability claims report that if the plan deviates from an attending physician's recommendation, a review is conducted by a supervisor, nurse, medical director or a consultant. This additional review usually generates documentation in the claim file. While this documentation may not be adequate in its current form to satisfy the requirement, the incremental costs to comply could be small, because it appears that deviations from physician's recommendations are documented currently. Plans or insurers may still need to prepare a response

using the already available information. The Department does not know how many claim determinations would require this discussion. The average hourly labor rate of a nurse is \$46.02 and that of a physician is \$157.80, and the Department estimates that preparing a report with information already available should not take more than one hour.

Adverse benefit determination would have to contain the internal rules, guidelines, protocols, standards, or other similar criteria of the plan used in denying the claim. The Department believes that this requirement will have minimal costs. In the process of determining a claim, plans will know, or should know, the internal rules, guidelines or protocols that were used to make a benefit determination. A commenter was concerned about the time and costs that would be required to comb through hundreds of pages of a claim manual to determine that no provision has any conceivable application to a particular claim in order to substantiate this requirement. The Department believes that neither the proposal nor the final rule requires this type of costly and time consuming process. The rule requires only the inclusion of those items that were relied upon and that should already be documented in the claim file at the time it was used to make a determination.

A notice of adverse benefit determination at the claims stage would have to contain a statement that the claimant is entitled to receive relevant

documents upon request. The Department believes that this requirement will have a negligible cost impact, because an insignificant amount of time will be required to add the statement to the notice. Although the current claims procedure regulation provides claimants with the right to request relevant documents when challenging an initial claims denial, a statement was required to be included only in notices of adverse benefit determinations on appeal. Including the statement in the initial denial notice as required by the final rule, in the Department's view, merely confirms claimants' rights under the current claims procedure regulation and will help ensure that they understand their right to receive such information to help them understand the reasons for the denial and to make informed decisions regarding whether and how they challenge a denial on appeal. The Department acknowledges that it is likely that more claimants will request this information when they are informed of their right to receive it; however, the Department does not have sufficient data to estimate the number of requests that will be made.

Culturally and Linguistically Appropriate Notices: The final regulations require notices of adverse benefit determinations with respect to disability benefits to be provided in a culturally and linguistically appropriate manner in certain situations. This requirement is satisfied if plans provide oral language services including

answering questions and providing assistance with filing claims and appeals in any applicable non-English language. The final regulations also require each notice sent by a plan to which the requirement applies to include a one-sentence statement in the relevant non-English language that translation services are available. The Department believes that this requirement will have a negligible cost impact. Plans also must provide, upon request, a notice in any applicable non-English language.

Although, one commenter reported that oral translation services are not provided by plans, the Department's conversations with the regulated community indicate that oral translation services generally are offered as a standard service. Based on this

information, the Department assumes that only a small number of plans will need to begin offering oral translation services for the first time upon the issuance of the final rule. Therefore, the Department assumes that this requirement will impose minimal additional costs.

The Department expects that the largest cost associated with the requirement is for plans to provide notices in the applicable non-English language upon request. Based on 2014 ACS data, the Department estimates that there are about 22.7 million individuals living in covered counties that are literate only in a covered non-English Language.⁴⁰ To estimate the number of these individuals that might request a notice in a non-English language, the Department estimated the number of

workers in each county (total population in county * state labor force participation rate * (1—state unemployment rate))^{41 42} and calculated the number with access to short-term and long-term disability insurance by multiplying those estimates by the estimates of the share of workers participating in disability benefit programs (39 percent for short-term and 33 percent for long term disability.)⁴³ It should be noted that the sums in the right two columns are all workers in the county with disability insurance, not just workers with disability insurance that are eligible to receive notices in the applicable non-English language, because the calculation for the number of requests for translation is based on workers with insurance.

TABLE 3—WORKERS IN AFFECTED COUNTIES BY STATE

	Pop in the county	Total effected foreign language pop in county	State labor force participation rate (2015) (%)	State unemployment rate (2015) (%)	Workers with short-term disability coverage	Workers with long-term disability coverage
Alabama	29,519	3,979	56	6	6,097	5,159
Alaska	8,634	2,677	67.1	6.5	2,113	1,788
Arizona	296,362	160,492	59.8	6.1	64,901	54,917
Arkansas	15,864	4,598	57.9	5.2	3,396	2,874
California	26,248,619	8,845,211	62.2	6.2	5,972,612	5,053,748
Colorado	513,177	122,183	66.7	3.9	128,287	108,550
Florida	3,166,261	1,785,759	59.3	5.4	692,719	586,147
Georgia	284,282	72,578	61.3	5.9	63,953	54,114
Idaho	87,012	21,145	63.9	4.1	20,795	17,596
Illinois	484,509	126,443	64.7	5.9	115,043	97,344
Iowa	35,029	7,861	69.9	3.7	9,196	7,781
Kansas	254,997	72,446	67.9	4.2	64,690	54,737
Missouri	6,170	919	65.6	5.0	1,500	1,269
Nebraska	106,532	26,134	70.1	3.0	28,251	23,905
Nevada	1,869,086	431,029	63.2	6.7	429,826	363,699
New Jersey	1,736,310	563,516	64.1	5.6	409,753	346,714
New Mexico	512,864	218,554	57.2	6.6	106,859	90,419
New York	4,983,647	1,472,029	61.1	5.3	1,124,613	951,596
North Carolina	55,317	10,260	61.2	5.7	12,450	10,535
Oklahoma	23,150	7,325	61.9	4.2	5,354	4,530
Oregon	31,532	8,897	61.1	5.7	7,085	5,995
Texas	12,541,167	5,304,121	63.7	4.5	2,975,400	2,517,646
Virginia	50,989	15,060	65.2	4.4	12,395	10,488
Washington	437,583	164,140	63.0	5.7	101,386	85,788
Puerto Rico	3,433,930	3,252,314	39.8	11.2	473,317	400,499
Total	57,212,542	22,699,670	.....	.....	12,825,893	10,852,679

The Department's discussions with the regulated community indicate that in California, which has a State law requirement for providing translation services for health benefit claims,

requests for translations of written documents averages 0.098 requests per 1,000 members (note that requirement applies to all members not just foreign language speaking) for health claims.

While the requirements of California differ from those contained in these final regulations and the demographics for California do not match those of covered counties, for purposes of this

⁴⁰ <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/2009-13-CLAS-County-Data.pdf>.

⁴¹ Labor force Participation rate: <http://www.bls.gov/lau/staadata.txt>. Unemployment rate: <http://www.bls.gov/lau/lastrk14.htm>.

⁴² Please note that using state estimates of labor participation rates and unemployment rates could lead to an over estimate as those reporting in the ACS survey that they speak English less than "very well" are less likely to be employed. Also, this estimate includes both private and public workers,

instead of just private workers leading to an overestimate of the costs.

⁴³ "Beyond the Numbers: Disability Insurance Plans Trends in Employee Access and Employer Cost," February 2015 Vol. 4 No. 4. <http://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm>.

analysis, the Department used this percentage to estimate the number of translation service requests that plans could expect to receive. The Department believes that this estimate significantly overstates the number of translation requests that will be received, because there are fewer disability claims than health claims. Industry experts also told the Department that while the cost of translation services varies, \$500 per document is a reasonable approximation of translation cost, and the Department used this amount in its cost estimate for the final rule. This number was provided to the Department in 2010; therefore, for purposes of this analysis, the Department has adjusted this amount to \$553 to account for inflation.⁴⁴

Based on the foregoing, the Department estimates that the cost to provide translation services pursuant to the final rule will be approximately \$1,283,840 annually (23,678,572 lives * 0.098/1000 * \$553).

Commenters questioned the data the Department used in the regulatory impact analysis for the proposed rule to estimate the costs incurred by TPAs and insurers to provide culturally and linguistically appropriate notices. One commenter questioned whether the \$500 per document translation cost accurately reflects the costs to comply with this provision. The commenter, however, failed to explain its rationale or provide any alternative information the Department could use to refine its estimate.

Another commenter questioned whether it was valid to rely on cost estimates to translate a notice into a non-English language based on data used by the Department to quantify the costs of complying with the a similar ACA requirement for group health plans. The Department believes that its experience with ACA group health plan claims and appeals regulations is directly applicable to this final regulation regarding disability claims and appeals. Contrary to the commenter's assertion that disability claims are so different from health claims that information about one cannot inform the other, the Department believes that translation of a notice into a different language is very similar for health and disability benefits, particularly as the same translation companies offer services for both types of notices. Also, while commenters argue that disability claims files are

much larger than medical claim files, the distinction is not relevant here, because the claim file is not required to be translated; only the notice is.

Another comment received was that there would be additional costs due to privacy issues arising from sharing personal information with a third-party. The same privacy issues arise in the health claims context. Pricing for translation services used in the analysis, therefore already have the costs for privacy issues built into the estimates.

The Department did not have sufficient data to quantify other costs associated with the final rule; and therefore, has provided a qualitative discussion of these costs below and a response to cost-related comments received in response to the regulatory impact analysis for the proposed regulation.

Independence and Impartiality-Avoiding Conflicts of Interest: The Department's claims and appeals regulation required certain standards of independence for persons making claims decisions before the final rules were issued. These final rules add new criteria for avoiding conflicts that require plans providing disability benefits to ensure "that all claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decisions." Also decisions regarding hiring, compensation, termination, promotion, or other similar matters must not be made based on the likelihood that the individual will support the denial of benefits.

These requirements provide protections to claimants by ensuring that their claims are processed impartially and already are considered best practice by many plan administrators who comply with this standard. Some plans and insurers may need to evaluate their policies and procedures to ensure they are compliant with this this requirement. The Department did not have sufficient data to quantify the costs of these requirements.

One commenter, who supported applying independence and impartiality requirements, expressed concern about a statement in the preamble to the proposed rule where the Department explained, as an example, that a plan cannot contract with a medical expert based on the expert's reputation for outcomes in contested cases rather than based on the expert's professional qualifications. The commenter expressed concern that the statement in the preamble might result in claimants requesting statistics and other

information on cases in which the medical expert expressed opinions in support of denying versus granting a disability benefit claims.

In the Department's view, the preamble statement is an accurate example of one way that the independence and impartiality standard would be violated, and, accordingly, does not believe it would be appropriate to disclaim or caveat the statement in the final rule. That said, the independence and impartiality requirements in the rule do not modify the scope of what would be "relevant documents" subject to the disclosure requirements in paragraphs (g)(1)(vii)(C) and (h)(2)(iii) of the Section 503 Regulation, as amended by this rule. Nor does the rule prescribe limits on the extent to which information about consulting experts would be discoverable in a court proceeding as part of an evaluation of the extent to which the claims administrator or insurer was acting under a conflict of interest that should be considered in evaluating an adverse benefit determination. Thus, the Department acknowledges that plans may incur costs to respond to claimants' requests for statistics and other information described by the commenter. However, the commenter provided no evidence or data to support their assertion and did not quantify the additional cost, thus the Department does not have sufficient data to quantify such costs.

Deemed Exhaustion of Claims and Appeals Process: The final rule tracks the proposal and provides that if a plan fails to adhere to all the requirements in the claims procedure regulation, the claimant would be deemed to have exhausted administrative remedies, with a limited exception where the violation was (i) *de minimis*; (ii) non-prejudicial; (iii) attributable to good cause or matters beyond the plan's control; (iv) in the context of an ongoing good-faith exchange of information; and (v) not reflective of a pattern or practice of non-compliance. Litigation costs are the primary cost related to this requirement, because claimants may proceed directly to court after a deemed exhaustion. Pursuing litigation is more expensive than the plan appeals process, however, it may be the only option claimants have available to obtain denied benefits. Deemed exhaustion is available for the situations when plans are not following the procedural rules of the regulation. At times it may still be in a claimant's best interest to pursue an appeal inside the plan due to cost and time to resolve issues instead of using the court system. Commenters raised a concern the

⁴⁴ The 2010 and 2016 GDP Deflator was 100.056 in 2010 and 110.714 in 2016. The adjustment is $\$500 * (110.714/100.056) = \553 . <https://fred.stlouisfed.org/series/GNPDEF>.

claimants would be hurt by the higher costs and delay in obtaining a resolution if they sought resolution through litigation. However, this provision allows claimants to decide if the added costs and time of litigation are offset by the cost to them of remaining in an appeals process that is in violation of the procedural rules.

Some commenters maintained that their liability exposure increases when claimants' ability to go to court is enhanced. These commenters expressed concern about the expense of discovery to even determine if the procedural requirements have not been followed and asserted that claimants will allege that plans have violated their procedures and go to court to force a settlement.

While all of these scenarios are possible, the Department does not know of, nor did commenters provide, any data or information that would even be suggestive of, the frequency of these events, or the added expense resulting from their occurrence. The Department is not aware of systematic abuses or complaints of abuse with respect to a similar deemed exhaustion requirement contained in the ACA and the Departments' implementing regulation at 29 CFR 2590.715.2719. Thus, the Department believes these occurrences will be infrequent.

Covered Rescissions-Adverse Benefit Determinations: The final rule adds a new provision to address coverage rescissions. Specifically, the 2000 regulation already covered a rescission if it is the basis, in whole or in part, of an adverse benefit determination. The final regulation amends the definition of adverse benefit determination to include a rescission of disability benefit coverage that has a retroactive effect, whether or not there is an adverse effect on a benefit at that time.

The Department understands that this situation occurs infrequently. When it does occur, plans will incur the cost of providing an appeal of the rescission. The Department does not have sufficient data to estimate the cost to review and appeal a rescission of coverage. However, the Department expects that it would be less than the cost to appeal other disability benefit denials because medical or vocation professionals are not needed to review the claim. Instead, the facts of the coverage situation are required. When a rescission is reversed, the provision of future benefits would be considered a transfer from the plan to the claimant whose rescission was reversed.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final rule describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Department discusses the impacts of the final rule and the basis for its certification below.

Need for and Objectives of the Rule: As discussed in section II above, the final rule will revise and strengthen the current rules regarding claims and appeals applicable to ERISA-covered plans providing disability benefits primarily by adopting several of the new procedural protections and safeguards made applicable to ERISA-covered group health plans by the Affordable Care Act. Before the enactment of the Affordable Care Act, group health plan sponsors and sponsors of ERISA-covered plans providing disability benefits were required to implement internal claims and appeal processes that complied with the Section 503 Regulation. The enactment of the Affordable Care Act and the issuance of the implementing interim final regulations resulted in disability plan claimants receiving fewer procedural protections than group health plan participants even though litigation regarding disability benefit claims is prevalent today.

The Department believes this action is necessary to ensure that disability claimants receive the same protections that Congress and the President established for group health care claimants under the Affordable Care Act. This will result in some participants receiving benefits they might otherwise have been incorrectly denied in the absence of the fuller protections provided by the final

regulation. This will help alleviate the financial and emotional hardship suffered by many individuals when they lose earnings due to their becoming disabled.

Affected Small Entities: The Department does not have complete data on the number of plans providing disability benefits or the total number of participants covered by such plans. ERISA-covered welfare benefit plans with more than 100 participants generally are required to file a Form 5500. Only some ERISA-covered welfare benefit plans with less than 100 participants are required to file for various reasons, but this number is very small. Based on current trends in the establishment of pension and health plans, there are many more small plans than large plans, but the majority of participants are covered by the large plans.

Data from the 2014 Form 5500 Schedule A indicates that there are 39,135 plans reporting a code indicating they provide temporary disability benefits covering 40.1 million participants, and 26,171 plans reporting a code indicating they provide long-term disability benefits covering 22.4 million participants. To put the number of large and small plans in perspective, the Department estimates that there are 150,000 large group health plans and 2.1 million small group health plans using 2016 Medical Expenditure Panel Survey-Insurance Component.

Impact of the Rule: The Department has quantified some of the costs associated with these final regulations' requirements to (1) provide the claimant free of charge with any new or additional evidence considered, and (2) to providing notices of adverse benefit determinations in a culturally and linguistically appropriate manner. These requirements and their associated costs are discussed in the Costs and Transfers section above. Additionally other costs are qualitatively discussed in the Costs section. Comments addressing the burden of the regulations were received and are discussed above as well.

Provision of new or additional evidence or rationale: As stated earlier in this preamble, before a plan can issue a notice of adverse benefit determination on review, the final rule requires plans to provide disability benefit claimants, free of charge, with any new or additional evidence considered, relied upon, or generated by (or at the direction of) the plan as soon as possible and sufficiently in advance of the date the notice of adverse benefit determination on review is required to be provided and any new or additional

rationale sufficiently in advance of the due date of the response to an adverse benefit determination on review.

The Department is not aware of data suggesting how often plans rely on new or additional evidence or rationale during the appeals process or the volume of materials that are received. The Department estimated the cost per claim by assuming that compliance will require medical office staff, or other similar staff in other service setting with a labor rate of \$30, 30 minutes to collect and distribute the additional evidence considered, relied upon, or generated by (or at the direction of) the plan during the appeals process. The Department estimates that on average, material, printing and postage costs will total \$2.50 per mailing. The Department further assumes that 30 percent of all mailings will be distributed electronically with no associated material, printing or postage costs.

Providing Notices in a Culturally and Linguistically Appropriate Manner: The final rule would require notices of adverse benefit determinations with respect to disability benefits to be provided in a culturally and linguistically appropriate manner in certain situations. This requirement is satisfied if plans provide oral language services including answering questions and providing assistance with filing claims and appeals in any applicable non-English language. The final rule also requires such notices of adverse benefit determinations sent by a plan to which the requirement applies to include a one-sentence statement in the relevant non-English language about the availability of language services. Plans also must provide, upon request, such notices of adverse benefit determinations in the applicable non-English language.

The Department expects that the largest cost associated with the requirement for culturally and linguistically appropriate notices will be for plans to provide notices in the applicable non-English language upon request. Industry experts also told the Department that while the cost of translation services varies, \$553 per document is a reasonable approximation of translation cost.

In discussions with the regulated community, the Department found that experience in California, which has a State law requirement for providing translation services, indicates that requests for translations of written documents averages 0.098 requests per 1,000 members for health claims. While the California law is not identical to the final rule, and the demographics for California do not match other counties,

for purposes of this analysis, the Department used this percentage to estimate of the number of translation service requests plans could expect to receive. Based on the low number of requests per claim, the Department expects that translation costs would be included as part of a package of services offered to a plan, and that the costs of actual requests will be spread across multiple plans.

Duplication, Overlap, and Conflict With Other Rules and Regulations: The Department does not believe that the final rule will conflict with any relevant regulations, federal or other.

D. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department submitted an information collection request (ICR) to OMB regarding the ICRs contained in the final rule in accordance with 44 U.S.C. 3507(d), for OMB's review. OMB approved the ICR under OMB Control Number 1210-0053, which currently is scheduled to expire on November 30, 2019.

As discussed earlier in this preamble, the Department's final amendments to its claims and appeals procedure regulation would revise and strengthen the current rules regarding claims and appeals applicable to ERISA-covered plans providing disability benefits primarily by adopting several of the procedural protections and safeguards made applicable to ERISA-covered group health plans by the ACA. Some of these amendments revise disclosure requirements under the current rule that are information collections covered by the PRA. For example, benefit denial notices must contain a full discussion of why the plan denied the claim, and to the extent the plan did not follow or agree with the views presented by the claimant to the plan or health care professional treating the claimant or vocational professionals who evaluated the claimant, or a disability determination regarding the claimant presented by the claimant to the plan made by the SSA, the discussion must include an explanation of the basis for disagreeing with the views or disability determination. The notices also must include either (1) the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, or (2) a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist.

A copy of the ICR may be obtained by contacting the PRA addressee shown

below or at <http://www.RegInfo.gov>. PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N-5718, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-4745. These are not toll-free numbers.

After the implementation of the ACA claims regulations, disability plans claimants received fewer procedural protections than group health plan participants even though disability plan claimants experience more issues with the claims review process. These final regulations will reduce the inconsistent procedural rules applied to health and disability benefit plan claims and provide similar procedural protections to claimants of both types of plans.

The burdens associated with the regulatory requirements of the ICRs contained in the final rule are summarized below.

Type of Review: Revised collection.

Agencies: Employee Benefits Security Administration, Department of Labor.

Title: ERISA Claims Procedures.

OMB Number: 1210-0053.

Affected Public: Business or other for-profit; not-for-profit institutions.

Total Respondents: 5,808,000.

Total Responses: 311,790,000.

Frequency of Response: Occasionally.

Estimated Total Annual Burden

Hours: 516,000.

Estimated Total Annual Burden Cost: \$814,450,000.

IV. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in an annual effect on the economy of \$100 million or more.

V. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of \$100 million or more (as adjusted for inflation).

VI. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism,

and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation.

In the Department of Labor’s view, these final regulations have federalism implications because they would have direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government to the extent states have enacted laws affecting disability plan claims and appeals that contain similar requirements to the final rule. The Department believes these effects are limited, because although section 514 of ERISA supersedes State laws to the extent they relate to any covered employee benefit plan, it preserves State laws that regulate insurance, banking, or securities. In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Department solicited input from affected States, including the National Association of Insurance Commissioners and State insurance officials, regarding this assessment at the proposed rule stage but did not receive any comments.

List of Subjects in 29 CFR Part 2560

Claims, Employee benefit plans.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2560 as set forth below:

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

■ 1. The authority citation for part 2560 is revised to read as follows:

Authority: 29 U.S.C. 1132, 1135, and Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Section 2560.503–1 also issued under 29 U.S.C. 1133. Section 2560.502c–7 also issued under 29 U.S.C. 1132(c)(7). Section 2560.502c–4 also issued under 29 U.S.C. 1132(c)(4). Section 2560.502c–8 also issued under 29 U.S.C. 1132(c)(8).

- 2. Section 2560.503–1 is amended by:
 - a. Adding paragraph (b)(7).
 - b. Revising paragraph (g)(1)(v).
 - c. Adding paragraphs (g)(1)(vii) and (viii).
 - d. Revising paragraphs (h)(4) and (i)(3)(i).
 - e. Revising paragraphs (j)(4) and (j)(5) introductory text.
 - f. Adding paragraphs (j)(6) and (7).
 - g. Revising paragraphs (l) and (m)(4).
 - i. Redesignating paragraph (o) as (p), and adding new paragraph (o).
 - j. Revising newly redesignated paragraph (p).

The revisions and additions read as follows:

§ 2560.503–1 Claims procedure.

* * * * *

(b) * * *

(7) In the case of a plan providing disability benefits, the plan must ensure that all claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision. Accordingly, decisions regarding hiring, compensation, termination, promotion, or other similar matters with respect to any individual (such as a claims adjudicator or medical or vocational expert) must not be made based upon the likelihood that the individual will support the denial of benefits.

* * * * *

(g) * * * (1) * * *

(v) In the case of an adverse benefit determination by a group health plan—

* * * * *

(vii) In the case of an adverse benefit determination with respect to disability benefits—

(A) A discussion of the decision, including an explanation of the basis for disagreeing with or not following:

(i) The views presented by the claimant to the plan of health care professionals treating the claimant and vocational professionals who evaluated the claimant;

(iii) The views of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant’s adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination; and

(iii) A disability determination regarding the claimant presented by the claimant to the plan made by the Social Security Administration;

(B) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical

judgment for the determination, applying the terms of the plan to the claimant’s medical circumstances, or a statement that such explanation will be provided free of charge upon request;

(C) Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist; and

(D) A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant’s claim for benefits. Whether a document, record, or other information is relevant to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section.

(viii) In the case of an adverse benefit determination with respect to disability benefits, the notification shall be provided in a culturally and linguistically appropriate manner (as described in paragraph (o) of this section).

* * * * *

(h) * * *

(4) *Plans providing disability benefits.*

The claims procedures of a plan providing disability benefits will not, with respect to claims for such benefits, be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless, in addition to complying with the requirements of paragraphs (h)(2)(ii) through (iv) and (h)(3)(i) through (v) of this section, the claims procedures—

(i) Provide that before the plan can issue an adverse benefit determination on review on a disability benefit claim, the plan administrator shall provide the claimant, free of charge, with any new or additional evidence considered, relied upon, or generated by the plan, insurer, or other person making the benefit determination (or at the direction of the plan, insurer or such other person) in connection with the claim; such evidence must be provided as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination on review is required to be provided under paragraph (i) of this section to give the claimant a reasonable opportunity to respond prior to that date; and

(ii) Provide that, before the plan can issue an adverse benefit determination on review on a disability benefit claim based on a new or additional rationale, the plan administrator shall provide the

claimant, free of charge, with the rationale; the rationale must be provided as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination on review is required to be provided under paragraph (i) of this section to give the claimant a reasonable opportunity to respond prior to that date.

* * * * *

(i) * * *

(3) *Disability claims.* (i) Except as provided in paragraph (i)(3)(ii) of this section, claims involving disability benefits (whether the plan provides for one or two appeals) shall be governed by paragraph (i)(1)(i) of this section, except that a period of 45 days shall apply instead of 60 days for purposes of that paragraph.

* * * * *

(j) * * *

(4)(i) A statement describing any voluntary appeal procedures offered by the plan and the claimant's right to obtain the information about such procedures described in paragraph (c)(3)(iv) of this section, and a statement of the claimant's right to bring an action under section 502(a) of the Act; and,

(ii) In the case of a plan providing disability benefits, in addition to the information described in paragraph (j)(4)(i) of this section, the statement of the claimant's right to bring an action under section 502(a) of the Act shall also describe any applicable contractual limitations period that applies to the claimant's right to bring such an action, including the calendar date on which the contractual limitations period expires for the claim.

(5) In the case of a group health plan—

* * * * *

(6) In the case of an adverse benefit decision with respect to disability benefits—

(i) A discussion of the decision, including an explanation of the basis for disagreeing with or not following:

(A) The views presented by the claimant to the plan of health care professionals treating the claimant and vocational professionals who evaluated the claimant;

(B) The views of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination; and

(C) A disability determination regarding the claimant presented by the claimant to the plan made by the Social Security Administration;

(ii) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the determination, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request; and

(iii) Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist.

(7) In the case of an adverse benefit determination on review with respect to a claim for disability benefits, the notification shall be provided in a culturally and linguistically appropriate manner (as described in paragraph (o) of this section).

* * * * *

(l) *Failure to establish and follow reasonable claims procedures.* (1) *In general.* Except as provided in paragraph (l)(2) of this section, in the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

(2) *Plans providing disability benefits.*

(i) In the case of a claim for disability benefits, if the plan fails to strictly adhere to all the requirements of this section with respect to a claim, the claimant is deemed to have exhausted the administrative remedies available under the plan, except as provided in paragraph (l)(2)(ii) of this section.

Accordingly, the claimant is entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim. If a claimant chooses to pursue remedies under section 502(a) of the Act under such circumstances, the claim or appeal is deemed denied on review without the exercise of discretion by an appropriate fiduciary.

(ii) Notwithstanding paragraph (l)(2)(i) of this section, the administrative remedies available under a plan with respect to claims for

disability benefits will not be deemed exhausted based on *de minimis* violations that do not cause, and are not likely to cause, prejudice or harm to the claimant so long as the plan demonstrates that the violation was for good cause or due to matters beyond the control of the plan and that the violation occurred in the context of an ongoing, good faith exchange of information between the plan and the claimant. This exception is not available if the violation is part of a pattern or practice of violations by the plan. The claimant may request a written explanation of the violation from the plan, and the plan must provide such explanation within 10 days, including a specific description of its bases, if any, for asserting that the violation should not cause the administrative remedies available under the plan to be deemed exhausted. If a court rejects the claimant's request for immediate review under paragraph (l)(2)(i) of this section on the basis that the plan met the standards for the exception under this paragraph (l)(2)(ii), the claim shall be considered as re-filed on appeal upon the plan's receipt of the decision of the court. Within a reasonable time after the receipt of the decision, the plan shall provide the claimant with notice of the resubmission.

* * * * *

(m) * * *

(4) The term "adverse benefit determination" means:

(i) Any of the following: A denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including any such denial, reduction, termination, or failure to provide or make payment that is based on a determination of a participant's or beneficiary's eligibility to participate in a plan, and including, with respect to group health plans, a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit resulting from the application of any utilization review, as well as a failure to cover an item or service for which benefits are otherwise provided because it is determined to be experimental or investigational or not medically necessary or appropriate; and

(ii) In the case of a plan providing disability benefits, the term "adverse benefit determination" also means any rescission of disability coverage with respect to a participant or beneficiary (whether or not, in connection with the rescission, there is an adverse effect on any particular benefit at that time). For this purpose, the term "rescission" means a cancellation or discontinuance

of coverage that has retroactive effect, except to the extent it is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage.

* * * * *

(o) *Standards for culturally and linguistically appropriate notices.* A plan is considered to provide relevant notices in a “culturally and linguistically appropriate manner” if the plan meets all the requirements of paragraph (o)(1) of this section with respect to the applicable non-English languages described in paragraph (o)(2) of this section.

(1) *Requirements.* (i) The plan must provide oral language services (such as a telephone customer assistance hotline) that include answering questions in any applicable non-English language and providing assistance with filing claims and appeals in any applicable non-English language;

(ii) The plan must provide, upon request, a notice in any applicable non-English language; and

(iii) The plan must include in the English versions of all notices, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the plan.

(2) *Applicable non-English language.* With respect to an address in any United States county to which a notice is sent, a non-English language is an applicable non-English language if ten percent or more of the population residing in the county is literate only in

the same non-English language, as determined in guidance published by the Secretary.

(p) *Applicability dates and temporarily applicable provisions.* (1) Except as provided in paragraphs (p)(2), (p)(3) and (p)(4) of this section, this section shall apply to claims filed under a plan on or after January 1, 2002.

(2) This section shall apply to claims filed under a group health plan on or after the first day of the first plan year beginning on or after July 1, 2002, but in no event later than January 1, 2003.

(3) Paragraphs (b)(7), (g)(1)(vii) and (viii), (j)(4)(ii), (j)(6) and (7), (l)(2), (m)(4)(ii), and (o) of this section shall apply to claims for disability benefits filed under a plan on or after January 1, 2018, in addition to the other paragraphs in this rule applicable to such claims.

(4) With respect to claims for disability benefits filed under a plan from January 18, 2017 through December 31, 2017, this paragraph (p)(4) shall apply instead of paragraphs (g)(1)(vii), (g)(1)(viii), (h)(4), (j)(6) and (j)(7).

(i) In the case of a notification of benefit determination and a notification of benefit determination on review by a plan providing disability benefits, the notification shall set forth, in a manner calculated to be understood by the claimant—

(A) If an internal rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination, either the specific rule,

guideline, protocol, or other similar criterion; or a statement that such a rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination and that a copy of such rule, guideline, protocol, or other criterion will be provided free of charge to the claimant upon request; and

(B) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the determination, applying the terms of the plan to the claimant’s medical circumstances, or a statement that such explanation will be provided free of charge upon request.

(ii) The claims procedures of a plan providing disability benefits will not, with respect to claims for such benefits, be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless the claims procedures comply with the requirements of paragraphs (h)(2)(ii) through (iv) and (h)(3)(i) through (v) of this section.

Signed at Washington, DC, this 9th day of December, 2016.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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8 CFR Parts 1001, 1003, 1103, et al.

Recognition of Organizations and Accreditation of Non-Attorney
Representatives; Final Rule

DEPARTMENT OF JUSTICE**Executive Office for Immigration Review****8 CFR Parts 1001, 1003, 1103, 1212, and 1292**

[EOIR Docket No. 176; A.G. Order No. 3783–2016]

RIN 1125–AA72

Recognition of Organizations and Accreditation of Non-Attorney Representatives**AGENCY:** Executive Office for Immigration Review, Department of Justice.**ACTION:** Final rule.

SUMMARY: This rule amends the regulations governing the requirements and procedures for authorizing representatives of non-profit religious, charitable, social service, or similar organizations to represent persons in proceedings before the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS). The rule also amends the regulations concerning EOIR's disciplinary procedures.

DATES: This rule is effective on January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470 (not a toll-free call).

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I. Public Participation

On October 1, 2015, the Department published in the **Federal Register** a rule proposing to amend the regulations governing the requirements and procedures for authorizing representatives of non-profit religious, charitable, social service, or similar organizations to represent persons in proceedings before the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS). 80 FR 59514 (Oct. 1, 2015). The rule also proposed amendments to the regulations concerning EOIR's disciplinary procedures. *Id.* The Department received 63 comments from various sources, including non-profit organizations, bar associations, government agencies, legal clinics, attorneys, and law students. Both in response to these comments and as a result of further consideration, the Department has decided to revise the proposed rule as discussed below. Except for those revisions, the proposed rule is adopted without change.

II. Regulatory Background

The rule amends 8 CFR part 1292 by removing § 1292.2, revising §§ 1292.1, 1292.3, and 1292.6, and adding §§ 1292.11 through 1292.19. It amends 8 CFR 1001.1 and 8 CFR part 1003 at §§ 1003.0, 1003.1, and 1003.101 through 1003.108, and it adds §§ 1003.110 and 1003.111. The rule also amends 8 CFR part 1103 at § 1103.3 and 8 CFR part 1212 at § 1212.6. The rule transfers the administration of the Recognition and Accreditation (R&A) program within EOIR from the Board of Immigration Appeals (Board) to the Office of Legal Access Programs (OLAP) (8 CFR 1003.0); amends the qualifications for recognition of organizations and accreditation of their representatives (8 CFR 1292.11 and 1292.12); institutes administrative procedures to enhance the management of the R&A roster (8 CFR 1292.13 through 1292.19); and updates the disciplinary process to make recognized organizations, in addition to accredited representatives, attorneys, and other practitioners, subject to sanctions for conduct that contravenes the public interest (8 CFR 1003.101 *et seq.*).

III. Comments and Responses

As noted above, the Department received sixty-three comments in response to the proposed rule. Twenty-nine comments were from currently-recognized non-profit organizations and other non-profit organizations. Three comments were from bar associations, 11 comments were from private

individuals, 19 comments were anonymously submitted, and 1 comment came from a government entity.

In response to the comments, the Department changed a number of provisions. First, the final rule makes a number of changes to the requirements for recognition. The final rule retains the requirement that organizations must have an accredited representative to be recognized or renewed if the organization is seeking recognition for the first time or is a currently recognized organization without an accredited representative on the effective date of the rule. However, once an organization is recognized, the organization will not have its recognition administratively terminated if it no longer has an accredited representative. Such organizations will be placed on inactive status. The final rule details the rules and procedures for inactive status. (Section III.B.1.a.) The final rule removes the substantial amount standard for recognition and the associated waiver provision set forth in the proposed rule. (Section III.B.1.d.) Instead, the focus in the recognition process is placed on whether organizations are non-profit, federally tax-exempt religious, charitable, social service, or similar organizations and whether they are providing immigration legal services primarily to low-income and indigent clients in the United States. The final rule provides that these requirements will be considered together. (Section III.B.1.e.)

Second, the final rule makes no changes to the character and fitness provision for accreditation. Therefore, immigration status remains a factor in that determination. However, further clarification and guidance regarding why and how immigration status may be used as a factor is provided in the supplementary information. (Section III.B.2.a.)

Third, as mentioned above, the final rule unlinks recognition and accreditation, which allows the validity period for recognition to be increased to six years and to run independent of the three-year period of accreditation for an organization's representatives. Accordingly, organizations and their representatives will seek renewal of recognition and accreditation separately at the conclusion of their respective recognition and accreditation cycles. (Section III.B.5.)

Fourth, the final rule amends the reporting requirement in the proposed rule. The final rule renames the annual report as the "annual summary of immigration legal services provided" to avoid confusion with other annual

reports that organizations may prepare. More significantly, the information required to be submitted has shifted to focus on the legal services provided by the organization as a whole, rather than by its accredited representatives individually. (Section III.B.8.)

Fifth and finally, the final rule includes the following additional changes: Removes the requirement of renewal for all other organizations recognized at the effective date of the final rule if they seek extension of recognition or accreditation of a new representative (Section III.B.6); adds provisions that give OLAP the ability to permit electronic communications and filings among OLAP, prospective and current organizations, DHS, the EOIR disciplinary counsel, and the anti-fraud officer (Section III.E.); and adds provisions that enable organizations to request reconsideration of OLAP determinations that disapprove requests for recognition or accreditation or that administratively terminate recognition or accreditation and that permit organizations to seek administrative review of denied reconsideration requests before the Director (Section III.F).

Below, the Department summarizes in greater detail the comments received and explains the changes, if any, that the Department has made in response. Note that because some comments overlap and commenters raised multiple subjects, the comments are generally addressed by topic rather than by reference to a specific commenter.

A. Transfer of R&A Program From the Board to OLAP

The Department received nine comments addressing the transfer of the administration of the R&A Program within EOIR from the Board to OLAP. Six comments from non-profit organizations, bar associations, and a government body supported the transfer as “well-placed and appropriate” because of OLAP’s mission to facilitate access to legal representation and counseling and its record in doing so. Two of these commenters expressed concern that the public and DHS staff may be confused by the change in administrator, and another commenter stated that the transfer may cause confusion because advocates have educated the public about “BIA recognized organizations” and “BIA accredited representatives.” However, all three commenters that had concerns asserted that the confusion may be alleviated through clear public guidance from OLAP on its role and responsibilities and the use of a commonly recognized term, such as

“DOJ recognized organization” or “DOJ accredited representative.”

Three commenters opposed the transfer based on concerns about whether OLAP’s current staffing and resources are adequate to enable OLAP to take on the new duties and responsibilities provided by the rule.

The Department has made no change to the proposed rule and accordingly the administration of the R&A Program will be transferred from the Board to OLAP. See final rule at 8 CFR 1003.0. The Department is committed to providing OLAP with sufficient resources to successfully administer its new duties and responsibilities under this rule. As suggested by the commenters, the Department will endeavor to engage in significant education and outreach with the public and government stakeholders regarding the R&A program, the changes in this rule, and OLAP’s role. Furthermore, the effective date of the final rule on January 18, 2017, leaves considerable time after the date of publication to provide time for public awareness and outreach and to effectively and efficiently manage the transfer of the program. See 80 FR at 59523 n. 70 (“At the effective date of the final rule, a pending application for initial recognition, initial accreditation, or renewal of accreditation before the Board would be transferred to OLAP to review. Organizations with such pending applications would have to meet the new requirements of the final rule to be approved for recognition or accreditation. OLAP will provide organizations with pending applications the opportunity to amend the applications, if necessary, to conform to the new requirements of the final rule. Further guidance will be provided prior to the effective date of the final rule”).

B. Recognition and Accreditation

1. Recognition Qualifications

a. Accredited Representative Required and Inactive Status

The Department received 20 comments regarding the requirement that an organization have at least one accredited representative to be recognized, to maintain recognition, and to have its recognition renewed. Of the 20 comments received, one supported the requirement, eight generally supported the requirement, and 11 opposed the requirement. The commenters that opposed the requirement and those that generally supported it were primarily concerned that an organization could have its recognition terminated if it lost its accredited representative at any time during the validity period or if it did not

have one on staff at renewal because of the linking of recognition and accreditation in the proposed rule. The commenters suggested that if recognition and accreditation must be linked, the rule should provide a grace period to give recognized organizations time to replace their only accredited representative when the representative leaves the organization or is otherwise terminated. The commenters asserted that the grace period could come through the inactive status provision but asked for clarification regarding whether placement on inactive status was automatic or required an organization to request this status and how long an organization could be permitted to remain on inactive status. Commenters also raised a concern that one year after the effective date of the final rule would not be sufficient time for organizations that are currently recognized without an accredited representative to obtain an accredited representative and come into compliance with the rule.

The final rule retains the accredited representative requirement for organizations to be recognized or renewed if the organization is seeking recognition for the first time or is a currently recognized organization without an accredited representative on the effective date of the rule. See final rule at 8 CFR 1292.11(a)(3). The Department believes that the requirement is a foundational element of the rule because the purpose of recognizing an organization is to allow for the accreditation of non-attorney representatives. The Department believes that currently recognized organizations without an accredited representative on the effective date of the rule will have sufficient time to hire, train, and seek accreditation for a new representative, given that the rule provides such organizations with an additional year beyond the effective date to submit their application for renewal of their recognition under this rule.¹

Based on the comments, however, the Department recognizes that a rigid requirement that an organization have an accredited representative at all times does not account for the practical realities that organizations face with limited budgets, the hiring process, and employee turnover. In this regard, once an organization is recognized, the final rule has unlinked recognition and

¹ This provision also applies to currently recognized organizations that only have attorneys on staff on the effective date of the rule, January 18, 2017. Such organizations will have one year from January 18, 2017, to seek accreditation for a new representative and submit an application for renewal of recognition.

accreditation so that an organization will not have its recognition administratively terminated if it no longer has an accredited representative. Recognized organizations that lose their only accredited representative will be placed on inactive status, which is clarified in the final rule at 8 CFR 1292.16(i), and they will be allowed a reasonable amount of time to obtain a new accredited representative before risking termination of recognition.

The final rule moves the regulatory text regarding inactive status from proposed § 1292.17(e) to 8 CFR 1292.16(i) and revises it so that organizations are placed on inactive status when they have no currently approved accredited representative on staff and they have promptly notified OLAP of that situation as mandated by the reporting requirements.² Inactive status provides the organization with a grace period of two years from the date the organization was placed on inactive status to apply for and have approved at least one accredited representative. The grace period provided by inactive status prevents an organization from having its recognition administratively terminated and gives it sufficient time to obtain a new representative. Under the final rule, the OLAP Director has the discretion to extend an organization's time on inactive status when warranted.

The final rule makes clear that organizations on inactive status must request renewal of recognition if their renewal period occurs while on inactive status. *See* final rule at 8 CFR 1292.16(i). The OLAP Director has the discretion to renew an inactive organization's recognition without a currently approved accredited representative as long as the organization otherwise meets the requirements for renewal and attests that it intends to apply for and have approved a new representative within two years of renewal. *See* final rule at 8 CFR 1292.11(a)(3), 1292.16(a), (i). If the renewal request is granted under such circumstances, the organization will remain on inactive status and have 2 years from the date of renewal to obtain a new accredited representative.

Organizations on inactive status remain subject to administrative termination of recognition under 8 CFR 1292.17. Specifically, their recognition may be administratively terminated when they do not request renewal of recognition while on inactive status or do not have an individual approved for accreditation during the time period specified at 8 CFR 1292.16(i).

² A recognized organization on inactive status would remain on the R&A roster with a designation that it has no accredited representatives.

Finally, an organization on inactive status is not authorized to provide immigration legal services, unless it has at least one attorney on staff. *See* final rule at 8 CFR 1292.16(i). Organizations on inactive status that continue to provide immigration legal services without an attorney on staff may be subject to disciplinary sanctions for the unauthorized practice of law. The final rule adds a ground of discipline for organizations at 8 CFR 1003.110(b)(5), if the organization provides immigration legal services without an attorney or accredited representative on staff.

b. Federal Tax-Exempt Status

The Department received 19 comments regarding the proposed requirement that an organization establish that it is federally tax-exempt. The Department asked for comment on this requirement and specifically asked whether the requirement would be too restrictive and whether Federal tax-exempt status should be limited to organizations exempted under 26 U.S.C. 501(c)(3). *See* 80 FR at 59528.

Fourteen commenters supported the requirement, one commenter generally supported the provision, and four commenters did not support the provision. The majority of the fourteen commenters who supported the provision urged that the final rule be as broad as possible to extend to social service or similar organizations that do not fall within the section 501(c)(3) Federal tax-exemption. Commenters asked that a range of documents suffice to prove Federal tax-exempt status. The commenter that expressed general support for the Federal tax-exemption requirement stated that waivers of the requirement should be given sparingly. Three of the commenters against the requirement asserted that the burden of cost and time associated with seeking Federal tax-exempt status would discourage capacity building. The fourth comment in opposition stated that the requirement was too stringent because it excluded certain institutions from becoming recognized like public schools and libraries.

The final rule retains the requirement that organizations be federally tax-exempt to be recognized,³ while changing the proof required to show Federal tax-exempt status to include a variety of supporting documents. *See*

³ In addition to establishing Federal tax-exempt status, as discussed in section III.B.1.e below, an organization must also establish that it is a non-profit religious, charitable, social service, or similar organization that provides immigration legal services primarily to low-income and indigent clients within the United States in order to qualify for recognition.

final rule at 8 CFR 1292.11(a)(2), (c). The rule modifies the proof required to include an organization's currently valid Internal Revenue Service tax exemption letter (under 26 U.S.C. 501(c)(3) or some other section of the Federal tax code),⁴ alternative documentation to establish Federal tax-exempt status, or proof that it has applied for Federal tax-exempt status. *See* final rule at 8 CFR 1292.11(d).

As under the proposed rule, if an organization has not yet received an IRS tax-exemption determination letter at the time it applies for recognition, it may satisfy this requirement by submitting proof that it has applied for Federal tax-exempt status. 80 FR at 59517. The final rule, however, clarifies at 8 CFR 1292.11(f) that such organizations will be granted conditional recognition. Conditional recognition allows these organizations to begin providing services while their applications for tax exemptions are pending and gives OLAP the opportunity to evaluate the organizations at an earlier renewal date to ensure that they have become federally tax-exempt and otherwise meet the requirements for recognition. *See generally* 80 FR at 59524.

c. Elimination of Nominal Charges Requirement

The Department received 22 comments regarding the elimination of the "nominal charges" requirement. Eighteen comments supported the elimination of the requirement that a recognized organization charge only a nominal fee for its immigration legal services because it tended to impede the ability of organizations to serve greater numbers of individuals in need and discouraged new organizations from seeking recognition. Three commenters were against the elimination of the requirement because they believed that it would place recognized organizations in financial competition with private attorneys and could lead to market-rate fees. The fourth comment against the change opposed it because of concerns that the proposed substantial amount standard would be even more burdensome for organizations than the "nominal charges" requirement. This sentiment was shared by many of the commenters who expressed support for

⁴ Government entities, such as libraries, schools, or local government offices, may provide a government information letter from the Internal Revenue Service to show that the entity is exempt from Federal taxes. This letter can be requested from the IRS free-of-charge. Government Information Letter, Internal Revenue Service (Jan. 26, 2016), <https://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Governmental-Information-Letter>.

the elimination of the nominal charges requirement and is addressed more fully in the next section.

The final rule eliminates the “nominal charges” requirement, as proposed. The Department believes, as noted by the commenters, that the elimination of the nominal charges requirement for recognition is supported by the rule’s other requirements that ensure that organizations are non-profit, federally tax-exempt religious, charitable, social service, or similar organizations that are primarily serving low-income or indigent clients. These requirements mandate that any “[l]egal fees, membership dues, or donations charged or requested by a recognized organization are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area,” so that low-income and indigent clients are able to access the organization’s immigration legal services. 80 FR at 59519.

d. Substantial Amount of Budget Is Not Derived From Client Charges

The Department received 30 comments on the requirement that organizations demonstrate that a substantial amount of its immigration legal services budget is derived from sources other than funds provided by or on behalf of immigration clients themselves, such as legal fees, donations, or membership dues. The Department specifically requested public comment on the substantial amount standard.

Twenty-four commenters opposed the substantial amount requirement. The commenters objected to the standard because it placed an impractical reliance on outside funding sources of revenue that was unreflective of the diversity of ways in which organizations provide immigration legal services or of the availability of outside funding. They stated that many organizations depend on fees to provide legal services and that even when they may have outside funding sources, those funds may only be applied to certain legal services while other services must be supported by fees. The commenters criticized the requirement as being just as burdensome for organizations as the nominal fee restriction because it lacked enough specificity for the organizations to understand or OLAP to implement with ease or consistency. They speculated that regardless of the percentage of outside funding applied the requirement could lead organizations to provide less services and volume of service in order to reduce their fee revenue and meet the standard.

Three commenters who supported the requirement even noted that a too-stringent focus on outside sources of funding could lead to organizations being unable to meet the standard or a greater need for waivers of the requirement to the point that the requirement would have no meaning. The commenters in opposition recommended that the Department remove the substantial amount standard from the final rule and shift the focus to whether organizations are non-profit, federally tax-exempt religious, charitable, social service, or similar organizations that are primarily providing immigration legal services to low-income and indigent clients in the United States.

The final rule removes the substantial amount standard for recognition and the associated waiver provision set forth in the proposed rule. The Department agrees with the concerns of commenters who opposed the standard that a requirement that an organization have outside sources of funding would be unduly burdensome and act as a potential deterrent to capacity building. The proper focus in the recognition process is whether organizations are non-profit, federally tax-exempt religious, charitable, social service, or similar organizations that are primarily providing immigration legal services to low-income and indigent clients in the United States. Accordingly, as discussed below, the funding sources of an organization are one of several relevant factors in that assessment.

e. Serving Primarily Low-Income and Indigent Persons and Non-Profit Status

The Department received 16 comments on the proposed provision requiring that an organization provide immigration legal services primarily to low-income and indigent clients within the United States. The Department specifically requested comment on this provision and the corresponding requirement that, if an organization charges fees, the organization has a written policy for accommodating clients unable to pay for immigration legal services.

Ten commenters generally supported the requirements that recognized organizations primarily serve low-income and indigent clients and have a written policy to accommodate those unable to pay for immigration legal services. However, these commenters and two additional commenters stated that the proof required to demonstrate that organizations primarily serve low-income and indigent clients was too burdensome. In particular, commenters objected to producing guidelines to

determine whether individuals are low-income and indigent because of the difficulty in verifying the income of clients with unconventional work circumstances or inadequate documentation. They asserted that organizations target the low-income and indigent communities as part of their mission without defining the terms low-income and indigent. The commenters recommended, as they did above regarding the substantial amount standard, that the Department focus on an organization’s non-profit status, mission, and all of its other charitable reporting duties to the Federal Government or local donors.

Four commenters stated that the final rule should set a standard or provide guidance for what constitutes low-income and indigent. One commenter recommended the Federal poverty standard, whereas another commenter suggested a standard of household assets less than \$10,000, excluding the value of the client’s residence and vehicle. A third commenter stated that the rule should require organizations to show that clients who are not low-income or indigent fall within some multiple of the low-income standard. The last commenter stated that an income percentage should be set so that organizations would know who they may serve in order to be recognized.

The final rule retains the requirements that recognized organizations primarily serve low-income and indigent clients and have a written policy to accommodate those unable to pay for immigration legal services and joins it with the requirement that the organization be a non-profit religious, charitable, social service, or similar organization. See final rule at 8 CFR 1292.11(a)(1). As discussed in the proposed rule, these requirements are related. See 80 FR at 59518 (“In order to avoid recognizing organizations with for-profit motives and to advance the requirement that organizations have a religious, charitable, social service, or similar purpose, the proposed rule would require an organization to establish that it provides immigration legal services primarily to low-income and indigent clients.”). The Department has determined that they should be considered together in the final rule and, accordingly, has combined and amended the proof required to satisfy these requirements. Under the final rule at 8 CFR 1292.11(b), an organization must submit: a copy of its organizing documents, including a statement of its mission or purpose; a declaration from its authorized officer attesting that it serves primarily low-income and

indigent clients; a summary of the legal services to be provided; if it charges fees for legal services, fee schedules and organizational policies or guidance regarding fee waivers or reduced fees based on financial need; and its annual budget. The organization may also submit additional documentation to demonstrate non-profit status and service to primarily low-income and indigent individuals, such as tax filings, reports prepared for funders, or information about other free or low-cost immigration-related services that it provides like educational or outreach events.

These amendments to the proof required address the comments raised and more accurately and simply allow organizations to show whether they are non-profit religious, charitable, social service, or similar organizations that primarily serve low-income and indigent clients. As discussed in the proposed rule, the proof required to make this showing cannot be limited to demonstrating tax-exempt status under 26 U.S.C. 501(c)(3) (concerning entities organized for religious, charitable, social service, or other specified purposes), because such a designation is for tax purposes and more significantly, organizations may be recognized that are tax-exempt under other sections of the Federal tax code. 80 FR at 59517. The rule thus requires an organization's charter, by-laws, articles of incorporation, or similar documents that show its religious, charitable, social service, or similar mission.

The rule also includes as proof the organization's fee schedules and organizational policies or guidance regarding fee waivers or reduced fees based on financial need, if it charges fees for services. As stated in the proposed rule:

Requiring recognized organizations to serve primarily low-income and indigent clients necessarily affects the magnitude of legal fees, membership dues, or donations, if any, that an organization may charge or request. Charging or requesting excessive fees, membership dues, or donations would not be consistent with the aim of serving primarily low-income and indigent clients. An organization that charges or requests such fees, dues, or donations would be less likely to primarily serve low-income and indigent clients, who have a limited ability to pay fees, and would be more likely to have an impermissible profit-seeking motive and prey upon vulnerable populations. Thus, while fees, dues, and donations for immigration legal services are not defined under the proposed rule, recognized organizations are expected to limit fees, dues, and donations charged or requested so that low-income and indigent clients are able to access the organization's immigration legal services . . . Legal fees, membership dues, or donations

charged or requested by a recognized organization are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area.

80 FR at 59518–19. Thus, while the Department no longer intends to scrutinize these fee schedules under the final rule because the substantial amount requirement has been removed, the fee schedules may be used to evaluate whether an organization is serving primarily low-income and indigent clients and serve as a baseline when a complaint is received about the fees charged by an organization. With respect to the organizational policies or guidance regarding fee waivers or reduced fees based on financial need, the Department does not require organizations to produce guidelines to determine whether individuals are low-income and indigent but it does expect that an organization's policies or guidance mention the factors or standards used when deciding to provide a fee waiver or reduced fees. Such information informs the Department's understanding of the organization's non-profit purpose to serve primarily low-income and indigent clients and gives the organization's clients some sense of the circumstances that would warrant fee waivers or reduced fees.

Finally, the organization must include its annual budget for immigration legal services. Under the proposed rule, the budget was necessary for an analysis of the organization's funding under the substantial amount standard. Now, the budget will serve as further evidence that the organization is a non-profit that primarily serves low-income and indigent clients. The budget will show sources of revenue apart from fees, like grants and monetary or in-kind donations. To the extent that an organization cannot make such a showing of outside funding sources and is fee-dependent, the factors discussed above in addition to other documentation, such as its tax filing, letters of recommendation from the community, its annual report, or information about other free or low-cost immigration-related services that it provides, will be considered.

f. Knowledge and Experience

Fifteen commenters sent the Department comments on the recognition requirement that an organization have "access to adequate knowledge, information, and experience in all aspects of immigration law and procedure," 80 FR at 59538, and the related accreditation requirement that a proposed representative possess "broad

knowledge and adequate experience in immigration law and procedure," 80 FR at 59539. Both requirements are consistent with the Board's current decisions regarding the knowledge and experience sufficient to warrant recognition and accreditation. 80 FR at 59519–59520. For the reasons set forth below, the final rule retains the requirements for knowledge and experience for recognition and accreditation as stated in the proposed rule. See final rule at 8 CFR 1292.11(a)(4), 1292.12(a)(6).

Four commenters expressed support for the recognition and accreditation requirements regarding knowledge and experience. Three of these commenters further stated that they appreciated that the rule allowed for flexibility in showing education, training, and experience by not mandating a specific number of formal training hours, specific courses, or testing.

Eight commenters objected to the requirements because they lacked specificity regarding the knowledge and experience required for recognition and accreditation. They contended that the rule may fail to properly advise organizations as to the level of knowledge and experience required, or in the alternative, it could permit unqualified individuals to become accredited. Some of these commenters urged the Department to develop and administer a test for accreditation, or to require a minimum number of hours of on-the-job training or supervised practice before seeking accreditation. Others recommended that the Department develop a uniform, standardized training program on its own or in collaboration with DHS or other non-profit organizations, or require a specified number of immigration legal trainings per year. Two commenters stated that the Department should, as discussed in the proposed rule, make known, or even require completion of, recommended education, testing, training courses and hours, or internships that would satisfy the knowledge and experience requirements for accreditation.

Five commenters asserted that the rule should require that organizations have attorney supervision or mentors in order to satisfy the knowledge and experience requirement to be recognized. According to these commenters, an attorney supervision or mentoring requirement would provide much needed oversight to avoid the improper handling of cases while also preventing unscrupulous individuals from attempting to obtain recognition and accreditation. Attorney supervision or mentoring could be achieved through

an attorney on staff or a formal arrangement with an attorney or another recognized organization with attorneys on staff. A waiver of the requirement could be provided when it was cost-prohibitive or not feasible due to a lack of attorneys in an area.

While the Department understands the concerns raised regarding the need for attorney supervision or mentoring and more specific testing or training requirements, such requirements would not advance the rule's goal to increase capacity because they would result in increased costs for non-profit organizations. The flexible approach adopted by the rule allows organizations to meet the knowledge and experience requirements in a number of ways, and it is currently used by the Department in the recognition and accreditation process.

Nonetheless, the Department recognizes that the knowledge and experience requirements would benefit from some parameters. As stated in the proposed rule, the Department intends to provide guidance on the knowledge and experience required for accreditation so that organizations are generally aware of the education, testing, training courses and hours, or internships that could satisfy the standard. 80 FR at 59520. Similarly, the Department encourages, but does not require, organizations to have attorney supervision or mentors because attorney supervision or mentorship will likely show that an organization has access to adequate knowledge, information, and experience in order to be recognized. 80 FR at 59519.

Furthermore, to the extent that an organization or representative engages in unscrupulous behavior or unprofessional conduct during the course of representation, the conduct may be remedied through the disciplinary process or the rule's other oversight procedures.

g. Authorized Officer

The Department received eight comments regarding the recognition requirement that an organization designate an authorized officer who is empowered to act on its behalf for all matters related to recognition and accreditation. All of the comments supported the requirement, and the only concern raised was that organizations did not want to be unduly penalized because staff turnover leads an organization to lack an authorized officer briefly. The Department acknowledges that organizations and their appointed authorized officer may change over time, and the final rule requires organizations to promptly

report such changes pursuant to 8 CFR 1292.14(a). The Department believes that 30 days will generally be sufficient time for organizations to appoint someone to act in the capacity of an authorized officer until a replacement is designated, if they cannot designate a permanent replacement within that time, and to notify the OLAP Director of the change. The final rule without change adopts the requirement for an organization to designate an authorized officer. See final rule at 8 CFR 1292.11(a)(5).

2. Accreditation Qualifications

a. Character and Fitness

The Department received a number of comments on the replacement of the requirement that an accredited representative be a person of good moral character, with the requirement that a proposed representative possess the "character and fitness" to represent clients before the immigration courts, the Board, or DHS. The Department specifically asked for comments on the change and what factors may be relevant to the character and fitness assessment. In relation to the factors, the Department asked whether current immigration status should be a factor and to what extent EOIR should consider whether the individual has employment authorization, has been issued a notice of intent to revoke or terminate an immigration status (or other relief), such as asylum or withholding of removal or deportation, or is in pending deportation, exclusion, or removal proceedings.

The Department received 16 comments on the change from good moral character to character and fitness. Eleven of the comments expressed opposition to the change, although two of the comments voiced opposition to the change without any stated reason. One comment in opposition was expressly adopted by five other commenters and reiterated by two other commenters. The commenters objected to the character and fitness requirement because it is the same requirement applied to attorneys in order for them to practice law. The commenters claimed that the requirement is not appropriate for accredited representatives because they differ from attorneys in that they can only provide immigration legal services and can only do so through a recognized organization. Three commenters also raised a concern that the character and fitness requirement may increase administrative burdens for the organization in the accreditation process. In particular, they recommended that the organization's

attestation of good moral character and letters of recommendation, rather than background check documentation, should be sufficient to demonstrate good moral character.

Five commenters expressed support for the change to the character and fitness requirement. Two of these commenters stated that the character and fitness requirement was appropriate because it would align the accreditation process with the process for attorneys to be admitted to their State bars to practice law. In contrast, one commenter asserted that while a general character and fitness standard was appropriate, the standard should not be identical to the standard applied to attorneys.

The final rule retains the character and fitness requirement for accreditation. The Department agrees with the commenters who supported the requirement. Accredited representatives should be held to a similar standard of character and fitness as attorneys for the admission to practice law because accreditation allows an individual to provide immigration legal services. The fact that accredited representatives are limited to providing immigration legal services and are required to work through a recognized organization is immaterial because they are permitted to perform a function that is generally limited to attorneys held to the character and fitness standard.

Additionally, the Department does not believe that the character and fitness requirement will create administrative burdens for organizations because organizations would not have to submit the extensive documentation that attorneys submit to obtain admission to a State bar. In fact, the same documents that may be used under the current regulation to show good moral character may be used to show character and fitness. Board of Immigration Appeals, Frequently Asked Questions about the Recognition and Accreditation Program 22 (Sept. 2015), <https://www.justice.gov/eoir/recognition-and-accreditation-faqs/download>. The character and fitness requirement may be satisfied through attestations of the authorized officer of the organization and the proposed representative and letters of recommendation or favorable background checks. 80 FR at 59520. Additional documentation beyond this would only be necessary if the proposed representative has an issue in the proposed representative's record regarding the proposed representative's honesty, trustworthiness, diligence, professionalism, or reliability. 80 FR at 59520 & n.42.

The Department received 29 comments regarding whether immigration status should be considered as a factor in the character and fitness assessment. Twenty-five commenters objected to the use of immigration status as a factor, and three other commenters expressed general concerns about how immigration status as a factor would negatively affect the ability to provide legal services through immigrants or volunteers. The 25 comments in objection generally rejected the proposition that there was an “inherent conflict in having accredited representatives represent individuals before the same agencies before whom they are actively appearing in their personal capacities.” 80 FR at 59520. Seventeen commenters stressed that a representative’s personal immigration experience enhances the representative’s ability to effectively represent others and guide them through the process. Four of the seventeen commenters further noted that they employed accredited representatives who are immigrants and had not witnessed or dealt with any conflict of interest during these representatives’ representation of other immigrants as a result of their own personal immigration experience. Eight commenters stated that attorneys are not restricted from appearing in a professional capacity before courts in which they may have a personal matter pending and that immigrants are not typically excluded from the legal profession because of their immigration status alone. The commenters concluded that individuals should not be excluded from eligibility for accreditation based on their immigration status alone, regardless of whether they have employment authorization, are in removal proceedings, or are recipients of Deferred Action for Childhood Arrivals, because immigration status does not create an inherent conflict. They argued that immigration status is not related to the character and fitness assessment as it has no bearing on an individual’s honesty, trustworthiness, diligence, or professionalism and that considering it would potentially reduce capacity by excluding a segment of individuals who are likely to become representatives.

Six commenters also rejected the proposition that an individual’s immigration status would have any more effect on the continuity of representation than any other factor. They asserted that the same concern could be raised by other circumstances unrelated to immigration status, such as a new job, an illness, or maternity leave.

Two commenters noted that the rule’s goal of increasing capacity would be best served by allowing willing and capable individuals to become accredited representatives, even if they may be unable to represent a client on occasion or to completion of the client’s matter.

Five commenters that opposed immigration status as a factor offered suggestions for dealing with potential conflicts of interest or disruption in representation. One stated that the potential conflicts could be addressed through existing safeguards, such as the Rules of Professional Conduct for Practitioners. Another commenter asserted that potential conflicts should be handled on a case-by-case basis, rather than a categorical rule disqualifying individuals from accreditation. In this same regard, two commenters suggested that if a representative was in active removal proceedings, the representative could withdraw or EOIR could disqualify the representative from cases before the Immigration Judge hearing the representative’s case. The fifth commenter suggested that a representative could name another person to continue the representation if the representative is removed from the United States while representing other persons.

One commenter suggested that immigration status could be a factor in the character and fitness determination, acknowledging that an individual’s immigration status may present a conflict of interest. The commenter stated that the level of immigration status required to satisfy the character and fitness standard depends on an examination of the individual’s employment relationship with the organization, the resources of the organization, and the type of accreditation sought.

After considering the comments received, the Department has determined that no change will be made to the proposed rule and that immigration status may be considered as a factor in the character and fitness determination for accreditation in certain circumstances. See final rule at 8 CFR 1292.12(a)(1). The Department recognizes that individuals who have been through the immigration system can provide valuable insight and assistance to others going through the system. However, as with any applicant for accreditation, not all individuals are fit to be accredited by the Department to provide immigration legal services. The Department has and will continue to consider issues relating to immigration status in determining whether an

immigration practitioner is fit to appear before DHS and EOIR.⁵ Thus, the Department will make case-by-case assessments regarding accreditation, but as suggested by some commenters, the Department will likely not accredit individuals who are in active deportation, exclusion, or removal proceedings or who have been issued a notice of intent to revoke or terminate an immigration status (or other relief) until the matter is concluded.⁶ In these circumstances, the Department, through OLAP, will make the case-by-case assessment of whether an individual’s immigration status presents an actual or perceived conflict of interest after such information arises that calls into question the individual’s fitness to appear as a representative and, as the rule provides, the organization is given the opportunity to respond to the information. Similarly, individuals who are under an order of removal will generally not be eligible for accreditation unless they have received, for example, temporary protected status or Deferred Enforced Departure.⁷ The rule, however, does not require an organization to present proof of any immigration status during the application process.⁸

b. Employee or Volunteer

The Department received four comments on the requirement that a proposed representative for accreditation be an employee or volunteer of an organization so that the representative would be subject to the direction and supervision of the organization. The four comments all supported the requirement and stressed that the rule’s explicit permission for volunteers to become accredited representatives would help increase capacity.⁹ The final rule retains without

⁵ See, e.g., *Matter of Ravindra Singh Kanwal*, D2009–053 (OCIJ July 8, 2009), and *Matter of Noel Peter Mpaka Canute*, D2010–124 (OCIJ Mar. 16, 2011), available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/03/CanuteMpakaNoelPeter_FinalOrder.pdf (last visited June 28, 2016).

⁶ For purposes of this rule, individuals whose proceedings have been administratively closed would not be considered to be in active proceedings.

⁷ This restriction does not apply to individuals who have been granted withholding of removal pursuant to 8 U.S.C. 1231(b)(3) or the Convention Against Torture, although under an order of removal.

⁸ We note that when an accredited representative is an employee of the organization, the organization has an independent obligation to verify that its accredited representative employee is authorized to work in the United States. 8 U.S.C. 1324a; see also 80 FR at 59520 n.43. Therefore, the Department will not consider employment authorization in its character and fitness assessment.

⁹ UFW Foundation, although in agreement with the employee/volunteer requirement, suggested that

change the requirement that the proposed representative be an employee or volunteer of an organization to be accredited. *See* final rule at 8 CFR 1292.12(a)(2).

c. No Attorneys, No Orders Restricting Practice of Law or Representation, No Serious Crimes

The Department received three comments on the provision that precludes attorneys, individuals under an order restricting their practice of law, and individuals convicted of a serious crime from being accredited. The first comment supported the restriction from accreditation of attorneys and those under an order restricting their practice of law. The other comments objected to the bar to accreditation of an individual convicted of a serious crime because it conflicts with the character and fitness requirement and may prevent otherwise qualified individuals from becoming accredited.

The final rule does not change the restriction against accreditation of attorneys, individuals under an order restricting their practice of law, and individuals convicted of a serious crime. *See* final rule at 8 CFR 1292.12(a)(3)–(5). Regarding those convicted of a serious crime, this prohibition supplements the character and fitness requirement, as the Department has determined that individuals with serious crimes are not qualified to be accredited. Unlike with attorneys permitted to appear before EOIR and DHS, the Department has the authority to decide whether non-lawyers should be accredited and permitted to provide immigration legal services in the first instance and need not be limited to pursuing discipline against them based on a serious crime after they have been accredited.

3. Applying for Recognition and Accreditation

The Department received four comments related to the provisions governing the application process for

the rule should permit an individual to become an accredited representative even though that individual may not be an employee or volunteer of an organization provided that the individual has adequate supervision and direction from a recognized organization. UFW Foundation posited that this circumstance would likely occur in rural communities where two organizations partner—one provides legal oversight and supervision and the other provides staff and space—in order to create a legal service infrastructure that neither could provide alone. The rule does not directly address such a circumstance, and as a result, contrary to UFW Foundation's assertion, it may be permissible in some form. For instance, a recognized organization may be able to extend its recognition and provide legal services through its own accredited representative at a location of another non-recognized organization.

recognition and accreditation. The four comments conveyed general support for the application process but expressed some concerns. One commenter stated that EOIR should have a formal process for training and communicating with United States Citizenship and Immigration Services (USCIS), Department of Homeland Security, regarding its role in the recommendation process for recognition and accreditation. Relatedly, another commenter stated that the process for service on the USCIS district director in the jurisdictions where the organization offers or intends to offer legal services should be simplified. This commenter asserted that the current EOIR Form-31 only has space to indicate service on one USCIS district director and suggested that service should be limited to the USCIS district director who is located in the jurisdiction of the proposed representative's primary office. This commenter also requested that a list of contact information for USCIS district directors be made available. Two commenters asserted seemingly opposing concerns about the length of the application process due to the ability of OLAP to request more information from an organization in order to avoid adverse determinations. One commenter worried that the procedure could lead to increased processing times, whereas the other commenter suggested that organizations should have at least 90 days to respond to requests for information.

The final rule adopts the application procedures as proposed, except for changes that allow an organization to request reconsideration of a disapproved request,¹⁰ and that permit OLAP to allow requests, notifications, recommendations, and determinations in the application process to be done electronically.¹¹ *See* final rule at 8 CFR 1292.13(a). As mentioned above, the Department intends upon publication of the final rule to engage in significant education and outreach with government stakeholders like USCIS so that they are aware of its implementation and their role in the process. The Department has not amended the service procedure in the final rule, as recommendations from all USCIS offices where an organization provides or intends to provide services ensures consideration of the greatest possible amount of information about an

¹⁰ *See infra* section III.F. (“Request for Reconsideration and Administrative Review”) (discussing requests for reconsideration).

¹¹ *See infra* section III.E. (“Recognition and Accreditation for Practice Before DHS”) (regarding electronic requests, notifications, recommendations, and determinations).

organization and its proposed representatives. The updated EOIR Form-31 for recognition-related requests and EOIR Form 31–A for accreditation requests should simplify the procedure for service, as they include several lines to indicate service has been made on multiple USCIS offices. The Department will also publicize a list of USCIS offices that is readily available.¹² The Department has not included a specified time period for organizations to respond to a request for information from OLAP, but OLAP will ensure that the response times are reasonable. *See* 80 FR at 59521 n.54 (stating that EOIR intends to regularly make available average processing time for recognition and accreditation applications). Additionally, for timely-filed requests for renewal, the recognition of an organization and the accreditation of representatives remain valid pending OLAP's consideration of the renewal request. *See* final rule at 8 CFR 1292.16(b)(3). Accordingly, the processing times for renewal requests will not prejudice organizations or their representatives.

4. Extending Recognition and Accreditation

The Department received 20 comments regarding the provision that permits OLAP the discretion to extend an organization's recognition and the accreditation of its representatives from a headquarters or other designated office to other offices or locations where the organization provides immigration legal services. Nineteen commenters overwhelmingly supported this provision as a means of increasing capacity and reducing the administrative burden on organizations to file a separate application for recognition and accreditation at each location offering legal services. One commenter opposed the provision, unless an organization had attorney supervision of its accredited representatives.¹³ The final rule adopts the provision as proposed and adds that OLAP may permit requests for extension of recognition and accreditation and determinations on the requests to be made electronically. *See* final rule at 8 CFR 1292.15.

¹² *See* USCIS Office of Public Engagement, *USCIS District Offices* (Dec. 2011), available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/December%202011/District%20Office%20Mailing%20Addresses.pdf> (last visited Feb. 29, 2016).

¹³ *See supra* section III.B.1.f. (“Knowledge and experience”) (stating that attorney supervision is encouraged but not required to be recognized).

5. The Validity Period, Renewal of Recognition and Accreditation

Twenty-one commenters provided input regarding the three-year validity period for both recognition and accreditation and renewal thereof. The commenters generally supported or did not mention the three-year validity period and renewal process for accredited representatives. Instead, the comments were directed in opposition to the three-year validity period for recognition and concurrent renewal of recognition and accreditation. The commenters generally did not oppose a validity period and renewal process for recognized organizations in order to improve oversight, but they contended that the proposed three-year period was too short and recommended a period of up to nine years. They claimed that the three-year period was unnecessarily burdensome in that organizations do not change in substantial ways in a three-year period and because the renewal process would require organizations to shift resources away from providing immigration legal services in order to comply with the renewal requirements, such as the annual report. The commenters noted that the burden would be compounded because organizations and their representatives would have to seek renewal concurrently every three years. The commenters also asserted that concurrent renewal of recognition and accreditation may serve as a disincentive to apply for accreditation if the organization's recognition period was set to expire in a short period of time. The majority of commenters urged the Department to un-link the validity periods for recognition and accreditation and to provide a longer validity period for recognized organizations.

After considering the comments, the Department has decided to retain the three-year validity period for accredited representatives but to modify the validity period for recognized organizations. *See* final rule at 8 CFR 1292.12(d); 8 CFR 1292.11(f). Under the final rule, recognition will be valid for a period of six years, unless the organization has been granted conditional recognition, which is valid only for two years, or the organization has its recognition administratively terminated or is disciplined (through revocation or termination) prior to the conclusion of its recognition period. *See* final rule at 8 CFR 1292.11(f). An organization's six-year recognition period would run independently of the three-year period of accreditation for its

representatives.¹⁴ Therefore, organizations and their representatives will seek renewal of recognition and accreditation separately at the conclusion of their respective recognition and accreditation cycles. *See* final rule at 8 CFR 1292.16(b).

The final rule retains the renewal process for recognized organizations and accredited representatives, except for changes that allow an organization to request reconsideration of a disapproved request,¹⁵ and that authorize OLAP to allow requests, notifications, recommendations, and determinations in the application process to be made electronically.¹⁶ *See* final rule at 8 CFR 1292.16.

6. Organizations and Representatives Recognized and Accredited Prior to the Effective Date of the Final Rule

The Department received three comments regarding the provision governing when organizations and representatives recognized and accredited prior to the effective date of this final rule would have to seek renewal. The three comments generally opposed the provision that required recognized organizations without an accredited representative on staff at the effective date of the final rule to seek renewal and comply with the accredited representative requirement within one year of the effective date of the rule. These commenters also stated that the requirement that an organization would have to seek renewal of its recognition and the accreditation of its representatives if they sought to extend recognition to an additional office or location or to accredit a new representative would cause organizations to refrain from either action and discourage capacity building.

The final rule, as discussed above, retains the requirement that recognized organizations without an accredited representative on staff at the effective date of the final rule request renewal within one year of the effective date of the rule.¹⁷ *See* final rule at 8 CFR 1292.16(h)(2)(i). However, the Department agrees with the commenters

and has removed the provision requiring renewal for all other organizations recognized at the effective date of the final rule if they seek extension of recognition or accreditation of a new representative. Consistent with the changes made elsewhere in the final rule, renewal of organizations and representatives recognized and accredited prior to the effective date of the rule has been de-coupled. Such organizations will only be subject to the renewal timelines as proposed and maintained in the final rule. *See* final rule at 8 CFR 1292.16(h)(2)(ii), (iii). Accredited representatives, on the other hand, will have to seek renewal at the expiration of their three-year accreditation period under the current regulation. *See* final rule at 8 CFR 1292.16(h)(3).

7. Conditional Recognition

The Department received 12 comments regarding the proposed rule's provision for conditional recognition of organizations that have not been previously recognized or that are recognized anew after having lost recognition due to an administrative termination or disciplinary sanctions. Conditional recognition provides a probationary period and requires the specified organizations to apply for renewal within two years of the date that OLAP granted conditional recognition. The Department specifically asked for public comment on conditional recognition and whether conditionally recognized organizations would be able to remove the conditional status after one year instead of two.

Eleven commenters generally supported the provision, but the majority of these commenters wanted to exclude established, federally tax-exempt non-profit organizations that were adding immigration legal services to their service portfolio from conditional recognition. They sought to limit conditional recognition to organizations with pending Federal tax-exempt status and organizations reapplying after an administrative termination or disciplinary sanctions. One commenter in support of the provision stated that the public may view the designation of conditional recognition as a sign of mistrust or lack of ability, whereas another suggested that the time period for renewal should be shortened from two years to 18 months. The dissenting comment stated that conditional recognition was an unnecessary administrative burden and that all organizations should be treated equally.

The final rule adopts the conditional recognition provision as proposed and

¹⁴ *See supra* section III.B.1.a. ("Accredited representative required & inactive status") (addressing accredited representative requirement and inactive status).

¹⁵ *See infra* section III.F. ("Request for Reconsideration and Administrative Review") (discussing requests for reconsideration).

¹⁶ *See infra* section III.E. ("Filings and Communications") (regarding electronic requests, notifications, recommendations, and determinations).

¹⁷ *See supra* section III.B.1.a. ("Accredited representative required & inactive status") (discussing accredited representative required requirement).

adds as clarification that it also applies to organizations whose Federal tax-exempt status is pending at the time of recognition. See final rule at 8 CFR 1292.11(f). While the Department appreciates the thoughtful comments on this issue, it has determined that because the final rule provides a six-year renewal period for established recognized organizations,¹⁸ a two-year initial renewal period is appropriate for organizations that have not been previously recognized, whose Federal tax-exempt status is pending at the time of recognition, or that have been previously administratively terminated or subject to disciplinary sanctions. These organizations, regardless of their history as non-profits, must show within two years of recognition that they can maintain the qualifications for recognition and establish a track record of offering immigration legal services through accredited representatives without issue. Any organization that has been conditionally recognized will not be identified as such on the R&A roster; rather, the roster will show that the organization's renewal date is in two years rather than six.

8. Reporting, Recordkeeping, and Posting Requirements

The Department received 16 comments related to the reporting, recordkeeping, and posting requirements imposed on organizations by the proposed rule. One commenter supported all three requirements. Three other commenters stated their agreement with the posting requirement and none dissented. Seven commenters addressed the reporting requirements and stated general support for the duty to report changes. Six of these commenters, however, requested that the number and type of changes that need to be reported should be limited to changes that affect the R&A roster and that electronic submission of the changes should be permitted. The other commenter stated that changes should be reported in an annual report, unless OLAP requests an update at an earlier date. Fourteen commenters asserted concerns regarding the recordkeeping requirements. All of these commenters voiced concerns regarding the annual report because it would create a new burden in time and money for organizations and shift resources away from the provision of legal services. Some of the commenters stated that they do not currently track the information

requested in the proposed rule for the annual report and that recordkeeping should be limited to documents that organizations already maintain, such as fee schedules, tax filings, and annual budgets. One commenter suggested that if the annual report would be required under the final rule, it should concern the immigration legal services of the organization as a whole. Eight of the commenters urged the Department to consider whether organizations should be required to compile and submit annual reports and fee schedules at the time of renewal. They recommended that organizations should only be required to submit such documentation with cause or while under investigation.

The final rule adopts the posting requirement as proposed, see final rule at 8 CFR 1292.14(c), but amends the reporting and recordkeeping requirements. The final rule revises the duty to report to permit electronic notification of changes to be submitted to OLAP. See final rule at 8 CFR 1292.14(a). The Department has not otherwise modified the scope or timing of the duty to report because the scope has been appropriately limited to changes in information that would be listed on the R&A roster or that would affect an organization's or representative's eligibility to be recognized or accredited. Due to the nature of these types of changes, they must be reported promptly. 80 FR at 59524. The Department believes that 30 days will generally constitute prompt notification.

The final rule revises but does not remove the recordkeeping requirement. See final rule at 8 CFR 1292.14(b). The Department understands the concerns raised by commenters regarding the recordkeeping requirement—in particular the annual report—but has retained the requirement because it provides OLAP with a means to monitor organizations and ensure compliance with the recognition requirements. An organization's annual report on the services provided assists in the evaluation of whether a recognized organization is actually providing immigration legal services and is a non-profit primarily serving low-income and indigent clients. Nonetheless, based on the comments received, the final rule renames the annual report as the “annual summary of immigration legal services provided” to avoid confusion with other annual reports that organizations may prepare. More significantly, the information required to be submitted is more concise and has shifted to a focus on the legal services provided by the organization as a whole, rather than by its accredited

representatives individually. The annual summary of immigration legal services provided must include: The total number of clients served (whether through client intakes, applications prepared and filed with USCIS, cases in which the organization's attorneys or accredited representatives appeared before the Immigration Courts or, if applicable, the Board, or referrals to attorneys or other organizations) and clients to which it provided services at no cost; a general description of the immigration legal services and other immigration-related services (*e.g.*, educational or outreach events) provided; a statement regarding whether services were provided pro bono or clients were charged in accordance with a fee schedule and organizational policies or guidance regarding fee waivers and reduced fees; and a list of the offices or locations where the immigration legal services were provided. The summary may include the total amount of fees, donations, and membership dues, if any, charged or requested of immigration clients. Organizations likely have such information for their own purposes because it tracks the work that they perform and it is information that they likely provide to funders and donors. If organizations do not compile such information presently, it should not be difficult to start because of its general nature. For organizations recognized at the time of the effective date of this rule, information would only be requested from the effective date of the rule (*i.e.*, January 18, 2017).

C. Administrative Termination of Recognition and Accreditation

The Department received nine comments on the provision regarding administrative termination of recognition and accreditation. Six commenters generally supported the administrative termination provision as a means for removing an organization or representative from the R&A roster for administrative, non-disciplinary reasons. However, these commenters recommended several changes to the provision. They stated that the OLAP Director should request information from an organization, representative, DHS, or EOIR prior to terminating recognition or accreditation. They also expressed concern that termination of recognition would lead to termination of a representative's accreditation and asserted that the representative should be given a limited amount of time to transfer to another recognized organization so that clients would not lose representation. Likewise, the commenters stated that an organization

¹⁸ See *supra* section III.B.5 (“The Validity Period, Renewal of Recognition and Accreditation”) (discussing validity period of recognition and accreditation).

should be placed on inactive status and given time to find a new representative if its only accredited representative is terminated, rather than have its recognition terminated, so that it would not have to go through the process of seeking recognition anew when it found a new individual to be accredited.

One of the three remaining commenters stated that the Board should have authority for administrative termination of recognition and accreditation, instead of OLAP, because of the opportunity for a hearing. The two other commenters asserted that accreditation should only be terminated if there is an adverse determination.

The Department has adopted the administrative termination provision of the proposed rule, except as modified to accommodate the changes made in relation to the request for reconsideration and inactive status provisions added to the rule and discussed above. The Department has not amended the regulatory text to require that the OLAP Director request information from an organization, representative, DHS, or EOIR prior to terminating recognition or accreditation because not all grounds for termination require OLAP to contact anyone. For example, if an organization or representative voluntarily requests termination of their recognition or accreditation, OLAP has no reason to contact the organization for further information. However, the Department notes that the rule specifically requires the OLAP Director to contact the organization and provide it with the opportunity to respond to certain deficiencies affecting eligibility for recognition or accreditation prior to determining whether to issue a termination notice. 80 FR at 59525; *see also* final rule at 8 CFR 1292.17(b)(5), (6), (c)(6).

The final rule addresses the concern that an organization could be administratively terminated through the inactive status provision added to the final rule and discussed above. The final rule, however, does not make any changes regarding the administrative termination of accreditation where the representative's organization has its recognition terminated. Accreditation is dependent on the supervision and resources of a recognized organization, and an accredited representative should not be permitted to maintain accreditation, even if time limited, if the representative no longer has a connection to a recognized organization.

D. Sanctioning Recognized Organizations and Accredited Representatives

The Department received four comments regarding the rule's updates and additions to the disciplinary process, from three non-profit organizations and one bar association. Three of the commenters stated their general support for the provisions. The fourth commenter also expressed general agreement with the provisions but inquired into some aspects. In particular, the commenter stated that the rule adds a ground for organizational discipline for failure to adequately supervise its accredited representative but was unclear as to whether the EOIR disciplinary counsel or OLAP would be required to share complaints, warning letters, admonitions, or agreements in lieu of discipline in order to put the organization on notice of a representative's conduct and give it the opportunity to remedy the conduct. The commenter also inquired into the standards that would be applied to determining the appropriate sanction for organizations and suggested that the rule should impose a time period during which an adjudicating official would have to render a decision on a petition for an interim suspension due to the urgency of the possible situation.

The Department has adopted the changes to the disciplinary provisions set forth in the proposed rule, except for the modifications discussed above regarding inactive status and below regarding a drafting error about reinstatement in the proposed rule. The Department acknowledges that the rule does not require the EOIR disciplinary counsel or OLAP to share information about accredited representatives with their organizations but clarifies that the EOIR disciplinary counsel will provide an organization with notice prior to taking disciplinary action against an organization for failure to supervise. 80 FR at 59526; *see also* final rule at 8 CFR 1003.108(b). The rule also does not prescribe standards for the application of sanctions to organizations but would apply the same flexible framework that is applied to immigration practitioners when determining the level of sanction. Generally, adjudicators examine the type of misconduct that occurred, whether it was done intentionally, knowingly, or inadvertently, the harm caused, and any aggravating or mitigating factors.¹⁹ Finally, although

¹⁹ *See* ABA, *Standards for Imposing Lawyer Sanctions* (1992); *see, e.g., Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005) (finding that expulsion was an

the rule also does not impose a time period for an adjudicator's decision on a petition for interim suspension so as to not interfere with the adjudicator's discretion, it would be expected that a decision would be issued within a reasonable period of time based on the nature of the petition.

E. Filings and Communications

Six commenters recommended that the Department facilitate the duty to report changes by permitting electronic submissions. The Department agrees that electronic filings and communications would be beneficial. EOIR is considering, in the future, permitting the electronic submission of a wide range of documents related to the R&A program. Such documents could include: Requests for recognition and accreditation, renewal, and extension of recognition and accreditation; responses to inquiries and notices from EOIR; recommendations from DHS and the EOIR disciplinary counsel and anti-fraud officer, and responses thereto; reports and notifications of changes in organization information or status; and complaints against recognized organizations and accredited representatives. EOIR is also considering communicating electronically with prospective and current organizations, DHS, and the EOIR disciplinary counsel and anti-fraud officer. EOIR may electronically transmit documents such as: Decisions to approve or disapprove requests for recognition and accreditation, renewals, extensions of recognition and accreditation, extension of time requests; inquiries to organizations for additional information or disclosing unfavorable information; and determinations regarding inactive status and administrative termination of recognition and accreditation. In anticipation of such electronic filings and communications, the Department has revised §§ 1292.13(a), 1292.14(a), 1292.15, 1292.16(e), 1292.17(a), (d), (e), and (f), and 1292.18(a). No notice-and-comment period is required for the revisions described in this paragraph, as they pertain to "agency organization, procedure, or practice" under 5 U.S.C. 553(b).

F. Request for Reconsideration and Administrative Review

The proposed rule solicited comments on whether an opportunity for administrative review should be provided for adverse OLAP determinations regarding recognition

appropriate sanction based on his disbarment from a state bar due to extensive unethical conduct).

and accreditation, given that the prior regulation also had no such procedures. The solicitation further inquired as to the extent to and contexts in which such review should be provided, if it was deemed necessary. The Department received 10 comments, which all stated general support for an additional review process.

Five commenters supported an appeal process for denied recognition and accreditation applications but provided no further explanation. One commenter suggested an appeal process for disapproved recognition and accreditation requests in order to provide additional information to overcome the disapproval or to identify information overlooked in requests that should have been approved. The commenter asserted that organizations should have 45 days to submit an appeal and that the process should be a prompt review, rather than the three or four months that it would take to reach a determination on a re-filed request. Similarly, a commenter stated that an appeal process for disapproved applications should only be established if it can avoid re-filing of requests for issues that can be fixed easily and it is less burdensome than the initial process for requests for recognition and accreditation. Another commenter suggested that the administrative review or appeal process should be completed within 60 days.

Two commenters requested an administrative review process before the Board in the administrative termination context. Both commenters were concerned about terminations that may occur as organizations adjust to the new requirements of this rule or due to errors in eligibility determinations. One of these commenters recommended that organizations retain recognition during the review process.

The final rule adopts the provisions of the proposed rule that afford an applicant an opportunity to be heard before the issuance of a determination on an initial or renewal application for recognition and accreditation or a determination on administrative termination based on deficiencies regarding the requirements for recognition or accreditation or reporting, recordkeeping, and posting. See final rule at 8 CFR 1292.13(a); 8 CFR 1292.16(e); 8 CFR 1292.17(b)(5), (b)(6), (c)(6). In keeping with the spirit and purpose of this rule to maintain and increase capacity, OLAP will take these opportunities to engage with organizations in order to limit adverse determinations so the concerns about adverse determinations arising from organizations being unable to adjust to

the new requirements are unlikely. Nevertheless, the Department realizes that adverse determinations are likely to occur and that organizations may have the ability to correct any deficiencies that led to the adverse determination or otherwise point to an error in the determination. For these situations, the final rule adds further review in the form of a 30-day request for reconsideration of the OLAP Director's final determinations at 8 CFR 1292.13(e), 1292.16(f), and 1292.17(d). The filing of a request for reconsideration automatically stays the OLAP Director's determination until a decision issues on the reconsideration request and allows recognized organizations and its accredited representatives to continue to provide immigration legal services during the reconsideration process. The reconsideration process should provide for a faster decision-making process and avoid the need for organizations to go through the potentially lengthy request process anew to correct the types of simple errors or issues raised by the commenters.

Additionally, the final rule provides that organizations whose requests for reconsideration are denied may seek administrative review by the Director of EOIR. See final rule at 8 CFR 1292.18. This provision responds to concerns that OLAP would be the sole decision-maker regarding recognition and accreditation and that another entity should be able to review OLAP's decisions. Like with requests for reconsideration, a request for administrative review stays the OLAP Director's determination until a decision issues on the review request and allows recognized organizations and their accredited representatives to continue to provide immigration legal services during the review process. See *id.* at 1292.18(a)(3).

G. Recognition and Accreditation for Practice Before DHS

As the Department stated in the proposed rule, as of the effective date of this final rule, EOIR will apply the standards and procedures for recognition and accreditation set forth in this rule governing EOIR's activities, not the DHS regulations set forth in 8 CFR part 292. In addition, DHS has informed the Department that it plans to publish a rule relating to the same subject matter. Until DHS revises 8 CFR part 292 to conform its recognition and accreditation provisions with this final rule, the regulations codified in this rule will govern to the extent that they are inconsistent with those DHS regulations.

IV. Other Revisions

The final rule adds paragraph (b)(3) to 8 CFR 1003.107. This paragraph explains the decisions the Board may make in the early reinstatement context and was inadvertently omitted in the proposed rule. It is substantially similar to paragraph (b)(2) in the same section of the current regulation at 8 CFR 1003.107.

V. Notice and Comment

The revisions to the proposed rule do not require a new notice-and-comment period. The revisions pertaining to electronic filings and communications, at §§ 1292.13(a), 1292.14(a), 1292.15, 1292.16(e), and 1292.17(a), (d), (e), and (f), pertain to "agency organization, procedure, or practice" under 5 U.S.C. 553(b). The Department has "good cause" under 5 U.S.C. 553(b) to add paragraph (b)(3) to 8 CFR 1003.107 because it is substantially similar to paragraph (b)(2) in the same section of the current regulation. The other provisions are logical outgrowths of those in the proposed rule. See, e.g., *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851–52 (9th Cir. 2003); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

VI. Regulatory Requirements

A. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

Currently, there are almost 1,000 recognized organizations and more than 1,900 accredited representatives. This rule seeks to increase the number of recognized organizations and accredited representatives that are competent and qualified to provide immigration legal services primarily to low-income and indigent persons. The Department, however, cannot estimate with certainty the actual increase in the number of recognized organizations and accredited individuals that may result from the rule. That figure is subject to multiple external factors, including changes in immigration law and policy and fluctuating needs for representation and immigration legal services.

While EOIR does not keep statistics on the size of recognized organizations, many of these organizations and their accredited representatives may be classified as, or employed by, "small entities" as defined under 5 U.S.C. 601. In particular, recognized organizations, which are by definition non-profit entities, may also be classified as "small

organizations” and thus, as “small entities” under section 601.

Although the exact number of recognized organizations that may be classified as “small entities” is not known, the Department certifies that this rule will not have a significant economic impact on a substantial number of these entities. The rule, like the prior regulations, does not assess any fees on an organization to apply for initial recognition or accreditation, to renew recognition or accreditation, or to extend recognition.

The Department, however, acknowledges that organizations may incur some costs to apply for recognition or accreditation, renew recognition or accreditation, or extend recognition. Based on the most recent Bureau of Labor Statistics reports that state the median hourly wage for lawyers is \$64.17, and the average burden hours to apply for recognition or accreditation, renew recognition or accreditation, or extend recognition, discussed below in the Paperwork Reduction Act section, *see infra* section VI.G, and in the proposed rule, the Department estimates the costs as follows. If an organization hires a lawyer to assist with the application process, the organization would incur costs of approximately \$128.34 to apply for initial recognition (\$64.21 hour × 2 hours); \$449.16 to renew recognition (\$64.17 hour × 7 hours), and \$128.34 to apply for or to renew accreditation (\$64.21 hour × 2 hours). For organizations that prepare their applications without a practitioner, there is an estimated cost of \$10 per hour for completing the form (the individual’s time and supplies) in lieu of the attorney cost such that those organizations would incur costs of approximately \$20.00 to apply for initial recognition (\$10.00/hour × 2 hours), \$70.00 to renew recognition (\$10.00/hour × 7 hours), and \$20.00 to apply for or to renew accreditation (\$10.00/hour × 2 hours).

The Department also recognizes that the rule imposes a new recordkeeping requirement on recognized organizations to compile and maintain fee schedules, if the organization charges any fees, and annual summaries of immigration legal services for a period of six years. However, the Department does not believe that the recordkeeping requirement will have a significant economic impact on recognized organizations. The annual summaries, as modified by this final rule, would be compiled from information already in the possession of recognized organizations, and based on the estimates from the Paperwork

Reduction Act section below, the Department estimates that it would cost an organization approximately \$64.21 per year to have a lawyer compile the annual summary, and \$10.00 per year for a non-lawyer to do so.²⁰ Maintaining the fee schedules and annual summaries after their creation for six years should not impose a significant economic impact on recognized organizations because such records may be retained in the normal course of business like other records, such as client files, that organizations are obligated to retain for State or Federal purposes.

Despite the costs mentioned above, the Department notes that the rule may economically benefit recognized organizations. The rule eliminates the requirement that recognized organizations assess only “nominal charges” for their immigration legal services. The final rule shifts the primary focus of eligibility for recognition from the fees an organization charges its clients to an examination of whether it is a non-profit religious, charitable, social service, or similar organization that primarily serves low-income and indigent clients. This change is intended to provide organizations with flexibility in assessing fees, which should improve their financial sustainability and their ability to serve more persons.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. As discussed in the certification under the Regulatory Flexibility Act, organizations and representatives will not be assessed a fee to either apply for or seek renewal of recognition and accreditation, and the burden of seeking renewal of recognition has been reasonably mitigated. The Department recognizes, however, that the rule’s elimination of the “nominal charges”

restriction may affect competition and employment in the market for legal services because a recognized organization could charge higher fees (but less than market rates) to clients. The rule balances the elimination of the “nominal charges” restriction by also requiring that non-profit organizations primarily serve low-income and indigent persons. Legal fees charged by a non-profit organization are expected to be at a rate meaningfully less than the cost of hiring competent private immigration counsel in the same geographic area. Accordingly, this rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The rule is considered by the Department to be a “significant regulatory action” under section 3(f)(4) of Executive Order 12866. Accordingly, the regulation has been submitted to the Office of Management and Budget (OMB) for review.

The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The rule seeks to address the critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before Federal administrative agencies. Specifically, the rule would revise the eligibility requirements and procedures for recognizing organizations and accrediting their representatives to provide immigration legal services to underserved populations. To expand the availability of such legal services, the rule permits recognized organizations to extend their recognition and the accreditation of their representatives to

²⁰ Note that the total average burden (and cost) for renewing recognition includes the burden (and cost) of compiling six annual summaries of immigration legal services provided.

multiple offices or locations and to have flexibility in charging fees for services. The rule also imposes greater oversight over recognized organizations and their representatives in order to protect against potential abuse of vulnerable immigrant populations by unscrupulous organizations and individuals.

The rule will greatly benefit organizations, DHS, EOIR, and most importantly, persons who need legal representation in immigration matters. The rule is expected to increase the availability of competent and qualified legal representation in underserved areas and particularly for indigent and low-income persons for whom there is an ongoing and critical shortage of such representation. For example, the elimination of the nominal fee restriction will allow organizations the flexibility to assess fees so that organizations will be able to sustain their operations and potentially expand them to serve more persons. In addition, the extension of recognition and accreditation to multiple offices or locations will permit organizations and their representatives, through mobile or technological means, to reach underserved persons who may currently have difficulty finding legal representation in remote or rural locations. These two provisions will greatly increase legal representation for persons in administrative cases before EOIR and DHS, and in turn, will substantially aid the administration of justice.

The rule will provide EOIR with greater tools to manage and oversee the recognition and accreditation program. The rule requires organizations to renew their recognition every six years and the accreditation of their representatives every three years, and it imposes limited reporting, recordkeeping, and posting requirements on the organizations. The Department acknowledges that the new oversight provisions impose some burdens on organizations. However, the burdens on the organizations are necessary to protect vulnerable immigrant populations from unscrupulous organizations and individuals and to legitimize reputable organizations and representatives.

Although the renewal requirement adds a new burden on recognized organizations, the Department has reasonably mitigated this burden. The rule maintains the same three-year renewal period for accredited representatives as under the current regulations and only requires organizations to seek renewal of recognition every six years. Also, at renewal, organizations would not be required to submit documentation

previously submitted at initial recognition or accreditation, unless there have been changes that affect eligibility for recognition or accreditation. Organizations would only have to submit documentation that would support renewal of recognition and accreditation. The information and documentation required to renew recognition and accreditation should be in the possession of the organization in the normal course of its operations.

The reporting requirement expands the reporting obligation of organizations under the current regulations, which only require organizations to report changes in the organization's name, address, or public telephone number, or in the employment status of an accredited representative. This final rule expands the current requirement so as to include any changes that would affect the organization's recognition (such as a merger), or a representative's accreditation (such as a change in the representative's name). The reporting requirement should not impose a significant cost to organizations because organizations may comply with the requirement by simply contacting EOIR to report such changes.

The recordkeeping requirement will primarily aid EOIR in evaluating an organization's request to renew recognition. The recordkeeping requirement requires an organization to compile fee schedules, if it charges any fees, and annual summaries of immigration legal activities, and maintain them for a period of six years. The recordkeeping requirement is not unduly burdensome, as modified by the final rule, because organizations should have such information in their possession, and the six-year record retention requirement is consistent with the organization's obligation to retain records, such as client files, for State or Federal purposes.

The posting requirement will require organizations to post public notices about the approval period of an organization's recognition and the accreditation of its representatives, the requirements for recognition and accreditation, and the process for filing a complaint against a recognized organization or accredited representative. EOIR will provide the notices to the organizations, and the organizations should not incur any tangible costs for the minimal burden of posting the notices. In fact, the public notices should greatly benefit organizations because the notices will legitimize organizations and notify the public that they are qualified to provide immigration legal services.

As detailed above in section VI.A ("Regulatory Flexibility Act"), and below in section VI.G ("Paperwork Reduction Act"), EOIR anticipates that if an organization hires a lawyer to assist with the application process, the organization will incur costs of approximately \$128.34 to apply for initial recognition, \$449.16 to renew recognition, and \$128.34 to apply for or to renew accreditation. If an organization prepares its applications on its own, the organization will incur costs of approximately \$20.00 to apply for initial recognition, \$70.00 to renew recognition, and \$20.00 to apply for or to renew accreditation.

E. Executive Order 13132: Federalism

This rule may have federalism implications but, as detailed below, 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.

The rule, like the current regulations it would replace, permits non-lawyer accredited representatives to provide immigration legal services in administrative cases before EOIR and DHS. The provision of immigration legal services by non-lawyers may constitute the unauthorized practice of law under some State laws and rules prohibiting the unauthorized practice of law. However, the Supreme Court's decision in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), provides that Federal agency laws and regulations authorizing the practice of law in administrative cases before Federal agencies preempt conflicting State laws that would otherwise prohibit authorized representatives from participating in those Federal administrative cases.²¹ This principle has long been applicable with respect to accredited representatives providing representative services in administrative cases before EOIR and DHS.

Despite the preemptive effects of this rule, the federalism implications are minimal. The rule merely updates the current, well-established regulations permitting non-lawyer accredited representatives to provide immigration legal services in administrative cases before EOIR and DHS. The rule does not alter or extend the scope of the limited authorization to provide immigration

²¹ *Sperry* held that a statute and implementing regulation authorizing non-lawyers to practice before the Patent Office preempted a contrary state law prohibition on the unauthorized practice of law to the extent that the state law prohibition was incompatible with the Federal rules. See 373 U.S. at 385.

legal services before Federal administrative agencies provided under the current regulations. In addition, following *Sperry*, States have expressly determined that non-lawyers providing immigration legal services before EOIR and DHS does not constitute the unauthorized practice of law under their State laws and rules.²²

Under these circumstances, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The Department received two comments in relation to its requests under the Paperwork Reduction Act (PRA) of 1995 to revise the currently approved information collections contained in this rule: (1) The form for non-profit religious, charitable, or social service organizations to apply for recognition (Form EOIR-31); (2) the form for recognized organizations to apply for accreditation of non-attorney representatives (Form EOIR-31A); and (3) the form for filing a complaint against an immigration practitioner (Form EOIR-44). These information collections were previously approved by OMB under the provisions of the PRA, and the information collections were assigned OMB Control Numbers 1125-0012 (EOIR-31), 1125-0013 (EOIR-31A), and 1125-0007 (EOIR-44). The Department requested revisions to these information collections based on the proposed rule regarding the R&A program.

The two commenters addressed the estimated average time to apply for recognition and accreditation using the Form EOIR-31 and Form EOIR-31A. One commenter asserted that under the prior regulations it took an organization about 10 hours to prepare a Form EOIR-31. The other commenter stated that under the prior regulations, organizations needed three to four hours to prepare and complete a Form EOIR-

31 or a Form EOIR-31A. The commenter acknowledged that most of the additional documentation required under the rule was standard non-profit documentation but that renewal of recognition under the proposed rule would require an additional amount of time because the annual report (in the final rule now called the summary of immigration legal services provided) was not routinely prepared by all organizations. The commenter estimated that the proposed annual report would take three to four hours to prepare each year. Based on the Department's amendments to the final rule as discussed in section III above and the two comments discussed here, the Department has made changes to the final Form EOIR-31 and Form EOIR-31A.

1. Request for Recognition, Renewal of Recognition, or Extension of Recognition for a Non-Profit, Federal Tax-Exempt Religious, Charitable, Social Service, or Similar Organization (Form EOIR-31)

The Department has modified the final Form EOIR-31 and the instructions thereto for consistency with the changes in the final rule regarding the requirements for recognition and renewal of recognition. First, the final form does not require organizations to provide information regarding whether a substantial amount of their immigration legal services budget is from outside funding sources. Second, the instructions have been modified to say that the form will generally be used every six years (rather than three years) in connection with a request to renew recognition, and that the request need not be accompanied by a request for accreditation of a representative. Third and finally, the final form has been amended to reflect the changes to the annual reports required to be submitted at renewal. In the final rule, the annual report has been renamed the summary of immigration legal services provided. More significantly, the substance of the summary has been modified to include information already gathered for other purposes like funder reports or otherwise readily accessible to the organization, such as: The total number of clients served (whether through client intakes, applications prepared and filed with USCIS, cases in which the organization's attorneys or accredited representatives appeared before the Immigration Courts or, if applicable, the Board, or referrals to attorneys or other organizations) and clients to which it provided services at no cost; a general description of the immigration legal services and other immigration-related

services (e.g., educational or outreach events) provided; a statement regarding whether services were provided pro bono or clients were charged in accordance with a fee schedule and organizational policies or guidance regarding fee waivers and reduced fees; and a list of the offices or locations where the immigration legal services were provided.

The Department has determined that the estimated average time to review the form, gather necessary materials, complete the form, and assemble the attachments is 2 hours for initial recognition, which is the same as the current information collection. The current Form EOIR-31 has been in use for several years, and the Department has not received any comments regarding the accuracy of this estimate. The Department has now received two comments in response to the proposed rule's revisions to the form suggesting that the time estimate may not be accurate. However, the commenters did not specifically address the revised form, as no individual requested it during the comment period. Notwithstanding the comments received, the Department has kept the estimated average total response time of 2 hours for initial recognition because initial recognition requires the same materials as the current information collection and the revised form provides much improved detail and specificity that will assist organizations in preparing and completing the form in a timely manner.

For renewal of recognition, the Department clarifies that an organization will not be required to submit the information previously submitted at initial recognition, unless such information has changed since the initial recognition and it affects the organization's recognition. Instead, an organization will only be required to complete the form and submit fee schedules and six annual summaries of immigration legal services provided (formerly called the annual report in the proposed rule). The Department understands that these summaries, though simplified under the final rule, will place some additional burdens on organizations. Therefore, the Department has adjusted the estimated time to account for the burdens associated with preparation and retention of the summaries of immigration legal services provided. The Department estimates that the average time to review the form, gather necessary materials, complete the form, and assemble the attachments for each application to renew recognition will be 7 hours in total. The estimate includes

²² See Ariz. Rev. Stat. Ann. § 12-2702(A)(4) (stating that an accredited representative is not engaging in the unauthorized practice of immigration law by providing immigration legal services); N.M. Stat. Ann. § 36-3-4(A)(4) (same); N.J. Stat. Ann. § 2 C:21-31(d) (similar); Va. Unauthorized Practice R. 9-103 (similar); North Carolina State Bar, *Preventing Unlicensed Legal Practice*, <http://www.ncbar.gov/public/upl.asp> (last visited Sept. 15, 2015) (similar).

1 hour for review and completion of the form, and an additional 6 hours divided over 6 years to prepare the annual summaries of immigration legal services provided. This estimate and the one for initial recognition are minimized by the time saved from streamlining the recognition process to allow an organization to file a single application for multiple locations.

2. Request by Organization for Accreditation or Renewal of Accreditation of Non-Attorney (Form EOIR-31A)

Based on changes in the final rule, the instructions to the final Form EOIR-31A have been modified to reflect that requests for renewal of accreditation must be requested every three years, and that requests for accreditation do not need to be submitted with requests for renewal of recognition, unless the renewal dates for both are the same.

The Department finds no reason to adjust the estimated average time to complete Form EOIR-31A, despite the comments received about the time burden to request recognition and accreditation. The comments did not directly address the use of the revised form, as no individual requested the form. The comments generally concerned requests for accreditation, which may have related to the period in which there was no form to request accreditation. Even if the comments concerned the current information collection, the final form is improved in clarity and specificity such that organizations should be able to prepare and complete the form in an expeditious manner.

3. Immigration Practitioner Complaint Form (Form EOIR-44)

The two comments received did not concern the revisions to the Form EOIR-44, which was updated to reflect that the public may use the form to file a complaint against a recognized organization in addition to an immigration practitioner. Therefore, the final rule adopts the revisions to the EOIR-44 as proposed.

List of Subjects

8 CFR Part 1001

Administrative practice and procedure, Aliens, Immigration, Organizations and functions (Government agencies).

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organizations and functions (Government agencies).

8 CFR Part 1103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 1212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 1292

Administrative practice and procedure, Immigration, Lawyers, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1001, 1003, 1103, 1212, and 1292 are amended as follows:

PART 1001—DEFINITIONS

- 1. The authority citation for part 1001 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107-296, 116 Stat. 2135; Title VII of Pub. L. 110-229.

- 2. In § 1001.1, add paragraphs (x) and (y) to read as follows:

§ 1001.1 Definitions.

* * * * *

(x) The term *OLAP* means the Office of Legal Access Programs.

(y) The term *OLAP Director* means the Program Director of the Office of Legal Access Programs.

* * * * *

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

- 3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

- 4. In § 1003.0, revise paragraphs (a) and (e)(1), redesignate paragraph (f) as paragraph (g), and add new paragraph (f), to read as follows:

§ 1003.0 Executive Office for Immigration Review.

(a) *Organization.* Within the Department of Justice, there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General. The Director shall be assisted

by a Deputy Director and by a General Counsel. EOIR shall include the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, the Office of Legal Access Programs, and such other staff as the Attorney General or the Director may provide.

* * * * *

(e) * * *

(1) *Professional standards.* The General Counsel shall administer programs to protect the integrity of immigration proceedings before EOIR, including administering the disciplinary program for practitioners and recognized organizations under subpart G of this part.

* * * * *

(f) *Office of Legal Access Programs and authorities of the Program Director.* Within EOIR, there shall be an Office of Legal Access Programs (OLAP), consisting of a Program Director and such other staff as the Director deems necessary. Subject to the supervision of the Director, the Program Director of OLAP (the OLAP Director), or the OLAP Director's designee, shall have the authority to:

(1) Develop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law;

(2) Develop and administer a program to recognize organizations and accredit representatives to provide representation before the Immigration Courts, the Board, and DHS, or DHS alone. The OLAP Director shall determine whether an organization and its representatives meet the eligibility requirements for recognition and accreditation in accordance with this chapter. The OLAP Director shall also have the authority to administratively terminate the recognition of an organization and the accreditation of a representative and to maintain the roster of recognized organizations and their accredited representatives;

(3) Issue guidance and policies regarding the implementation of OLAP's statutory and regulatory authorities; and

(4) Exercise such other authorities as the Director may provide.

* * * * *

- 5. In § 1003.1, revise paragraph (b)(13), the first sentence of paragraph (d)(2)(iii), and paragraph (d)(5) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(b) * * *
(13) Decisions of adjudicating officials in disciplinary proceedings involving practitioners or recognized organizations as provided in subpart G of this part.

* * * * *

(d) * * *
(2) * * *

(iii) *Disciplinary consequences.* The filing by a practitioner, as defined in § 1003.101(b), of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section, may constitute frivolous behavior under § 1003.102(j).

* * * * *

(5) *Discipline of practitioners and recognized organizations.* The Board shall have the authority pursuant to § 1003.101 *et seq.* to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or DHS, and upon recognized organizations. The Board shall also have the authority pursuant to § 1003.107 to reinstate disciplined practitioners to appear in a representative capacity before the Board and the Immigration Courts, or DHS, or all three authorities.

* * * * *

■ 6. In § 1003.101, add paragraph (c) to read as follows:

§ 1003.101 General provisions.

* * * * *

(c) The administrative termination of a representative's accreditation under 8 CFR 1292.17 after the issuance of a Notice of Intent to Discipline pursuant to § 1003.105(a)(1) shall not preclude the continuation of disciplinary proceedings and the imposition of sanctions, unless counsel for the government moves to withdraw the Notice of Intent to Discipline and the adjudicating official or the Board grants the motion.

■ 7. In § 1003.102, revise paragraph (f)(2), remove the word "or" from the end of paragraph (t)(2), remove the period and add "; or" in its place at the end of paragraph (u), and add paragraph (v).

The revision and addition read as follows:

§ 1003.102 Grounds.

* * * * *

(f) * * *

(2) Contains an assertion about the practitioner or the practitioner's qualifications or services that cannot be substantiated. A practitioner shall not state or imply that the practitioner has been recognized or certified as a specialist in immigration or nationality

law unless such certification is granted by the appropriate State regulatory authority or by an organization that has been approved by the appropriate State regulatory authority to grant such certification. An accredited representative shall not state or imply that the accredited representative:

(i) Is approved to practice before the Immigration Courts or the Board, if the representative is only approved as an accredited representative before DHS;

(ii) Is an accredited representative for an organization other than a recognized organization through which the representative acquired accreditation; or

(iii) Is an attorney.

* * * * *

(v) Acts outside the scope of the representative's approved authority as an accredited representative.

■ 8. In § 1003.103, revise paragraph (c) to read as follows:

§ 1003.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner or recognized organization to notify EOIR of conviction or discipline.

* * * * *

(c) *Duty of practitioner and recognized organizations to notify EOIR of conviction or discipline.* A practitioner and if applicable, the authorized officer of each recognized organization with which a practitioner is affiliated must notify the EOIR disciplinary counsel within 30 days of the issuance of the initial order, even if an appeal of the conviction or discipline is pending, when the practitioner has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in § 1003.102(h), or has been disbarred or suspended by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory or Commonwealth of the United States, or the District of Columbia, or any Federal court. A practitioner's failure to do so may result in an immediate suspension as set forth in paragraph (a) of this section and other final discipline. An organization's failure to do so may result in the administrative termination of its recognition for violating the reporting requirement under 8 CFR 1292.14. This duty to notify applies only to convictions for serious crimes and to orders imposing discipline for professional misconduct entered on or after August 28, 2000.

■ 9. In § 1003.104, revise paragraph (b) to read as follows:

§ 1003.104 Filing of Complaints; preliminary inquiries; resolutions; referrals of complaints.

* * * * *

(b) *Preliminary inquiry.* Upon receipt of a disciplinary complaint or on its own initiative, the EOIR disciplinary counsel will initiate a preliminary inquiry. If a complaint is filed by a client or former client, the complainant thereby waives the attorney-client privilege and any other privilege relating to the representation to the extent necessary to conduct a preliminary inquiry and any subsequent proceedings based thereon. If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may, in the disciplinary counsel's discretion, close a preliminary inquiry if the complainant fails to comply with reasonable requests for assistance, information, or documentation. The complainant and the practitioner shall be notified of any such determination in writing.

* * * * *

■ 10. In § 1003.105, revise the paragraph (a) subject heading and paragraph (a)(1), the first sentence of paragraph (c)(1), the last sentence of paragraph (c)(2), and paragraphs (c)(3), (d)(2) introductory text, and (d)(2)(ii) to read as follows:

§ 1003.105 Notice of Intent to Discipline.

(a) *Issuance of Notice.* (1) If, upon completion of the preliminary inquiry, the EOIR disciplinary counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 1003.102 or a recognized organization with misconduct as set forth in § 1003.110, the EOIR disciplinary counsel will file with the Board and issue to the practitioner or organization that was the subject of the preliminary inquiry a Notice of Intent to Discipline. In cases involving practitioners, service of the notice will be made upon the practitioner either by certified mail to the practitioner's last known address, as defined in paragraph (a)(2) of this section, or by personal delivery. In cases involving recognized organizations, service of the notice will be made upon the authorized officer of the organization either by certified mail at the address of the organization or by personal delivery. The notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board. In summary disciplinary

proceedings brought pursuant to § 1003.103(b), a preliminary inquiry report is not required to be filed with the Notice of Intent to Discipline. If a Notice of Intent to Discipline is filed against an accredited representative, the EOIR disciplinary counsel shall send a copy of the notice to the authorized officer of the recognized organization through which the representative is accredited at the address of the organization.

* * * * *

(c) *Answer*—(1) *Filing*. The practitioner or, in cases involving a recognized organization, the organization, shall file a written answer to the Notice of Intent to Discipline with the Board within 30 days of the date of service of the Notice of Intent to Discipline unless, on motion to the Board, an extension of time to answer is granted for good cause. * * *

(2) * * * The practitioner or, in cases involving a recognized organization, the organization, may also state affirmatively special matters of defense and may submit supporting documents, including affidavits or statements, along with the answer.

(3) *Request for hearing*. The practitioner or, in cases involving a recognized organization, the organization, shall also state in the answer whether a hearing on the matter is requested. If no such request is made, the opportunity for a hearing will be deemed waived.

(d) * * *

(2) Upon such a default by the practitioner or, in cases involving a recognized organization, the organization, the counsel for the government shall submit to the Board proof of service of the Notice of Intent to Discipline. The practitioner or the organization shall be precluded thereafter from requesting a hearing on the matter. The Board shall issue a final order adopting the proposed disciplinary sanctions in the Notice of Intent to Discipline unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted or not in the interests of justice. With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103 or that otherwise involve an accredited representative or recognized organization, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending

immigration matters and notifying immigration clients of the imposition of any sanction. Any final order imposing discipline against an accredited representative or recognized organization shall become effective immediately. A practitioner or a recognized organization may file a motion to set aside a final order of discipline issued pursuant to this paragraph, with service of such motion on counsel for the government, provided:

* * * * *

(ii) The practitioner's or the recognized organization's failure to file an answer was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner or the recognized organization.

■ 11. In § 1003.106, revise paragraph (a)(2) introductory text, paragraphs (a)(2)(i) through (iii), paragraph (a)(3) introductory text, and paragraphs (a)(3)(ii), (b), and (c) to read as follows:

§ 1003.106 Right to be heard and disposition.

(a) * * *

(2) The procedures set forth in paragraphs (b) through (d) of this section apply to cases in which the practitioner or recognized organization files a timely answer to the Notice of Intent to Discipline, with the exception of cases in which the Board issues a final order pursuant to § 1003.105(d)(2) or § 1003.106(a)(1).

(i) The Chief Immigration Judge shall, upon the filing of an answer, appoint an Immigration Judge as an adjudicating official. At the request of the Chief Immigration Judge, the Chief Administrative Hearing Officer may appoint an Administrative Law Judge as an adjudicating official. The Director may appoint either an Immigration Judge or Administrative Law Judge as an adjudicating official if the Chief Immigration Judge or the Chief Administrative Hearing Officer does not appoint an adjudicating official or if the Director determines it is in the interest of efficiency to do so. An Immigration Judge or Administrative Law Judge shall not serve as the adjudicating official in any case in which the Judge is the complainant, in any case involving a practitioner who regularly appears before the Judge, or in any case involving a recognized organization whose representatives regularly appear before the Judge.

(ii) Upon the practitioner's or, in cases involving a recognized organization, the

organization's, request for a hearing, the adjudicating official may designate the time and place of the hearing with due regard to the location of the practitioner's practice or residence or of the recognized organization, the convenience of witnesses, and any other relevant factors. When designating the time and place of a hearing, the adjudicating official shall provide for the service of a notice of hearing, as the term "service" is defined in § 1003.13, on the practitioner or the authorized officer of the recognized organization and the counsel for the government. The practitioner or the recognized organization shall be afforded adequate time to prepare a case in advance of the hearing. Pre-hearing conferences may be scheduled at the discretion of the adjudicating official in order to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding. Settlement agreements reached after the issuance of a Notice of Intent to Discipline are subject to final approval by the adjudicating official or, if the practitioner or organization has not filed an answer, subject to final approval by the Board.

(iii) The practitioner or, in cases involving a recognized organization, the organization, may be represented by counsel at no expense to the government. Counsel for the practitioner or the organization shall file the appropriate Notice of Entry of Appearance (Form EOIR-27 or EOIR-28) in accordance with the procedures set forth in this part. Each party shall have a reasonable opportunity to examine and object to evidence presented by the other party, to present evidence, and to cross-examine witnesses presented by the other party. If the practitioner or the recognized organization files an answer but does not request a hearing, then the adjudicating official shall provide the parties an opportunity to submit briefs and evidence to support or refute any of the charges or affirmative defenses.

* * * * *

(3) *Failure to appear in proceedings*. If the practitioner or, in cases involving a recognized organization, the organization, requests a hearing as provided in § 1003.105(c)(3) but fails to appear, the adjudicating official shall then proceed and decide the case in the absence of the practitioner or the recognized organization in accordance with paragraph (b) of this section, based on the available record, including any additional evidence or arguments presented by the counsel for the

government at the hearing. In such a proceeding the counsel for the government shall submit to the adjudicating official proof of service of the Notice of Intent to Discipline as well as the Notice of the Hearing. The practitioner or the recognized organization shall be precluded thereafter from participating further in the proceedings. A final order imposing discipline issued pursuant to this paragraph shall not be subject to further review, except that the practitioner or the recognized organization may file a motion to set aside the order, with service of such motion on counsel for the government, provided:

* * * * *

(ii) The practitioner's or the recognized organization's failure to appear was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner or the recognized organization.

(b) *Decision.* The adjudicating official shall consider the entire record and, as soon as practicable, render a decision. If the adjudicating official finds that one or more grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear and convincing evidence, the official shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified. If the adjudicating official determines that the organization's recognition should be revoked, the official may also identify the persons affiliated with the organization who were directly involved in the conduct that constituted the grounds for revocation. If the adjudicating official determines that the organization's recognition should be terminated, the official shall specify the time restriction, if any, before the organization may submit a new request for recognition. Any grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline that have not been established by clear and convincing evidence shall be dismissed. The adjudicating official shall provide for service of a written decision or memorandum summarizing an oral decision, as the term "service" is defined in § 1003.13, on the practitioner or, in cases involving a recognized organization, on the authorized officer

of the organization and on the counsel for the government. Except as provided in paragraph (a)(2) of this section, the adjudicating official's decision becomes final only upon waiver of appeal or expiration of the time for appeal to the Board, whichever comes first, and does not take effect during the pendency of an appeal to the Board as provided in § 1003.6. A final order imposing discipline against an accredited representative or recognized organization shall take effect immediately.

(c) *Appeal.* Upon issuance of a decision by the adjudicating official, either party or both parties may appeal to the Board to conduct a review pursuant to § 1003.1(d)(3). Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in Part 1003, and must use Form EOIR-45. The decision of the Board is the final administrative order as provided in § 1003.1(d)(7), and shall be served upon the practitioner or, in cases involving a recognized organization, the organization, as provided in § 1003.1(f). With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103 or cases involving accredited representatives or recognized organizations, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A final order imposing discipline against an accredited representative or recognized organization shall take effect immediately. A copy of the final administrative order of the Board shall be served upon the counsel for the government. If disciplinary sanctions are imposed against a practitioner or a recognized organization (other than a private censure), the Board may require that notice of such sanctions be posted at the Board, the Immigration Courts, or DHS for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.

* * * * *

■ 12. In § 1003.107, revise paragraphs (a) and (b), redesignate paragraph (c) as paragraph (d), and add new paragraph (c) to read as follows:

§ 1003.107 Reinstatement after disbarment or suspension.

(a) *Reinstatement upon expiration of suspension.* (1) Except as provided in paragraph (c)(1) of this section, after the period of suspension has expired, a practitioner who has been suspended and wishes to be reinstated must file a motion to the Board requesting reinstatement to practice before the Board and the Immigration Courts, or DHS, or before all three authorities. The practitioner must demonstrate by clear and convincing evidence that notwithstanding the suspension, the practitioner otherwise meets the definition of attorney or representative as set forth in § 1001.1(f) and (j), respectively, of this chapter. The practitioner must serve a copy of such motion on the EOIR disciplinary counsel. In matters in which the practitioner was ordered suspended from practice before DHS, the practitioner must serve a copy of such motion on the DHS disciplinary counsel.

(2) The EOIR disciplinary counsel and, in matters in which the practitioner was ordered suspended from practice before DHS, the DHS disciplinary counsel, may reply within 13 days of service of the motion in the form of a written response objecting to the reinstatement on the ground that the practitioner failed to comply with the terms of the suspension. The response must include supporting documentation or evidence of the petitioner's failure to comply with the terms of the suspension. The Board, in its discretion, may afford the parties additional time to file briefs or hold a hearing to determine if the practitioner meets all the requirements for reinstatement.

(3) If a practitioner does not meet the definition of attorney or representative, the Board shall deny the motion for reinstatement without further consideration. If the practitioner failed to comply with the terms of the suspension, the Board shall deny the motion and indicate the circumstances under which the practitioner may apply for reinstatement. If the practitioner meets the definition of attorney or representative and the practitioner otherwise has complied with the terms of the suspension, the Board shall grant the motion and reinstate the practitioner.

(b) *Early reinstatement.* (1) Except as provided in paragraph (c) of this section, a practitioner who has been disbarred or who has been suspended for one year or more may file a petition for reinstatement directly with the Board after one-half of the suspension period has expired or one year has

passed, whichever is greater, provided that notwithstanding the suspension, the practitioner otherwise meets the definition of attorney or representative as set forth in § 1001.1(f) and (j), respectively, of this chapter. A copy of such a petition shall be served on the EOIR disciplinary counsel. In matters in which the practitioner was ordered disbarred or suspended from practice before DHS, a copy of such petition shall be served on the DHS disciplinary counsel.

(2) A practitioner seeking early reinstatement must demonstrate by clear and convincing evidence that the practitioner possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, or DHS, and that the practitioner's reinstatement will not be detrimental to the administration of justice. The EOIR disciplinary counsel and, in matters in which the practitioner was ordered disbarred or suspended from practice before DHS, the DHS disciplinary counsel, may reply within 30 days of service of the petition in the form of a written response to the Board, which may include, but is not limited to, documentation or evidence of the practitioner's failure to comply with the terms of the disbarment or suspension or of any complaints filed against the disbarred or suspended practitioner subsequent to the practitioner's disbarment or suspension.

(3) If a practitioner cannot meet the definition of attorney or representative, the Board shall deny the petition for reinstatement without further consideration. If the petition for reinstatement is found to be otherwise inappropriate or unwarranted, the petition shall be denied. Any subsequent petitions for reinstatement may not be filed before the end of one year from the date of the Board's previous denial of reinstatement, unless the practitioner is otherwise eligible for reinstatement under paragraph (a). If the petition for reinstatement is determined to be timely, the practitioner meets the definition of attorney or representative, and the petitioner has otherwise established by the requisite standard of proof that the practitioner possesses the qualifications set forth herein, and that reinstatement will not be detrimental to the administration of justice, the Board shall grant the petition and reinstate the practitioner. The Board, in its discretion, may hold a hearing to determine if the practitioner meets all of the requirements for reinstatement.

(c) *Accredited representatives.* (1) An accredited representative who has been suspended for a period of time greater than the remaining period of validity of

the representative's accreditation at the time of the suspension is not eligible to be reinstated under § 1003.107(a) or (b). In such circumstances, after the period of suspension has expired, an organization may submit a new request for accreditation pursuant to 8 CFR 1292.13 on behalf of such an individual.

(2) *Disbarment.* An accredited representative who has been disbarred is permanently barred from appearing before the Board, the Immigration Courts, or DHS as an accredited representative and cannot seek reinstatement.

* * * * *

■ 13. In § 1003.108, revise paragraph (a) introductory text, paragraphs (a)(1)(i) through (iv), and paragraph (a)(2)(v), add paragraph (a)(3), and revise paragraph (b) to read as follows:

§ 1003.108 Confidentiality.

(a) *Complaints and preliminary inquiries.* Except as otherwise provided by law or regulation, information concerning complaints or preliminary inquiries is confidential. A practitioner or recognized organization whose conduct is the subject of a complaint or preliminary inquiry, however, may waive confidentiality, except that the EOIR disciplinary counsel may decline to permit a waiver of confidentiality if it is determined that an ongoing preliminary inquiry may be substantially prejudiced by public disclosure before the filing of a Notice of Intent to Discipline.

(1) * * *

(i) A practitioner or recognized organization has caused, or is likely to cause, harm to client(s), the public, or the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. If disclosure of information is made pursuant to this paragraph, the EOIR disciplinary counsel may define the scope of information disseminated and may limit the disclosure of information to specified individuals and entities;

(ii) A practitioner or recognized organization has committed criminal acts or is under investigation by law enforcement authorities;

(iii) A practitioner or recognized organization is under investigation by a disciplinary or regulatory authority, or has committed acts or made omissions that may reasonably result in investigation by such authorities;

(iv) A practitioner or recognized organization is the subject of multiple disciplinary complaints and the EOIR disciplinary counsel has determined not to pursue all of the complaints. The

EOIR disciplinary counsel may inform complainants whose allegations have not been pursued of the status of any other preliminary inquiries or the manner in which any other complaint(s) against the practitioner or recognized organization have been resolved.

(2) * * *

(v) To the practitioner or recognized organization who is the subject of the complaint or preliminary inquiry or the practitioner's or recognized organization's counsel of record.

* * * * *

(3) *Disclosure of information for the purpose of recognition of organizations and accreditation of representatives.*

The EOIR disciplinary counsel, in the exercise of discretion, may disclose information concerning complaints or preliminary inquiries regarding applicants for recognition and accreditation, recognized organizations or their authorized officers, or accredited representatives to the OLAP Director for any purpose related to the recognition of organizations and accreditation of representatives.

(b) *Resolutions reached prior to the issuance of a Notice of Intent to Discipline.* Resolutions reached prior to the issuance of a Notice of Intent to Discipline, such as warning letters, admonitions, and agreements in lieu of discipline are confidential, except that resolutions that pertain to an accredited representative may be disclosed to the accredited representative's organization and the OLAP Director. However, all such resolutions may become part of the public record if the practitioner becomes subject to a subsequent Notice of Intent to Discipline.

* * * * *

■ 14. Add §§ 1003.110 and 1003.111 to read as follows:

§ 1003.110 Sanction of recognized organizations.

(a) *Authority to sanction.* (1) An adjudicating official or the Board may impose disciplinary sanctions against a recognized organization if it is in the public interest to do so. It will be in the public interest to impose disciplinary sanctions if a recognized organization has engaged in the conduct described in paragraph (b) of this section. In accordance with the disciplinary proceedings set forth in this subpart, an adjudicating official or the Board may impose the following sanctions:

(i) Revocation, which removes the organization and its accredited representatives from the recognition and accreditation roster and permanently bars the organization from future recognition;

(ii) Termination, which removes the organization and its accredited representatives from the recognition and accreditation roster but does not bar the organization from future recognition. In terminating recognition under this section, the adjudicating official or the Board may preclude the organization from submitting a new request for recognition under 8 CFR 1292.13 before a specified date; or

(iii) Such other disciplinary sanctions, except a suspension, as the adjudicating official or the Board deems appropriate.

(2) The administrative termination of an organization's recognition under 8 CFR 1292.17 after the issuance of Notice of Intent to Discipline pursuant to § 1003.105(a)(1) shall not preclude the continuation of disciplinary proceedings and the imposition of sanctions, unless counsel for the government moves to dismiss the Notice of Intent to Discipline and the adjudicating official or the Board grants the motion.

(3) The imposition of disciplinary sanctions against a recognized organization does not result in disciplinary sanctions against that organization's accredited representatives; disciplinary sanctions, if any, against an organization's accredited representatives must be imposed separately from disciplinary sanctions against the organization. Termination or revocation of an organization's recognition has the effect of terminating the accreditation of representatives of that organization, but such individuals may retain or seek accreditation through another recognized organization.

(b) *Grounds.* It shall be deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any recognized organization that violates one or more of the grounds specified in this paragraph, except that these grounds do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. A recognized organization may be subject to disciplinary sanctions if it:

(1) Knowingly or with reckless disregard provides a false statement or misleading information in applying for recognition or accreditation of its representatives;

(2) Knowingly or with reckless disregard provides false or misleading information to clients or prospective clients regarding the scope of authority of, or the services provided by, the organization or its accredited representatives;

(3) Fails to adequately supervise accredited representatives;

(4) Employs, receives services from, or affiliates with an individual who performs an activity that constitutes the unauthorized practice of law or immigration fraud; or

(5) Engages in the practice of law through staff when it does not have an attorney or accredited representative.

(c) *Joint disciplinary proceedings.* The EOIR disciplinary counsel or DHS disciplinary counsel may file a Notice of Intent to Discipline against a recognized organization and one or more of its accredited representatives pursuant to § 1003.101 *et seq.* Disciplinary proceedings conducted on such notices, if they are filed jointly with the Board, shall be joined and referred to the same adjudicating official pursuant to § 1003.106. An adjudicating official may join related disciplinary proceedings after the filing of a Notice of Intent to Discipline.

§ 1003.111 Interim suspension.

(a) *Petition for interim suspension—*
(1) *EOIR Petition.* In conjunction with the filing of a Notice of Intent to Discipline or at any time thereafter during disciplinary proceedings before an adjudicating official, the EOIR disciplinary counsel may file a petition for an interim suspension of an accredited representative. Such suspension, if issued, precludes the representative from practicing before the Board and the Immigration Courts during the pendency of disciplinary proceedings and continues until the issuance of a final order in the disciplinary proceedings.

(2) *DHS Petition.* In conjunction with the filing of a Notice of Intent to Discipline or at any time thereafter during disciplinary proceedings before an adjudicating official, the DHS disciplinary counsel may file a petition for an interim suspension of an accredited representative. Such suspension, if issued, precludes the representative from practicing before DHS during the pendency of disciplinary proceedings and continues until the issuance of a final order in the disciplinary proceedings.

(3) *Contents of the petition.* In the petition, counsel for the government must demonstrate by a preponderance of the evidence that the accredited representative poses a substantial threat of irreparable harm to clients or prospective clients. An accredited representative poses a substantial threat of irreparable harm to clients or prospective clients if the representative committed three or more acts in violation of the grounds of discipline described at § 1003.102, when actual harm or threatened harm is

demonstrated, or engages in any other conduct that, if continued, will likely cause irreparable harm to clients or prospective clients. Counsel for the government must serve the petition on the accredited representative, as provided in § 1003.105, and send a copy of the petition to the authorized officer of the recognized organization at the address of the organization through which the representative is accredited.

(4) *Requests to broaden scope.* The EOIR disciplinary counsel or DHS disciplinary counsel may submit a request to broaden the scope of any interim suspension order such that an accredited representative would be precluded from practice before the Board, the Immigration Courts, and DHS.

(b) *Response.* The accredited representative may file a written response to the petition for interim suspension within 30 days of service of the petition.

(c) *Adjudication.* Upon the expiration of the time to respond to the petition for an interim suspension, the adjudicating official will consider the petition for an interim suspension, the accredited representative's response, if any, and any other evidence presented by the parties before determining whether to issue an interim suspension. If the adjudicating official imposes an interim suspension on the representative, the adjudicating official may require that notice of the interim suspension be posted at the Board and the Immigration Courts, or DHS, or all three authorities. Upon good cause shown, the adjudicating official may set aside an order of interim suspension when it appears in the interest of justice to do so. If a final order in the disciplinary proceedings includes the imposition of a period of suspension against an accredited representative, time spent by the representative under an interim suspension pursuant to this section may be credited toward the period of suspension imposed under the final order.

PART 1103—APPEALS, RECORDS, AND FEES

■ 15. The authority citation for part 1103 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510.

■ 16. In § 1103.3, revise paragraph (a), remove and reserve paragraph (b), and revise paragraph (c).

The revisions read as follows:

§ 1103.3 Denials, appeals, and precedent decisions.

(a) *DHS regulations.* The regulations pertaining to denials, appeals, and precedent decisions of the Department of Homeland Security are contained in 8 CFR Chapter I.

* * * * *

(c) *DHS precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General.

PART 1212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 17. The authority citation for part 1212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); Title VII of Public Law 110–229.

■ 18. Revise § 1212.6 to read as follows:

§ 1212.6 Border crossing identification cards.

The regulations of the Department of Homeland Security pertaining to border crossing identification cards can be found at 8 CFR 212.6.

PART 1292—REPRESENTATION AND APPEARANCES

■ 19. Revise the authority citation for part 1292 to read as follows:

Authority: 8 U.S.C. 1103, 1362.

■ 20. In part 1292, before § 1292.1, add an undesignated center heading to read “In General”.

■ 21. In § 1292.1, revise paragraph (a)(4) to read as follows:

§ 1292.1 Representation of others.

(a) * * *

(4) *Accredited representative.* An individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired. A partially accredited representative is authorized to practice solely before DHS. A fully

accredited representative is authorized to practice before DHS, and upon registration, to practice before the Immigration Courts and the Board.

* * * * *

§ 1292.2 [Removed and Reserved]

■ 22. Remove and reserve § 1292.2.

■ 23. Revise § 1292.3 to read as follows:

§ 1292.3 Conduct for practitioners and recognized organizations—rules and procedures.

Practitioners, as defined in § 1003.101(b) of this chapter, and recognized organizations are subject to the imposition of sanctions as provided in 8 CFR part 1003, subpart G, § 1003.101 *et seq.*, and 8 CFR 292.3 (pertaining to practice before DHS).

■ 24. Revise § 1292.6 to read as follows:

§ 1292.6 Interpretation.

Interpretations of §§ 1292.1 through 1292.6 will be made by the Board, subject to the provisions of part 1003 of this chapter. Interpretations of §§ 1292.11 through 1292.20 will be made by the OLAP Director.

■ 25. Add §§ 1292.11 through 1292.20, with an undesignated center heading preceding § 1292.11, to read as follows:

Sec.

* * * * *
Recognition of organizations and accreditation of non-attorney representatives

Sec.

1292.11 Recognition of an organization.

1292.12 Accreditation of representatives.

1292.13 Applying for recognition of organizations or accreditation of representatives.

1292.14 Reporting, recordkeeping, and posting requirements for recognized organizations.

1292.15 Extension of recognition and accreditation to multiple offices or locations of an organization.

1292.16 Renewal of recognition and accreditation.

1292.17 Administrative termination of recognition and accreditation.

1292.18 Administrative review of denied requests for reconsideration.

1292.19 Complaints against recognized organizations and accredited representatives.

1292.20 Roster of recognized organizations and accredited representatives.

* * * * *

Recognition of Organizations and Accreditation of Non-Attorney Representatives**§ 1292.11 Recognition of an organization.**

(a) *In general.* The OLAP Director, in the exercise of discretion, may recognize an eligible organization to provide representation through accredited

representatives who appear on behalf of clients before the Immigration Courts, the Board, and DHS, or DHS alone. The OLAP Director will determine whether an organization is eligible for recognition. To be eligible for recognition, the organization must establish that:

(1) The organization is a non-profit religious, charitable, social service, or similar organization that provides immigration legal services primarily to low-income and indigent clients within the United States, and, if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services;

(2) The organization is a Federal tax-exempt organization established in the United States;

(3) The organization is simultaneously applying to have at least one employee or volunteer of the organization approved as an accredited representative by the OLAP Director and at least one application for accreditation is concurrently approved, unless the organization is seeking renewal of recognition and has an accredited representative or is seeking renewal of recognition on inactive status as described in § 1292.16(i);

(4) The organization has access to adequate knowledge, information, and experience in all aspects of immigration law and procedure; and

(5) The organization has designated an authorized officer to act on behalf of the organization.

(b) *Proof of status as non-profit religious, charitable, social service, or similar organization established in the United States and service to low-income and indigent clients.* The organization must submit: A copy of its organizing documents, including a statement of its mission or purpose; a declaration from its authorized officer attesting that it serves primarily low-income and indigent clients; a summary of the legal services to be provided; if it charges fees for legal services, fee schedules and organizational policies or guidance regarding fee waivers or reduced fees based on financial need; and its annual budget. The organization may also submit additional documentation to demonstrate non-profit status and service to primarily low-income and indigent individuals, such as reports prepared for funders or information about other free or low-cost immigration-related services that it provides (*e.g.*, educational or outreach events).

(c) *Annual budget.* The organization must submit its annual budget for providing immigration legal services for

the current year and, if available, its annual budget for providing immigration legal services for the prior year. If the annual budgets for both the current and prior years are unavailable, the organization must submit its projected annual budget for the upcoming year. The annual budget should describe how the organization is funded and include information about the organization's operating expenses and sources of revenue for providing immigration legal services. Sources of revenue may include, but are not limited to, grants, fees, donations, or dues.

(d) *Proof of tax-exempt status.* The organization must submit a copy of its currently valid IRS tax-exemption determination letter, alternative documentation to establish Federal tax-exempt status, or proof that is has applied for Federal tax-exempt status.

(e) *Proof of knowledge, information, and experience.* The organization must submit: A description of the immigration legal services that the organization seeks to offer; a description of the legal resources to which the organization has access; an organizational chart showing names, titles, and supervisors of immigration legal staff members; a description of the qualifications, experience, and breadth of immigration knowledge of these staff members, including, but not limited to resumes, letters of recommendation, certifications, and a list of all relevant, formal immigration-related trainings attended by staff members; and any agreement or proof of a formal arrangement entered into with non-staff immigration practitioners and recognized organizations for consultations or technical legal assistance.

(f) *Validity period of recognition.* Recognition is valid for a period of six years from the date of the OLAP Director's approval of recognition, unless the organization has been granted conditional recognition. Conditional recognition is granted to an organization that has not been recognized previously, that has Federal tax-exempt status pending, or that has been approved for recognition after recognition was previously terminated pursuant to § 1292.17 or 8 CFR 1003.101 *et seq.* Conditional recognition is valid for two years from the date of the OLAP Director's approval of conditional recognition. Any organization's recognition is subject to being terminated pursuant to § 1292.17 or upon the issuance of disciplinary sanctions (termination or revocation) under 8 CFR 1003.101 *et seq.*

§ 1292.12 Accreditation of representatives.

(a) *In general.* Only recognized organizations, or organizations simultaneously applying for recognition, may request accreditation of individuals. The OLAP Director, in the exercise of discretion, may approve accreditation of an eligible individual as a representative of a recognized organization for either full or partial accreditation. An individual who receives full accreditation may represent clients before the Immigration Courts, the Board, and DHS. An individual who receives partial accreditation may represent clients only before DHS. In the request for accreditation, the organization must specify whether it seeks full or partial accreditation and establish eligibility for accreditation for the individual. To establish eligibility for accreditation, an organization must demonstrate that the individual for whom the organization seeks accreditation:

(1) Has the character and fitness to represent clients before the Immigration Courts and the Board, or DHS, or before all three authorities. Character and fitness includes, but is not limited to, an examination of factors such as: Criminal background; prior acts involving dishonesty, fraud, deceit, or misrepresentation; past history of neglecting professional, financial, or legal obligations; and current immigration status that presents an actual or perceived conflict of interest;

(2) Is employed by or is a volunteer of the organization;

(3) Is not an attorney as defined in 8 CFR 1001.1(f);

(4) Has not resigned while a disciplinary investigation or proceeding is pending and is not subject to any order disbaring, suspending, enjoining, restraining, or otherwise restricting the individual in the practice of law or representation before a court or any administrative agency;

(5) Has not been found guilty of, or pleaded guilty or *nolo contendere* to, a serious crime, as defined in 8 CFR 1003.102(h), in any court of the United States, or of any State, possession, territory, commonwealth, or the District of Columbia, or of a jurisdiction outside of the United States; and

(6) Possesses broad knowledge and adequate experience in immigration law and procedure. If an organization seeks full accreditation for an individual, it must establish that the individual also possesses skills essential for effective litigation.

(b) *Request for accreditation.* To establish that an individual satisfies the requirements of paragraph (a) of this section, the organization must submit a

request for accreditation (Form EOIR-31A and supporting documents). The request for accreditation must be signed by the authorized officer and the individual to be accredited, both attesting that the individual satisfies these requirements.

(c) *Proof of knowledge and experience.* To establish that the individual satisfies the requirement in paragraph (a)(6) of this section, the organization must submit with its request for accreditation, at minimum: A description of the individual's qualifications, including education and immigration law experience; letters of recommendation from at least two persons familiar with the individual's qualifications; and documentation of all relevant, formal immigration-related training, including a course on the fundamentals of immigration law, procedure, and practice. An organization must also submit documentation that an individual for whom the organization seeks full accreditation has formal training, education, or experience related to trial and appellate advocacy.

(d) *Validity period of accreditation.* Accreditation is valid for a period of three years from the date of the OLAP Director's approval of accreditation, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(e) *Change in accreditation.* An organization may request to change the accreditation of a representative from partial to full accreditation at any time during the validity period of accreditation or at renewal. Such a request will be treated as a new, initial request for full accreditation and must comply with this section.

§ 1292.13 Applying for recognition of organizations or accreditation of representatives.

(a) *In general.* An organization applying for recognition or accreditation of a representative must submit a request for recognition (Form EOIR-31) or a request for accreditation (Form EOIR-31A) to the OLAP Director with proof of service of a copy of the request on the appropriate USCIS office(s) in the jurisdictions where the organization offers or intends to offer immigration legal services. An organization must submit a separate request for accreditation (Form EOIR-31A) for each individual for whom it seeks accreditation. To determine whether an

organization has established eligibility for recognition or accreditation of a representative, the OLAP Director shall review all information contained in the request for recognition or accreditation and may review any publicly available information or any other information that OLAP may obtain or possess about the organization, its authorized officer, or the proposed representative or may have received pursuant to paragraphs (b), (c), and (d) of this section. Unfavorable information obtained by the OLAP Director that may be relied upon to disapprove a recognition or accreditation request, if not previously served on the organization, shall be disclosed to the organization, and the organization shall be given a reasonable opportunity to respond. Prior to determining whether to approve or disapprove a request for recognition or accreditation, the OLAP Director may request additional information from the organization pertaining to the eligibility requirements for recognition or accreditation. The OLAP Director, in writing, shall inform the organization and each USCIS office in the jurisdictions where the organization offers or intends to offer immigration legal services of the determination approving or disapproving the organization's request for recognition or accreditation of a representative. The OLAP Director may, in the exercise of discretion, extend the deadlines provided in this section. The OLAP Director is authorized to allow requests, notifications, recommendations, and determinations described in this section to be made electronically.

(b) *USCIS recommendation and investigation.* Within 30 days from the date of service of the request for recognition or accreditation, the USCIS office served with the request may submit to the OLAP Director a recommendation for approval or disapproval of the request for recognition or accreditation, including an explanation for the recommendation, or may request from the OLAP Director a specified period of additional time, generally no more than 30 days, in which to conduct an investigation or otherwise obtain relevant information regarding the organization, its authorized officer, or any individual for whom the organization seeks accreditation. The OLAP Director shall inform the organization if the OLAP Director grants a request from USCIS for additional time to conduct an investigation, or if, in the exercise of discretion, the OLAP Director has requested that USCIS conduct an investigation of the organization, its

authorized officer, or any individual for whom the organization seeks accreditation. USCIS must submit any recommendation with proof of service of a copy of the recommendation on the organization. Within 30 days of service of an unfavorable recommendation, the organization may file with the OLAP Director a response to the unfavorable recommendation, along with proof of service of a copy of such response on the USCIS office that provided the recommendation.

(c) *ICE recommendation.* Upon receipt of a request for recognition or accreditation, the OLAP Director may request a recommendation or information from ICE in the jurisdictions where the organization offers or intends to offer immigration legal services regarding the organization, its authorized officer, or any individual for whom the organization seeks accreditation. Within 30 days from the date of receipt of the OLAP Director's request, ICE may make a recommendation or disclose information regarding the organization, its authorized officer, or individuals for whom the organization seeks accreditation. ICE must submit any recommendation with proof of service of a copy of the recommendation on the organization. Within 30 days of service of an unfavorable recommendation, the organization may file with the OLAP Director a response to the unfavorable recommendation, along with proof of service of a copy of such response on the ICE office that provided the recommendation. The OLAP Director, in writing, shall inform ICE of the determination approving or disapproving the organization's request for recognition or accreditation of a representative.

(d) *EOIR investigation.* Upon receipt of a request for recognition or accreditation, the OLAP Director may request that the EOIR disciplinary counsel or anti-fraud officer conduct an investigation into the organization, its authorized officer, or any individual for whom the organization seeks accreditation. Within 30 days from the date of receipt of the OLAP Director's request, the EOIR disciplinary counsel or anti-fraud officer may disclose to the OLAP Director information, including complaints, preliminary inquiries, warning letters, and admonitions, relating to the organization, its authorized officer, or any individual for whom the organization seeks accreditation.

(e) *Finality of decision.* The OLAP Director's determination to approve a request for recognition or accreditation is final. An organization whose request

for recognition or accreditation was disapproved may make one request for reconsideration of the disapproval within 30 days of the determination. An organization whose request for recognition or accreditation was disapproved, or whose request for reconsideration after disapproval and, if applicable, request for administrative review pursuant to § 1292.18 was denied, may submit a new request for recognition or accreditation at any time unless otherwise prohibited.

§ 1292.14 Reporting, recordkeeping, and posting requirements for recognized organizations.

(a) *Duty to report changes.* A recognized organization has a duty to promptly notify the OLAP Director in writing or electronically of changes in the organization's contact information, changes to any material information the organization provided in Form EOIR-31, Form EOIR-31A, or the documents submitted in support thereof, or changes that otherwise materially relate to the organization's eligibility for recognition or the eligibility for accreditation of any of the organization's accredited representatives. These changes may include alterations to: The organization's name, address, telephone number, Web site address, email address, or the designation of the authorized officer of the organization; an accredited representative's name or employment or volunteer status with the organization; and the organization's structure, including a merger of organizations that have already been individually accorded recognition, or a change in non-profit or Federal tax-exempt status.

(b) *Recordkeeping.* A recognized organization must compile each of the following records in a timely manner, and retain them for a period of six years from the date the record is created, as long as the organization remains recognized:

(1) The organization's immigration legal services fee schedule, if the organization charges any fees for immigration legal services, for each office or location where such services are provided; and

(2) An annual summary of immigration legal services provided by the organization, which includes: The total number of clients served (whether through client intakes, applications prepared and filed with DHS, cases in which its attorneys or accredited representatives appeared before the Immigration Courts or, if applicable, the Board, or referrals to attorneys or other organizations) and clients to whom it provided services at no cost; a general

description of the immigration legal services and other immigration-related services (e.g., educational or outreach events) provided; a statement regarding whether services were provided pro bono or clients were charged in accordance with a fee schedule and organizational policies or guidance regarding fee waivers and reduced fees; and a list of the offices or locations where the immigration legal services were provided. The summary should not include any client-specific or client-identifying information. OLAP may require the organization to submit such records to it or DHS upon request.

(c) *Posting.* The OLAP Director shall have the authority to issue public notices regarding recognition and accreditation and to require recognized organizations and accredited representatives to post such public notices. Information contained in the public notices shall be limited to: The names and validity periods of a recognized organization and its accredited representatives, the requirements for recognition and accreditation, and the means to complain about a recognized organization or accredited representative.

§ 1292.15 Extension of recognition and accreditation to multiple offices or locations of an organization.

Upon approving an initial request for recognition or a request for renewal of recognition, or at any other time, the OLAP Director, in the OLAP Director's discretion, may extend the recognition of an organization to any office or location where the organization offers services. To request extension of recognition, an organization that is seeking or has received recognition must submit a Form EOIR-31 that identifies the name and address of the organization's headquarters or designated office and the name and address of each other office or location for which the organization seeks extension of recognition. The organization must also provide a declaration from its authorized officer attesting that it periodically conducts inspections of each such office or location, exercises supervision and control over its accredited representatives at those offices and locations, and provides access to adequate legal resources at each such office or location. OLAP may require an organization to seek separate recognition for an office or location of the organization, for example, when a subordinate office or location has distinct operations, management structure, or funding sources from the

organization's headquarters. The OLAP Director's determination to extend recognition to the offices or locations identified in Form EOIR-31 permits the organization's accredited representatives to provide immigration legal services out of those offices or locations. OLAP will post the address of each office or location to which recognition has been extended on the roster of recognized organizations and accredited representatives. The OLAP Director is authorized to allow requests and determinations described in this section to be made electronically.

§ 1292.16 Renewal of recognition and accreditation.

(a) *In general.* To retain its recognition and the accreditation of its representatives after the conclusion of the validity period specified in § 1292.11(f) or § 1292.12(d), an organization must submit a request for renewal of its recognition or the accreditation of its representatives (Form EOIR-31, Form EOIR-31A, and supporting documents). In the exercise of discretion, as provided in paragraph (i) of this section, the OLAP Director may approve an organization's request for renewal of recognition without a currently approved accredited representative.

(b) *Timing of renewal—(1) Recognition.* An organization requesting renewal of recognition must submit the request on or before the sixth anniversary date of the organization's last approval or renewal of recognition or, for a conditionally recognized organization, on or before the second anniversary of the approval date of the conditional recognition. Any request must include proof of service of a copy of the request on the appropriate USCIS office(s) in the jurisdictions where the organization offers or intends to offer immigration legal services.

(2) *Accreditation.* An organization requesting renewal of accreditation of its representative must submit the request on or before the third anniversary date of the representative's last approval or renewal of accreditation, with proof of service of a copy of the request on the appropriate USCIS office(s) in the jurisdictions where the organization offers or intends to offer immigration legal services.

(3) The OLAP Director, in the OLAP Director's discretion, may grant additional time to submit a request for renewal or accept a request for renewal filed out of time. The recognition of the organization and the accreditation of any representatives for whom the organization timely requests renewal shall remain valid pending the OLAP

Director's consideration of the renewal requests, except in the case of an interim suspension pursuant to 8 CFR 1003.111.

(c) *Renewal requirements—(1) Recognition.* The request for renewal of recognition must establish that the organization remains eligible for recognition under § 1292.11(a), include the records specified in § 1292.14(b) regarding fee schedules and the summary of immigration legal services provided that the organization compiled since the last approval of recognition, and describe any unreported changes that impact eligibility for recognition from the date of the last approval of recognition.

(2) *Accreditation.* Each request for renewal of accreditation must establish that the individual remains eligible for accreditation under § 1292.12(a) and has continued to receive formal training in immigration law and procedure commensurate with the services the organization provides and the duration of the representative's accreditation.

(d) *Recommendations and investigations.* Each USCIS office served with a request for renewal of recognition or a request for renewal of accreditation may submit to the OLAP Director a recommendation for approval or disapproval of that request pursuant to § 1292.13(b). The OLAP Director may request a recommendation from ICE or an investigation from the EOIR disciplinary counsel or anti-fraud officer, pursuant to § 1292.13(c) and (d).

(e) *Renewal process.* The OLAP Director shall review all information contained in the requests and may review any publicly available information or any other information that OLAP may possess about the organization, its authorized officer, or any individual for whom the organization seeks accreditation or renewal of accreditation or that OLAP may have received pursuant to § 1292.13(b) through (d). Unfavorable information obtained by the OLAP Director that may be relied upon to disapprove a recognition or accreditation request, if not previously served on the organization, shall be disclosed to the organization, and the organization shall be given a reasonable opportunity to respond. Prior to determining whether to approve or disapprove a request for renewal of recognition or accreditation, the OLAP Director may request additional information from the organization pertaining to the eligibility requirements for recognition or accreditation. The OLAP Director, in writing, shall inform the organization and the appropriate DHS office(s) in the jurisdictions where

the organization offers or intends to offer immigration legal services of the determination to approve or disapprove a request for renewal of recognition. If the OLAP Director renews recognition, the OLAP Director shall issue a written determination approving or disapproving each request for accreditation or renewal of accreditation. The OLAP Director is authorized to allow requests, notifications, recommendations, and determinations described in this section to be made electronically.

(f) *Finality of decision.* The OLAP Director's determination to approve a request to renew recognition or accreditation is final. An organization whose request for renewal of recognition or accreditation of its representatives has been disapproved may make one request for reconsideration of the disapproval within 30 days of the determination. The recognition of the organization and the accreditation of any representatives for whom the organization timely requests reconsideration shall remain valid pending the OLAP Director's consideration of the reconsideration request, except in the case of an interim suspension pursuant to 8 CFR 1003.111. An organization whose recognition or accreditation of its representatives is terminated because the organization's request to renew recognition or accreditation is disapproved or whose request for reconsideration after disapproval and, if applicable, request for administrative review pursuant to § 1292.18 was denied, may submit a new request for recognition and accreditation at any time unless otherwise prohibited.

(g) *Validity period of recognition and accreditation after renewal.* After renewal of recognition, the recognition of the organization is valid for a period of six years from the date of the OLAP Director's determination to renew recognition, unless the organization's recognition is terminated pursuant to § 1292.17 or the organization is subject to disciplinary sanctions (*i.e.*, termination or revocation) under 8 CFR 1003.101 *et seq.* After renewal of accreditation, the accreditation of a representative is valid for a period of three years from the date of the OLAP Director's determination to renew accreditation, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(h) *Organizations and representatives recognized and accredited prior to January 18, 2017—(1) Applicability.* An organization or representative that received recognition or accreditation prior to January 18, 2017, through the Board under former § 1292.2 is subject to the provisions of this part. Such an organization or representative shall continue to be recognized or accredited until the organization is required to request renewal of its recognition and accreditation of its representatives as required by paragraphs (h)(2) and (3) of this section and pending the OLAP Director's determination on the organization's request for renewal if such a request is timely made, unless the organization's recognition or the representative's accreditation is terminated pursuant to § 1292.17 or the organization or the representative is subject to disciplinary sanctions (termination, revocation, suspension, or disbarment) under 8 CFR 1003.101 *et seq.*

(2) *Renewal of recognition.* To retain its recognition, an organization that received recognition prior to January 18, 2017, must request renewal of its recognition pursuant to this section on or before the following dates:

(i) Within 1 year of January 18, 2017, if the organization does not have an accredited representative on the effective date of this regulation;

(ii) Within 2 years of January 18, 2017, if the organization is not required to submit a request for renewal at an earlier date under paragraph (h)(2)(i) of this section, and the organization has been recognized for more than 10 years as of the effective date of this regulation; or

(iii) Within 3 years of January 18, 2017, if the organization is not required to submit a request for renewal at an earlier date under paragraph (h)(2)(i) or (ii) of this section.

(3) *Renewal of accreditation.* To retain the accreditation of its representatives who were accredited prior to January 18, 2017, an organization must request renewal of accreditation of its representatives on or before the date that the representative's accreditation would have expired under the prior rule.

(i) *Inactive status.* An organization shall be placed on inactive status if it has no currently approved accredited representative, and it promptly notified OLAP that it no longer has an accredited representative, as required by § 1292.14(a). An organization on inactive status is precluded from providing immigration legal services unless it has an attorney on staff. An organization shall be on inactive status

for two years from the date the organization is placed on inactive status in order for the organization to apply for and have approved the accreditation of one or more representatives. If an organization on inactive status is subject to renewal while on inactive status, the organization must request renewal of recognition at the time required for renewal. The OLAP Director, in the OLAP Director's discretion, may approve a request to renew an organization's recognition without a currently approved accredited representative, provided that the organization satisfies the renewal requirements under § 1292.16(c)(1) and attests that it intends to apply for and have approved the accreditation of one or more representatives within two years from the date of renewal. An organization renewed under such circumstances shall be on inactive status for two years from the date of renewal in order for the organization to apply for and have approved the accreditation of one or more representatives. The OLAP Director, in the OLAP Director's discretion, may grant an organization additional time on inactive status beyond the time limits provided in this paragraph.

§ 1292.17 Administrative termination of recognition and accreditation.

(a) *In general.* The OLAP Director may administratively terminate an organization's recognition or a representative's accreditation and remove the organization or representative from the recognition and accreditation roster. Prior to issuing a determination to administratively terminate recognition or accreditation, the OLAP Director may request, in writing or electronically, information from the organization, representative, DHS, or EOIR, regarding the bases for termination. The OLAP Director, in writing or electronically, shall inform the organization or the representative, as applicable, of the determination to terminate the organization's recognition or the representative's accreditation, and the reasons for the determination.

(b) *Bases for administrative termination of recognition.* The bases for termination of recognition under this section are:

(1) An organization did not submit a request to renew its recognition at the time required for renewal;

(2) An organization's request for renewal of recognition is disapproved or request for reconsideration after disapproval and if applicable, request for administrative review pursuant to § 1292.18 is denied;

(3) All of the organization's accredited representatives have been terminated pursuant to this section or suspended or disbarred pursuant to 8 CFR 1003.101 *et seq.*, and the organization is not on inactive status as described in § 1292.16(i);

(4) An organization submits a written request to the OLAP Director for termination of its recognition;

(5) An organization fails to comply with its reporting, recordkeeping, or posting requirements under § 1292.14, after being notified of the deficiencies and having an opportunity to respond;

(6) An organization fails to maintain eligibility for recognition under § 1292.11, after being notified of the deficiencies and having an opportunity to respond; or

(7) An organization on inactive status fails to have an individual approved as an accredited representative within the time provided under § 1292.16(i).

(c) *Bases for administrative termination of accreditation.* The bases for termination of accreditation under this section are:

(1) An individual's organization has had its recognition terminated pursuant to this section or terminated or revoked pursuant to 8 CFR 1003.101 *et seq.*;

(2) An organization does not submit a request for renewal of the individual's accreditation at the time required for renewal;

(3) An organization's request for renewal of an individual's accreditation is disapproved or request for reconsideration after disapproval and, if applicable, request for administrative review pursuant to § 1292.18, is denied;

(4) An accredited representative submits a written request to the OLAP Director for termination of the representative's accreditation;

(5) An organization submits a written request to the OLAP Director for termination of the accreditation of one or more of its representatives; or

(6) An individual fails to maintain eligibility for accreditation under § 1292.12, after the individual's organization has been notified of the deficiencies and has had an opportunity to respond.

(d) *Request for reconsideration.* An organization whose recognition is terminated pursuant to paragraph (b)(5) or (6) of this section or the accreditation of its representative(s) is terminated pursuant to paragraph (c)(6) of this section may make one request for reconsideration of the disapproval within 30 days of the determination. The recognition of the organization and the accreditation of any representatives for whom the organization timely requests reconsideration shall remain

valid pending the OLAP Director's consideration of the reconsideration request. The OLAP Director is authorized to allow requests and determinations described in this paragraph to be made electronically.

(e) *Effect of administrative termination of recognition.* The OLAP Director's determination to terminate recognition is final as of the date of service of the administrative termination notice. Upon service or electronic delivery of an administrative termination of recognition notice to the organization's accredited representatives by OLAP, the organization's representatives shall no longer be authorized to represent clients before the Immigration Courts, the Board, or DHS on behalf of that organization, but the notice shall not affect an individual's accreditation through another recognized organization unless otherwise specified. An organization whose recognition is terminated may submit a new request for recognition at any time after its termination unless otherwise prohibited.

(f) *Effect of administrative termination of accreditation.* The OLAP Director's determination to terminate accreditation is final as of the date of service of the administrative termination notice. Upon service or electronic delivery of an administrative termination of accreditation notice to an accredited representative by OLAP, the individual shall no longer be authorized to represent clients before the Immigration Courts, the Board, or DHS on behalf of that organization, but the notice does not affect the individual's accreditation through another organization unless specified in the determination. An organization may submit a request for accreditation on behalf of any individual whose accreditation has been terminated unless otherwise prohibited.

§ 1292.18 Administrative review of denied requests for reconsideration.

(a) *Authority of the Director.* The Director has the discretionary authority to review a request for reconsideration pursuant to § 1292.13(e), § 1292.16(f), or § 1292.17(d) that has been denied. The Director may delegate this authority to any officer within EOIR, except the OLAP Director.

(1) An organization whose request for reconsideration pursuant to § 1292.13(e), § 1292.16(f), or § 1292.17(d) has been denied may request administrative review from the Director within ten (10) days of the denial, identifying the alleged factual or legal errors in the underlying

determination. The request for administrative review shall be submitted to the OLAP Director, who will forward the request to the Director.

(2) The Director may review a request for reconsideration pursuant to § 1292.13(e), § 1292.16(f), or § 1292.17(d) that has been denied on the Director's own initiative by issuing a notification of administrative review within ten (10) days of the denial. This notification shall state the issues to be reviewed.

(3) The recognition of the organization and the accreditation of any representatives that are subject to administrative review as described in this section shall remain valid pending the Director's consideration of the request, except in the case of an interim suspension pursuant to 8 CFR 1003.111.

(b) *Review.* The Director shall review the record before OLAP and the organization's request for administrative review, and, in the Director's discretion, may request additional filings from the organization. The Director may affirm the denial of the request for reconsideration or vacate the denial and return the matter to the OLAP Director for further action consistent with the Director's determination. The Director may not approve a request for recognition or accreditation or renewal thereof.

§ 1292.19 Complaints against recognized organizations and accredited representatives.

(a) *Filing complaints.* Any individual may submit a complaint to EOIR or DHS that a recognized organization or accredited representative has engaged in behavior that is a ground of termination or otherwise contrary to the public interest. Complaints must be submitted in writing or on Form EOIR-44 to the EOIR disciplinary counsel or DHS disciplinary counsel and must state in detail the information that supports the basis for the complaint, including, but not limited to: The name and address of each complainant; the name and address of each recognized organization and accredited representative that is a subject of the complaint; the nature of the conduct or behavior; the individuals involved; and any other relevant information. EOIR disciplinary counsel and DHS disciplinary counsel shall notify each other of any complaint that pertains, in whole or in part, to a matter involving the other agency. EOIR may authorize that complaints submitted to the EOIR disciplinary counsel may be made electronically.

(b) *Preliminary inquiry.* Upon receipt of the complaint, the EOIR disciplinary counsel shall initiate a preliminary

inquiry. If a complaint is filed by a client or former client of a recognized organization or any of its accredited representatives, the complainant waives the attorney-client privilege and any other privilege relating to the representation to the extent necessary to conduct a preliminary inquiry and any subsequent proceedings based thereon. If the EOIR disciplinary counsel determines that a complaint is without merit, no further action will be taken. The EOIR disciplinary counsel may also, in the disciplinary counsel's discretion, dismiss a complaint if the complainant fails to comply with reasonable requests for information or

documentation. If the EOIR disciplinary counsel determines that a complaint has merit, the EOIR disciplinary counsel may disclose information concerning the complaint or the preliminary inquiry to the OLAP Director pursuant to 8 CFR 1003.108(a)(3) or initiate disciplinary proceedings through the filing of a Notice of Intent to Discipline pursuant to 8 CFR 1003.105. If a complaint involves allegations that a recognized organization or accredited representative engaged in criminal conduct, the EOIR disciplinary counsel shall refer the matter to DHS or the appropriate United States Attorney, and if appropriate, to the Inspector General,

the Federal Bureau of Investigation, or other law enforcement agency.

§ 1292.20 Roster of recognized organizations and accredited representatives.

The OLAP Director shall maintain a roster of recognized organizations and their accredited representatives. An electronic copy of the roster shall be made available to the public and updated periodically.

Dated: December 6, 2016.

Loretta E. Lynch,
Attorney General.

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Assistance to States for the Education of Children With Disabilities;
Preschool Grants for Children With Disabilities; Final Rule

DEPARTMENT OF EDUCATION**34 CFR Part 300**

[Docket ID ED-2015-OSERS-0132]

RIN 1820-AB73

Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.**ACTION:** Final regulations.

SUMMARY: The Secretary amends the regulations under Part B of the Individuals with Disabilities Education Act (IDEA) governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program. With the goal of promoting equity under IDEA, the regulations will establish a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and in its local educational agencies (LEAs); clarify that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities; clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found; and require that LEAs identify and address the factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow these services for children from age 3 through grade 12, with and without disabilities.

DATES:

Effective Date: These regulations are effective January 18, 2017.

Compliance Date: Recipients of Federal financial assistance to which these regulations apply must comply with these final regulations by July 1, 2018, except that States are not required to include children ages three through five in the calculations under § 300.647(b)(3)(i) and (ii) until July 1, 2020.

FOR FURTHER INFORMATION CONTACT:

Mary Louise Dirrigl, U.S. Department of Education, 400 Maryland Avenue SW., Room 5156, Potomac Center Plaza,

Washington, DC 20202-2600.

Telephone: (202) 245-7324.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**Executive Summary**

Purpose of This Regulatory Action: The purpose of these final regulations is to promote equity in IDEA. Specifically, the final regulations will help to ensure that States meaningfully identify LEAs with significant disproportionality and that States assist LEAs in ensuring that children with disabilities are properly identified for services, receive necessary services in the least restrictive environment, and are not disproportionately removed from their educational placements by disciplinary removals. These final regulations also address the well-documented and detrimental over-identification of certain students for special education services, with particular concern that over-identification results in children being placed in more restrictive environments and not taught to challenging academic standards.

While these regulations only establish a system for identifying significant disproportionality based on overrepresentation, the regulations acknowledge that overrepresentation may be caused by under-identification of one or more racial or ethnic groups and the regulations allow funds reserved for comprehensive CEIS to be used to address these issues if they are identified as a factor contributing to the significant disproportionality. LEAs are legally obligated to identify students with disabilities and provide the resources and supports they need to have equal access to education. Thus we, encourage States to ensure that the State's and LEAs' child find policies, practices, and procedures are working effectively to identify all children with disabilities, regardless of race or ethnicity.

IDEA requires States and local educational agencies (LEAs) to take steps to determine the existence of and address significant disproportionality in special education. The statute and regulations for IDEA, Part B, include important provisions for how States and LEAs must address significant disproportionality, including an examination of significant disproportionality and remedies where findings of significant disproportionality occur.

Under IDEA section 618(d) (20 U.S.C. 1418(d)) and § 300.646, States are

required to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the State and the LEAs of the State with respect to the identification of children as children with disabilities, including identification as children with particular impairments; the placement of children in particular educational settings; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. States must make this determination annually.

When a State educational agency (SEA) identifies LEAs with significant disproportionality in one or more of these areas based on the collection and examination of their data, States must: (1) Provide for the review (and if appropriate) revision of the LEA's policies, procedures, and practices for compliance with IDEA; (2) require the LEA to reserve the maximum amount (15 percent) of its Part B funds to be used for comprehensive coordinated early intervening services (comprehensive CEIS) to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified; and (3) require the LEA to publicly report on the revision of its policies, procedures, and practices. Under the statute and regulations, each State has considerable discretion in how it defines significant disproportionality.

To address and reduce significant disproportionality, the final regulations establish a standard methodology that each State must use in its annual determination under IDEA section 618(d) (20 U.S.C. 1418(d)) of whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State.

Further, the final regulations clarify ambiguities in the existing regulations concerning significant disproportionality in the disciplining of children with disabilities. Specifically, these regulations adopt the Department's long-standing interpretation that the required remedies in IDEA section 618(d)(2) apply when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement. In addition, funds reserved for comprehensive CEIS now must be used to identify and address the factors contributing to significant disproportionality and may be used to serve children from age 3 through grade 12, with and without disabilities.

Summary of Major Provisions of This Regulatory Action

Significant provisions of these final regulations include:

- §§ 300.646(b) and 300.647(a) and (b) provide the standard methodology that States must use to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs;

- As part of the standard methodology, § 300.647(b)(1) requires States to set reasonable risk ratio thresholds, reasonable minimum n-sizes, reasonable minimum cell sizes, and if a State uses the flexibility described in § 300.647(d)(2), standards for measuring reasonable progress, all with input from stakeholders (including their State Advisory Panels), subject to the Department's oversight;

- § 300.647(b)(1)(iv) sets a rebuttable presumption that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30 are reasonable.

- § 300.647(d) provides flexibilities that States, at their discretion, may consider when determining whether significant disproportionality exists. States may choose to identify an LEA as having significant disproportionality after an LEA exceeds a risk ratio threshold for up to three prior consecutive years. States may also choose not to identify an LEA with significant disproportionality if the LEA is making reasonable progress, as defined by the State, in lowering risk ratios in each of the two consecutive prior years, even if the risk ratios exceed the State's risk ratio thresholds;

- § 300.646(c) clarifies that the remedies in IDEA section 618(d)(2) are triggered if a State makes a determination of significant disproportionality with respect to disciplinary removals from placement;

- § 300.646(c)(1) and (2) clarify that the review of policies, practices, and procedures must occur in every year in which an LEA is identified with significant disproportionality and that LEA reporting of any revisions to policies, practices, and procedures must be in compliance with the confidentiality provisions of the Family Educational Rights and Privacy Act (FERPA), (20 U.S.C. 1232), its implementing regulations in 34 CFR part 99, and IDEA section 618(b)(1); and

- § 300.646(d) describes which populations of children may receive comprehensive CEIS when an LEA has been identified with significant disproportionality. Comprehensive CEIS may be provided to children from age 3 through grade 12, regardless of whether

they are children with disabilities, and, as part of implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality.

Costs and Benefits: Due to the considerable discretion allowed States (e.g. flexibility to determine their own reasonable risk ratio thresholds, reasonable minimum n-sizes and cell size, and the extent to which LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios, we cannot evaluate the costs of implementing the final regulations with absolute precision. However, we estimate the total cost of these regulations over ten years would be between \$50.1 and \$91.4 million, plus transfers between \$298.4 and \$552.9 million. These estimates assume discount rates of three to seven percent.

There are several benefits of the regulations that include: Increased transparency regarding each State's definition of significant disproportionality; an increased role for State Advisory Panels in determining States' risk ratio thresholds, minimum n-sizes, and minimum cell sizes; and State review and, if appropriate, revision of the policies, procedures, and practices used in the identification, placement, or discipline of children with disabilities, to ensure that the policies, procedures, and practices comply with the requirements of IDEA; and, ultimately, better identification, placement, and discipline of children with disabilities.

Additionally, the Department believes that expanding the eligibility of children ages three through five to receive comprehensive CEIS would give LEAs new flexibility to use additional funds received under Part B of IDEA to provide appropriate services and supports at earlier ages to children who might otherwise later be identified as having a disability, which could reduce the need for more extensive special education and related services for such children in the future. The Department believes this regulatory action to standardize the methodology States use to identify significant disproportionality will provide clarity to the public, increase comparability of data across States, and improve upon current policy, which has resulted in State definitions which vary widely and may prevent States from identifying the magnitude of racial and ethnic overrepresentation in special education. We provide further detail regarding costs and benefits in the *Regulatory Impact Analysis* section.

General

On March 2, 2016, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (81 FR 10967) to amend the regulations in 34 CFR part 300 governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program. Specifically, in the NPRM, we proposed changes to the regulation regarding significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities.

In the preamble of the NPRM, we discussed on pages 10980 and 10981 the major changes proposed in that document. These included the following:

- Adding §§ 300.646(b) and 300.647(a) and (b) to provide the standard methodology that States must use to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs;

- Adding § 300.647(c) to provide the flexibilities that States, at their discretion, may consider when determining whether significant disproportionality exists. States may choose to identify an LEA as having significant disproportionality after an LEA exceeds a risk ratio threshold for up to three prior consecutive years. A State also has the flexibility not to identify an LEA with significant disproportionality if the LEA is making reasonable progress under § 300.647(d)(2) in lowering the risk ratios, even if they exceed the State's risk ratio thresholds, where reasonable progress is defined by the State;

- Amending current § 300.646(b) (proposed § 300.646(c)) to clarify that the remedies in IDEA section 618(d)(2) are triggered if a State makes a determination of significant disproportionality with respect to disciplinary removals from placement;

- Amending current § 300.646(b)(1) and (3) (proposed § 300.646(c)(1) and (2)) to clarify that the review of policies, practices, and procedures must occur in every year in which an LEA is identified with significant disproportionality, and that LEA reporting of any revisions to policies, practices, and procedures must be in compliance with the confidentiality provisions of the Family Educational Rights and Privacy Act (FERPA), (20 U.S.C. 1232), its implementing regulations in 34 CFR part 99, and IDEA section 618(b)(1); and

- Amending current § 300.646(b)(2) (proposed § 300.646(d)) to define which

populations of children may receive comprehensive CEIS when an LEA has been identified with significant disproportionality. Comprehensive CEIS may be provided to children from age 3 through grade 12, regardless of whether they are children with disabilities, and, as part of implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality.

These final regulations contain several significant changes from the NPRM, including:

- A revised § 300.646(d)(1)(ii) to include additional factors that may contribute to significant disproportionality;
- A new § 300.646(d)(1)(iii) to clarify that in implementing comprehensive CEIS an LEA must address a policy, practice, or procedure it identifies as contributing to significant disproportionality;
- A new § 300.646(e) to clarify that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS;
- A new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.
- A revised § 300.647(a) to include a definition of comparison group, minimum n-size, and minimum cell size;
- A revised § 300.647(b)(1) to require States to set reasonable risk ratio thresholds, reasonable minimum cell sizes, reasonable minimum n-sizes, and, if a State is using the flexibility in § 300.647(d)(2), standards for measuring reasonable progress, all with input from stakeholders (including their State Advisory Panels) and subject to the Department's oversight. As revised, § 300.647(b)(1) also clarifies that a State may, but is not required to, set these standards at different levels for each of the categories described in paragraphs (b)(3) and (4);
- States may delay the inclusion of children ages three through five in the review of significant disproportionality with respect to the identification of children as children with disabilities, and with respect to the identification of children as children with a particular impairment, until July 1, 2020;
- A revision of § 300.647(b)(4) to no longer require States to calculate the risk ratio for children with disabilities

ages 6 through 21, inside a regular class more than 40 percent of the day and less than 79 percent of the day;

- An amendment to § 300.647(b)(5) to require States to use the alternate risk ratio when the number of children in the comparison group fails to meet either the State's reasonable minimum n-sizes or the State's reasonable minimum cell sizes;
- A new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes must include a detailed explanation of why the numbers are reasonable and how they ensure appropriate analysis for significant disproportionality.
- A new § 300.647(c) to clarify that States are not required to calculate a risk ratio or alternate risk ratio if the particular racial or ethnic group being analyzed does not meet the minimum n-size or minimum cell size, or in calculating the alternate risk ratio under § 300.647(b)(5), the comparison group in the State does not meet the minimum cell size or minimum n-size; and
- A revision to proposed § 300.647(c)(2)—now § 300.647(d)(2)—to allow States the flexibility to not identify an LEA that exceeds a risk ratio threshold if it makes reasonable progress under § 300.647(d)(2) in lowering the applicable risk ratio or alternate risk ratio in each of two consecutive prior years.

We fully explain these changes in the Analysis of Comments and Changes elsewhere in this preamble.

Effective Date of These Regulations

As noted in the Dates section, these regulations become part of the Code of Federal Regulations on January 18, 2017. However, States and LEAs are not required to comply with these regulations until July 1, 2018, or to include children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

The Department recognizes the practical necessity of allowing States time to plan for implementing these final regulations, including to the extent necessary, time to amend the policies and procedures necessary to comply. States will need time to develop the policies and procedures necessary to

implement the standard methodology in § 300.647 and the revised remedies in § 300.646(c) and (d). In particular, States must consult with their stakeholders and State Advisory Panels under § 300.647(b)(1) to develop reasonable risk ratio thresholds, reasonable minimum n-sizes, reasonable minimum cell sizes, and if a State uses the flexibility in § 300.647(d)(2), standards for measuring reasonable progress. States must also determine which, if any, of the available flexibilities they will adopt. To the extent States need to amend their policies and procedures to comply with these regulations, States will also need time to conduct public hearings, ensure adequate notice of those hearings and provide an opportunity for public comment, as required by § 300.165.

Accordingly, States must implement the standard methodology under § 300.647 in school year (SY) 2018–19. In doing so, States must identify LEAs with significant disproportionality under § 300.647(d)(1) in SY 2018–2019 using, at most, data from the three most recent school years for which data are available. We note that, in the case of discipline, States may be using data from four school years prior to the current year, as data from the immediate preceding school year may not yet be available at the time the State is making its determinations (*i.e.*, final discipline data from SY 2017–2018 may not yet be available at the time during SY 2018–2019 the State is calculating risk ratios).

In SY 2018–2019, States must implement the standard methodology contained in these regulations by ensuring that the identification of any LEAs with significant disproportionality based on race and ethnicity in the identification, placement, or disciplinary removal of children with disabilities, is based on the standard methodology in § 300.647, and implements the revised remedies in accordance with § 300.646(c) and (d). In the spring of 2020, therefore, States will report (via IDEA Part B LEA Maintenance of Effort (MOE) Reduction and CEIS data collection, OMB Control No. 1820–0689) whether each LEA was required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS in SY 2018–19.

States may, at their option, accelerate this timetable by one full year. In other words, States may implement the standard methodology in SY 2017–18 and assess LEAs for significant disproportionality using data from up to the most recent three consecutive school years for which data are available.

States that choose to implement the standard methodology in § 300.647 to

identify LEAs with significant disproportionality in SY 2017–2018 may also require those LEAs to implement the revised remedies in accordance with § 300.646(c) and (d). Similarly, in SY 2017–18, States may choose to implement the revised remedies without implementing the standard methodology.

Whether a State begins compliance in SY 2017–2018 or 2018–2019, it need not include children ages three through five in the review of significant disproportionality, with respect to both the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

Finally, the delayed compliance date does not mean that States are excused from making annual determinations of significant disproportionality in the intervening years. States must still make these determinations in accordance with the current text of § 300.646.

Public Comment: In response to our invitation in the NPRM, 316 parties submitted comments on the proposed regulations. We group major issues according to subject under these headings:

- I. General Comments
 - Introduction
 - Glossary of Terms
 - Terminology
 - The Department Should Await Congressional Action
 - Under-Identification of Children With Disabilities by Race and Ethnicity
 - Recommendations Regarding Technical Assistance and Guidance
 - Causes of Racial and Ethnic Disparity That Originate Outside of School
 - Causes of Racial and Ethnic Disparities That Originate in School
 - Proposed Regulations Would Create Racial Quotas
 - The Purpose of the Proposed Regulations
 - The Cost and Burden of the Regulations
 - Evaluating the Impact of the Regulation Reporting Requirements
 - Additional State and Local Standards Noncompliance With IDEA
 - General Opposition to the Regulation Comments on the Racial and Ethnic Disparities Report
 - Timeline and Effective Date of the Regulation
 - Appropriate Placement of Children With Disabilities
 - Special Education. Generally
 - Results-Driven Accountability
- II. A Standard Methodology for Determining Significant Disproportionality (§ 300.647)
 - General
 - Risk Ratios (§ 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b))
 - Categories of Analysis (§ 300.647(b)(3) and (4))
 - Risk Ratio Thresholds (§ 300.647(a)(7); § 300.647(b)(1) and (2); § 300.647(b)(6))

- Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1))
- Alternate Risk Ratios (§ 300.647(a)(1); § 300.647(b)(5); § 300.647(c)(2))
- Flexibilities—Three Consecutive Years of Data, § 300.647(d)(1)
- Flexibilities—Reasonable Progress, § 300.647(d)(2)
- III. Clarification that Statutory Remedies Apply to Disciplinary Actions (§ 300.646(a)(3) and (c))
- IV. Clarification of the Review and Revision of Policies, Practices, and Procedures (§ 300.646(c))
 - Review of Policies, Practices, and Procedures—Requirements
 - Guidance
 - Clarifications
- V. Expanding the Scope of Comprehensive Coordinated Early Intervening Services (§ 300.646(d))
 - Use of Comprehensive CEIS for Specific Populations
 - Funding Comprehensive CEIS
 - Implications for IEPs
 - Implications for LEA Maintenance of Effort (MOE)
 - General Uses of Comprehensive CEIS Funds
 - Implications for Voluntary Implementation of CEIS
 - Miscellany

Analysis of Comments and Changes: An analysis of the comments and of any changes in the regulations since publication of the NPRM follows. Generally, we do not address: (a) Minor changes, including technical changes made to the language published in the NPRM; or (b) comments that express concerns of a general nature about the U.S. Department of Education (Department) or other matters that are not germane.

I. General Comments

Introduction

We provide a glossary as an aid to reading and understanding the technical discussions surrounding a standard methodology for determining significant disproportionality. Some terms in this glossary are defined in these final regulations.

Glossary of Terms

Alternate Risk Ratio means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk of that outcome for children in all other racial or ethnic groups in the State. (§ 300.647(a)).

Cell Size means the number of children experiencing of a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

Comparison Group consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality.

N-Size means the number of children enrolled in an LEA with respect to identification, and the number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

Population Requirement means the minimum number of children required before a racial or ethnic group within an LEA will be reviewed for significant disproportionality, such as a minimum cell size or minimum n-size.

Risk means the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a specified racial or ethnic group (or groups), calculated by dividing the number of children from a specified racial or ethnic group (or groups) experiencing that outcome by the total number of children from that racial or ethnic group (or groups) enrolled in the LEA. (§ 300.647(a)).

Risk Ratio means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk for children in all other racial and ethnic groups within the LEA. (§ 300.647(a)).

Risk Ratio Threshold means a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under § 300.646(a) and (b). (§ 300.647(a)).

Weighted Risk Ratio means a variation on the risk ratio in which the risk to each racial and ethnic group within the comparison group is multiplied by a weight that reflects that group's proportionate representation within the State.

Terminology

Comment: None.

Discussion: In the NPRM, the Department noted that many States have minimum cell size requirements to restrict their assessment of significant disproportionality to include only those LEAs that have sufficient numbers of children to generate stable calculations. The Department further noted that, while different States use different definitions of “minimum cell size,” the most common definition placed a requirement on the number of children with disabilities in the racial or ethnic subgroup being analyzed. This common

definition describes the population used in the denominator when calculating the risk of placement or disciplinary removal for a racial or ethnic group.

Based on this information, the Department used the term “minimum cell size” in its description of proposed § 300.647(b)(3) and (4), in which we intended to allow States not to apply the standard methodology when analyzing for significant disproportionality with respect to identification when a racial or ethnic group in an LEA had fewer than 10 children (or, when analyzing for placement or discipline, when a racial or ethnic group in an LEA had fewer than 10 children with disabilities). Put another way, it was the Department’s intent to allow States not to apply the standard methodology when, in calculating the risk of identification, placement, or discipline for a racial or ethnic group, the denominator of the risk calculation included fewer than 10 children.

In response to the NPRM, many commenters raised concerns about the effects of particularly small groups of children on the calculation of risk for particular racial or ethnic groups and the benefits and drawbacks of setting a minimum number of children for either the numerator or denominator in the risk calculation. Upon review of these comments, the Department determined that using a single term (*i.e.*, “minimum cell size”) to refer to both of these requirements would be potentially confusing. Therefore, in this NFR, the Department uses the term “n-size” to refer to the denominator of a risk calculation and “cell size” to refer to the numerator of the risk calculation. We note that this use of terms is different than what was used in the NPRM, but we believe this differentiation will provide the greatest clarity in our discussion of the requirements of the final rule.

Consistent with this approach, we have interpreted comments regarding the proposed § 300.647(b)(3) and (4), and comments regarding risk denominators, to be referring to n-size, and refer to those comments using that terminology. Further, we have interpreted comments regarding risk numerators to be referring to cell size, and refer to those comments using that terminology.

Change: We have revised proposed § 300.647 to include definitions for the terms “minimum cell size” and “minimum n-size” and have utilized those terms through the regulation to increase specificity and clarity.

The Department Should Await Congressional Action

Comments: Some commenters argued that the Department should withdraw the proposed rule and first allow Congress to address significant disproportionality in the next reauthorization of IDEA.

Discussion: The Department has an obligation to implement and enforce the requirements of IDEA as they exist today. While we will work with Congress to reauthorize IDEA, including any potential changes to section 618(d), we must continue to ensure that States and LEAs are appropriately implementing the current requirements to ensure that every child has access to a free appropriate public education in the least restrictive environment. As we have stated in the NPRM, following the Government Accountability Office (GAO) report, the Department conducted its own review of State approaches, as well as a review of the extent to which States identified significant disproportionality. Additionally, we examined research related to significant disproportionality and analyzed data collected under section 618 of IDEA.

The Department’s analysis found several nationwide examples of disparity across racial and ethnic groups. For example in 2012: American Indian and Alaska Native students were 60 percent more likely to be identified for an intellectual disability, while Black children were more than twice as likely as other groups to be so identified. Similarly, American Indian or Alaska Native students were 90 percent more likely, Black students were 50 percent more likely, and Hispanic students were 40 percent more likely to be identified as a student with a learning disability. In addition, Black children were more than twice as likely to be identified with an emotional disturbance. These national-level data are troubling, given the number of States that have not identified any LEAs with significant disproportionality.

As published in the NPRM, in SY 2012–13, only 28 States and the District of Columbia identified any LEA with significant disproportionality, and of the 491 LEAs identified, 75 percent were located in only seven States. Of the States that identified LEAs with significant disproportionality, only the District of Columbia and four States identified significant disproportionality in all three categories of analysis—identification, placement, and in discipline. In short, these data suggest that there are likely LEAs that are not, but should be, identified with

significant disproportionality, and thus that many children in these districts are not receiving proper services.

The Department’s decision now to require States to follow a standard methodology is intended to promote consistency between States and to help ensure compliance with IDEA section 618(d). We are adopting the standard methodology to ensure proper implementation of the statute and so that LEAs with significant disparities, based on race and ethnicity, in identification, placement and discipline are appropriately identified; that significant disproportionality is appropriately addressed; and that children with and without disabilities receive the services they need.

Changes: None.

Under-Identification of Children With Disabilities by Race and Ethnicity

Comments: Several commenters responded to Directed Question #11 and expressed various concerns about under-identification. Other commenters did the same independently of the question. Several commenters expressed support for the Department’s efforts to remediate the problems of overrepresentation and over-identification of children with disabilities based on race and ethnicity.¹ However, other commenters, some citing research, asserted that the under-identification of children of color for special education and related services is a greater and more serious problem than their overrepresentation in special education, and that, by not addressing the proper problem, the proposed regulations would allow harm to children of color to continue. One commenter stated that lawyers around the country have noted a systemic neglect of children of color with disabilities in education systems, and another stated that many families have reported delays in the identification of disabilities and, in some cases, the misidentification of disabilities. Still other commenters shared personal experiences of under-identification. Two commenters stated that the proposed regulations should be withdrawn and revised to address this more pressing problem, and one suggested that the Department withdraw the regulation in favor of other efforts to promote the proper implementation of

¹ We distinguish “overrepresentation” and “underrepresentation,” which describe disparities in the relative proportion of a racial or ethnic subgroup in special education and their relative proportion in the population, from “over-identification” and “under-identification,” which describe the appropriateness of a child’s identification as a child with a disability.

child find procedures and the early and appropriate identification of children with disabilities.

Discussion: The Department agrees that when under-identification of children of color occurs it is problematic. These children, like all children with disabilities, are entitled to a free appropriate public education. States should ensure that their child find procedures are robust enough to appropriately identify all children with disabilities in a timely manner.

The Department's long-standing interpretation of IDEA section 618(d) (20 U.S.C. 1418(d)), has been that it requires States to address overrepresentation, not under-identification or underrepresentation, consistent with the intent of Congress when it authorized that provision. (See, Office of Special Education Programs (OSEP) Memorandum 08-09 (July 28, 2008)).

The basis for congressional action was largely due to a concern that students of color were being identified too often for special education services, and placed too frequently in segregated settings, in ways that were detrimental to their education. There is also an increased understanding that appropriate identification and delivery of special education services would ensure that students with disabilities have access to, and an opportunity to fully participate in, the general education curriculum.

We understand that overrepresentation of one racial or ethnic group that rises to the level of significant disproportionality may occur for a variety of reasons, including over-identification of that racial or ethnic group, under-identification of another racial or ethnic group or groups, or appropriate identification with higher prevalence of a disability in a particular racial or ethnic group.

For example, consider an LEA in which the risk ratio for African American students with an emotional disturbance exceeds the State determined risk ratio threshold and is identified as having significant disproportionality. The overrepresentation of African American students could be due to: (1) The LEA inappropriately identifying African American students as having an emotional disturbance and needing special education and related services even though they do not (over-identification); (2) the LEA failing to appropriately identify students in other racial or ethnic groups as having an emotional disturbance and needing special education and related even though they do (under-identification); or (3) the LEA appropriately identifying all

students in the LEA who have an emotional disturbance but underlying variations in the prevalence of those disabilities across racial and ethnic groups results in an overrepresentation of African American students.

We encourage States and LEAs to consider multiple sources of data when attempting to determine the factors contributing to significant disproportionality, including school level data, academic achievement data, relevant environmental data that may be correlated with the prevalence of a disability, or other data relevant to the educational needs and circumstances of the specific group of students identified.

Changes: We have added a new § 300.646(d)(1)(iii), requiring an LEA, in implementing comprehensive CEIS, to address any policy, practice, or procedure it identifies as contributing to significant disproportionality, including any policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

Comments: Several commenters requested that the Department address both over-identification and under-identification based on race and ethnicity in special education. These commenters recommended that the Department require States to report racial and ethnic disparities in the identification of children with disabilities, and children with particular impairments, due to under-identification. These commenters also requested that the Department require States to provide technical assistance to LEAs with under-identification, by race or ethnicity, but not require those LEAs to implement the statutory remedies under IDEA section 618(d).

Similarly, one commenter asked the Department to amend proposed § 300.646(c)(1) to clarify that, in cases of significant disproportionality in the over-identification or the under-identification of children as children with disabilities, an LEA must undergo a review and, if necessary, revision of its policies, practices, and procedures.

One commenter suggested that addressing both over-identification and under-identification was particularly important in the context of autism and emotional disturbance identification. The commenter further observed that these are both areas where recent research has suggested that girls in particular are under-identified.

A few commenters, however, opposed any expansion of the proposed regulations to address under-identification due to concerns that this will weaken their ability to address overrepresentation. One of these

commenters stated that, when the Department previously required States to address under-identification by race and ethnicity as part of the State Performance Plan/Annual Performance Report (SPP/APR), the result was confusion among States.

Discussion: As we stated earlier, while this regulation only establishes a system for identifying significant disproportionality based on overrepresentation, nothing in these regulations prevents States from working with their LEAs to ensure appropriate identification of children with disabilities and address any potential under-identification that may exist. In cases where LEAs find that a factor contributing to the overrepresentation of one racial or ethnic group is the under-identification of a different racial or ethnic group, the LEA may use funds reserved for comprehensive CEIS to address that under-identification. In particular, we remind States that, consistent with IDEA child find requirements, each State must have policies and procedures to ensure that all children residing in the State who are in need of special education and related services are identified, located, and evaluated, regardless of race or ethnicity.

We also note that nothing in these regulations establishes or authorizes the use of racial or ethnic quotas limiting a child's access to special education and related services, nor do they restrict the ability of Individualized Education Program (IEP) Teams or others to appropriately identify and place children with disabilities. In fact, an LEA's use of quotas to artificially reduce the number of children who are identified as having a disability, in an effort to avoid a finding of significant disproportionality, would almost certainly conflict with their obligations to comply with other Federal statutes, including civil rights laws governing equal access to education. States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find procedures appropriately and make a free appropriate public education available to all eligible children with disabilities. (20 U.S.C. 1412(a)(1), (3) and (11); 34 CFR 300.101, 300.111, and 300.149). To clarify that these regulations must be implemented in a manner that is consistent with all other requirements of this part, we have added § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or

procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

Changes: As described above, we have added a new § 300.646(f).

Comment: One commenter recommended that the Department address the under-identification of children with disabilities by supporting States and LEAs in collecting child-level data on developmental screenings and referrals for services to better understand where child find efforts are effective.

Discussion: We appreciate the commenter's proposal to expand awareness and understanding of child find implementation, and of the potential under-identification of children with disabilities, through better data collection. The Department is committed to ensuring that all children with disabilities are appropriately identified, evaluated, and provided with special education services. However, we believe that any requirement to collect data regarding developmental screenings and referrals would be beyond the scope of IDEA section 618(d), which directs States to collect and examine data for the purpose of identifying significant disproportionality by race and ethnicity. We believe it is more appropriate to consider the merits of the commenter's proposal separately from regulation.

Changes: None.

Comments: Several commenters requested that the proposed regulations be withdrawn until there is more research available regarding under-identification and over-identification in special education, including better information as to whether over-identification or under-identification is the more pressing problem. Similarly, one commenter stated that the regulations were based on a flawed understanding of research on racial and ethnic disparities in special education.

One other commenter asserted that the research that the Department is using to justify its current regulations to address significant disproportionality has been repeatedly identified as having serious methodological limitations, including a lack of statistical controls for known confounds.

Discussion: The Department agrees that there is a continued need for research to support Federal, State, and local efforts to address racial and ethnic disparities in special education, though we do not agree that the research we relied upon is flawed. We also agree that additional research is necessary to

continue to examine both over- and under-representation in special education, and the Department plans to direct additional resources to research these issues. However, we do not agree that these regulations should be delayed until further research is conducted because there is sufficient evidence of significant disproportionalities going uninvestigated or unaddressed.

We also agree that some research suggests that there are children with disabilities who are not, but should be, receiving special education services under IDEA. However, there is a corresponding body of research that children of certain races or ethnicities are disproportionately identified with disabilities, educated in more restrictive placements, and disciplined at greater rates than their peers. We do not believe that over- and under-representation in special education based on race or ethnicity are mutually exclusive. In fact, it is possible, if not probable, that both over- and under-representation are occurring, which is why the Department's effort to standardize the way in which States examine LEAs for significant disproportionality is necessary.

The Department believes that § 300.646(b), which requires States to apply a standard methodology to identify significant disproportionality due to overrepresentation, will help to build greater knowledge about existing State practice and the extent of these disparities and encourage additional research to investigate their causes and potential solutions for them. That said, States are required to ensure that they are appropriately implementing these new regulations in conjunction with appropriate child find procedures. These regulations should not be used to exclude children with disabilities from receiving services under IDEA.

Changes: None.

Recommendations Regarding Technical Assistance and Guidance

Comment: A number of commenters called upon the Department to provide to States and LEAs technical assistance and guidance for implementing the proposed regulations. Some commenters asserted that the Department should provide technical assistance to States in order to ensure that LEAs appropriately identify children of color, rather than under-identifying them, to avoid a designation of significant disproportionality. In the absence of sufficient supports for LEAs, the commenters stated, LEAs may implement shortcuts so that they appear to be reducing disparities. These shortcuts could include under-reporting

of disciplinary removals, under-identifying children of color as children with disabilities, or referring fewer children from overrepresented racial or ethnic groups for special education services. Similarly, another commenter stated that the Department could ensure that LEAs do not under-identify children with disabilities by supporting States' efforts to utilize appropriate cell sizes, risk ratio thresholds, and significance testing.

Other commenters recommended that the Department provide suggestions to States about evidence-based practices that may reduce disproportionality and that the Department tailor technical assistance to the needs of the agencies served.

One commenter suggested that the Department provide specific information on evaluation and identification of children who may need special education, the use of schoolwide approaches such as positive behavioral interventions and supports, developing multi-tiered systems of support to provide intensive services before referral to special education, and the use of multi-disciplinary teams of specialized instructional support personnel to support children with and without disabilities. Another commenter also requested that the Department provide research-based root cause analysis tools, targeted to each of the areas of significant disproportionality, as well as assistance with cultural responsive evaluation, appropriate academic and behavioral interventions prior to referral for special education services, and the monitoring of highly mobile children within a multi-tiered system of support.

One commenter recommended that the Department provide guidance that indicates how LEAs can compare the number of children identified, placed, or disciplined to the number of children who should have been identified, placed, or disciplined and how best to use risk ratio methods with small populations.

One commenter requested that the Department provide guidance on, monitor, and enforce IDEA provisions governing evaluation procedures and encourage States to implement school-age hearing screening programs as part of their implementation of child find.

One commenter recommended that the Department provide more technical assistance and guidance on the importance of health care providers in helping identify all children with disabilities.

Other commenters suggested that the Department enhance State capacity to train and counsel parents about IDEA,

disability, and the implications when a child is found eligible for special education and related services.

Discussion: We agree that supporting States and LEAs in implementing these regulations is important. The Department provides technical assistance through numerous investments funded under part D of IDEA, and it provides easy access to information from its research to practice efforts at www.osepideasthatwork.org. In general, the Department funds technical assistance centers to work with States and LEAs to provide a variety of products and services to support children with disabilities, teachers, special education service providers, policy makers, and parents of children with disabilities with the implementation of IDEA requirements, including those provisions and activities required to address significant disproportionality based on race or ethnicity. We agree with commenters that there are many distinct but overlapping provisions under IDEA that will need to be addressed to help States and their stakeholders comply with the requirements of these regulations. The Department will continue to provide technical assistance to help States and stakeholders address significant disproportionality based on race or ethnicity. In addition, the Department plans to identify new Federal resources to support States' work to implement these regulations through the Technical Assistance and Dissemination network and Department staff. When these resources are available, the Department will work to ensure that States are aware of Federal technical assistance resources that can be used to support their implementation of these regulations.

Changes: None.

Comment: One commenter requested that the Department issue guidance to States on monitoring and analyzing LEA placement data with regard to disability category, gender, ethnicity, and socioeconomic status to help create transparency in decision-making that results in LEA-level disparities.

Discussion: We appreciate the suggestion and will take it into consideration as we develop guidance and technical assistance for these regulations after they are published.

Changes: None.

Causes of Racial and Ethnic Disparity That Originate Outside of School

Comments: Several commenters stated that the proposed regulations are based on a flawed assumption, that the percentage of children of color with disabilities who receive special education and related services should

reflect the percentage of children of color in the general population. Other commenters asserted that one should expect certain subgroups of children to be identified with disabilities (or particular impairments) at higher rates than others due to the effects of poverty, concentrated poverty, poor education, lack of adequate health care parental incarceration, limited language proficiency, drug abuse, environmental toxins, the lack of specialized instructional support or parent training, and other factors that (according to the commenters) increase the risk of disabilities and the need for special education services. Others asserted that achieving proportionality among all races and ethnicities in special education is not an appropriate goal, and that the statistical assumption of equal rates of identification across all groups is erroneous.

Discussion: The Department recognizes that there will be variations in the proportion of individuals across racial and ethnic groups who are identified as children with disabilities. The purpose of these regulations is not to artificially force the identification rate to be equal across all subgroups or to fit any preconceived proportion. The regulation does, however, seek to promote more accurate identification of LEAs in which disproportionality between racial and ethnic groups has become significant and, therefore, possibly indicative of an underlying problem in the identification, placement, or disciplinary removal of children with disabilities.

While various risk factors associated with poverty may be associated with greater risk of disability among children, those factors are by no means determinative of whether a child should be identified as a child with a disability under IDEA. Ideally, children exposed to these risk factors are screened for developmental delays, and other academic and behavioral challenges, so that their needs may be addressed early and appropriately. Further, IDEA requires that the individual needs of children with disabilities—as opposed to their exposure to risk—be central to determining the need for special education and related services.

Changes: None.

Comment: Many commenters stated that risk factors—such as poverty, concentrated poverty, poor education, and lack of access to health care—contribute to the incidence of disability and may confound attempts to effectively examine racial and ethnic disparity in special education. Similarly, one commenter suggested that recent increases in K–12

enrollment, the number of English Learners, and the prevalence of poverty may account for increases in the number of children of color in special education.

In this same context, a few other commenters warned that a simple comparison of percentages of populations must not be taken as evidence of bias, misidentification, or racial discrimination by school officials. Rather, these commenters argued that approaches such as the risk ratio are oversimplifications that may lead to the withdrawal or denial of special education services to children who need them. Similarly, another commenter stated that there are situations where a risk ratio alone will not provide enough information to determine whether an LEA has or does not have significant disproportionality.

Discussion: The Department understands that there are many complex factors that may influence the need for special education services, placement decisions, and disciplinary removals, and that schools alone cannot address all of these factors, particularly those associated with poverty. The Department also understands that risk ratios do not identify the causes of significant disproportionality.

However, risk ratios do identify those LEAs where there are large racial and ethnic disparities and, where these are considered significant, States and LEAs must review the policies, procedures, and practices related to identification, placement, or discipline and, through the implementation of comprehensive coordinated early intervening services, identify and address the causes of these disparities, as appropriate. Even in situations where differential exposure to risk factors contributes to racial disparities in special education, we believe that schools may help to mitigate the effects of these risk factors by screening children early and by providing early and appropriate interventions and supports. Donovan and Cross, 2002. This is a major purpose of comprehensive CEIS, and one reason, as we discuss in the section *Expanding the Scope of Comprehensive Coordinated Early Intervening Services*, that the Department has expanded the scope of comprehensive CEIS to include children ages three through five.

Changes: None.

Comments: Many commenters expressed concern that the Department's overall approach to addressing significant disproportionality, as well as the standard methodology in § 300.647(b), fails to address the underlying causes of racial and ethnic disparities. A large number of commenters noted that there are many

societal and systemic factors that lead to disproportionality. These commenters argued that final regulations should be postponed until these other societal and systemic factors, such as access to mental health care and access to quality early-childhood education, are addressed. Another commenter argued that the issue of significant disproportionality is beyond the responsibility of educators and beyond the scope of their role, and efforts to identify and address it must take into account factors such as poverty, urbanicity, medical care accessibility, and the presence of schools specifically for children with disabilities.

One commenter requested that—once these broad societal and educational problems are addressed—States only report on special education indicators (which we understand the commenter to mean data showing racial and ethnic disparities, similar to what was proposed under § 300.646(b)(3) and (4)) until systems are in place to hold general education accountable as well. Similarly, other commenters asserted that as special education programs typically have little influence over general education programs, it will be difficult to improve services using a mandate on special education.

Discussion: The Department recognizes that racial and ethnic disparities in the identification, placement, and discipline of children with disabilities can have a wide range of causes, including systemic issues well beyond the typical purview of most LEAs. Again, however, this does not mean that LEAs, schools, and educators are wholly incapable of addressing, or mitigating, any of the causes of significant disproportionality. In fact, the Department believes that effective elementary and secondary education, with appropriate supports for children with and without disabilities is essential to addressing the very issues the commenters raise. Delaying the examination of data to make determinations of significant disproportionality (and the review and revision of problematic policies, practices, and procedures) until these broader issues are resolved would overlook both the statutory requirement that States annually collect and examine data and strategies currently available to address these inequities.

The commenters' concerns about holding general education accountable suggest a false dichotomy between special and general education. That is, LEAs are responsible for providing a high quality education to every child, both in general education and special education. When children are

inappropriately identified, placed, or disciplined on the basis of race or ethnicity, all parties are, and should be, held accountable. In fact, this realization of the benefits of a holistic approach to addressing the causes of significant disproportionality led to the Department's expansion of comprehensive CEIS to serve both children with and without disabilities.

Changes: None.

Comment: One commenter suggested that the Department develop funding priorities to examine the connections between race, culture, socio-economic status, and disability. Many commenters noted that additional Federal funds should be made available to address disproportionality in special education and general education programs.

Discussion: Although we view this as beyond the scope of these regulations, we appreciate the suggestion. The Department will take this recommendation under consideration as we develop funding priorities for fiscal years 2017 and 2018.

Changes: None.

Causes of Racial and Ethnic Disparities That Originate in School

Comments: Several commenters asserted that disproportionality in special education occurs due to children not receiving the necessary interventions early in their academic career. Disproportionality, according to the commenters, must be addressed in the regular educational environment and earlier in the school process, with administrators responsible for title I programs as partners, and cannot be addressed once children have been referred for evaluation for special education.

Discussion: The Department believes that these regulations address the commenters' concerns. Under § 300.646(d)(3), LEAs identified with significant disproportionality may use funds reserved for comprehensive CEIS to support the needs of both children with and without disabilities. Section 300.646(d) requires the State to identify and address the factors contributing to the significant disproportionality which may include a wide range of factors, some of which were mentioned by commenters. Moreover, under § 300.646(d) the LEA may not limit comprehensive coordinated early intervening services to children with disabilities. To the extent, then, that an LEA identifies the lack of early interventions in the general education program as a factor contributing to the significant disproportionality, it may use funds reserved for comprehensive

CEIS to provide access to early interventions.

As to partnering with administrators of title I programs, we understand the commenters to suggest that title I funds should be used in conjunction with CEIS funds when providing early intervening services. Title I funds may be used this way, provided that all of the requirements attached to the funds are met. Further, CEIS funds may be used to carry out services aligned with activities funded by and carried out under ESEA, if IDEA funds are used to supplement, and not supplant, funds made available under the ESEA for those activities.

Changes: None.

Comments: One commenter noted that, while research suggests that there is disproportionate representation of children of color in special education, in restrictive special education settings, and in exclusionary disciplinary actions, the commenter does not believe this is the result of discriminatory practices. The commenter suggested that the Department should, therefore, concentrate its efforts on guidance, for example, on the appropriate identification of students with disabilities from diverse backgrounds. Similarly, another commenter suggested that instead of focusing on significant disproportionality, the Department should reevaluate the causes of ineffective practices in special education and focus directly upon appropriate services for students with disabilities in special education. Another commenter made this point more generally and suggested that the proposed regulations attempt to solve a problem that may not exist.

Discussion: IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State. IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) specifies that the review of—and if appropriate, revision of—policies, practices, and procedures is a consequence of, rather than a part of, a determination of significant disproportionality. Therefore, the Department does not have the authority to relieve States of their responsibility to determine whether significant disproportionality is occurring in an LEA, or require the review of policies, practices, and procedures, even in the absence of evidence showing discriminatory practices. Moreover, once identified with significant disproportionality, the LEA's review of policies, procedures, and practices and

implementation of comprehensive CEIS under § 300.646(d) could reasonably encompass determinations of whether proper identification practices are in place or determinations of the effectiveness of specific services.

Congress intended for States and LEAs to address significant disproportionality, by race and ethnicity, in special education. We noted in the NPRM various data points from our IDEA section 618 data, and using the standard methodology, indicating that children from certain racial or ethnic groups are overrepresented in special education, particularly in the categories of emotional disturbance, specific learning disabilities, and intellectual disabilities. 81 FR 10967. Further, we noted that some children are overrepresented, by race and ethnicity, with respect to their placement in restrictive settings and with respect to their exposure to disciplinary removals from placement. Therefore, we believe that the Department has both a congressional mandate and factual support for proceeding with this rule.

Changes: None.

Comment: One commenter asserted that the proposed regulations did not address the underlying issues that result in racial and ethnic disparities in the identification of children with disabilities, among them the failure to strictly follow procedures for child find, referral for evaluation, the evaluation itself, and subsequent identification of children as children with disabilities.

Discussion: We disagree and believe that these regulations are designed to directly address any underlying factors and IDEA noncompliance that result in or contribute to significant disproportionality.

Under § 300.646(c), States must provide for a review, and, if necessary, revision of policies, practices, and procedures to ensure compliance with IDEA's requirements if an LEA is identified as having significant disproportionality.

Under § 300.646(d)(1)(ii), an LEA identified as having significant disproportionality must reserve 15 percent of its IDEA part B funds for comprehensive CEIS, to identify and address the factors contributing to the significant disproportionality. If the underlying cause of significant disproportionality is found to be rooted in inappropriate practices, such as a failure to appropriately implement evaluation procedures, this provision would help to identify that issue and require that the problematic practices be changed. In addition, addressing the factors contributing to the significant

disproportionality could include training school personnel on the appropriate implementation of evaluation procedures.

Changes: None.

Proposed Regulations Would Create Racial Quotas

Comment: Many commenters asserted that proposed §§ 300.646(b) and 300.647 would put into place racial quotas that would interfere with the appropriate identification of children with disabilities based purely on the children's needs. Commenters raised concerns that the regulations might generally discourage appropriate identification of children of color, and, in so doing, harm children of color and children from low-income backgrounds. One commenter argued that the regulations will exacerbate inequality for children of color with disabilities and lead to a surge in class action lawsuits by families arbitrarily denied services based on their children's race or ethnicity. Other commenters stated that, if the determination of significant disproportionality is based strictly on numerical data, then the remedy for significant disproportionality, for some LEAs, will be denying access to special education services to children of color. One commenter suggested that to bias LEAs against serving eligible children with special education services is worse than providing these services to children who are only marginally eligible.

Discussion: The Department recognizes the possibility that, in cases where States select particularly low risk ratio thresholds, LEAs may have an incentive to avoid identifying children from particular racial or ethnic groups in order to avoid a determination of significant disproportionality. For this reason, § 300.647(b)(1) provides States the flexibility to set their own reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels. As part of the process of setting risk ratio thresholds, States must work with stakeholders to identify particular risk ratio thresholds that help States and LEAs to address large racial and ethnic disparities without undermining the appropriate implementation of child find procedures.

Further, nothing in these regulations establishes or authorizes the use of racial or ethnic quotas limiting a child's access to special education and related services, nor do they restrict the ability of IEP Teams to appropriately identify and place children with disabilities. In fact, an LEA's use of racial or ethnic quotas to artificially reduce the number

of children who are identified as having a disability, or inappropriately segregating children in LEAs that serve only children with disabilities, in an effort to avoid a finding of significant disproportionality, would almost certainly conflict with the LEA's obligations to comply with other Federal statutes, including civil rights laws governing equal access to education. States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find procedures appropriately. (20 U.S.C. 1412(a)(3); 34 CFR 300.111). We agree that the establishment of any such quotas would almost certainly result in legal liability under Federal civil rights laws, including title VI of the Civil Rights Act of 1964 and the Constitution.

We generally believe that the appropriate and timely identification of children with disabilities and the prevention of significant disproportionality on the basis of race and ethnicity are goals that work in concert with one another. In fact, a finding of significant disproportionality could be a signal that an LEA's child find procedures are not working appropriately. One of the goals of § 300.646(b) and (c) is to help LEAs identified with significant disproportionality to review and if appropriate, revise policies, practices, and procedures—including child find procedures—to ensure compliance with IDEA.

At the same time, we are interested in the impact that these regulations may have on the appropriate identification of children with disabilities. As a result, the Department intends to conduct an evaluation of the implementation of this regulation to assess its impact, if any, on how LEAs identify children with disabilities. This evaluation will include an examination of the extent to which school and LEA personnel incorrectly interpret the risk ratio thresholds and implement racial quotas in an attempt to avoid findings of significant disproportionality by States, contrary to IDEA.

Changes: As described above, we have added a new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

The Purpose of the Proposed Regulations

Comments: One commenter expressed concern that the Department's discussion of the ability to grant waivers to States and the content of the NPRM's directed questions indicate that the Department understands that the proposed regulations do not provide a solution to disproportionality.

Discussion: The NPRM did not include any discussion regarding waivers of IDEA section 618(d). 81 FR 10967. As the commenter points out, IDEA does not include a provision that would allow either the Department, or States, to waive the statutory remedies—including the review and revision of policies, practices, and procedures and reservation of funds for comprehensive CEIS—for LEAs identified with significant disproportionality.

The Department disagrees that the directed questions in the NPRM were an indication that the standard methodology and the flexibilities included in the NPRM will not appropriately identify LEAs with significant disproportionality. Rather, these questions were a means to gather informed input from the public about, among other things, how a standard methodology (and the accompanying flexibilities) should be structured to ensure proper implementation of the requirements of IDEA section 618(d). We appreciate the many informed and thoughtful responses that we received in public comment and have made several changes to the final regulations based on input from the public to improve comparability and transparency while providing States and LEAs sufficient flexibility to appropriately identify and address significant disproportionality.

Changes: None.

Comments: A commenter generally expressed confidence in their LEAs' ability to properly determine eligibility and placement for children with disabilities and to follow board policy with regard to the discipline of all children with disabilities. The Department interpreted this comment to suggest that these regulations are not necessary.

Discussion: The Department agrees with commenters that, in many LEAs, school personnel and LEA officials appropriately implement IDEA's requirements. However, we interpret IDEA section 618(d) to require States to examine data and make determination whether LEAs have significant disproportionality, based on race and ethnicity, irrespective of whether the practices, procedures, and policies of the LEA are appropriate and comply

with IDEA. Given the remedies that States and LEAs must implement following a determination of significant disproportionality, we believe the statute anticipates that the significant disproportionality within the LEA may be addressed by reviewing, and if appropriate, modifying policies, practices, and procedures not in compliance with IDEA, by providing children and staff with additional supports through the implementation of comprehensive CEIS, or by doing both. IDEA section 618(d)(2)(A) and (B), 20 U.S.C. 1418(d)(2)(A) and (B).

Changes: None.

Comment: A few commenters requested assurance that the purpose of the proposed regulations was more substantive than a means of identifying a larger number of LEAs with significant disproportionality.

Discussion: While it is possible that more LEAs may be identified with significant disproportionality as a result of these regulations, this outcome is a consequence of, rather than the purpose of, these regulations. The purpose of these regulations is to increase comparability and transparency in the examination of data and identification of LEAs with significant disproportionality across States to ensure that States are more uniform in implementing IDEA section 618(d). As the GAO noted in its 2013 report, the flexibility States were given to define significant disproportionality, in the absence of this regulation, provided "no assurance that the problem [was] being appropriately identified across the nation." The Department believes that these revised regulations will improve implementation of IDEA section 618(d), build greater knowledge about the extent of these disparities, and provide additional opportunities for stakeholders to understand and shape how LEAs are identified with significant disproportionality.

Ultimately, the purpose of the regulations is to help ensure that LEAs are appropriately identified with significant disproportionality, however many LEAs that may be, so that the children with disabilities in those LEAs receive the services that are appropriate to each of them. Even under a possible scenario where the first years of implementing these regulations increases the number of LEAs with significant disproportionality, using comprehensive CEIS to properly address the contributing factors should also reduce the number of LEAs with significant disproportionality in subsequent years.

Changes: None.

Comment: A number of commenters noted that ensuring proper implementation of IDEA section 618(d) would reinforce existing legal protections under the Civil Rights Act of 1964, the Americans with Disabilities Act, title IX of the Education Amendments Act of 1972, and Section 504 of the Rehabilitation Act.

Discussion: The Department generally agrees with the commenters that the proper implementation of IDEA section 618(d) may serve to reinforce and advance civil rights for all children.

Changes: None.

Comments: None.

Discussion: The Department believes it would be helpful to States and LEAs to clearly state that nothing in this rule supersedes or replaces other applicable constitutional, statutory, or regulatory requirements including those related to ensuring proper implementation of IDEA requirements for child find, free appropriate public education (FAPE), or placement in the least restrictive environment (LRE). Similarly, this rule does not abrogate, conflict with, or identify a specific violation of, any Federal civil rights protection from discrimination, including discrimination based on race, color, national origin, sex, or disability. Further, in establishing the methodology required under this rule (specifically the use of risk ratios and risk ratio thresholds to determine significant disproportionality), the Department does not intend that this methodology be presumed to apply or otherwise occupy the field in other legal contexts where examination of numerical data for racial and ethnic disparities may be relevant, such as enforcement of Federal civil rights laws.

Changes: We have added a new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

The Cost and Burden of the Regulations

Comment: One commenter anticipated that the implementation of the regulations would be more costly and time intensive than the estimates in the NPRM due to the costs associated with changes to data analysis protocols, documentation and technical assistance to data personnel to assure accurate implementation, and communication with schools and communities.

Discussion: The Department appreciates the commenter's concern and agrees that the initial time estimates to implement the regulation were too conservative. We agree that accurate and high-quality data are necessary to ensure appropriate implementation of the regulation.

Changes: We have increased the time estimates for modified data collection protocols, technical assistance activities, and communication required for implementation and increased the cost estimates for these regulations. In addition, the Department increased the estimated costs associated with consulting with State Advisory Panels to account for the additional time that will now be required for States to identify reasonable minimum n-sizes, reasonable minimum cell sizes, and standards for reasonable progress.

Comment: A few commenters expressed concerns about the amount of staff time that will be needed to implement the regulations. These commenters argued that some States simply do not have the staff the Department suggests are needed, and that there are no additional funds being made available to States for the increase in workload, including workload required to collect and analyze data. One of these commenters therefore recommended that the regulations be withdrawn until adequate funding is provided to support the additional State personnel needed to implement the regulations. Another commenter recommended that the Department work with those States or entities with limited staff support to help them implement the requirements of the proposed regulations. The commenter further argued that, in the past, States and entities could rely on the Regional Resource Centers (RRCs) to assist them in meeting their responsibilities under IDEA. With the elimination of the RRCs, the commenter suggested that some of the currently funded data technical assistance centers be tasked with making staff members available to support the States and other entities to undertake this work. One commenter asserted that if the State's offices responsible for special education oversight are required to monitor action plans to address significant disproportionality, then these new responsibilities will dilute the State's other monitoring responsibilities.

Discussion: While we recognize that States vary widely both in their staffing and financial resources, all States that receive funds under Part B of IDEA must meet the requirements of that Act, including those outlined in IDEA section 618(d), regardless of the funding

provided under the Act. Therefore, the Department disagrees with commenters who requested that the Department delay the implementation of the regulations until adequate funding is provided to support additional State personnel for both this and other requirements of the Act.

However, the Department recognizes that there is burden associated with implementing these final regulations, and States will need varying levels of support to appropriately implement these regulations. Therefore, the Department plans to identify Federal resources to support States' work through the Technical Assistance and Dissemination network and Department staff. When these resources are available, the Department will work to ensure that States are aware of Federal technical assistance resources that can be used to support their implementation of these new regulations.

Changes: None.

Comments: Some commenters requested that the Department clarify whether the examples contained in the report in the NPRM, Racial and Ethnic Disparities in Special Education, were intended to be illustrative or were intended to be duplicated by States or LEAs in setting risk ratios. Other commenters stated that the regulations would cost large amounts of money, both up front and over time, based on the Department's report published with the NPRM, Racial and Ethnic Disparities in Special Education. One commenter stated that the actual cost of the regulation would be \$12 billion, as, according to the commenter, the Department estimated that 8,148 LEAs could be found with significant disproportionality. The commenter stated that, as the Department recommended no increase in the Federal budget for special education, the overall result of the regulation would be a reduction in Federal funding for special education. Another commenter stated that the methodology used in the Department's report would mean a five-fold increase in the number of LEAs identified in one State, which exceeds the State's capacity to address through a review of policies, practices, and procedures and through technical assistance.

Several commenters offered other projections of the number of LEAs that would be identified with significant disproportionality due to these regulations. In general, commenters provided projections based on either the Department's report—Racial and Ethnic Disparities in Special Education—or a projected number of false-positive identifications of LEAs due to small

numbers. According to many of these commenters, over 80 percent of LEAs in one State would be identified with significant disproportionality and would have to transfer tens of millions of dollars away from supporting children with disabilities. We understand this concern to reference the mandatory reservation of funds for comprehensive CEIS by LEAs that are identified with significant disproportionality. Similarly, another commenter stated that Department projects that 23 States will require 50–80 percent of all LEAs to set aside 15 percent of their Federal share for comprehensive CEIS, a redirection of some \$550 million away from direct services for special education.

Discussion: The Department's purpose in creating the Racial and Ethnic Disparities in Special Education report was to provide the public the number and percentage of LEAs that would be identified with significant disproportionality if the Department's example risk ratio thresholds were adopted by all 50 States and the District of Columbia. We did not intend the tables to be indicative of the actual numbers of LEAs that would be identified with significant disproportionality under the proposed regulations, although we can understand how the commenters read the report this way. The tables do not represent an estimated number of LEAs that would be identified under the final regulations, and the risk ratio thresholds included in those tables do not represent the risk ratios thresholds that States must adopt or the standard that the Department will use to determine whether or not specific risk ratio thresholds are reasonable. Under final § 300.647, States retain the flexibility to set reasonable risk ratio thresholds in excess of those identified in the table without necessarily being subject to enforcement actions. Further, as described in greater detail elsewhere, these final regulations provide States with additional flexibilities that were not included in the proposed regulations to set reasonable minimum n-sizes and minimum cell sizes, both of which we expect would reduce the number of LEAs included in the analyses and the number of so-called "false positives" (e.g., LEAs identified due to small changes in the student population that result in large changes in the risk ratio that do not represent any systemic problems giving rise to significant disproportionality). As such, we do not believe that the tables in the Department's report reflect the actual number of LEAs that will be identified

as having significant disproportionality under these final regulations.

The Department therefore does not agree with the cost estimates produced by commenters who used the report as a basis for estimating costs or the number of LEAs that will be identified with significant disproportionality.

Changes: None.

Comment: A few commenters challenged the Department's estimate in the Regulatory Impact Analysis of the NPRM of how many LEAs would be identified with significant disproportionality, stating that the regulation would significantly increase the number of LEAs identified with significant disproportionality. One commenter noted that the Department provided little explanation for its estimates that 400 to 1,200 LEAs could be affected by the regulations.

Discussion: As stated in the NPRM, the Department does not know with a high degree of certainty how many LEAs would be newly identified in future years, particularly given the wide flexibilities provided to States in the final regulations. To address this uncertainty, the Department used SY 2012–13 IDEA section 618 data, in which States identified 449 out of approximately 16,000 LEAs as having significant disproportionality. Using that year's data as a baseline, the Department's estimates were based on the overall number of LEAs identified with significant disproportionality roughly doubling under the proposed regulations. However, to fully examine the sensitivity of our analysis to this estimate, we also included estimates for the number of identified LEAs tripling and quadrupling over the baseline. As discussed in the NPRM, we believe it would be highly unlikely that such an increase would be realized.

Changes: None.

Comment: One commenter expressed that, if only 400 LEAs would be impacted, there is little need for the regulation.

Discussion: We disagree with the commenter's assertion that the likelihood that a small number of LEAs will be affected should determine the appropriateness of regulatory action. Under IDEA, each and every child with a disability is entitled to a free appropriate public education in the least restrictive environment. If the regulations can help to identify and address racial disparities in special education—which may result from inappropriate identification, placement, and discipline of children with disabilities—regulatory action is fully warranted.

Changes: None.

Evaluating the Impact of the Regulation

Comment: One commenter requested that the Department withdraw the proposed regulations due to concerns that they do not include sufficient detail to allow the public to provide informed comments. In particular, the commenter expressed concern that the proposed regulations do not include any national standard, criteria, benchmarks, or goals upon which to gauge State compliance with them. The Department interprets these comments to refer to the impact of the proposed standard methodology.

Discussion: In its 2013 audit, the GAO noted that the wide variability in States' approaches to identifying significant disproportionality made it difficult to determine the extent of significant disproportionality across the Nation, or the extent to which it is being addressed. The Department agrees with the GAO's assessment, and believes States' current implementation of IDEA section 618(d)—with only 28 States and the District of Columbia identifying any significant disproportionality—would not provide an appropriate baseline from which to establish benchmarks or goals for the reduction of significant disproportionality.

The Department's goal in issuing these regulations, as discussed in the NPRM, is to ensure the appropriate review of data and examination for significant disproportionality, and to help States and LEAs address and reduce significant disproportionality. To accomplish this goal, as well as facilitate a better understanding of the extent of significant disproportionality across the Nation, the Department did not propose to decide for States the point at which specific racial or ethnic overrepresentation becomes significant disproportionality; rather, the Department proposed to require States to follow a standard methodology, with flexibility to account for State differences, consistent with the GAO's 2013 recommendation. Further, a key area of flexibility, under § 300.647(b)(1)(i), allows States to set reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels, under § 300.647(b)(1)(i), subject to the Department's review and enforcement for reasonableness. As the risk ratio threshold is the point at which an LEA is determined to have significant disproportionality, this aspect of the standard methodology has a strong impact on the total cost. Accordingly, the Department's proposal to allow States to select reasonable risk ratio thresholds means that, to a great extent, the final impact of these regulations will

be determined by the States themselves. This relationship between the flexibility afforded to States, and the Department's estimates of the costs of the regulation, were explained in the NPRM. The Department continues to believe that allowing States the flexibility to set reasonable risk ratio thresholds is necessary to account for differences between States, despite the fact that Department-established risk ratio thresholds would allow for a more precise assessment of the costs of the regulation.

Changes: None.

Comment: Several commenters responded to Directed Question #13 in the NPRM, which requested suggestions for the metrics the Department should establish to assess the regulations once they are final. We received a variety of responses.

One commenter suggested that the regulations be measured by whether they reduce or eliminate the number of States and LEAs with significant disproportionality. A different commenter, by contrast, suggested that measures focus on children, not LEAs and suggested that the Department give consideration to the number of children attending LEAs identified with significant disproportionality and the proportion of all children that represents. Another made a similar suggestion, that the Department should compare proportions of children with disabilities identified, placed, and disciplined over three years—within an LEA and across LEAs with comparable demographics—to determine, first, whether there is a decrease in significant disproportionality over the years within LEAs and, second, if trends in significant disproportionality are similar across LEAs with comparable demographics. Still another suggested that the Department monitor metrics that focus on the placement of children with particular impairments—specifically, children with autism, emotional disturbance, or intellectual disability—outside of the regular classroom. The commenter argued that a child's disability should not be the determining factor for where the child spends the school day. Last, a few commenters recommended that the Department assess the regulation's impact on the appropriate identification, placement, and discipline of children with disabilities; increases in placement in the regular classroom for children of color with disabilities; increases in access to the general curriculum for children of color with disabilities; and movement of children of color from restrictive settings to placement in the regular

classroom 80 percent or more of the school day.

A few commenters suggested that the Department use monitoring metrics that include State baseline and progress data but insisted that these data not be used in any ranking or accountability ratings. Another commenter suggested that the Department monitor baseline and progress data that integrate IDEA results-driven accountability measures with measures from Federal elementary and secondary, as well as career and technical, education programs. Another commenter recommended that metrics used to assess the regulation include academic, social, and emotional outcomes.

Finally, a few other commenters interpreted the question broadly, perhaps more broadly than intended. One commenter suggested that the Department develop self-assessments for States, similar to what the Department previously provided for dispute resolution and correctional education. Another commenter suggested the Department measure impact by monitoring and enforcing the requirement in proposed § 300.647(b)(1)(i), which requires States to use advice from stakeholders.

Discussion: The Department appreciates the comments we received addressing what metrics should be established to assess these regulations once they become final, and will take them all into consideration. Further, as States take the steps necessary to implement the regulations, we will be in a better position to determine what evaluation metrics, monitoring, and technical assistance, will be most meaningful and appropriate.

Changes: None.

Reporting Requirements

Comment: A few commenters generally opposed any attempt by the Department to require States to take on additional reporting burden.

Discussion: We recognize the commenters' concern about reporting burden. Under IDEA section 618(d) (20 U.S.C. 1418(d)), States are required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. Prior to these regulations, the Department clarified in guidance the specific data that States must collect and review with respect to the identification of children as children with disabilities, including the identification of children with particular impairments, placement and disciplinary removals. OSEP Memorandum 08–09 (July 28, 2008).

The Department made a concerted effort, both in our prior guidance and in these final regulations, to ensure that States were only required to collect and examine data that they, and their LEAs, are otherwise obligated to collect and report to the Department and the public under IDEA section 618(a) (20 U.S.C. 1418(a)). We have added a new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress and the rationales for each to the Department. Prior to the development of a new data collection to be submitted to the Department at a time and in a manner determined by the Secretary, the *EMAPS User Guide: State Supplemental Survey—IDEA* will be revised to clarify what specific information States should include within their definition of significant disproportionality. The updated survey instructions will be released in February of 2017. The Department is sensitive to the reporting burdens upon States, but believes that the additional reporting requirements created by this regulation will be minimal as States are required to select risk ratio thresholds, minimum cell sizes, and minimum n-sizes, and States will have sufficient time to prepare before that information is required. We also believe that this information will help the Department analyze the impact of this regulation. As noted in the regulation, this information will be collected in a time and manner determined by the Secretary and will not be collected until an information collection request has been completed.

Changes: We have added a new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each to the Department at a time and in a manner determined by the Secretary. We are currently revising the *EMAPS User Guide: State Supplemental Survey—IDEA* to clarify what specific information States should include within their definition of significant disproportionality. These include requests of States to include information on risk ratio thresholds and minimum cell and n-sizes. The revised survey instructions will publish in February 2017. States will then submit SY 15–16 data.

Comments: Commenters requested that States each be required to submit a long-term plan to the Department for addressing significant disproportionality that includes how they will implement the new regulations and provide support to LEAs.

Discussion: The Department recognizes the value of States having long-term plans to reduce significant disproportionality. Indeed, we believe such an approach, including the setting of appropriate risk ratio thresholds, minimum n-sizes, and minimum cell sizes, can serve to help States identify the most pressing issues facing their students and provide adequate support to LEAs as they work to reduce significant disproportionalities.

In addition, we note that to the extent that implementation of these regulations, including establishing reasonable risk ratio thresholds, cell sizes, n-sizes and a measure for reasonable progress, would require changes to a State's policies and procedures, under § 300.165, States must conduct public hearings, ensure adequate notice of those hearings, and provide an opportunity for public comment. We would expect that States, in consulting with stakeholders, including their State Advisory Panels, would engage in planning to ensure the best results for their students. However, we believe that requiring States to report these plans to the Department would place an unnecessary burden upon them. As such, we decline to require this reporting.

Changes: None.

Comments: A few commenters suggested that the Department add a requirement for States to publicly report risk ratios, including LEA-level risk ratios, regarding placement, noting that they are rarely reported and that LEAs are rarely aware of their own performance. One commenter requested that the Department require States to publish LEA-wide data on suspensions of children of color with disabilities.

Discussion: Under IDEA section 618(a)(3) (20 U.S.C. 1418(a)(3)), the Department has broad authority to require States to collect, and report to the Department and the public, data and information related to Part B of IDEA. In general, the Department does not exercise this authority by including specific reporting requirements in regulations. Rather, the Department issues an information collection request, which is subject to public comment, to specify the data States must collect and report. Under the Department's current information collection (OMB Control No. 1875–0240), States are required to submit counts of children with disabilities, by race, who are (1) identified with a particular impairment, (2) placed in particular educational settings, and (3) subjected to disciplinary removals. We agree with the commenters' suggestion that all of the risk ratios and alternate risk ratios

the States calculate for their LEAs should be made public. This increased transparency allows States, LEAs, and stakeholders alike to monitor significant disproportionality and reinforces the review and revision of risk ratio thresholds, cell sizes, and n-sizes as an iterative public process within each State. The Department therefore anticipates that all risk ratios and alternative risk ratios will be made public but has not yet determined the precise time and manner for this to occur. We anticipate doing so through an information collection request, through the Department's own publication of these data, or some combination of the two.

Changes: None.

Comments: A few commenters suggested that the Department add a requirement for States to publicly report risk ratios calculated to determine disproportionate representation, under IDEA section 612(a)(24).

Discussion: These regulations pertain only to IDEA section 618(d) (20 U.S.C. 1418(d)), which outlines the obligation of each State to collect and examine data to determine if significant disproportionality, based on race or ethnicity, is occurring in the State and LEAs of the State with respect to the identification, placement, or discipline of children with disabilities. A different provision of IDEA—section 612(a)(24) (20 U.S.C. 1412(a)(24))—requires States, consistent with the purposes of IDEA and IDEA section 618(d), to develop policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment. Under Indicators 9 and 10 of the Part B State Performance Plan/Annual Performance Report (SPP/APR), consistent with section 616(a)(3)(C) (20 U.S.C. 1416(a)(3)(C)), States are required to report the percent of districts with disproportionate representation of racial and ethnic groups in special education and in specific disability categories that is the result of inappropriate identification. It would be outside the scope of these regulations to prescribe how States collect, calculate, or report data regarding the identification of LEAs with disproportionate representation due to inappropriate identification.

Changes: None.

Comments: One commenter requested that the Department require States to report data on all children who are deaf and hard of hearing, regardless of whether another disability is considered the child's primary disability, in its

IDEA section 618 data collection. The commenter stated that up to 55 percent of deaf and hard of hearing children are reported to have an additional disability. The commenter believed that, if they are counted in the category of their additional disability, but not in the category of hearing impairment, data on the number of deaf and hard of hearing children is incomplete or inaccurate.

Discussion: The Department appreciates the commenter's concern that if children who are deaf or hard of hearing are not counted in the categories of deafness or hearing impairment, but are counted in the another category that is considered the child's "primary disability," the State's section 618 data on the number of deaf and hard of hearing children is incomplete or inaccurate. The commenter's suggestion that the Department change the section 618 data collection for children who are deaf or hard of hearing is outside the scope of this regulation. We also note that children who are deaf or hard of hearing are not included as a category of analysis under § 300.647(b)(3). Therefore, States are not required to determine if significant disproportionality is occurring with respect to the identification of children who are deaf or hard of hearing.

Changes: None.

Comments: A few commenters requested that the Department require States to annually report additional discipline data—suspensions of one day or more disaggregated by impairment, race and ethnicity, gender, and English language proficiency—to the public. These commenters suggested that this data would help address the problem that children identified with deafness, blindness, or traumatic brain injury are often disciplined due to improper school discipline policies or inadequate staff training.

One commenter stated that, under IDEA section 618(a)(1), while States are already required to do this reporting, as of 2013, only 16 States had reported any discipline data for children with disabilities, and only 1 State provided the disaggregated data as required by Statute. The commenter requested that the Department reinforce for the States that compliance with the public reporting requirements of IDEA will be reviewed by the Secretary and could influence the Department's determination of whether risk ratio thresholds are reasonable.

Discussion: The Department declines to require States to annually report additional discipline data under IDEA section 618(a) through these regulations. Further, in the exercise of our responsibilities to ensure compliance

with IDEA, the Department annually reviews each State's SPP/APR, in which each State reports to the Secretary on the performance of the State and makes an annual determination of the State's performance under section 616(d) of IDEA (20 U.S.C. 1416(d)). The Department considers the timeliness and accuracy of data reported by the State under section 618 of IDEA, when making annual determinations for each State under IDEA section 616(d) (20 U.S.C. 1416(d)). The Department would typically address noncompliance with section 618(a) reporting requirements through this process and, as such, we decline to address them as part of this regulation.

Further, States' compliance with the requirement to report to the Department under IDEA section 618(a) is a separate issue from the State's compliance with the requirement to establish reasonable risk ratio thresholds under § 300.647 of the final regulation, which implements IDEA section 618(d). For this reason, we decline the commenters' request to consider States' reporting under section 618(a) in the Department's review of the reasonableness of States' risk ratio thresholds.

Changes: None.

Comments: One commenter requested that the Department eliminate SPP/APR Indicators 4 (rates of suspension and expulsion), 9 (disproportionate representation in special education resulting from inappropriate identification), and 10 (disproportionate representation in specific disability categories resulting from inappropriate identification). The commenter asserted that the standard methodology will require States to duplicate analyses of the same data, albeit with varying definitions, and to report it twice.

Discussion: We are sensitive to concerns about duplicative reporting requirements and seek to reduce them wherever possible. However, multiple distinct provisions of IDEA require States to analyze similar data sets to identify LEAs where racial or ethnic disparities exist. These provisions include IDEA sections 612(a)(24) and 616(a)(3)(C) (20 U.S.C. 1412(a)(24) and 1416(a)(3)(C)), under which States must identify LEAs with disproportionate representation that is the result of inappropriate identification; IDEA section 612(a)(22) (20 U.S.C. 1412(a)(22)), under which States must identify LEAs that have a significant discrepancy in the rate of long-term suspensions and expulsions; and IDEA section 618(d), which is the focus of these regulations. While the Department acknowledges that these provisions may require States to use similar data (*i.e.*,

identification and discipline data disaggregated by race and ethnicity), the data analysis required to identify LEAs with disproportionate representation, a significant discrepancy, and significant disproportionality is different. As States have an obligation under IDEA to comply with each of these provisions, we believe it is appropriate for the Department to monitor their implementation separately.

Further, the Department does not have flexibility to eliminate Indicators 9 and 10 of the SPP/APR—under which States report their implementation of IDEA section 612(a)(24)—as States are explicitly required to submit this information under IDEA section 616(a)(3)(C) (20 U.S.C. 1416(a)(3)(C)).

Changes: None.

Additional State and Local Standards

Comments: One commenter requested that the Department set State and local standards, as well as national standards, for identifying and addressing significant disproportionality.

Discussion: To the extent that the commenter means that the Department should, in addition to the standard methodology, require States and LEAs to adopt additional standards for identifying significant disproportionality, we believe this is unnecessary. The standard methodology in § 300.647 implements the requirement in IDEA section 618(d) (20 U.S.C. 1416(d)) that each State annually collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to the identification, placement, and discipline of children with disabilities. Section 300.647 sets common parameters for analysis, which each State must use to determine whether significant disproportionality is occurring at the State and local level. As such, there is no need for the Department to set any separate State or local standards.

To the extent that the commenter means that the Department should set State and local standards for addressing significant disproportionality once it is identified in LEAs, we believe that this is not the best approach given the potential variability in the needs of students with and without disabilities in the various States and LEAs and that further prescribing the ways that States and LEAs must respond to significant disproportionality is unnecessary at this time and in these regulations.

IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)), requires LEAs identified with significant disproportionality to reserve 15 percent of their IDEA Part B

funds for comprehensive CEIS. The Department believes that the specifics of how those funds are to be used to address the underlying factors is best left to State and local officials. The Department notes that IDEA section 613(f) (20 U.S.C. 1413(f)) already sets out examples of the kinds of activities that may be funded. Section 300.646(d) of these regulations does the same and adds, in § 300.646(d)(1)(ii), that comprehensive CEIS must be directed to identifying and addressing the factors contributing to the significant disproportionality in the LEA. Regulations specifically prescribing how this is to be done cannot possibly address the myriad circumstances and needs that local officials will encounter when determining how best to provide comprehensive CEIS.

Changes: None.

Noncompliance With IDEA

Comments: One commenter requested that the Department not consider a finding of significant disproportionality as a finding of noncompliance with IDEA which, as explained in OSEP Memorandum 09–02 (October 17, 2008), would require correction at the individual and systems levels within one year of the finding. IDEA sections 616 and 642 (20 U.S.C. 1416 and 20 U.S.C. 1442). The commenter stated that a finding of significant disproportionality is merely an indication that policies, practices, and procedures warrant further attention due to the number of children of a race or ethnicity that have been identified, placed, or disciplined, as opposed to an indication that the LEA has taken inappropriate action. Further, the commenter, along with one other, argued that a State would not be able to enforce the correction of non-compliance for individual children affected by disproportionality with respect to identification or placement, as these are IEP Team decisions.

Discussion: The Department generally agrees with the commenters' description of a finding of significant disproportionality. An LEA found to have significant disproportionality is not necessarily out of compliance with IDEA; rather, as the commenter indicated, the significant disproportionality is, among other things, an indication that the policies, practices, and procedures in the LEA may warrant further attention.

If an LEA is identified with significant disproportionality, the State must provide for review and, if appropriate, revision of policies, practices, and procedures used in identification or placement in particular education

settings, including disciplinary removals, to ensure they comply with the requirements of IDEA.

If the State identifies noncompliance with a requirement of IDEA through this review, then under § 300.600(e), the State must ensure that the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. When verifying the correction of identified noncompliance, the State must ensure that the LEA has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA and the State determines that the LEA is correctly implementing the specific regulatory requirement(s) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system, as explained in OSEP Memorandum 09–02, dated October 17, 2008.

Changes: None.

General Opposition to the Regulation

Commenters: A number of commenters expressed general opposition to the proposed regulations, which they understood to cut special education funding. A few commenters expressed general opposition to the Department's proposed regulations as a whole, without further clarification.

Discussion: Final §§ 300.646 and 300.647 do not change the level of funding under IDEA provided to States or their LEAs. To the extent that these commenters are referring to the required reservation of funds to provide comprehensive CEIS, we note that IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) makes the reservation mandatory upon a finding of significant disproportionality in an LEA. The Department does not have the authority to alter this statutory requirement. As to the commenters who express general opposition, we set out throughout this document our reasons for proceeding with these regulations.

Changes: None.

Comments on the Racial and Ethnic Disparities Report

Changes: None.

Comments: A few commenters expressed concern that they were unable to reproduce the example risk ratio thresholds or verify the calculations published in the Department's report, Racial and Ethnic Disparities in Special Education. Other commenters requested that we publish the business rules associated with the report.

Discussion: We apologize for any concern or confusion the report may

have caused. We attempted to include the necessary details and explanations with the report, which we believe are responsive to the request for business rules. It was, however, not necessary, nor was it our intent, for States to reproduce the risk ratio thresholds or minimum n-size used in the report. The Department did not intend for States to adopt the risk ratios or minimum n-size in the report (referred to as “cell size” in the NPRM and the report), and the report did not account for the flexibilities provided in the regulations. Rather, the purpose of including the report was to provide the public with a set of tables showing the number and percentage of LEAs that would be identified with significant disproportionality if the Department’s example risk ratio thresholds and minimum n-size were adopted by all 50 States and the District of Columbia.

Changes: None.

Timeline and Effective Date of the Regulation

Comment: A number of commenters expressed concerns about the timeline for the implementation of the new regulations. One commenter stated that, if the regulations go into effect immediately, it would be costly to require States to retroactively implement the standard methodology, determine significant disproportionality, and notify LEAs. The commenter added that this timeline would present a challenge for States that have already made their significant disproportionality determinations for the next year. The commenter concluded by recommending a phase-in period for the implementation of the new standard methodology and the consequences for LEAs.

Similarly, another commenter stated that the Department should first run a pilot year in selected States. This, the commenter said, would allow States to prepare new personnel to implement the regulations (as, according to the commenter, there has been personnel turnover since the last regulation of IDEA section 618(d)); provide the Department with additional time to prepare comprehensive guidance and technical assistance; provide the Department an opportunity to determine whether these regulations are likely to address racial and ethnic disparities; and support more accurate and complete national data, due to the availability of stronger guidance. Finally, other commenters requested that the Department give States and LEAs additional time to understand the new standard methodology and

proactively make efforts to address racial and ethnic disparities.

Discussion: The Department agrees that additional time is needed to implement these regulations. With time for compliance delayed, we believe there is no need for a phase-in year or a pilot year in selected States.

These regulations become part of the Code of Federal Regulations on January 18, 2017. However, States and LEAs will not be required to comply with these regulations until July 1, 2018, and, in the case of § 300.647(b)(3)(iii), States may delay including children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

The Department recognizes the practical necessity of allowing States time to plan for implementation of these final regulations, including time to amend the policies and procedures necessary for compliance. States will need time to develop the policies and procedures necessary to implement the standard methodology in § 300.647 and the revised remedies in § 300.646(c) and (d). In particular, States must consult with their stakeholders and State Advisory Panels under § 300.647(b)(1) to develop reasonable risk ratio thresholds, a reasonable minimum n-size, a reasonable minimum cell size, and, if a State uses the flexibility described in § 300.647(d)(2), standards for determining whether an LEA has achieved reasonable progress under § 300.647(d)(2) in lowering a risk ratio. States must also determine which, if any, of the available flexibilities under § 300.647(d) they will adopt. To the extent States need to amend their policies and procedures to comply with these regulations, States will also need time to conduct public hearings, ensure adequate notice of those hearings, and provide an opportunity for public comment, as required by § 300.165.

Accordingly, States must implement the standard methodology under § 300.647 in SY 2018–19. In doing so, States must identify LEAs with significant disproportionality under § 300.647(c)(1) in SY 2018–2019 using, at most, data from the three most recent school years for which data are available. We note that, in the case of discipline, States may be using data from four school years prior to the current year, as data from the immediate preceding school year may not yet be available at the time the State is making its determinations (*i.e.*, final discipline data from SY 2017–2018 may not yet be

available at the time during SY 2018–2019 the State is calculating risk ratios).

States must ensure that the identification of LEAs with significant disproportionality based on race and ethnicity in the identification, placement, or disciplinary removal of children with disabilities in SY 2018–2019, is based on the standard methodology in § 300.647, and then implement the revised remedies in accordance with § 300.646(c) and (d). In the spring of 2020, therefore, States will report (via IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection, OMB Control No. 1820–0689) whether each LEA was required to reserve 15 percent of their IDEA Part B funds for comprehensive CEIS in SY 2018–19.

States may, at their option, accelerate this timetable by one full year. States may implement the standard methodology in SY 2017–18 and assess LEAs for significant disproportionality using data from up to the most recent three school years for which data are available. States that choose to implement the standard methodology in § 300.647 to identify LEAs with significant disproportionality in SY 2017–2018 may also require those LEAs to implement the revised remedies in accordance with § 300.646(c) and (d).

Whether a State begins compliance in SY 2017–2018 or 2018–2019, it need not include children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

Finally, the delayed compliance date does not mean that States are excused from making annual determinations of significant disproportionality in the intervening years. States must still make these determinations in accordance with the current text of § 300.646.

Changes: None.

Appropriate Placement of Children With Disabilities

Comments: Commenters expressed concerns that the Department is encouraging the placement of children with disabilities in the regular classroom, irrespective of their needs or IEP Team decisions. One commenter expressed concern at the Department’s perceived suggestion that children placed in restrictive environments receive substandard education and do not receive appropriate services. The commenter noted that, while the Department stated its intention not to

limit services for children with disabilities who need them, its suggestion that over-identification results in restrictive placements and less challenging academic standards suggests otherwise. The commenter noted that private, specialized education programs that serve children with disabilities publicly placed by LEAs are required to meet the same academic standards as public schools and that each public agency is required to ensure that a continuum of alternative placements and services is available to children with disabilities.

Discussion: The Department agrees with commenters that it would be inappropriate to place all children with disabilities in the general education classroom 100 percent of the time without regard to their individual needs or IEP Team decisions, including decisions about supplementary aids and services that will enable the child to be involved in, and make progress in, the general education curriculum. Section 300.115 explicitly requires that each public agency ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. Further, § 300.116 requires that each child's placement decision must be made in conformity with the least restrictive environment (LRE) provisions in §§ 300.114 through 300.118. The LRE provision in IDEA section 612(a)(5), (20 U.S.C. 1412(a)(5)) and its implementing regulation in § 300.114 require, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, be educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Unnecessarily removing children with disabilities from an integrated setting and concentrating them in separate schools runs contrary to the integration goal that lies at the heart of the Americans with Disabilities Act (ADA). (See, e.g., 28 CFR 35.130(b)(1)(ii), (b)(1)(iv), (b)(2); see also, *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability" under title II of the ADA).) Additionally, under § 300.116, a child's placement must be determined at least annually, be based on the child's

individualized education program (IEP), and be as close as possible to the child's home. The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and, in most cases, based on the child's IEP. Further, eligibility determinations and placement decisions must be made at the local level with parental input and in accordance with the requirements of IDEA and its implementing regulations.

These regulations do not override either the requirement under § 300.306(a) that eligibility determinations must be made by a group of qualified professionals and the parent of the child or the requirement under § 300.116(a)(1) that placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and placement options.

However, to the extent that a State identifies significant disproportionality based on race or ethnicity with respect to identification and placement in an LEA, we believe it is fully appropriate, as IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(B)) requires, for there to be a review, and, if necessary, revision, of the policies, practices, and procedures of the LEA to ensure that eligibility and placement decisions are consistent with IDEA's focus on providing children with disabilities a free appropriate public education in the least restrictive environment based on their individual needs.

Changes: None.

Comments: Many commenters raised concerns that a standard methodology would be inconsistent with the individualized nature of IDEA. Some were concerned that proposed § 300.647(b) would lead LEAs to establish strict, albeit unofficial, quotas on the numbers of children with disabilities who could be identified, placed in particular settings, or disciplined in order for the LEA to avoid being identified with significant disproportionality. These commenters stated that this practice, or any uniform mathematical calculation, would fail to consider each child's individual needs. Other commenters had similar concerns, noting that identification and placement decisions are appropriately made by IEP teams on an individual basis—based on a full, fair, and complete evaluation, consistent with IDEA's requirements—and argued that it would be inappropriate for the Department to promulgate a regulation that could exert undue pressure on those decisions. These commenters said that discipline

decisions alone should be subject to analysis for significant disproportionality, as it was the only category that was an administrative decision and not the purview of IEP teams.

Discussion: Under IDEA section 601(d)(1)(A) (20 U.S.C. 1400(d)(1)(A)), one of the purposes of IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. The Department disagrees with the assertion that any uniform methodology for determining significant disproportionality in LEAs would be inconsistent with IDEA's emphasis on addressing the unique needs of individual children. In fact, one of the main goals of these regulations is to help ensure, through improved implementation of section 618(d) of IDEA, that identification and placement decisions are, in fact, based on the unique needs of individual children, rather than the result of problematic policies, practices, and procedures that may differentially and inappropriately affect children in various racial and ethnic groups.

Once an LEA is identified as having significant disproportionality, it would not be appropriate for the LEA to overturn prior decisions regarding the identification of children as children with disabilities or the placement of children with disabilities in particular educational environments simply to prevent future findings of significant disproportionality.

Moreover, it is a violation of IDEA for LEAs to attempt to avoid determinations of significant disproportionality by failing to identify otherwise eligible children as children with disabilities. IDEA sections 612(a)(3)(A) and 613(a)(1), 20 U.S.C. 1412(a)(3)(A) and 20 U.S.C. 1413(a)(1). Imposing artificial numerical targets on the groups responsible for making eligibility determinations under § 300.306(a)(1) or placement decisions under § 300.116(a)(1), or restricting their ability to make eligibility determinations or placement decisions based on the unique needs of the child are also inconsistent with IDEA. IDEA requires that the individual needs of children with disabilities, as described in their IEPs, be central to determining eligibility for IDEA services and appropriate placement.

Furthermore, IDEA and its implementing regulations currently include provisions to safeguard individualized decision-making. States must ensure that all LEAs, including

those determined to have significant disproportionality with respect to identification, implement the States' child find procedures. (20 U.S.C. 1412(a)(3) and (a)(11) and 20 U.S.C. 1416 (a)(1)(C)) (34 CFR 300.111, 300.149 and 300.600). States must also ensure that LEAs comply with specific evaluation procedures under IDEA section 614(b) (20 U.S.C. 1414(b)) to determine a child's eligibility for special education services and ensure that a child's placement in a particular education setting is based on his or her IEP (§ 300.116(b)) and is in the least restrictive environment (IDEA section 612(a)(5)) (20 U.S.C. 1412(a)(5)). Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), States must provide for an annual review, and, if appropriate, revision of policies, practices, and procedures to ensure that LEAs identified with significant disproportionality are in compliance with IDEA's requirements. Through this review process and their monitoring procedures, States have an opportunity to ensure that LEAs identified with significant disproportionality appropriately implement child find, evaluation, and placement procedures.

Last, while the Department will require all States to use a standard methodology to implement IDEA section 618(d), we believe that § 300.647(b) provides States with sufficient flexibility to prevent unintended consequences associated with the use of a numerical formula to identify significant disproportionality. When risk ratio thresholds are set too low, we believe there is some risk that LEAs may face pressure to inappropriately limit or reduce the identification of children with disabilities to avoid a determination of significant disproportionality. For this reason, we believe it is important for States to take time to consult with their stakeholders and State Advisory Panels to ensure that, when setting risk ratio thresholds, they balance the need to identify significant disproportionality in LEAs with the need to avoid perverse incentives that would inhibit a child with a disability from being identified or placed in the most appropriate setting based on the determination of the IEP Team.

Changes: None.

Special Education—Generally

Comments: A few commenters asserted that special education must be seen as a support for children, not as bad for children or as a punishment, and that it was inappropriate for the Department to suggest that special

education services are generally of low quality.

Discussion: We agree that special education and related services provided in conformity with a child's IEP are essential for children with disabilities to receive a free appropriate public education. We do not agree that we in any way suggested that special education services are of low quality or that they are a punishment of any kind. To the extent that children in particular racial or ethnic groups are disproportionately identified as children with disabilities, placed in particular educational environments, and disciplined, it is possible that the special education and related services that those children are receiving are inappropriate for their specific needs. This says nothing about the quality of the services that LEAs provide to children with disabilities generally.

Changes: None.

Results-Driven Accountability

Comments: Some commenters expressed concerns that the proposed regulations divert OSEP away from results-driven accountability—which includes consideration of both compliance and results data in measuring States' performance under IDEA annual determinations process—and back towards IDEA compliance alone.

Discussion: We disagree. The Department's re-conceptualized IDEA accountability system—results-driven accountability—is designed to support States in improving results for children with disabilities, while continuing to assist States in ensuring compliance with IDEA's requirements. We believe that an effective accountability system is attentive to both goals. High quality results do not mitigate a State's responsibility to comply with the statute, just as compliance with the statute does not reduce the imperative for States to achieve improved results for children with disabilities. While significant disproportionality has not been included as a compliance indicator in the SPP/APR, States are still responsible for complying with IDEA section 618(d) (20 U.S.C. 1418(d)), and for ensuring that LEAs identified with significant disproportionality carry out the statutory remedies. Nothing in the regulations changes these obligations, and the Department maintains its responsibility to monitor and enforce the implementation of this requirement.

Changes: None.

II. A Standard Methodology for Determining Significant Disproportionality (§ 300.647)

General

Comments: The Department received several comments in support of proposed § 300.647(b), which would require States to follow a standard methodology to identify significant disproportionality in the State and the LEAs of the State. Many supported particular features of the proposed methodology, including the use of a standard method to compare racial and ethnic groups and minimum n-size requirements, and others expressed support for having a general or common methodology.

One commenter also noted that proposed § 300.647(b) addressed the GAO's recommendation to develop a standard approach for defining significant disproportionality. One commenter described observing racial and ethnic disparities within LEAs that went unaddressed by States and that State definitions of significant disproportionality were so complex that they were difficult to comprehend. Other commenters stated that the standard methodology in proposed § 300.647(b) would provide much needed clarity and draw attention to potentially inappropriate policies, practices, and procedures for the identification, placement, and discipline of children with disabilities. Some of these commenters stated that common standards are the only way for the public and the Department to judge the efforts of the States and to ensure transparency in this area.

Discussion: The Department appreciates the comments in support of the creation of a standard methodology to identify significant disproportionality in the identification, placement, and discipline of children with disabilities. We agree that these regulations will help to improve comparability of significant disproportionality determinations across States, increase transparency in how States make determinations of LEAs with significant disproportionality, improve public comprehension of a finding of significant disproportionality (or lack thereof), and address concerns raised by the GAO.

Changes: None.

Comments: Many commenters expressed concern that the standard methodology is unnecessary, has not been sufficiently reviewed, or should be further researched before its adoption is required to prevent potential harm to States that already address significant disproportionality well. Another

commenter argued that, without substantive analysis of the intended and unintended results, it was premature to implement the standard methodology at a national level. Further, the commenter recommended that the standard methodology be subject to a pilot test to explore fiscal, data analysis, and systems change issues after a full review of public comment. Another commenter recommended that the Department postpone issuing these regulations until it had better knowledge of appropriate methods for measuring racial differences. One commenter acknowledged the complexity involved in measuring racial and ethnic disparities but stated that there is no reason why a measurement strategy cannot be selected, implemented, and studied after the regulations are in place. The Department interpreted this comment to suggest that is not necessary to study, or pilot, a particular method of measuring racial and ethnic disparities before State use of the method is required by regulation.

Discussion: The Department appreciates all of the comments about § 300.647(b). However, for the reasons that follow, we do not believe it is necessary to remove the requirement that States use the standard methodology in § 300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State. Further, we disagree with commenters' concerns that the standard methodology requires further research before being implemented or could cause substantial harm to States that are doing well in addressing significant disproportionality.

In developing the standard methodology, the Department drew heavily from current State practices. As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio, a minimum n-size or cell size, a threshold over which LEAs are identified with significant disproportionality, and up to three years of data when making an annual determination.

States also have flexibility to tailor the standard methodology to the needs of their populations. This flexibility includes the ability to set reasonable risk ratio thresholds and reasonable minimum cell sizes and n-sizes (all with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not

identify LEAs that exceed the risk ratio threshold but are making reasonable progress under § 300.647(d)(2) in lowering their risk ratios in each of the two prior consecutive years. We provided this flexibility because we believe it is appropriate for States to tailor their implementation of these regulations to their unique circumstances—and, as they feel necessary, make adjustments—rather than delay the implementation of the regulations. Nothing in the regulations prohibits States from changing their risk ratio thresholds, population requirements, or flexibilities in accordance with § 300.647 if, after implementation of the regulations, they determine that reasonable adjustments are needed.

The Department appreciates the suggestion that States pilot the standard methodology and analyze its effects prior to adopting the regulations nationwide; however, we decline to accept the suggestion. Given that the standard methodology is largely based on approaches currently in use among States, we agree with the commenter who asserted that additional study of the standard methodology after the regulations are in place, rather than before, is appropriate. Accordingly, we plan to evaluate the impact of these regulations, including the implications of using risk ratios to compare racial and ethnic groups. We also believe that the considerable flexibility provided to States will allow researchers to collect and study valuable data regarding different applications of the standard methodology across States.

Changes: None.

Comments: One commenter suggested that the States' loss of flexibility to define significant disproportionality may create other, more significant forms of inequity and inappropriate identification. The commenter did not further detail the types of inequity that might arise.

Discussion: While § 300.647(b) requires that all States follow a standard methodology to identify significant disproportionality, we believe that these regulations provide States with sufficient flexibility to tailor their implementation to their unique circumstances. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cells sizes and n-sizes (with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold but are making reasonable

progress under § 300.647(d)(2) in lowering their risk ratios in each of the two prior consecutive years.

Changes: None.

Comments: Numerous commenters noted that each State's disproportionality processes have been approved by the Department and recommended that, in lieu of these regulations, the Department address any concerns regarding disproportionality, or definitions of significant disproportionality, State by State.

Discussion: The Department does not believe that approach would achieve the goals of improved transparency and consistency among States. We believe that the standard methodology adopted in these final regulations is a necessary step to achieve those goals.

Changes: None.

Comments: One commenter was concerned about the Department's contention that States' current methodologies of identifying significant disproportionality were inappropriate, given that the Department's contention is based on a data analysis that uses a methodology different from the States' methodologies.

Discussion: The Department disagrees that the basis for these regulations is a single analysis conducted by the Department. The standard methodology provides basic guidelines to facilitate greater consistency among States, consistent with the GAO's recommendations, and to promote greater transparency in State efforts to address significant disproportionality. The recommendations of the GAO, public comments the Department received in a response to a 2014 request for information (79 FR 35154), and the Department's review of State definitions of significant disproportionality all informed the Department's decision to require that all States follow a standard methodology.

Comments: One commenter stated that, because there is no flexibility once an LEA is identified with significant disproportionality, States make decisions about their methodologies to ensure LEAs are not inappropriately identified for arbitrary factors unrelated to policies, practices, and procedures.

Discussion: While it is important for States to appropriately identify LEAs for significant disproportionality, we disagree with the commenter that identification of significant disproportionality is arbitrary if it is based on factors unrelated to an LEA's policies, practices, or procedures. IDEA section 618(d) (20 U.S.C. 1418(d)) is not intended solely to address significant disproportionality that results from inappropriate policies, practices, or

procedures. Under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), a review of policies, practices, and procedures is a consequence of, not a part of, a determination of significant disproportionality. Under this provision, once LEAs are identified with significant disproportionality, States are required to ensure the review and, if appropriate, revision of the LEAs' policies, practices, and procedures to ensure they comply with IDEA.

Changes: None.

Comments: One commenter argued that the ability to make comparisons among States, if that is the Department's goal with these regulations, does not result in meaningful discussion or problem-solving as each State is unique.

Discussion: By requiring that all States follow a standard methodology, it is the Department's intent to foster greater comparability in the approaches States use to identify significant disproportionality. While States will have flexibility to determine their own reasonable risk ratio thresholds, to determine reasonable population requirements, such as a minimum n-size or cell size, and to use up to three consecutive years of data, we believe the standard methodology provides comparability that is key to promoting transparency in the States' implementation of IDEA section 618(d), and, in turn, meaningful discussion with stakeholders and State Advisory Panels regarding the State's progress in addressing significant disproportionality. These comparisons among States are currently not possible, given, for example, the vastly different methods States currently use to compare racial and ethnic groups, as was described in the NPRM.

Changes: None.

Comments: One commenter expressed concern that the Department's standard methodology is inconsistent with IDEA. The commenter stated that, when reauthorizing IDEA in 2004, Congress expanded the law's focus on issues related to disproportionality by including consideration of racial disparities and by adding certain enforcement provisions out of a "desire to see the problems of over-identification of minority children strongly addressed." The commenter noted that Congress did not define the term "significant disproportionality" or impose a methodology to determine whether significant disproportionality based on race or ethnicity in the State and its LEAs is occurring. According to the commenter, each State was left to choose its own methodology for determining whether there is significant disproportionality in the State and its

LEAs with respect to identification, placement, and discipline of racial and ethnic minority children with disabilities. The commenter argued that this intent was reflected in final IDEA Part B regulations, promulgated by the Department in August 2006, which stated that "[w]ith respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general." The commenter stated that, in 2006, the question of whether to impose a methodology for determining significant disproportionality was rejected by the Department as inconsistent with the law. The commenter also argued that an expansion of the Department's authority to determine whether States' risk ratio thresholds are reasonable conflicts with congressional intent, as the law does not support a national standard for determining significant disproportionality. Other commenters expressed similar concerns, stating that proposed § 300.647(b) was an example of Federal overreach—an improper attempt to control local education.

Discussion: We agree with the commenter that, at the time of the 2006 regulations, the Department declined to include a definition of significant disproportionality in the regulations. At the time, the Department stated that there are multiple factors to consider in making a determination of significant disproportionality—such as population size, the size of individual LEAs, and composition of State population—and determined that States were in the best position to evaluate those factors. 71 FR 46738. However, the Department did not state that a definition of significant disproportionality would be inconsistent with the law.²

The fact that the Department chose not to regulate on these issues in 2006, based on information and experience available at the time, does not preclude the Department from doing so now under our authority to issue regulations under IDEA section 607(a) (20 U.S.C. 1406(a)). Under IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), States must collect and examine data to determine each year whether significant disproportionality based on race and ethnicity is occurring in the State and its LEAs with respect to the

² In the 2006 IDEA regulation, just prior to the Department's discussion regarding a definition of significant disproportionality, the Department did note that another commenter's suggestion was inconsistent with IDEA. This commenter had proposed that the Department amend the regulation to clarify that the determination of significant disproportionality should be based on a review of LEA policies and procedures, and not just a numerical determination. 71 FR 46738.

identification, placement, and discipline of children with disabilities. The Department has the authority to issue regulations to the extent regulations are necessary to ensure compliance with the requirements of Part B of IDEA (IDEA section 607(a) (20 U.S.C. 1406(a)). As we noted in the NPRM, the Department concurs with findings by the GAO that the variability in State definitions of significant disproportionality has made it difficult to assess the extent to which States are appropriately identifying LEAs with significant disproportionality. Based on the GAO's findings, comments received in response to a June 2014 request for information on addressing significant disproportionality under IDEA section 618(d), and the field's experience with IDEA section 618(d) over the last 12 years, the Department now believes that these proposed changes are necessary to ensure that States meaningfully identify LEAs with significant disproportionality and that the statutory remedies are implemented in a manner that addresses any significant disproportionality identified.

We do not believe that standardization of an analysis required under a Federal statute, consistent with the authority provided to us in that same statute, while providing a great deal of flexibility to States, constitutes Federal overreach. Nothing in these regulations requires the adoption of particular educational practices at the local level or seeks to exert control of local education decision-making.

Changes: None.

Comments: One commenter noted that Directed Questions #5, #9, #10, and #12 all inquire whether the Department should place future mandates, requirements, or restrictions upon the States relating to creation of risk ratio thresholds or State flexibility to define "reasonable progress." The commenter stated that additional Federal oversight in the form of mandates, requirements, or restrictions is unwarranted and inappropriate. The commenter claimed the States and their respective State boards or departments of education are most knowledgeable about the issues affecting them. As such, the commenter argued that those issues are best left to the discretion of individual States.

Discussion: As the Department has explained in detail, both in the NPRM and in this document, we believe these regulations are necessary to ensure consistent State action in examining LEAs for significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. Again, as the GAO found in its 2013

study, only two percent of more than 15,000 LEAs nationwide were required in SY 2010–11 to provide comprehensive CEIS, and the Department found, in SY 2012–13 that 22 States did not identify any LEAs as having significant disproportionality.

That said, we agree that flexibility is necessary for States, and these final regulations give States the flexibility to determine reasonable risk ratio thresholds, reasonable minimum cell sizes and n-sizes, and standards for reasonable progress after consultation with stakeholders and State Advisory Panels. Section 300.647(d) of the final regulations provides additional flexibilities to States.

Under § 300.647(d)(1) a State is not required to identify an LEA with significant disproportionality until it has exceeded the risk ratio threshold set by the State for up to three years. Under § 300.647(d)(2), a State is not required to identify an LEA that has exceeded the risk ratio threshold with significant disproportionality until the LEA ceases to make reasonable progress in lowering its risk ratio in each of two prior consecutive years.

Changes: None.

Comments: One commenter stated that it is discriminatory to create a formula for how many children of color can be identified as having disabilities. Another commenter stated that the Department's proposal would force LEAs to serve children based on the Department's understanding of how many children should be served, rather than on the individual needs of each child. A number of commenters argued that individual children need to be assessed without consideration of their race, ethnicity, socioeconomic status, sexual orientation, or gender.

Discussion: The Department agrees with commenters that the determination of whether a child is eligible for special education services must not include consideration of his or her race, ethnicity, socioeconomic status, sexual orientation, or gender, or any numerical formula associated with these characteristics. LEAs must also follow specific evaluation procedures under IDEA section 614(b) (20 U.S.C. 1414(b)) to determine a child's eligibility for special education services.

However, we disagree that the standard methodology under § 300.647(b) represents a formula indicating how many children of color, or children in general, may be identified as children with disabilities. As we note elsewhere in this section, we believe that restricting the ability to make eligibility determinations by imposing artificial numerical targets on the groups

responsible for making eligibility determinations under § 300.306(a)(1) is inconsistent with IDEA. The standard methodology is not intended to guide determinations of eligibility for special education; rather, it is designed to help States to appropriately determine whether significant disproportionality, based on race and ethnicity, is occurring within an LEA with respect to the identification, placement, and discipline of children as children with disabilities. For LEAs determined to have significant disproportionality, the statute requires that the State provide for a review, and, if necessary, revision of policies, practices, and procedures to ensure compliance with IDEA and require each LEA to implement comprehensive CEIS to address the factors contributing to the significant disproportionality.

Changes: None.

Comments: One commenter stated that the proposed regulations do little to address significant disproportionality and that the only way to address disparities in identification is to provide guidance to States and LEAs on the appropriate identification of children with disabilities from diverse backgrounds.

Discussion: While we generally agree that guidance about the appropriate identification of children with disabilities would be helpful to States and LEAs, we do not believe it is the only way to address disparities in identification. By requiring States to use a standard methodology, it is our intent to help States to make more appropriate determinations of significant disproportionality, and, consistent with IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), help ensure that LEAs identified with significant disproportionality undergo a review, and, if necessary, revision, of policies, practices, and procedures to ensure compliance with IDEA. We believe that guidance regarding the appropriate identification of children as children with disabilities will be more valuable when paired with strategies that require LEAs determined to have with significant disproportionality to take steps to review their policies, practices, and procedures.

Consistent with the commenters' suggestion, it is the Department's intent to publish guidance to help schools to prevent racial discrimination in the identification of children as children with disabilities, including over-identification, under-identification, and delayed identification of disabilities by race.

Changes: None.

Comments: A large number of commenters opposed the standard methodology based on their view that any standard method for calculating disproportionality is inherently flawed because numbers and data cannot reveal the cause of the disproportionality.

Discussion: While we agree with commenters that data analysis does not identify or address the causes of numerical disparities, the identification of LEAs as having significant disproportionality nevertheless is a first step that will require LEAs to identify and address the causes of the significant disproportionality. Under § 300.646(d)(1)(ii), in implementing comprehensive CEIS, LEAs identified with significant disproportionality are required to identify and address the factors contributing to the significant disproportionality.

Changes: None.

Comments: Many commenters stated that any rules to address disproportionality in special education must be based on solid theoretical foundations and research-based, reliable mechanisms for the identification of disproportionality that are not skewed by extraneous factors and not based on single, arbitrary calculations.

Discussion: While we generally agree that efforts to address racial and ethnic disparities in special education should be informed by research, theory, and reliable data, we also interpret IDEA section 618(d) to require States to make a determination of significant disproportionality based on a numerical calculation and to take specific steps to address any significant disproportionality identified. This has been our long-standing position and we believe that it is the best interpretation based on the language in section 618(d) that requires States to collect and examine "data" to determine if significant disproportionality is occurring. Congress placed the significant disproportionality provision in section 618(d) and under section 618(a), States are required to provide "data" on the number and percentage of children with disabilities by race and ethnicity who are: Receiving FAPE; participating in regular education; in separate classes, separate schools or residential facilities; removed to interim alternative education setting; and subject to long-term suspensions and expulsions and other disciplinary actions. To develop a standard methodology consistent with the requirements of IDEA section 618(d), the Department drew heavily from current State practices implemented and adjusted over the course of the 12 years since the last reauthorization of IDEA.

As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio and a threshold over which LEAs are identified with significant disproportionality. Further, States use population requirements—such as a minimum n-size or cell size—and up to three years of data when making an annual determination to offset the volatility of risk ratios.

The standard methodology under § 300.647 includes these features, but also provides States with flexibility to tailor them to the needs of their populations. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cell sizes and n-sizes (with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold but are making reasonable progress, under § 300.647(d)(2), in lowering their risk ratios in each of the two prior consecutive years.

Given that the standard methodology is largely based on approaches currently in use among States and includes a large degree of flexibility, it will help States to make appropriate, and not arbitrary, determinations of significant disproportionality.

Changes: None.

Comments: Several other commenters requested that the analysis for significant disproportionality include not only a risk ratio or other mathematical calculation but also a review of factors such as inappropriate identification, discriminatory practices, State performance indicators, graduation rates, and academic performance. One commenter suggested that the Department use a two-step approach to ensure that States are focusing on LEAs where compliance indicators may have impacted the performance of children with disabilities. The Department would first examine performance indicators and identify agencies significantly discrepant from the median. This information would then be combined with data from compliance indicators, including information on disproportionality, to determine how to provide States and LEAs with technical assistance and support. A few commenters suggested that LEAs first undergo a review for discriminatory practices, and, if none exist, no further action should be taken.

Discussion: Based on the plain language of IDEA section 618(d) (20 U.S.C. 1418(d)), States are required to make a determination of whether significant disproportionality, based on race and ethnicity, is occurring by collecting and examining data. We interpret this language to limit States' determinations of significant disproportionality to a review of the numerical disparities between racial and ethnic groups with respect to identification, placement, and discipline. Given this language, we do not believe it would be consistent with IDEA to allow the multi-factor standard methodology for determining significant disproportionality that the commenters suggested.

Changes: None.

Comments: Several commenters argued that, if States must adopt a standard methodology for determining significant disproportionality, then States need greater flexibility to exempt LEAs from reserving Part B funds for comprehensive CEIS.

Discussion: Once an LEA has been determined to have significant disproportionality in identification, placement or discipline, the LEA is required under IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) to reserve the maximum amount of funds under section 613(f) to provide comprehensive CEIS. IDEA does not include any provision that would allow the Department or States to waive the statutory remedies for LEAs identified with significant disproportionality.

Changes: None.

Comments: Some commenters likened the standard methodology to a one-size metric that would fail to account for factors that might influence measurements of significant disproportionality. These include, according to one commenter, the size of the LEA, its location, and the popularity of an LEA's programs. Similarly, one commenter noted that data may be misinterpreted in a one-size-fits-all model, especially where there are outliers that do not fit the model.

Discussion: The Department disagrees with the assertion that the proposed standard methodology is a one-size-fits-all approach to identifying significant disproportionality. The final regulations provide States with a great deal of flexibility within the standard methodology to identify significant disproportionality only in those LEAs with the greatest racial and ethnic disparities.

Section 300.647(b)(1) of the final regulations requires States to set reasonable risk ratio thresholds to determine the threshold above which an

LEA may be identified with significant disproportionality and to determine reasonable minimum cell sizes and n-sizes to exclude from their review for significant disproportionality those racial and ethnic groups within LEAs with too few children to calculate stable risk ratios. These standards must be based on advice from stakeholders, including State Advisory Panels. Section 300.647(d)(1) of the final regulation allows States flexibility not to identify an LEA until it has exceeded the risk ratio threshold for up to three consecutive years. Lastly, § 300.647(d)(2) allows States not to identify LEAs that exceed the risk ratio thresholds if LEAs are making reasonable progress in lowering their risk ratios in each of the two prior consecutive years.

Changes: None.

Comments: Many commenters requested that the standard methodology be flexible enough to allow LEAs to appeal any findings of significant disproportionality that are outside the control of school personnel. One commenter requested that the Department establish a waiver system, whereby LEAs could exceed risk ratio thresholds for the identification of children with disabilities without a finding of significant disproportionality, so long as the LEAs provide adequate justification.

Another commenter suggested that LEAs with specialized programs, when identified with significant disproportionality, have the option to submit an explanation to the State as to why their numerical disparities are not indicative of any inappropriate identification, placement, or discipline of children. The commenter suggested that the State then consider this explanation, along with compliance data, to determine whether a finding of significant disproportionality is appropriate.

Two commenters requested that States have flexibility to consider mitigating circumstances; the commenters shared that, as a result of one LEA's location near a children's hospital, the LEA has an identification rate for autism much higher than the State rate.

Discussion: The Department appreciates the request to create a waiver and appeals system for certain LEAs with risk ratios above the State-selected risk ratio threshold. However, IDEA does not allow for such a system, and we believe there are sufficient flexibilities in the final regulations to address the commenters' underlying concerns. Further, the Department believes that, even if it had the authority

to allow this system, it would be inconsistent with the goal of maximizing consistent enforcement of the statute and comparability of data across States, which were issues raised by the GAO.

Changes: None.

Comments: Several commenters included a request that States be allowed to waive the requirements of IDEA section 618(d) for very small LEAs.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and analyze data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. There is no provision in the statute that allows a State to exempt an LEA from this analysis solely because of the size of its overall enrollment.

However, with these regulations, it is our goal to help ensure that LEAs with significant disproportionality based on race and ethnicity in identification, placement, or discipline are appropriately identified and that the significant disproportionality is appropriately addressed. For certain racial and ethnic groups within small LEAs, specifically those groups with very small populations, the risk ratio method of measuring significant disproportionality is susceptible to volatility—the possibility that small changes in population will result in large changes in the risk ratio that do not represent any systemic problems giving rise to significant disproportionality. Therefore, in order to ensure that LEAs are not inappropriately identified because their data would not produce valid results, § 300.647(c) of the final regulation allows States to exclude from their review any racial and ethnic groups within LEAs that do not meet the State-set population requirements. This is consistent with various IDEA provisions that require States and LEAs to use valid and reliable data when meeting IDEA requirements. (See, IDEA section 614(b)(3)(A)(iii), requiring public agencies to use assessments that are valid and reliable; IDEA section 616(b)(2)(B)(i), requiring States to report valid and reliable data in their State Performance Plans/Annual Performance Reports (SPPs/APRs); and IDEA section 616(i)(1), requiring the Secretary to review the data collection and analysis capacity of States to ensure that data and information determined necessary for implementation of section 616 is collected, analyzed, and accurately reported to the Secretary).

Changes: None.

Comment: Several commenters requested that States be allowed to waive the standard methodology in proposed § 300.647(b) in extraordinary circumstances, including environmental disasters that may impact children's health, such as the recent water contamination in Flint, Michigan. Other commenters urged the Department to allow States discretion to determine the appropriate set-aside amount if an LEA is suffering both a fiscal and environmental crisis, or if there should even be a set-aside for LEAs that are recovering from a substantial health or environmental crisis, as the demand for basic special education programs and services for eligible children may be extremely high. One commenter urged the Department to consider the needs of children in these circumstances, rather than simple measures of disparity, to determine whether the identification of significant disproportionality is appropriate.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. A specific exemption for LEAs that have experienced an environmental disaster, or other extraordinary circumstances, is not contemplated under IDEA. We think it would be inappropriate to assume that all such crises would create, or worsen, prolonged and significant racial and ethnic disparities in special education. Therefore, we do not think it would be appropriate to exempt LEAs that have experienced an environmental disaster or other extraordinary circumstances from the analysis for significant disproportionality.

If an LEA is identified with significant disproportionality, IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) requires the State to provide for the review and, if necessary, revision, of the LEA's policies, practices, and procedures to ensure they comply with IDEA. The section also requires the LEA to publicly report on any revisions and reserve 15 percent of its IDEA Part B funds to provide comprehensive CEIS. Specifically, IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) requires an LEA identified with significant disproportionality to reserve the maximum amount of funds under IDEA section 613(f), which is 15 percent of its IDEA Part B funds, to provide comprehensive CEIS. Therefore, the Department does not have the authority to allow LEAs to adjust the amount that they are required to reserve for comprehensive CEIS.

Changes: None.

Comments: Some commenters shared their concerns that LEAs with a high population turnover due to highly mobile families or school choice might be inappropriately identified with significant disproportionality under the standard methodology in § 300.647(b). One commenter suggested that, if a school's mobility rate is significantly higher than the State average, the standard methodology should not be applied. One commenter argued that there is nothing that an LEA can do to address significant disproportionality when it is the result of children simply enrolling or moving into the LEA. Another commenter requested that the Department address the issue of transfers, both interstate and intrastate, and their potential impact on findings of significant disproportionality. One commenter stated that, in one LEA, families are transient due to military connections, making it highly likely that the children transferring into the LEA were identified with a disability outside of the LEA. One commenter supported the exclusion of transfer children from the LEA counts of children with disabilities used to determine significant disproportionality. Last, one commenter opposed the omission of highly mobile children from the State's review for significant disproportionality because children transfer in and out of LEAs, and, in general, this movement does not result in a significant net gain in children. Further, the commenter argued that omitting those children from the analysis would be burdensome for States.

Discussion: The Department recognizes that particular LEAs are more likely to serve high numbers of highly mobile children, including children of military families. In such LEAs, it is particularly likely that eligibility determinations were initially made by LEAs other than the one currently providing special education and related services to the student. Highly mobile children include children experiencing frequent family moves into new school districts, such as military-connected children, migrant children, children in the foster care system, and children who are homeless. There is no reason States cannot determine, in accordance with § 300.647, whether significant disproportionality is occurring in LEAs with highly mobile children. To the extent that highly mobile children make an LEA vulnerable to large swings in the risk ratio from year to year, the standard methodology will help to prevent inappropriate identification due to rapid changes in enrollment by allowing States to take into consideration up to

three years of data prior to making a determination of significant disproportionality.

However, under IDEA section 614(a)(1) (20 U.S.C. 1414(a)(1)), all children who are suspected of having a disability and who are in need of special education and related services, including highly mobile children, must be evaluated in a timely manner and without undue delay so that eligible children can receive a free appropriate public education (FAPE). (34 CFR 300.101, 300.111, and 300.201.) When a child transfers to a new school district in the same school year, whether in the same State or in a different State, after the previous school district has begun but has not completed the evaluation, both school districts must coordinate to ensure completion of the evaluation. This must occur as expeditiously as possible, consistent with applicable Federal regulations. Under IDEA section 614(a)(2)(B) (20 U.S.C. 1414(a)(2)(B)), all LEAs are required to reevaluate each child with a disability not more frequently than once a year, and at least once every three years, unless the child's parent and the LEA agree otherwise. As such, each LEA must ensure, through proper implementation of its child find procedures, appropriate identification and placement of all children with disabilities for whom it is responsible for making FAPE available, regardless of how long that child has resided in the LEA.

For this reason, and because providing that exception would be particularly complex and burdensome to implement, the Department declines the recommendation to exempt highly mobile children, or to exempt LEAs with large numbers of mobile children, from the State's analysis for significant disproportionality.

Changes: None.

Comments: A few commenters urged the Department to allow States, in implementing § 300.647(b)(3), to count only those children with disabilities identified by the LEA. Of these, one commenter noted that it would not be fair for LEAs to be held accountable for children who are not identified by the LEA's own school personnel. Another commenter stated that there are some LEAs, such as vocational LEAs and charters schools, that educate children with disabilities identified by other LEAs. According to the commenter, these LEAs are often identified with disproportionate representation and would likely be inappropriately identified with significant disproportionality under the Department's proposed standard methodology. Similarly, another

commenter recommended that States have flexibility to determine if the disproportionality based on race or ethnicity is due not to the actions of the LEA but to disparities in the enrollment of children previously identified with disabilities.

Discussion: Children with disabilities, like all children, may transfer from school to school for a variety of reasons, ranging from a family relocation—including relocations related to the military—to homelessness, foster care, or because they are members of migrant families, to name a few. The Department has provided guidance to States regarding how they should collect and report IDEA section 618 data, including child count data. As explained in the guidance, children who reside in one LEA but received services in another LEA should be reported by the LEA that has responsibility for providing a free appropriate public education to the children. OSEP Memorandum 08–09, Response to Question 18 and FILE C002, 2013. In general, the Department expects that States will use the same data annually submitted to the Department under IDEA section 618 to make determinations of significant disproportionality.

Further, as we discussed elsewhere in this section, the Department believes that the standard methodology contains sufficient flexibility to prevent the inappropriate identification of LEAs with specialized programs as having significant disproportionality.

Changes: None.

Comments: Many commenters requested that States have the flexibility to exempt an LEA from examination for significant disproportionality under IDEA section 618(d) if the LEA houses any residential facilities, foster homes (or high numbers of children in foster care), or group homes. One commenter stated that the standard methodology does not properly account for residential placements and the locations of facilities, including incarcerated children.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. However, a specific exemption for LEAs that house residential facilities, foster homes, or group homes is not contemplated under IDEA. We also do not believe that exemption would be appropriate. There could be significant racial and ethnic disparities in LEAs that house residential facilities, foster homes, or group homes, and nothing prevents the State from doing a reliable

data analysis in those LEAs. For these reasons, the Department declines to exempt an LEA from examination for significant disproportionality under IDEA section 618(d) if it houses any residential facilities, foster homes (or high numbers of children in foster care), or group homes.

The Department has previously provided guidance on how children with disabilities placed in a residential facility or group home by an educational or noneducational agency should be counted for the purpose of calculating significant disproportionality. All children with disabilities placed in a residential facility or group home in the same State by an educational agency must be included in the calculation of significant disproportionality. However, a State should assign responsibility for counting children with disabilities placed in out-of-district placements to the LEA that is responsible for providing FAPE for those children, rather than the LEA in which the child has been placed.

Children with disabilities placed in a residential facility or group home in a different State by an educational agency should be included in a State's calculation of significant disproportionality in the LEA responsible for providing FAPE for that child (the placing LEA).

Children with disabilities placed in residential facilities or group homes in the same State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from a State's calculation of significant disproportionality if the State has valid and reliable procedures for determining which children should be excluded.

Children with disabilities placed in a residential facility or group home in a different State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and the State where the residential facility or group home is located, if the State has valid and reliable procedures for determining which children should be excluded. (See, IDEA section 618(d); Questions and Answers on Disproportionality, June 2009, Response to Question B–1.)

Changes: None.

Comments: One commenter shared that, in one State, only LEAs—and not State-run facilities or group homes housed within LEAs—are accountable for significant disproportionality.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine whether the LEAs within the State have significant disproportionality. In general, the term “local educational agency” means a public board of education or other public authority legally constituted within a State for administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. (See, IDEA section 602(19) (20 U.S.C. 1401(19) and 34 CFR 300.28.) For this reason, we do not expect States to determine whether State-run facilities or group homes housed within LEAs have significant disproportionality, unless those facilities or group homes are LEAs under § 300.28.

Changes: None.

Comments: A number of commenters responded to Directed Question #1 in the NPRM, which requested public input about the appropriate application of the standard methodology to LEAs serving only children with disabilities and LEAs with special schools and programs. We received comments with varying suggestions.

Several commenters stated that special schools and programs should be excluded from a State’s review of an LEA for standard methodology, whereas others stated that these special schools must be included. Numerous commenters opposed to including special schools or programs in the identification of significant disproportionality stated that States should have discretion to include children in specialized schools in their review for significant disproportionality. One commenter stated that, in one State, only LEAs are held accountable for significant disproportionality—not schools serving only children with disabilities or offering specialized programs. Another commenter inquired whether programs serving children with disabilities from multiple LEAs should be excluded from the State’s determination of significant disproportionality.

One commenter noted that, while LEAs specially constituted as special education LEAs may have the appearance of disproportionality, these LEAs have legitimate reasons for overrepresentation of certain racial and ethnic populations. One commenter stated that the standard methodology

cannot be used, as the risk ratio cannot be calculated, for an LEA that enrolls only children with disabilities. This commenter suggested that States monitor disproportionality in those LEAs through performance reports.

Discussion: The Department disagrees with the commenters that requested that LEAs with specialized schools or programs, and the children within those schools or programs, should be excluded from a review of significant disproportionality. IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. As a general matter, therefore, if a special school or program is an LEA, consistent with the definition of LEA in § 300.28, and serves children with and without disabilities, the State must apply the standard methodology in § 300.647 to determine if significant disproportionality is occurring in that LEA, and all of the remedies in § 300.647(c) and (d) apply.

However, the Department has carefully considered the commenters’ concerns about LEAs serving only children with disabilities. In accordance with IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), a State must annually collect and examine data to determine, using the standard methodology under § 300.647, if significant disproportionality is occurring in LEAs that serve only children with disabilities. Consistent with IDEA section 618(d)(2)(A) and (C), and § 300.346(c), if such an LEA is identified with significant disproportionality, the State must provide for the review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure they comply with the IDEA. The State must also require the LEA to publicly report on any revisions.

However, we note that it would be impossible for LEAs that serve only children with disabilities to comply with the requirement in IDEA section 618(d)(2)(B) following a determination of significant disproportionality. Under our interpretation of that section, LEAs must use at least some of the IDEA Part B funds reserved for comprehensive CEIS to serve children without disabilities, and we have adopted this interpretation in § 300.646(d)(3). This would require an LEA that serves only children with disabilities to reserve IDEA Part B funds to provide comprehensive CEIS, which under § 300.646(d)(3) must include services to

children without disabilities, a population that the LEA does not serve. Therefore, an LEA that serves only children with disabilities is not required to reserve 15 percent of its IDEA Part B funds to provide comprehensive CEIS.

That said, suggestions that specialized schools or programs that are housed in an LEA that serves children with disabilities and children without disabilities or only children with disabilities should be exempt from the standard methodology are inconsistent with the goal of addressing significant disproportionality, by race or ethnicity, in the most restrictive placements. By allowing States to ignore children in those placements when reviewing LEAs, the Department could inadvertently create an incentive to place children with disabilities in special schools—instead of separate classrooms. Further, as noted earlier, a State should assign responsibility for counting a child who is placed in a specialized school or program housed in an LEA to the “placing LEA,” if that LEA remains responsible for providing FAPE to that child, rather than to the LEA in which the specialized school or program is housed.

Changes: The Department has added § 300.646(e) to clarify that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

Comments: A few commenters suggested that States have flexibility to exclude from their review children with disabilities who are placed in special schools by non-education agencies, such as courts or mental health agencies.

Discussion: Children with disabilities placed in special schools in the same State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from a State’s calculation of significant disproportionality, if the State has valid and reliable procedures for determining which children should be excluded. Children with disabilities placed in a special school in a different State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and the State where the residential facility or group home is located, if each State has valid and reliable procedures for determining which children should be excluded. (See, IDEA section 618(d); and Questions and Answers on

Disproportionality, June 2009, Response to Question B-1.)

Changes: None.

Comments: One commenter stated that, while LEAs specially constituted as special education LEAs may have the appearance of disproportionality, these LEAs have legitimate reasons for overrepresentation of certain racial and ethnic populations. Another commenter suggested that States, when calculating risk ratios for LEAs with specialized schools, use an alternate method of calculating risk for the racial or ethnic group of interest. The Department understood this commenter to suggest that States adjust the denominator used to calculate risk to include children from the racial or ethnic group from that LEA and children from the same racial or ethnic group from a similarly sized LEA without children with disabilities. A few commenters suggested that States should have discretion to include additional calculations of disproportionality of the LEAs with special schools. Commenters in favor of including special schools indicated that the LEAs are responsible for the children within their LEAs and, therefore, should be held accountable for those children. One commenter stated that, because children in one State remain assigned to the LEA responsible for accountability and reporting purposes, specialized populations have not had an effect on the State's ability to capture significant disproportionality data.

One commenter stated that, in its State, the data from the children placed in the specialized school are included in the receiving LEA's counts of children. A number of commenters expressed a belief that when a child is placed in a specialized school, the referring LEA should retain the child's data for this count. One commenter requested that the Department clarify the impact of the standard methodology on programs serving children with disabilities across multiple LEAs, and clarify the implications of the standard methodology for the LEA in which the program operates and LEA in which attending children are residents. The commenter asked about the possibility of sharing accountability for these children between the resident and operating (or "sending" and "receiving") LEAs.

Discussion: The Department considered the different approaches commenters recommended. As noted earlier, using the standard methodology under § 300.647, a State must annually collect and examine data to determine if significant disproportionality is occurring in LEAs that serve only

children with disabilities. However, we have clarified in § 300.646(e) that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

That said, there is no specific exemption in IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) for LEAs that house special schools and serve children with and without disabilities or only children with disabilities. We do not believe an exemption for those LEAs is appropriate because by allowing States to ignore children in special schools when reviewing LEAs, the Department could inadvertently create an incentive to place children with disabilities in special schools instead of separate classrooms, for example. For these reasons, the Department declines to exempt LEAs that house special schools and serve children with and without disabilities or only children with disabilities from a determination of significant disproportionality under IDEA section 618(d).

Further, current IDEA section 618 data collection procedures are consistent with the commenters' recommendation that children with disabilities placed in a special school should be counted by the LEA that placed the children in the special school (what one commenter refers to as the "sending LEA") and is responsible for providing FAPE to the child. (See, FILE C002, 2013 and OMB Control No. 1875-0240.) The Department expects that States will use the same data annually submitted under IDEA section 618(a) (20 U.S.C. 1418(a)) to make determinations of significant disproportionality. Consistent with the guidelines that govern that reporting, children publicly placed in special schools should be included in the enrollment counts for the LEA that is responsible for providing FAPE to the child. FILE C002, 2013. This means that many children in special schools or programs in LEAs, to the extent they are publicly placed by another LEA, will not affect LEAs count of children, for purposes of significant disproportionality, because these children are already attributed to the LEA responsible for providing FAPE to the child.

Changes: None.

Comment: Many commenters were concerned that highly regarded schools for children with disabilities with open enrollment policies often draw their children from across the State or region. In fact, one commenter expressed that families might relocate within the borders of some LEAs with reputations for higher quality services, resources, and outcomes for a particular disability.

This commenter stated that LEAs are not able to address significant disproportionality by race or ethnicity that is due to self-selection.

Discussion: The Department appreciates these concerns. However, data do not exist that could distinguish these LEAs from other LEAs or determine the intent of families that move into these LEAs. Further, there is no reason to exclude LEAs from the analysis for significant disproportionality because parents elect to enroll their children in LEAs with a reputation for high quality services. Therefore, the Department declines to create an exception for LEAs that include highly regarded schools with open enrollment policies that often draw their children from across the State or region.

Change: None.

Comments: In response to Directed Question #8, which inquired how best to address significant disproportionality in LEAs with homogenous populations, we received a few comments that LEAs with homogenous populations should not be examined for disproportionality, positing that "if there is no comparison group, there can be no disproportionality." However, we received more comments that indicated LEAs with homogenous populations should be included in significant disproportionality calculations. A few commenters offered that these LEAs should use an unspecified alternate method in place of, or in addition to, the standard methodology in proposed § 300.647(b). A few more commenters offered that these LEAs should use an unspecified calculation in addition to the standard risk ratio method.

Another commenter suggested that, for LEAs with homogenous populations, the Department closely analyze the performance data that States submit and use compliance monitoring to identify problems and provide technical assistance. Some commenters suggested that the data from the LEAs with homogenous populations should be compared to similarly sized LEAs, to a statewide risk ratio, or to national data.

One commenter suggested that the Department allow the use of alternate calculations to identify instances of significant disproportionality because, where no comparison group exists, it is not possible to obtain valid and reliable data by using a risk ratio or alternate risk ratio calculation. Another commenter suggested that a different risk ratio method should be used to identify significant disproportionality in homogenous populations (e.g., urban special education schools comprised primarily of children from one racial or

ethnic background), using data from LEAs or other States with more racially and ethnically diverse populations, yet similar in other demographic factors.

One commenter suggested that States undertake a longitudinal examination of homogenous LEAs over a period of five years and only take action if nearly all individuals from a race or ethnic subgroup have been identified or disciplined. This commenter disagreed with suggestions that these LEAs be compared with national or State data and suggested that comparisons to LEAs of similar size and demographics would be most appropriate. Two commenters expressed concern that homogenous LEAs would not fare well under the proposed regulations.

Discussion: The Department appreciates all of these suggestions. We believe it is important that States review LEAs, whenever possible, for significant disproportionality, even when LEAs may have homogenous populations. We do not agree with the suggestion that there cannot be disparity where there is no comparison group within the LEA. To the contrary, it is quite possible for children with disabilities from a particular racial or ethnic subgroup to be identified, disciplined, or placed in restrictive settings at rates markedly higher than their peers in other LEAs within the State. The fact that there is no comparison group within the LEA does not mean that the LEA should not be reviewed for significant disproportionality, particularly since IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to determine whether significant disproportionality is occurring within the State and the LEAs of the State. For this reason, under § 300.647(a) and (b)(5), States are required to calculate the alternate risk ratio—using a State-level comparison group—whenever the comparison group within the LEA does not meet the States' population requirements. While we considered commenters' suggestions to allow States to use an approach other than the alternate risk ratio to examine homogenous LEAs, we continue to believe that the alternate risk ratio is the strongest option, given its close similarity to the risk ratio in ease of calculation and interpretation. As with the risk ratio, we anticipate that the stability of the alternate risk ratio will be improved by the flexibility States have to set reasonable population requirements and use up to three consecutive years of data to identify significant disproportionality.

However, in reviewing the commenters' feedback, we recognize that there may be certain situations when using an alternate risk ratio may

not be adequate for evaluating a homogenous LEA. These instances include homogenous LEAs within homogenous States or unitary systems where an LEA and its State cover the same geographic area. In a homogenous unitary system, the risk ratio, which uses an LEA-level comparison group, and the alternate risk ratio, which uses a State-level comparison group, would be the same; therefore, if a unitary system has too small a comparison group to calculate a risk ratio, it would also have too small a comparison group to calculate the alternate risk ratio and therefore would produce an unreliable, or meaningless result. In this situation, we believe that IDEA does not require a review for significant disproportionality.

Changes: We have added § 300.647(c)(2), which excludes States from calculating the risk ratio or alternate risk ratio for a racial or ethnic group when, for both the risk ratio and the alternate risk ratio, there is an insufficient number of children in all other racial or ethnic groups to serve as a comparison group.

Comment: One commenter requested that the Department consider a unique methodology for determining significant disproportionality in LEAs with clusters of recent immigrants. This methodology should accommodate the special influences in language and culture, differences in access to education in immigrants' country of origin, or post-traumatic stress. A few commenters also noted that, as their LEA is now home to an office that provides adjustment services to refugees and immigrants, it may have the appearance of disproportionality even though it has legitimate reasons for overrepresentation of certain populations.

Discussion: The Department appreciates these concerns. However, there is no specific exemption in IDEA section 618(d) (20 U.S.C. 1418(d)(1)) for LEAs with clusters of immigrants. Such an exemption would not be appropriate because we believe that it is particularly important to review LEAs with clusters of recent immigrants for significant disproportionality. Therefore, the Department declines to create an exception for these LEAs.

Changes: None.

Comment: Several commenters requested that because certain LEAs have atypical demographic distributions that could create data anomalies, the Department should exempt certain types of LEAs from providing comprehensive CEIS and from reviewing, revising, and publishing, as appropriate, policies, procedures, and practices if identified

with significant disproportionality. Many commenters asserted that States should have authority to exempt LEAs from these statutory remedies if there is a small population of children, where the addition or subtraction of a few children alters a finding of significant disproportionality. Other commenters requested that LEAs with very low rates of special education identification, restrictive placements, or exclusionary discipline for all children should not be automatically required to set aside funding to provide comprehensive CEIS. The Department interprets the comment to suggest that LEAs with very low rates of identification, restrictive placement, and discipline will likely be identified with significant disproportionality due to high risk ratios. A few commenters requested further consideration of how significant disproportionality is applied to States and rural LEAs. One commenter expressed strong concerns that the regulation would, without just cause, negatively affect its small, rural LEA, where children of color make up less than five percent of the school population.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and analyze data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State.

However, the Department agrees with commenters that LEAs with small populations or small populations of specific racial or ethnic subgroups with disabilities, such as those in small rural or charter schools, could potentially produce risk ratios that are misleading due to volatility associated with calculating risk ratios for small numbers of children. The Department appreciates the feedback of commenters and agrees that a minimum n-size of 10, as proposed in the NPRM, is insufficient to account for issues related to LEAs with small populations.

We describe in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(b)(3) and (4); § 300.647(b)(6)), the changes to these regulations to give States added flexibility to exempt LEAs from a review for significant disproportionality when a racial or ethnic group does not meet a reasonable minimum cell size or reasonable minimum n-size set by the State with input from the stakeholders, including the State Advisory Panel.

This change will give the States increased flexibility to use a minimum cell size—a minimum number of children in the risk numerator when calculating a risk ratio—to avoid identifying LEAs with significant disproportionality due to the

identification, placement, or disciplinary removal of a small number of children. The minimum cell size should also help to prevent identification of LEAs with low prevalence of identification, placement, discipline—which may be subject to more volatile risk ratios—to the extent that these LEAs also have a small population of children.

Again, however, IDEA does not contain any provisions allowing either States, or the Department, to waive the statutory remedies once an LEA is identified with significant disproportionality. When an LEA is identified with significant disproportionality, the statute specifies that the State must require the LEA to reserve the maximum amount of funds under section 613(f)—15 percent of its IDEA, Part B funds—to provide comprehensive CEIS.

Changes: Please see the discussion on changes to minimum cell and n-sizes in the section *Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(b)(3) and (4); § 300.647(b)(6)*.

Comment: One commenter requested clarification about the responsibilities of virtual schools and the LEAs within which children attending the virtual schools live. The commenter stated that there has been a significant increase in the number of children with disabilities who receive part or all of their education through virtual schools, raising the need for guidance on this issue.

Discussion: IDEA requires that each State make FAPE available to all eligible children with disabilities aged 3 through 21 within the State's mandated age range and residing in the State. (20 U.S.C. 1412). This includes the identification and evaluation of children with disabilities, the development of an IEP, the provision of special education and related services in the least restrictive environment, and the provision of procedural safeguards to children with disabilities and their families. The requirements of IDEA apply to States and LEAs, regardless of whether a child is enrolled in a virtual school that is a public school of the LEA or a virtual school that is constituted as an LEA by the State.³ IDEA and its

implementing regulations do not make any exceptions to these requirements to allow States to waive or relax requirements for virtual schools, including those virtual schools constituted as LEAs. Therefore, the requirements that States must use to determine whether significant disproportionality based on race or ethnicity is occurring in LEAs applies to LEAs with virtual schools and to virtual schools that are constituted as LEAs, consistent with § 300.28. Letter to Texas Education Agency Associate Commissioner Susan Barnes, 2003.

Changes: None.

Comment: Another commenter observed that in its State, a high school LEA has been identified as having significant disproportionality based on the identification of children with disabilities, simply because of the combining of elementary school LEAs into one population. The commenter stated that there was no significant disproportionality at the elementary level.

Discussion: With regard to States that include elementary school LEAs and high school LEAs, the Department's standard methodology offers States sufficient flexibility to ensure that the identification of those LEAs is appropriate. When calculating risk ratios under § 300.647(b)(1), States are required to select reasonable minimum cell sizes (to be applied to the risk numerator) and minimum n-sizes (to be applied to the risk denominator). This will allow States to focus their attention on the most systemic disparities and avoid the identification of LEAs based on volatile risk ratios.

Changes: None.

Comments: One commenter recommended that the Department require States use to use a tiered standard methodology that takes into consideration the type, size, and poverty within an LEA

Discussion: As we noted in the NPRM, part of the purpose of the standard methodology is to foster greater transparency in how States identify significant disproportionality. Given this, it is critical that the standard methodology consist of simple and easily interpreted analyses. The Department believes that a tiered methodology would be inconsistent with this goal because it would require

special education and related services in the least restrictive environment (20 U.S.C. 1412(a)(5)), and the provision of procedural safeguards to children with disabilities and their families (20 U.S.C. 1412(a)(6)). The IDEA statute and its corresponding regulations do not make any exceptions to these requirements or allow States to waive or relax these requirements for virtual schools."

States to adjust the methodology for different types of LEAs, adding greater complexity and, possibly, ambiguity.

Instead of a tiered methodology, the Department has proposed a standard methodology that provides States with adequate flexibility to consider the needs of different types of LEAs. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cells sizes and n-sizes (with input from State Advisory Panels), the ability consider up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold and are making reasonable progress in lowering their risk ratios.

Changes: None.

Comments: Many commenters requested greater clarity as to the count of children that should be used for the denominator when calculating risk ratios for a particular racial or ethnic group. One commenter noted that, for discipline risk ratios, one State uses a cumulative count of children rather than a snapshot, point-in-time count. These commenters note that States should be allowed to use the denominators that most closely align with the numerators of the risk calculations, where alignment refers both to the timing of the counts and to the inclusion or exclusion of certain groups of children (e.g., parentally placed private school children, children ages three through five, children receiving transition services, etc.)

Discussion: In the NPRM, we noted that, with respect to the specific categories of analysis—identification, placement, and discipline—the Department's intended to incorporate in the regulations the required categories of analysis, which are consistent with the States' current IDEA section 618 data submissions.

In reviewing LEAs for significant disproportionality with respect to identification, we generally expect that States will use the same IDEA section 618 data that is reported to the Department (for data regarding children with disabilities) and data submitted to the Institute for Education Sciences for the Common Core of Data (for enrollment data). OMB Control No. 1875-0240. In reviewing LEAs for significant disproportionality with respect to placement, we generally expect that States will use the same IDEA section 618 data that is reported to the Department. OMB Control No. 1875-0240.

In reviewing LEAs for significant disproportionality with respect to discipline, we generally expect that

³ See, OSEP Dear Colleague Letter, August 5, 2016, citing Letter to Texas Education Agency Associate Commissioner Susan Barnes, December 18, 2003. As stated in the Barnes letter, ". . . IDEA requires that each State make available a free appropriate public education to all children with disabilities (as defined by the IDEA) aged 3 through 21 residing in the State (20 U.S.C. 1412(a)(1)). This includes the identification and evaluation of children with disabilities (20 U.S.C. 1412(a)(3)), the development of an individualized educational program (20 U.S.C. 1412(a)(4)), the provision of

States will use the same section 618 data reported to the Department. For IDEA section 618 data, discipline data is a cumulative count from July 1st through June 30th, while IDEA section 618 child count and placement data is a point-in-time count that occurs in the fall. OMB Control No. 1875–0240. After the final regulations are published, the Department plans to provide States with additional guidance about the counts of children that States should use when analyzing LEA data for significant disproportionality with respect to identification, placement, and discipline.

Changes: None.

Comments: A few commenters recommended that the Department convene workgroups and invest in research to explore issues related to significant disproportionality. A few commenters recommended that the Department establish a workgroup to make recommendations for researching how to address common issues and identify the root causes of disproportionality. One commenter recommended that Department build a workgroup to identify evidence-based practices in the implementation of IDEA's child find provisions so that these practices can be distributed widely to the field. This commenter also recommended that the Department convene an expert group to identify the issues and possible solutions to under-identification, including the under-identification of children who are twice exceptional. Another commenter recommended that the Department more carefully examine the impacts of poverty on significant disproportionality, including the linkages between poverty and the identification, placement, and discipline of children with disabilities.

Discussion: The Department appreciates the suggestions to develop workgroups and expand research into the causes of significant disproportionality, under-identification, and evidence based practices States and LEAs can use to address significant disproportionality. The Department agrees that it will be valuable to undertake more research on the impact of these regulations and on significant disproportionality in general. We also agree that it will be beneficial to help develop communities of practice for addressing significant disproportionality and expand technical assistance to support the work of States and LEAs. After the publication of these regulations, the Department plans to identify additional resources to support expanded research and technical assistance to improve the identification,

placement, and discipline of children with disabilities.

Changes: None.

Risk Ratios (§ 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b))

Comment: Several commenters responded to Directed Question #2, which requested additional strategies to address the shortcomings of the risk ratio method and inquired whether the Department should allow or require States to use another method in combination with the risk ratio method. A few commenters stated that the risk ratio has a definite advantage over other methods because it is easy to explain and duplicate. Other commenters agreed, stating that the risk ratio is relatively simple and straightforward, which is especially important for a standard methodology. Two commenters appreciated that the NPRM included a review of several possible methods for defining significant disproportionality and had no concerns with the selection of the risk ratio as the approach that is currently most widely used and best understood among States. One commenter stated that its State has primarily used the risk ratio method and found success in identifying LEAs as having significant disproportionality each year. A few commenters stated that the use of the risk ratio will provide an opportunity to make comparisons between LEAs and States to ensure children are appropriately served through IDEA.

Discussion: The Department appreciates the comments in support of the use of the risk ratio as part of the standard methodology. We agree that States' use of this method will help to improve comparability of significant disproportionality determinations across States, increase transparency in how States make determinations of LEAs with significant disproportionality, improve public comprehension of a finding of significant disproportionality (or lack thereof), and address concerns raised by the GAO.

Changes: None.

Comments: Several commenters expressed concerns about the risk ratio. A few of these commenters expressed that sole reliance on the risk ratio may result in a failure to fully address the problem of racial or ethnic disproportionality. A number of commenters expressed concern that, in general, the risk ratio will not provide enough information to determine whether an LEA has significant disproportionality. A few commenters were concerned that the Department

proposed the risk ratio as the standard methodology due to its ease of implementation by States and comprehension by the public rather than the robustness of the method itself in determining disproportionality in identification, placement, and discipline.

Discussion: In developing the standard methodology, the Department drew heavily from current State practices. As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio, along with a threshold over which LEAs are identified with significant disproportionality. Further, States using a risk ratio pair this method with a minimum n-size or cell size and use up to three years of data when making an annual determination to prevent inappropriate determinations of significant disproportionality due to risk ratio volatility. While the risk ratio method will allow States to conduct simple analyses that are easy to interpret, we also believe this approach is sufficiently robust to help States to appropriately identify significant disproportionality.

While we agree with commenters that while the use of risk ratios—or any data analysis alone—does not identify or address the causes of numerical disparities, risk ratios are sufficient to determine whether an LEA has sufficiently large disparities to determine whether significant disproportionality is occurring. This determination is an important first step that will require the LEA to identify and address the causes of the significant disproportionality. Further, as we note in *A Standard Methodology for Determining Significant Disproportionality—General*, we interpret IDEA section 618(d) (20 U.S.C. 1418(d)) to require efforts to address the causes of significant disproportionality as a consequence of, rather than a part of, the determination of significant disproportionality.

Changes: None.

Comments: Several commenters requested that the Department allow the use of additional criteria to address limitations in the risk ratio method. One commenter suggested that methods in addition to, or instead of, risk and alternate risk ratio should be allowed. One commenter recommended that States adopt other risk ratio methods, provide the Department with a rationale for doing so, and that the Federal government evaluate each State's approach. Two commenters

recommended that States be allowed to demonstrate to the Department why the use of a risk ratio or alternate risk ratio may not provide the best analysis of disproportionality in their State, and then demonstrate the effectiveness of an alternate calculation. These commenters stated that the primary purpose of the regulation should be to identify significant disproportionality and that methods other than the risk ratio can be effective in doing so. A few commenters requested that the Department allow States to use multiple measures to identify LEAs with significant disproportionality. One commenter stated that States' use of multiple risk ratio methods emerged based on careful analysis of false positive identifications that occurred when applying a single risk ratio, possibly complemented by the alternate risk ratio. This commenter stated that States would not have moved to more complex measures if it were not considered important for the analysis to have integrity.

A second commenter stated that one State currently uses two measurements for disproportionality—the alternate risk ratio and the e-formula. This commenter stated that using both methods—with an appropriate minimum cell size and minimum n-size—identifies both large and small LEAs that have real racial and ethnic disparities. Another commenter encouraged the use of multiple methods of identifying LEAs, as the sole reliance on the relative risk ratio can lead to unintended results (e.g., an inability to calculate the risk ratio when a comparison group has 0 percent risk).

Discussion: In reviewing these comments, the Department carefully considered the need to provide States adequate flexibility to adjust the standard methodology to their needs, while ensuring that the Department's goal of promoting uniformity and transparency is addressed. As mentioned in the NPRM, a 2013 GAO study found that “the discretion that States have in defining significant disproportionality has resulted in a wide range of definitions that provides no assurance that the problem is being appropriately identified across the nation.” Further, the GAO found that “the way some states defined overrepresentation made it unlikely that any districts would be identified and thus required to provide early intervening services.” (GAO, 2013). To better understand the extent of racial and ethnic overrepresentation in special education and to promote consistency in how States determine which LEAs are required to provide comprehensive CEIS, the GAO recommended that the Department “develop a standard

approach for defining significant disproportionality to be used by all States” and added that “this approach should allow flexibility to account for state differences and specify when exceptions can be made.” (GAO, 2013.)

In keeping with these recommendations, the Department believes that restricting States to the risk ratio will foster greater transparency, as well as comparability between States, and thereby strengthen the Department's ability to review and report on States' implementation of IDEA section 618(d). To allow States to generate and adopt additional criteria—even if only a second criterion—would interfere with the goal of greater comparability while adding to the complexity of the standard methodology as a whole.

However, the Department is sensitive to the commenters' concerns and has included some limited flexibilities that States may consider when making determinations of significant disproportionality. Under § 300.647, States have the flexibility to set their own reasonable risk ratio thresholds and to identify only those LEAs that exceed the risk ratio threshold for a number of consecutive years, but no more than three. Section 300.647(d)(2) also allows States to not identify LEAs that exceed the risk ratio threshold if they demonstrate reasonable progress, as determined by the State, in lowering the risk ratio for the group and category in each of two consecutive prior years. This latter flexibility enables States to identify significant disproportionality only in those LEAs where the level of disproportionality is the same or not decreasing at a reasonable rate and does not require those LEAs that are reasonably reducing disparities to implement the remedies required under IDEA section 618(d)(2), even if those LEAs have risk ratios that exceed the State's risk ratio threshold.

Last, while in the NPRM the Department proposed to allow States to set a minimum n-size of up to 10 children (or children with disabilities), the Department has amended the regulation to allow States to set reasonable minimum n-sizes, as well as reasonable minimum cell sizes, that apply to the risk numerator when calculating risk ratios. The Department's intent with this change was to allow States to account for the volatility of risk ratio calculations, deem as significant only the most systemic cases of significant disproportionality, and prevent the identification of significant disproportionality based on the enrollment of, or the LEA's responses to the needs of, one or two children. It is our belief that, by allowing States the

flexibility to determine both minimum n-sizes and minimum cell sizes, the Department has dramatically reduced the likelihood of inappropriate identifications of significant disproportionality (false positives) that could occur when broadly applying the risk ratio methodology. Further, allowing States to use minimum cell and n-sizes to determine when to use an alternate risk ratio would allow States to examine racial and ethnic groups for significant disproportionality in the absence of an LEA-level comparison group or when the comparison group has a risk of 0 percent.

With these provisions, the Department believes these regulations achieve an appropriate balance between the need for flexibilities to ensure valid data analysis when evaluating significance and the need for greater consistency among the States' systematic reviews.

Changes: See, discussion on changes to minimum cell and n-sizes in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)). See also, discussion on the reasonable progress flexibility in the section, *Reasonable Progress*, § 300.647(c)(2).

Comments: A large number of commenters noted that the risk ratio method does not work well with small populations. Although most of these comments cited issues with the Department's proposed cap on minimum n-sizes, which we address in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)), some commenters were concerned that the standard risk ratio method would be inappropriately sensitive to racial and ethnic disparities in smaller LEAs that have fewer children with disabilities.

Many commenters also recommended that States have flexibility to add criteria beyond risk ratio and minimum n-size to avoid inappropriately identifying significant disproportionality due to small numbers. Several of these commenters reported that a large number of LEAs in their States and regions are small and use varying benchmarks for identification. One commenter noted that this flexibility would be necessary for small LEAs, whether using a risk ratio or weighted risk ratio calculation.

A few commenters recommended that, in States with small populations, the Department permit the use of a second method of calculating risk ratio, such as the e-formula, statistical significance testing, or n-size criteria,

since small populations are vulnerable to year-to-year fluctuations and a second method helps to ensure risk is not due to chance alone. A few commenters noted that the use of the risk ratio alone, without adequate minimum n-sizes or additional significance testing, will result in many LEAs being identified as having significant disproportionality when the disproportionality is due to small numbers of children identified with disabilities, placed in restrictive settings, and disciplined, and not to any underlying cause.

Discussion: The Department appreciates all of these comments and has considered the suggestion to permit States to use additional methods, beyond the use of the risk ratio alone, to address the potential for false positive identification of significant disproportionality when risk ratios are applied to small populations. As discussed earlier, in the interest of increasing both comparability and transparency across States, with respect to their implementation of IDEA section 618(d), we believe it is necessary to require States to use a common analytical method for determining significant disproportionality and to allow limited flexibilities within that methodology rather than allowing or requiring additional methodologies.

For example, as discussed elsewhere in this section, the Department received various comments that the minimum n-size initially proposed in the NPRM did not adequately protect small communities. The Department agrees that additional criteria—beyond the risk ratio and minimum n-size—would help to ensure appropriate identification of LEAs with significant disproportionality. In addition to minimum n-sizes, which States may use to ensure risk denominators are sufficiently large to calculate a stable risk ratio, States may also use minimum cell sizes to ensure that risk numerators are sufficiently large to reduce the potential for false positive identification due to small numbers.

Likewise, the ability to use up to three years of data when determining significant disproportionality could be used to address the year-to-year fluctuations that may occur in a State with many small LEAs. Finally, because States, in consultation with the State Advisory Panel, must set a reasonable risk ratio threshold and a measure of reasonable progress, the Department believes that the regulations provide sufficient flexibilities for ensuring that IDEA section 618(d) can be properly implemented using this methodology.

Changes: See, discussion on changes to minimum cell and n-sizes in the

section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)). See also, discussion on the reasonable progress flexibility in the section, *Reasonable Progress*, § 300.647(c)(2).

Comment: Several commenters expressed concern about efforts to identify significant disproportionality in LEAs with low incidence in any of the categories of analysis. A few commenters argued that there are situations in which a risk ratio alone will not provide enough information to determine whether an LEA has or does not have significant disproportionality. For example, comparing two very low risks for discipline of children with disabilities can result in a high risk ratio, even though both the racial or ethnic group being examined and the comparison group's discipline rates are low. Similarly, a few commenters noted that sole reliance on the risk ratio can produce similar results when examining disability identification and restrictive placement.

A few commenters argued that the risk ratio is dependent on scale and may unduly penalize LEAs with a low overall prevalence in the disability or discipline categories. For example, an LEA with an overall rate of suspension for all children of less than one percent would be regarded by most as exemplary. According to the commenter, the same LEA—if it were suspending 1.5 percent of children with disabilities in one racial or ethnic group, and 0.5 percent from a comparison group—would be treated the same as an LEA that was suspending 30 percent of children with disabilities in one group, and 10 percent from a comparison group.

One commenter suggested that States have flexibility to consider a low incidence of disciplinary removals as reasonable progress, or to exempt LEAs with low incidence from any review of significant disproportionality with respect to discipline.

Discussion: The Department appreciates the suggestions to expand the flexibilities included in the NPRM. Under § 300.647(d)(1), States may choose not to identify any LEAs as having significant disproportionality until a risk ratio for a particular racial or ethnic group for a particular category of analysis has exceeded a risk ratio threshold for up to three consecutive years. The Department believes that, in cases where an LEA that exceeds the minimum cell and n-sizes achieves persistently low rates of disciplinary action, such as a suspension, but a particular racial or ethnic group faces

consistently disproportionate treatment over the course of multiple years, it would be appropriate for the LEA to be identified with significant disproportionality.

Further, the Department believes that allowing the use of up to three years of data provides LEAs the time and opportunity to encourage schools to use, and train personnel to use, alternatives to disciplinary removals prior to a State determination of significant disproportionality. The Department also believes that allowing States to use up to three years of data to identify significant disproportionality will promote the appropriate identification of LEAs, including LEAs with low incidence rates.

Changes: None.

Comments: Several commenters argued that the risk ratio will fail to detect significant disproportionality in areas where the risk levels in an LEA for identification, placement, or discipline are extraordinarily high for children in all racial and ethnic groups. That LEA could nevertheless have a small risk ratio. Similarly, one commenter argued that the risk ratio is an illogical measure of the association between two groups; for example, a risk ratio of 1.85 for outcome rates of 37 percent and 20 percent means the same thing as a risk ratio of 2.60 for rates of 13 percent and 5 percent.

Discussion: While that there may be LEAs where children with disabilities are inappropriately identified, placed in overly restrictive settings, or disciplined at higher rates than national averages, IDEA section 618 and its requirement for an annual review for significant disproportionality does not operate in isolation. There are other provisions of IDEA beyond section 618(d) that promote appropriate practices in these areas. For example, States and LEAs share responsibility for ensuring appropriate implementation of State child find procedures (IDEA section 612(a)(3)) and evaluation and reevaluation procedures (IDEA section 614(a)–(c)); children with disabilities must receive FAPE in the least restrictive environment (IDEA section 612(A)(5)); and finally, specific discipline procedures and protections must be followed (IDEA section 615(k)).

In addition, Congress included specific language that allows States to address higher incidences of discipline for children with disabilities under IDEA section 612(a)(22)(A). This provision requires that States examine data to determine if LEAs have significant discrepancies, by disability status or by race and ethnicity, in rates of long-term suspensions and

expulsions, either among the LEAs in the State or when comparing rates for disabled and nondisabled children within each LEA.

There are still other sections of IDEA that support the provision of services for children in need of behavioral supports and that could be used to address any high incidence of disciplinary removals among children with disabilities. Section 614(d)(3)(B)(i) (20 U.S.C. 1414(d)(3)(B)(i)), for example, requires IEP teams to, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

In 2016, the Department released guidance to clarify that, while IDEA section 615(k)(1)(B) (20 U.S.C. 1415(k)(1)(B)) authorizes school personnel to remove from their current placement children who violate a code of student conduct, that authority in no way negates the obligation of schools to provide behavioral supports to children with disabilities as needed to ensure FAPE. OSEP Dear Colleague Letter, August 1, 2016.

As noted earlier, significant discrepancies in the rates of long-term suspension and expulsions among LEAs in a State or when comparing rates for children with and without disabilities are addressed by IDEA section 612(A)(22), but section 618(d) does not contain comparable language mandating those examinations.

Finally, consistent with earlier discussions, the Department declines to require or allow additional criteria that would reduce the proposed levels of comparability and transparency.

Changes: None.

Comments: Many commenters suggested that the Department allow States to compare LEA risk to a risk index. Some argued that if the Department allowed States to include comparisons to risk indices in the standard methodology, States could reduce the number of LEAs identified with significant disproportionality where risk levels are very low for all groups (but where the risk ratios are high). Similarly, others recommended that while any LEA with a racial or ethnic group risk ratio above the specified risk ratio threshold would be considered for a finding of significant disproportionality, any LEA with a racial or ethnic group risk that was to some degree below the State mean risk index would not be determined to have significant disproportionality. Still other commenters suggested many variations on ways that a comparison to a risk index could be used, such as comparing

the risk of a particular outcome for a racial or ethnic group in an LEA to a statewide risk or a national risk for that same group. These recommendations addressed the use of risk indices for different areas of analysis, different racial or ethnic groups, and different disabilities. In short, the commenters suggested ways to use risk indices in conjunction with the risk ratio for all of the analysis required under § 300.647(b).

Discussion: To begin with, the Department understands *risk index* to mean the likelihood of a particular outcome (identification, placement or disciplinary removal) for an aggregate population of children—such as all children within a State, or all children nationally—to which risk may be compared. The Department is not aware of, and no commenters provided, a research basis for selecting a particular magnitude of difference—such as one or two percentage points—between racial or ethnic subgroup risk and a risk index that would allow the risk index to be used as a measure of significant disproportionality in a way that is not arbitrary.

That aside, LEAs must use extreme caution to avoid actions based on race or ethnicity that could violate Federal civil rights laws and the Constitution. Moreover, LEAs must ensure that the requirements for individualized decisions about evaluations, placement, and disciplinary removals are properly and fully implemented.

Under IDEA, a child's identification, placement, and discipline are determined through specific individualized means. The Department has determined that allowing or requiring States to compare and control for racial or ethnic group risk and an overall risk index—that is, including in the standard methodology measures that would require States to adjust for, and thereby artificially mandate, the overall incidence of identification, placement, or discipline—would create strong incentives for impermissible quotas in overall identification, placements, and disciplinary removals. The Department believes that restrictions that would inhibit the ability of an evaluation team to make eligibility determinations, a placement team to make placement decisions based on the child's unique needs, or an IEP Team to determine if conduct subject to discipline was a manifestation of the child's disability, would result in violations of IDEA section 612(a)(3) (child find), section 614(a)–(c) (evaluation and reevaluation) section 612(a)(5) (placement in the least restrictive environment), or section 615(k) (disciplinary removals).

As such, the Department believes that creating an exception to a determination of significant disproportionality based on a comparison between racial or ethnic group risk and a risk index, or modifying the standard methodology to include this use of the risk index, would undermine the determinations required under 618(d) and create strong incentives to violate IDEA's requirements for identification, placement, and disciplinary removals.

The Department appreciates the various suggestions for addressing certain potential issues when using risk ratios to identify LEAs with significant disproportionality. In line with the GAO's recommendations, the Department also believes that restricting States to the risk ratio will foster greater transparency, as well as comparability between States, and thereby strengthen the Department's ability to evaluate States' implementation of IDEA section 618(d). To allow States to add additional criteria—even if only a second criterion—would reduce comparability between States' approaches while adding to the complexity of the standard methodology as a whole and creating additional burdens.

Changes: None.

Comments: Several commenters requested that States be permitted to use risk difference along with, or instead of, risk ratios because it has a number of advantages over the risk ratio for measuring racial and ethnic disparities.

First, commenters stated that risk differences can be calculated even when the comparison group has a risk level of zero, and therefore the risk ratio cannot be calculated. According to commenters, the most serious racial disparities are those in which only one racial or ethnic group is subjected to the harshest disciplinary actions; for this reason, commenters supported the use of risk difference to properly analyze significant disproportionality in suspensions and expulsions exceeding 10 days.

Second, commenters argued that risk differences could capture disparities in LEAs that have very high rates of restrictive settings and disciplinary exclusion for all groups. Commenters expressed their concerns that those LEAs would be overlooked if risk ratios alone are used.

Third, as discussed elsewhere in this section, commenters stated that risk difference can ensure that significant disproportionality would not be triggered when incidence levels are very low for all groups.

Finally, commenters stated that risk differences are easy to calculate,

interpret, and use to compare LEAs. These commenters suggested that the Department define a range of acceptable risk difference thresholds and review each State's thresholds for reasonableness. The commenters also expressed that, because risk differences are simple to calculate and easy to understand, the Department should not find it difficult to review States' risk difference thresholds for reasonableness. Further, commenters suggested that, as most of the States finding zero LEAs with significant disproportionality use a risk ratio, the preferences of States for risk ratios should not prejudice the Department against the use of risk difference in addition to, or instead of, a risk ratio.

Discussion: The Department carefully considered the optional use of a second measure of significant disproportionality, either instead of or in addition to, the risk ratio. The Department agrees that risk difference has certain advantages that the risk ratio does not. However, the Department also believes that, at the present time, the risk ratio also has advantages not shared by the risk difference.

First, as risk ratio method is widely used by States, its strengths and weaknesses are well known, as are the approaches needed to address its shortfalls (*e.g.*, multiple years of data and minimum n-sizes and minimum cell sizes). While we agree that the risk difference can be calculated when risk in the comparison group is zero, and may help States to avoid inappropriate identification of LEAs with low incidence rates, we believe that the standard methodology, as a whole, allows States to appropriately measure racial and ethnic disparities in LEAs experiencing these issues. Further, while risk differences may identify racial and ethnic disparities when LEAs have high incidence rates, we believe there are other provisions of IDEA beyond section 618(d) that promote appropriate practices to address those high incidence rates, which we list earlier in this section.

Second, due to the widespread use of risk ratio thresholds, the Department anticipates that § 300.646(b), which would require States to follow a standard methodology, will create less burden for States if the methodology includes a more common measure of racial and ethnic group disparity. Based on the Department's review of State definitions of significant disproportionality, as noted in the NPRM, fewer than five States used risk difference, while nearly 45 States used some form of the risk ratio (*e.g.*, risk ratio, alternate risk ratio, weighted risk

ratio), and 21 used the risk ratio proposed in the Department's standard methodology.

Third, the States' experience with risk ratios provides the Department with some historical knowledge of what risk ratio thresholds have previously been considered as indicative of significant disproportionality. In the NPRM, we noted that, of States utilizing a risk ratio, 16 States used a risk ratio threshold of 4.0, while seven States each used thresholds of 3.0 and 5.0. This history will help inform the Department's review of reasonableness. With so few States utilizing risk difference, this same history is not available to the Department. For these reasons, the Department considers the risk ratio to be superior to risk difference as the primary measure of racial and ethnic disparities for the standard methodology.

Further, the Department does not believe the benefits of the risk difference outweigh the consequences. While the risk difference method may serve to clarify the significance of racial disproportionality between LEAs with identical risk ratios, its application would still require the development of a threshold of risk difference for determination of significant disproportionality. The use of two different thresholds for significant disproportionality is contrary to the objective of promoting consistency and transparency in how States determine disproportionality, as recommended by the GAO report. In addition, we believe that the measures implemented in these final regulations to promote consistency and transparency also will lead to more appropriate identification of significant disproportionality and do not believe that the low incidence of identification in the past is a result of the risk ratio method itself.

Changes: None.

Comments: Two commenters asserted that the weighted risk ratio is the most accurate and effective measurement because it allows the State to standardize across LEAs that are very different. These commenters argued that, while the risk ratio is simple and straightforward, the weighting of findings using State data provides standardization that makes comparability across LEAs possible. These commenters also argued that the weighted risk ratio formula is not too difficult for States to utilize. Further, commenters argued that the States currently using a weighted risk ratio—nearly half of all States—would be prohibited from doing so under proposed § 300.647(b), apparently because of its complexity and lack of

public understanding—rather than specified weaknesses in the methodology itself. Some commenters suggested allowing States to calculate significant disproportionality using either the risk ratio method or the weighted risk ratio method. One commenter stated that the weighted risk ratio ensures that two LEAs are treated similarly if the risk for the racial or ethnic group of interest is the same in both LEAs, even if the racial demographics in each LEA are different.

Other commenters, meanwhile, supported regulations that would disallow States' use of the weighted risk ratio. These commenters agreed that weighted risk ratios add a high level of complexity that makes the decision to identify an LEA difficult for the layperson to follow. These commenters stated as well that weighted risk ratios are not necessary if the alternative risk ratio is available. One of these commenters stated that it was important for special education administrators to be able to calculate current racial and ethnic disparities independent from a State report, which is based on prior year data. A few commenters stated that the use of the weighted risk ratio alone, without adequate minimum n-sizes or additional significance testing, would result in many LEAs being identified as having significant disproportionality when the disproportionality is due only to small numbers of children identified with disabilities, placed in restrictive settings, and disciplined. Some commenters observed that the Department's proposal did not include permission to use weighted risk ratio but requested that the Department explicitly prohibit its use.

Discussion: As we noted in the NPRM, with a weighted risk ratio, the comparison group is adjusted by adding different weights to each racial and ethnic group, typically based on State-level representation. The weighted risk ratio method has the drawback of volatility across years, similar to the risk ratio, but does not support straightforward interpretation as well as the risk ratio does.

Given that we proposed three mechanisms to help States account for risk ratio volatility—(1) the alternate risk ratio, (2) the allowance for using up to three consecutive years of data before making a significant disproportionality determination, and (3) the minimum n-size and cell size requirements—the Department previously determined that the potential benefits of the weighted risk ratio method were exceeded by the costs associated with complexity and decreased transparency. Although the final regulations adopt additional

flexibility, and potential variability, through the requirement for a minimum cell size, the Department continues to believe that use of the weighted risk ratio is not justified for the same reasons.

While a number of States currently use the weighted risk ratio method, the Department believes that method fails to provide LEAs and the public with a transparent comparison between risk to a given racial or ethnic group and risk to peers in other racial or ethnic groups, as the risk ratio and alternate risk ratio methodologies are designed to do. We believe that the final regulations, as drafted, clearly disallow use of the weighted risk ratio as part of the standard methodology and that additional clarification on this point is not necessary.

Changes: None.

Comment: A few commenters stated that States should be encouraged to add a test of statistical significance to the standard methodology. Two commenters requested that the Department allow States to use appropriate tests of statistical significance to assess the statistical significance of any preliminary result produced through risk ratio analysis.

Another commenter suggested that, if the Department only allows States to set a minimum n-size, it should allow States to conduct a test of statistical significance to determine if the risk ratio is truly significant.

Discussion: Statistical significance testing is applicable only to samples rather than population data, and therefore is not an appropriate method of determining significant disproportionality in an LEA. As we noted in the NPRM, States have access to population data, including actual counts of children identified with a disability, placed into particular settings, or subjected to a disciplinary removal from placement. With this information, States can simply calculate whether an LEA's risk ratio for a given subgroup is different from the risk ratio for a comparison group.

Changes: None.

Comment: A commenter argued that, when calculating a risk ratio, White children would be a more appropriate comparison group than "all other racial and ethnic groups" as specified in the definition of "risk ratio" in the proposed § 300.647(a)(3) (now § 300.647(a)(6)). To help States make use of this comparison, while ensuring that White children are not precluded from the States' review for significant disproportionality, the commenter recommended that States be required to calculate both the Department's

proposed risk ratio and a second risk ratio where White children replace all other racial and ethnic groups. The commenter noted that the additional data analysis and reporting burden associated with the addition of this risk ratio would be negligible. Another commenter recommended that, in addition to the risk ratio, the Department allow States to compare all racial or ethnic groups to the State risk index for White children only, in order to prevent States from identifying significant disproportionality in LEAs where risk for a given racial or ethnic group is low.

Discussion: The Department acknowledges that, in general, it may be a common practice to utilize White children as a comparison group when examining data for racial and ethnic disparities. However, for purposes of IDEA section 618(d), it would be inappropriate to use one method for children of color with disabilities—a comparison to White children—and a separate method for White children in which they are compared to all other racial and ethnic groups. We do not find it appropriate for one racial or ethnic group to be treated differently from the others in these regulations.

Changes: None.

Categories of Analysis (§ 300.647(b)(3) and (4))

Comment: One commenter stated that, in one State, children with disabilities are not categorized by impairment, noting that IDEA does not require that children be classified by their disability. The commenter requested that, to preserve this State's current policy, the Department revise proposed § 300.647(b)(3) to clarify that States need only calculate risk ratios for particular impairments if those States or their LEAs identify children with particular impairments.

Discussion: The Department does not believe that a revision to § 300.647(b)(3) is necessary to allow a State that currently does not classify children by disability to continue in its current practice. The standard methodology in § 300.647 does not require States to classify children by impairment in order to comply with the requirement to identify and address significant disproportionality. Rather, under § 300.647(b)(3), the State is required to review those racial or ethnic groups within LEAs that meet the State's population requirements, including a minimum cell size. Because a State that does not classify children by disability would, in assessing LEAs for significant disproportionality, have a cell size of zero for each of the impairments

enumerated under § 300.647(b)(3)(ii) for all racial and ethnic groups and for all LEAs, that State would not be required to calculate risk ratios for any of the impairments. Under § 300.647(b)(3)(i), however, the State must calculate risk ratios for the category of all children with disabilities, by racial and ethnic group.

Changes: None.

Comments: Several commenters responded to Directed Question #3 in the NPRM, which inquired whether the Department should remove any of the six impairments from, or add additional impairments to, proposed § 300.647(b)(3)(ii). That section listed the impairments that States must examine in determining whether an LEA has significant disproportionality with respect to the identification of particular impairments.

One commenter responded that the Department need not expand the list of impairments because the remaining impairments under IDEA section 602(3) that could be added to those listed in § 300.647(b)(3)(ii) are low incidence, and the qualifying factors for these are so specific, that there is limited room for varying interpretations that might lead to significant disproportionality. Two commenters recommended that all six impairments included in proposed § 300.647(b)(3)(ii) remain if the Department allows States to limit their review of significant disproportionality only to those racial and ethnic groups where at least 10 children (or, as an alternative, at least 15 children) have been identified with that particular impairment. One commenter asserted that all impairments listed in proposed § 300.647(b)(3)(ii) should remain and that the Department should further include all of the impairments in IDEA section 602(3), including those impairments enumerated under IDEA section 603(3)(B) that are applicable to children, aged 3 through 9, who experience developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. Another commenter also supported the inclusion of developmental delay in States' review for significant disproportionality.

Two commenters recommended that blindness, orthopedic impairment, and hearing impairments be added to the list of impairments in proposed § 300.647(b)(3)(ii).

Discussion: The Department agrees that it is unnecessary to require States to examine the seven low-incidence impairments listed in IDEA section 602(3) and in § 300.8 that were not

included in proposed § 300.647(b)(3)(ii) for significant disproportionality. Given the low incidence of these impairments, the Department continues to believe that disproportionality based on race or ethnicity will not be reliably identified as systemic or otherwise indicative of persistent underlying problems. Further, given that the Department has not previously required States to examine these impairments, doing so now would impose a new data analysis burden that the Department does not believe is necessary. For this same reason, the Department declines to add to § 300.647(b)(3)(ii) blindness, orthopedic impairment, hearing impairments, or the developmental impairments applicable to children aged three through nine defined under IDEA section 602(3)(B).

Changes: None.

Commenter: One commenter recommended the use of an alternative risk ratio method to capture the disability categories in IDEA section 602(3). The commenter suggested that the alternative risk ratio method be used when a racial or ethnic group does not meet a minimum population requirement for any of the disability categories. The commenter suggested this approach to help address the possible under-identification of hearing loss.

Discussion: Again, the Department believes that it is unnecessary to require States to examine the seven low-incidence impairments listed in IDEA section 602(3) that were not included in proposed § 300.647(b)(3)(ii) for significant disproportionality. Given the low incidence of these impairments, disproportionality based on race or ethnicity may not be reliably identified as systemic or otherwise indicative of persistent underlying problems, and the Department has not previously required States to examine these impairments. Nothing, however, would prevent a State from examining low-incidence disabilities for racial and ethnic disparities—or for disproportionate overrepresentation—if it chose to do so. Moreover, while a State may choose to review an LEA's policies, procedures, and practices for compliance with IDEA requirements related to identification and evaluation under its separate general supervisory authority in IDEA section 612(a)(22) or monitoring authority in section 616, the consequences set out in IDEA section 618(d)(2) and these regulations, including mandating the use of comprehensive CEIS, do not apply.

Change: None.

Comments: One commenter recommended that the Department

exclude any of the six impairments from a review for significant disproportionality that were not part of the research base informing the 2004 IDEA regulations related to significant disproportionality in special education.

According to the commenter, concerns regarding overrepresentation in special education were limited to the identification of intellectual disabilities, specific learning disabilities, and emotional disturbance.

Discussion: We decline to make the commenter's requested change to § 300.647(b)(3). IDEA section 618(d) (20 U.S.C. 1418(d)) requires that States examine LEAs for significant disproportionality based on race and ethnicity in the identification of particular impairments. We believe there is a sufficient statutory basis to extend the requirement for States to examine LEAs for significant disproportionality to all of the impairments included in IDEA section 602(3); however, the Department has determined that, given the low incidence of several of the listed impairments, it may be difficult to reliably identify significant disproportionality with respect to these impairments that is systemic or otherwise indicative of persistent underlying problems.

Change: None.

Comments: One commenter recommended that under proposed § 300.647(b)(3)(ii), States should not be required to examine LEAs for significant disproportionality in the identification of children with specific learning disabilities. This commenter noted that some States have put in place a process whereby children must receive certain services—specifically, response to intervention—prior to being identified with specific learning disabilities. This commenter suggested that the use of evidence-based interventions has reduced the number of children requiring special education services.

Discussion: The Department appreciates the comment and agrees that the provision of multi-tiered systems of support, such as response to intervention, can be useful and important in serving children with disabilities. At the same time, we note that States and LEAs have an obligation under §§ 300.304 to 300.311 to ensure that the evaluation of children suspected of having a disability is not delayed or denied because of the implementation of specific strategies or interventions. Under § 300.307, States must adopt criteria for determining whether a child has a specific learning disability. The criteria adopted by the State: (1) Must not require the use of a

severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability; (2) must permit the use of a process based on the child's response to scientific, research-based interventions; and (3) may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability. (34 CFR 300.307, OSEP Memorandum 11-07, January 21, 2011).

We decline to revise § 300.647(b)(3)(ii) as suggested by the commenter. In its 37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2015) (37th IDEA Annual Report), the Department noted that the percentage of the resident population ages 6 through 21 served under IDEA, Part B, identified with specific learning disabilities was 39.5 percent of children, the highest of all impairments.

The fact that specific learning disabilities, as a category, has the highest incidence of all the impairments recognized by IDEA suggests that it may be one of the most important disability categories to review for significant disproportionality. Moreover, given that it is a high-incidence category, removing specific learning disabilities from the analysis may have the unintended effect of increasing identification of this impairment to minimize any appearance of racial and ethnic disparities in the identification of children with impairments that are subject to examination for significant disproportionality. To prevent this possibility and encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality with respect to specific learning disabilities.

Changes: None.

Comments: Several commenters recommended that the Department remove autism from the list of impairments under proposed § 300.647(b)(3)(ii) that States must examine in LEAs for significant disproportionality. Of these commenters, one noted that autism identification generally follows a medical diagnosis. Several explained that some States require that a medical evaluation be conducted or a medical diagnosis be considered before a child can be identified with autism. Several others generally noted that it is rare that an LEA diagnoses a child as having autism. As a result, one commenter concluded, any over-identification of autism may be attributable to a medical professional in the LEA and not

necessarily indicative of an issue in the LEA itself. Another commenter noted that, since a diagnosis of autism is not under the control of the LEA, the LEA would have no means or capacity to remedy and correct a finding of significant disproportionality.

Several other commenters stated that a failure to provide children with special education services after a medical diagnosis of autism could result in noncompliance with IDEA. Finally, several commenters examined the Department's report—*Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity (2015)*—and found that the most egregious disparities with respect to autism applied to White children. These commenters believed that requiring LEAs to address significant disproportionality with respect to White children was not the intention of IDEA.

With respect to special education eligibility determinations, a last commenter stated that LEAs generally do not make clinical diagnoses. Rather, LEAs and schools are charged with determining whether children meet State and Federal criteria to be eligible for special education and require specialized instruction.

Discussion: In its 37th Annual Report, the Department noted that the percentage of the resident population of children with autism ages 6 through 21 served under IDEA, Part B, increased markedly between 2004 and 2013. Specifically, the percentages of three age groups—ages 6 through 11, 12 through 17, and 18 through 21—that were reported under the category of autism were 145 percent, 242 percent, and 258 percent larger in 2013 than in 2004, respectively.

Given those increases, and to encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality with respect to autism.

We further note that, even if disparities in an LEA's identification of autism tend to result from disparities in the medical diagnosis of autism, it may be the case that the latter disparities are due to factors such as unequal access to medical care, which may result in children not being referred for an evaluation. In this instance, the broader use of developmental screening for young children—which may be supported using comprehensive CEIS—may help to identify children in other racial or ethnic groups that may currently be underrepresented among children with impairments such as

autism that may follow a medical diagnosis.

Last, we disagree with the commenters' suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children.

Changes: None.

Comments: A number of commenters recommended that the Department remove other health impairments (OHI) from the list of impairments under proposed § 300.647(b)(3)(ii) that States must examine for significant disproportionality. Of these, some commenters noted that some States require that a medical evaluation be conducted, or a medical diagnosis be considered, before a child is determined to have OHI. Still others noted that it is rare for an LEA to diagnose a child with OHI and that failure to provide children with special education services when an evaluation indicates OHI could result in non-compliance with IDEA. One commenter stated that, since a diagnosis of OHI is not under the control of the LEA, the LEA would have no means or capacity to remedy and correct a finding of significant disproportionality. Finally, some commenters stated that the Department's data show that the most egregious disproportionality with respect to OHI applies to White children, but requiring LEAs to address significant disproportionality with respect to White children was not the intention of IDEA.

With respect to special education eligibility determinations, a last commenter stated that LEAs generally do not make clinical diagnoses. Rather, LEAs and schools are charged with determining whether children meet State and Federal criteria to be eligible for special education and require specialized instruction.

Discussion: In its 37th Annual Report, the Department noted that the percentage of the resident population with OHI ages 6 through 21 and served under IDEA, part B, increased markedly between 2004 and 2013. Specifically, the percentages of three age groups reported—ages 6 through 11, 12 through 17, and 18 through 21—were 45 percent, 624 percent, and 104 percent larger in 2013 than in 2004, respectively.

Given recent increases in the percentage of children identified with OHI, and to encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality in OHI. Also, we note that, even if disparities in the identification of OHI tend to result from disparities in the medical or clinical diagnosis of OHI, it may be the case that the latter disparities are due to factors such as unequal access to medical care, which may result in children not being referred for an evaluation. In this instance, the broader use of developmental screening for young children—which may be supported using comprehensive CEIS—may help to identify children in other racial or ethnic groups that may currently be underrepresented in disability categories, like OHI, that may follow a medical diagnosis.

Last, we disagree with commenters' suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children.

Changes: None.

Comment: Several commenters responded to Directed Question #4 of the NPRM, which inquired whether the Department should continue to require States to review LEAs for significant disproportionality based on race or ethnicity in the placement of children with disabilities inside the regular classroom between 40 percent and 79 percent of the day.

Multiple commenters suggested that the Department continue the requirement. Of these commenters, a few noted that this type of placement data is already collected by States and might be helpful in addressing other issues of disproportionality. One commenter advocated for leaving this placement in the regulations and noted that 50 percent of the day is the equivalent of lunch, recess, gym, morning meeting, and art class. In the commenter's opinion, placement in the classroom only 50 percent of the day is a significant amount of isolation, and may mean a potential lack of access to the general education curriculum.

One commenter stated that research shows that almost every child of color

with disabilities who takes an alternate assessment based on alternate academic achievement standards is segregated from their peers for all or most of the day, and that the lack of integration in the regular classroom is associated with lower performance on State general assessments. The commenter suggested that this information supports the continued inclusion of placement inside the regular classroom between 40 percent and 79 percent of the day in States' review for significant disproportionality.

Conversely, a few commenters expressed their preference that the Department not require States to review for significant disproportionality placement in the regular classroom between 40 and 79 percent of the school day. These commenters noted that data regarding this placement provides little information about the severity of a child's disability, the classroom supports the child receives, or the quality of the services in that setting. Many commenters noted that 40 percent to 79 percent of the school day covers a wide range that encompasses anywhere from 2.4 to 4.7 hours. These commenters stated that while only 2.4 hours in the regular classroom may be more restrictive, 4.7 hours may not be; therefore, this placement is difficult to categorize.

Several commenters noted that it is generally meaningless to draw conclusions about the percentage of time a child is in a regular class and whether it means the LEA has provided services in the least restrictive environment.

One commenter asserted that one State may have difficulty collecting data regarding this placement, as the State reports placement using different percentages of time spent in the regular classroom (*i.e.*, 20 percent or less, less than 60 percent and greater than 20 percent, 60 percent or more). The commenter expressed concern that requiring States to change their placement categories would require changes to State special education regulations, resulting in significant increases in paperwork and resource expenditures.

Additionally, several commenters stated that reporting additional placement data will be a burden for LEAs and will not provide useful information.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State with respect to the placement of children with disabilities.

To meet their general data reporting obligations under IDEA section 618(a) (20 U.S.C. 1418(a)), States currently submit to the Department a count of children with disabilities, disaggregated by race and ethnicity, who are placed inside the regular classroom between 40 percent and 79 percent of the day, inside the regular classroom less than 40 percent of the day (*i.e.*, inside self-contained classrooms) and inside separate settings (*i.e.*, separate schools and residential facilities). OSEP Memorandum 08-09 and FILE C002, OMB Control Nos. 1875-0240 and 1820-0517. Consistent with this reporting requirement, the Department initially proposed requiring States to review each of these three placements for significant disproportionality, as racial and ethnic disparities in these placements may suggest that some children with disabilities have less access to the least restrictive environment to which they are entitled under IDEA section 612(a)(5) (20 U.S.C. 1412(a)(5)). The Department did not include in the NPRM any requirements that States expand the scope of their data collection with respect to placement.

However, the Department asked Directed Question #4 to ascertain whether States and LEAs should be required to determine whether there is significant disproportionality in LEAs with respect to placement in the regular classroom between 40 percent and 79 percent of day. After reviewing the perspectives shared by commenters, the Department agrees to no longer require that States determine whether significant disproportionality, by race or ethnicity, is occurring within an LEA with respect to placement in the regular classroom between 40 percent and 79 percent of the day. The Department acknowledges that there could be significant qualitative differences in the opportunities for interaction with nondisabled peers for students at the lower end of this range and students at the upper end. While the Department emphasizes that placement decisions must be individualized, we also recognize that, given these differences, for students on the lower end of this range, there could be unintended incentives to improperly place them in settings where they spend less classroom time with nondisabled students rather than more. Given the qualitative differences and the broad range of class time addressed in this category, we no longer believe that addressing significant disproportionality in LEAs with regard

to this placement category is appropriate.

The Department appreciates the comments supporting the proposed requirement and we recognize that an examination of the placement of children with disabilities outside of the regular classroom more than 40 percent of the day and less than 79 percent of the day could, in some limited cases, help to highlight systemic issues. In the Department's view, on balance, the continued use of this category for determining significant disproportionality is not warranted.

Changes: The Department has revised proposed § 300.647(b)(4) to remove the requirement that States identify significant disproportionality with respect to the placement of children with disabilities ages 6 through 21, inside a regular class more than 40 percent of the day and less than 79 percent of the day.

Comment: One commenter expressed concern that the standard methodology requires States to examine risk ratios for each placement type separately, rather than recognizing their interconnectedness. The commenter suggested, for example, that an LEA could evade a finding of what the commenter calls "significant discrepancy" by moving children from partial inclusion to a substantially separate classroom. The commenter stated that this would cause the LEA to not be identified with "significant discrepancy" with respect to the number of children being educated in partially inclusive settings. The commenter concluded that this approach would not create the right incentives for LEAs.

Discussion: We appreciate the commenter's concern. The Department has heard from several commenters regarding our initial proposal to require States to review for significant disproportionality the placement of children with disabilities in the regular classroom for no more than 79 percent of the day and no less than 40 percent of the day. After reviewing the comments, we agree that this placement covers too broad a range of hours within the school day to help States to identify significant disproportionality with respect to placement. In considering this commenter's perspective, we find it may also be the case that, to avoid a determination of significant disproportionality with respect to placement in the regular class for no more than 79 percent of the day and no less than 40 percent of the day, LEAs may have an incentive to shift children with disabilities from this more inclusive placement to self-contained

classrooms or separate schools. With this in mind, the Department will remove the proposed language requiring States to review LEAs, or their racial or ethnic groups, for significant disproportionality with respect to placement in the regular classroom for no more than 79 percent of the day and no less than 40 percent of the day from § 300.647(b)(4). With this change, the Department has narrowed States' review of significant disproportionality to the most restrictive placements, including self-contained classrooms, separate schools, and residential facilities. We believe that § 300.647(b)(4), as revised, encourages LEAs to focus on placing children in the proper setting by requiring them to analyze only the most significant removals from the regular classroom.

Changes: As discussed above, the Department has revised proposed § 300.647(b)(4) to remove the requirement that States identify significant disproportionality with respect to the placement of children with disabilities ages 6 through 21, inside a regular class more than 40 percent of the day and less than 79 percent of the day.

Comment: Several commenters noted that the Department should not expand data collection regarding disproportionality in placements as discretion regarding placement is not entirely within the hands of the LEA. Instead, these commenters asserted, placement involves difficult decisions by IEP Teams, including parents, that can change significantly from year to year (and sometimes throughout the year). The commenters added that the only way to address significant disproportionality would be to change a child's educational placement, which by law is the decision of an IEP Team that includes the parents. We interpreted these comments to refer to the requirements of § 300.116(a)(1), which specifies that placement is to be determined by a group of persons, including the parents, and other persons knowledgeable about the child. One commenter expressed concern that LEAs will stop thinking about the individual needs of the child and instead include them in regular classes to avoid a determination of significant disproportionality.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) explicitly requires States to review LEAs for significant disproportionality based on race and ethnicity with respect to placement, and, when significant disproportionality is identified, to (1) require LEAs to undergo a review and, if appropriate, revision of policies, practices, and

procedures; (2) publicly report on any revisions; and (3) reserve 15 percent of their IDEA Part B funds for comprehensive CEIS. This statutory language is consistent with the mandate that all children with disabilities receive special education and related services in the least restrictive environment. (IDEA section 612(a)(5) (20 U.S.C. 1412(a)(5))).

When LEAs have significant disproportionality with respect to placement, the LEA must review its policies, practices, and procedures to ensure that the policies and procedures conform with IDEA requirements and that the practice of placement teams in implementing these policies and procedures is also consistent with IDEA—such as involving parents in placement decisions, and ensuring placement decisions are made in conformity with least restrictive environment requirements. (34 CFR 300.114 and 116(a)(1)). In any case, these regulations do not include an expansion of data collections to support State review for significant disproportionality in placement. In Question 14 of OSEP Memorandum 08–09 (July 28, 2008), the Department clarified that States had an obligation to use the data collected for reporting under IDEA section 618 and must, at a minimum, examine data for three of IDEA section 618 reporting categories: Children who received educational and related services in the regular class no more than 79 percent of the day and no less than 40 percent of the day, children who received special education and related services in the regular class for less than 40 percent of the day, and children who received special education and related services in separate schools and residential facilities. However, as we note in this section of this document, the Department is revising proposed § 300.647(b)(4) to no longer require States to review LEAs for significant disproportionality with respect to placement in the regular class no more than 79 percent of the day and no less than 40 percent of the day.

Changes: None.

Comment: Several commenters expressed that it is worth noting how much time a child spends in a self-contained classroom as it is a unique placement.

Discussion: The Department agrees and has retained the requirement that States review LEAs for significant disproportionality with respect to placement in the regular classroom less than 40 percent of the day. In general, when children spend less than 40 percent of the day in the regular classroom, the Department considers

most of these children to be placed in self-contained classrooms.

Changes: None.

Comment: One commenter noted that the populations reviewed under proposed § 300.647(b)(3) do not align with the populations reviewed under proposed § 300.647(b)(4). The commenters specifically noted that none of the subsections under § 300.647(b)(4) reference the six specific impairments enumerated under § 300.647(b)(3)(ii). The commenter also noted that the two provisions include differences in the ages of the children reviewed. The commenter requested that the Department revise both provisions so that the populations reviewed for significant disproportionality are consistent across the review of identification, placement, and discipline.

Discussion: In OSEP Memorandum 08–09, the Department previously provided guidance on the data that IDEA section 618(d) requires States to examine to determine if significant disproportionality based on race and ethnicity was occurring with respect to the identification, placement, or discipline of children with disabilities. This data is consistent with that already required of States to meet their reporting obligations under IDEA section 618(a), and which were established, following notice and comment, in OMB-approved data collections 1875–0240 and 1820–0517. FILE C002, 2013. As we noted in the NPRM, the Department intentionally designed § 300.647(b)(3) and (4) to mirror the guidance previously provided in OSEP Memorandum 08–09, and current data collection requirements, so as not to introduce confusion or add unnecessary burden.

Changes: None.

Comments: Various commenters requested that the Department extend the list of placements that States must review to determine whether significant disproportionality based on race or ethnicity is occurring within their States.

Several commenters requested that the Department require States to review LEAs for significant disproportionality in the placement of children in hospital, homebound and correctional settings, as well as private schools, if they include more than 10 children. Several commenters specifically argued that children with disabilities in correctional education programs should be included, generally, in the calculations for significant disproportionality.

Commenters reported that, according to advocates and attorneys, the number of children with disabilities placed in homebound or tutoring programs—and,

as a consequence, provided with only one or two hours of instruction a day—is increasing due to unaddressed disability-related behaviors in school and efforts to reduce the use of suspension and expulsion. In many cases, according to the commenters, no attempt is made to provide these children with supplementary aids and services in less restrictive settings. The commenters stated that these practices likely have a greater impact on low-income families and children of color and concluded that the need to review this low-incidence placement for significant disproportionality is worth the risk of false positive identification of LEAs.

Further, commenters stated that LEAs play a role in the placement of children with disabilities in correctional facilities through the use of school-based arrests and juvenile justice referrals. One commenter clarified that States need to answer the question of whether children with disabilities were receiving special education services and supports in correctional facilities and whether there is significant disproportionality in those placements.

Discussion: The Department continues to believe that it is inappropriate to require States to examine placement in correctional facilities, or in homebound or hospital settings, given that LEAs generally have little, if any, control over a child's placement in those settings. Further, given that the Department has not previously required States to examine data to determine if significant disproportionality is occurring in these placements, a new requirement that States examine these placements in LEAs would represent a new data analysis burden that the Department does not believe is warranted.

Change: None.

Comments: A commenter requested that the Department require States to: (1) Report the number and proportion of inmates in correctional facilities within the State who have been identified as children with disabilities and are receiving special education services, and (2) make a determination of significant disproportionality, by disability status, with respect to placement in correctional facilities.

Discussion: We decline to require States to take either action. First, States already report to the Department counts of children with disabilities in correctional facilities as part of IDEA Part B Child Count and Educational Environments Collection. OMB Control No. 1875–0240 and File C002, 2013. Further, IDEA section 618(d) (20 U.S.C. 1418(d)) explicitly requires States to

collect and examine data to identify significant disproportionality by race and ethnicity in the LEAs of the State. Insofar as correctional facilities are not constituted as LEAs in the State, IDEA section 618(d) does not require States to conduct a significant disproportionality analysis there, and it would be an inappropriate expansion of the statutory requirement to mandate that analyses. However, to the extent that the educational programs in specific correctional facilities or systems are constituted as LEAs, States are required under IDEA to assess whether there is significant disproportionality by race and ethnicity whenever the populations are of sufficient size.

Changes: None.

Comment: One commenter requested that the Department require States to measure disparities in placement within separate schools for children who are blind and children who are deaf. (0221, 0227). The commenter stated that these schools often have separate sub-campuses or separate residential placements and academic tracks for children with multiple disabilities, and that is likely that children of color with disabilities are at greater risk of placement into these sub-campuses.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires SEAs to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State or the LEAs of the State. Accordingly, unless a separate school is an LEA in its own right, it will not be reviewed for significant disproportionality.

Further, as we have stated elsewhere in this document, a State must annually collect and examine data to determine, using the standard methodology in § 300.647, if significant disproportionality is occurring in LEAs that serve only children with disabilities. However, we have clarified in § 300.646(e) that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

Changes: None.

Comment: One commenter expressed concern that disciplinary removal data may not be collected consistently. The commenter stated that proposed § 300.647(b)(4) allows States to either compare rates for children with disabilities to rates for nondisabled children within an LEA or compare among LEAs for children with disabilities in the State.

A second commenter requested that the Department clarify whether a State might use the same calculation to determine significant disproportionality

with respect to disciplinary removal that it currently uses to identify significant discrepancy for purposes of APR/SPP Indicator 4. The commenter added that the State currently compares children with disabilities to children without disabilities within an LEA, and does not make comparisons between children with disabilities across LEAs.

Discussion: We appreciate the comments seeking to interpret or recommend the comparisons required under § 300.647(b)(4). This provision does not require, nor does it allow, States to compare children with disabilities to children without disabilities within an LEA or across LEAs for the purpose of identifying significant disproportionality. Rather, § 300.647(b)(4) requires States to compare children with disabilities in one racial or ethnic group to children with disabilities in all other racial groups within an LEA. When reviewing a racial or ethnic group within an LEA with a comparison group that does not meet the State's population requirements, the State will compare children with disabilities in one racial or ethnic group to children with disabilities in all other racial or ethnic groups within the State.

Moreover, we note that unlike the language in IDEA section 618(d), the language in section 612(a)(22) expressly provides for an examination of data for significant discrepancies (in the rates of long-term suspensions and expulsions of children with disabilities) among the LEAs in the State or compared to rates of nondisabled children in those LEAs. Thus, Congress knew how to require comparisons and expressly did so in IDEA section 612(a)(22), but not in sections 618(d), which is the subject of these regulations.

Change: None.

Comments: One commenter suggested that the Department remove from proposed § 300.647(b)(4)(vi), (vii) and (viii) all mention of in-school suspensions, as the term is not defined and the implementation of in-school suspension varies greatly from LEA to LEA.

Discussion: We generally expect that States will review LEAs for significant disproportionality using the same IDEA section 618 data reported to the Department. Under the IDEA Part B Discipline Collection, in-school suspension is defined as “instances in which a child is temporarily removed from his/her regular classroom(s) for disciplinary purposes but remains under the direct supervision of school personnel, including but not limited to children who are receiving the services in their IEP, appropriately participate in

the general curriculum, and participate with children without disabilities to the extent they would have in their regular placement. Direct supervision means school personnel are physically in the same location as students under their supervision.” OMB Control No. 1875–0240; Data Accountability Center, 2013.

Change: None.

Comments: A few commenters requested that the Department modify the proposed regulations to require States to collect and analyze data to determine if significant disproportionality by English language proficiency or gender is occurring with respect to the identification, placement, or discipline of children with disabilities. These commenters argued that IDEA provides the Department with authority to require States to submit demographic data on children with disabilities beyond race and ethnicity. Some of these commenters stated that the ability to disaggregate and cross-tabulate data is essential to understanding disparities in treatment between subgroups of children. One commenter noted that, according to the NPRM, English Learners are at greater risk for being disproportionately identified as children with a disability. This commenter stated that there are other demographic factors—beyond race and ethnicity—that should be considered when evaluating significant disproportionality across identification, placement, and discipline, including socioeconomic and linguistic status.

A few commenters cited research suggesting that school-age boys are over-identified as having disabilities, while school-age girls are under-identified. A last commenter stated that gender deserved heightened attention, especially as it relates to identification for autism and emotional disturbance.

Discussion: IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring with respect to the identification, placement, and discipline of children with disabilities in the State or the LEAs of the State. The Department believes that requiring, or permitting, analysis for significant disproportionality based on sex, English language proficiency, or socioeconomic status is beyond the scope of IDEA section 618(d) and inappropriate for these regulations. Accordingly, the Department will only require States to identify significant disproportionality based on race and ethnicity and will not require States to expand their review to include significant disproportionality based on factors such as sex, English language

proficiency, or socioeconomic status. As with other areas of review, there is nothing in IDEA that would prevent review of data for significant disproportionality based on factors such as sex or English language proficiency. In addition, States may choose to review policies, procedures, and practices of an LEA for compliance with IDEA requirements under its general supervisory authority in IDEA section 612(a)(11) or monitoring authority in section 616; however, the consequences of a determination of significant disproportionality based on other factors not set out in these regulations—*e.g.*, sex or English language proficiency—may not include mandating the use of comprehensive CEIS as set out in IDEA section 618(d)(2) and these regulations.

Changes: None.

Comments: A large number of commenters offered perspectives as to whether children ages three through five should be included in States’ review for significant disproportionality in the identification of children as children with disabilities and in the identification of children as children with a particular impairment.

Several commenters expressed that it is inappropriate to consider ages three through five in a determination of significant disproportionality, as some LEAs are not responsible for early intervention. One commenter stated that data used to identify significant disproportionality is also used in Indicators 9 and 10 of the SPP/APR, in which States have been instructed to use data only on children ages 6 through 21. The commenter requested that the age ranges used to identify disproportionate representation under IDEA section 612(a)(24) (20 U.S.C. 1412(a)(24)) and those used to identify significant disproportionality under IDEA section 618(d) (20 U.S.C. 1418(d)) remain consistent. Another commenter noted that the proposed regulations require States to report data on three through five year olds that is not currently reported. This commenter noted that States cannot calculate data regarding placement for children ages three through five because there are no peers in the regular classroom to compare the numbers. Two commenters noted that most States do not have a data collection mechanism to make determinations of whether significant disproportionality, based on either identification or discipline, for children ages three and four, is occurring. These commenters urged the Department to eliminate the requirement to determine significant disproportionality for three and four year olds. Another commenter

built on this argument, stating that, in a State without universal preschool, a majority of the children enrolled in public preschool are children with disabilities ages three to five. The commenter stated that this disproportional loading of preschool children into the analysis will result in the identification of nearly all of one State’s small regional elementary LEAs.

One commenter suggested that the Department require States to review LEAs for significant disproportionality with respect to identification only among children age 6 through 21. Other commenters noted that the inclusion of preschool-aged children is problematic because, without universal preschool, there is no reliable method for determining the total population of children ages three through five and, therefore, no appropriate denominator for the risk calculation. One commenter noted that, because preschoolers without disabilities do not have the same guarantee of a free appropriate public education as their peers with disabilities, States would have to use general census data, rather than enrollment, to identify the population of three and four year olds for purposes of determining significant disproportionality. In one State, according to one commenter, the State is the LEA responsible for the education of children with disabilities ages three through five. Given this context, the commenter expressed concern that the requiring States to review ages three through five for significant disproportionality will create a disincentive to offer non-mandated early intervention programs.

Conversely, several commenters suggested that the Department require States to review the identification of three through five year old children with disabilities only when there is a valid comparison or reliable baseline group within the public school.

A number of commenters generally supported the Department’s proposal to lower the age range for the calculation of disproportionality for identification and discipline from ages 6 to 21 to ages 3 to 21. Commenters noted that lowering the age limit of each State’s review of significant disproportionality in both identification and discipline is an important step in addressing the importance of the preschool years, and focusing attention on early childhood discipline.

Discussion: The Department has previously issued guidance explaining which specific disability categories, types of discipline removals, and placements that States must review for significant disproportionality based on

race and ethnicity under IDEA section 618(d). OSEP Memorandum 08–09, July 28, 2008. This guidance included only those identification categories, disciplinary removals, and placements—as well as the age ranges to be reviewed for each—that were consistent with the data collection that States submit to the Department each year to satisfy their reporting obligations under IDEA section 618(a) (20 U.S.C. 1418(a)). OMB Control Nos. 1875–0240 and 1820–0517 and File C002, 2013. At present, States submit to the Department data on children identified with any disability, autism, intellectual disability, emotional disturbance, specific learning disabilities, other hearing impairments, speech and language impairment for ages 3 through 21, and data on discipline removals for children ages 3 through 21.

It was the Department's intention to align the proposed regulations, to the extent possible, with IDEA section 618 data collection requirements so as to avoid any new data collection burden and any new data analysis burden on the States. At the same time, however, we must balance our desire to minimize burden with our interest in ensuring that children are not mislabeled. As this may be especially critical for young children, we agree with commenters that including children ages three through five is a meaningful step in recognizing the importance of preschool and early childhood education.

To that end, the Department will maintain the requirement for States to examine populations age 3 through 21, for purposes of significant disproportionality due to identification. We also agree, however, that the inclusion of children ages three through five in the State's review for significant disproportionality—with respect to the identification of disabilities and impairments—may create some complications or additional burden related to data collection and comparison. We acknowledge, for example, that some LEAs do not yet provide universal preschool, making a determination about the total population of children ages three through five more difficult. We also recognize that this collection would not correspond with current Indicators 9 and 10 of the SPP/APR, which focus on children ages 6 through 21.

As it is our expectation that States will use the same IDEA section 618 data reported to the Department to examine LEAs for significant disproportionality, we anticipate that States will use their IDEA, Part B child count data (rather than Federal census data) to examine significant disproportionality for

children ages 3 through 21. Additionally, to provide States more time to modify State analyses and consider how to identify and address factors associated with significant disproportionality in children with disabilities ages three through five, the Department will delay the requirement for including children ages three through five in their examination of significant disproportionality—with respect to the identification of disabilities and impairments—until July 1, 2020, in anticipation of more widespread provision of preschool programs in the future.

We disagree that States do not have data collection procedures to review LEAs for significant disproportionality due to discipline for populations ages 3 through 21, as States are currently required to collect data for purposes of IDEA section 618(a). For that reason, we will leave unchanged the requirement that States examine populations ages 3 through 21 for purposes of identifying significant disproportionality due to discipline.

Finally, we disagree that requiring the review of children ages three through five for significant disproportionality will create a disincentive for States or LEAs to offer non-mandated early intervention programs. We believe that early education and early intervention can have a number of salutary effects—not least being the reduced need for later, more intensive services—that serve as ample incentive for States to invest in these programs. Moreover, even in those instances in which States, not LEAs, are responsible for the provision of early intervention, the benefits of ensuring that this population is not subject to significant disproportionality outweigh any potential disincentives. Therefore, we will delay the inclusion of children ages three through five in the review of significant disproportionality with respect to the identification of children as children with disabilities, and with respect to the identification of children as children with a particular impairment, until July 1, 2020.

Changes: None.

Comments: Several commenters suggested that the Department allow States to use a single factor analysis and consider the total disability population when calculating disproportionality with respect to placement. We understood these comments to suggest that the Department allow States to identify LEAs with significant disproportionality based on the extent to which race or ethnicity is predictive of a child's placement.

Discussion: As we discussed in *Under-Identification of Children with Disabilities by Race and Ethnicity*, the Department interprets IDEA section 618(d) (20 U.S.C. 1418(d)) to require States to identify significant disproportionality based on race and ethnicity, irrespective of the causes of the disparity. The statute anticipates that the investigation of the causes of the disparity will take place after the significant disproportionality has been identified, as part of the implementation of the statutory remedies provided for under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)). For this reason, we decline to allow States to identify LEAs with significant disproportionality based on the extent to which the State believes race or ethnicity may predict the placement of a child with a disability.

Changes: None.

Comments: Several commenters offered perspectives on the requirements for States to review LEAs for significant disproportionality with respect to disciplinary removals.

A number of commenters recommended that the Department eliminate the requirement to calculate disciplinary removals of 10 days or fewer, both in-school and out-of-school, in proposed § 300.647(b)(4)(iv)–(vii). Of these, some commenters suggested that the requirement itself is excessive and punitive. Some commenters suggested that schools need some flexibility to manage behavior. These short-term removals, other commenters stated, respond to behaviors that are best managed through IEPs and are typically not as serious as the behaviors that give rise to removals of more than 10 days. Still other commenters stated that the requirement hampers school officials' ability to manage behavior, indicating that LEAs may feel constrained in their options for short-term removals if removals of fewer than 10 days and removals of 10 days or more are treated in the same way in the significant disproportionality calculation. In addition, these commenters stated that, by not requiring the review of short-term removals, the Department would enable States to focus more on the disproportionate results for schools placing children in disciplinary settings more than 10 days, which constitutes a change of placement.

Some commenters recommended removing the requirement for calculating total disciplinary removals under proposed § 300.647(b)(4)(viii) so as not to double count removals. The commenter also stated that it is unfair to treat LEAs that have a few short-term suspensions where behaviors are resolved through changes in IEPs in the

same way as LEAs that have repeated removals of more than 10 days and make no changes in IEPs or services for the children involved.

One commenter suggested that, to reduce confusion, the Department should rewrite proposed § 300.647(b)(4) to separate disciplinary removals from educational placements and place them under a heading of discipline. The commenter stated that data must be collected on exclusionary removals of all students with disabilities, regardless of the restrictiveness of the setting in which they are served.

One commenter expressed concern that, by including the entire range of disciplinary options in the required risk ratio calculations—from alternative education settings to removals by a hearing officer—the Department will force schools to constantly watch their data for quota targets for each type of discipline because there are no acceptable options not subject to the test for significant disproportionality.

Finally, one commenter requested that only discretionary discipline actions be monitored for significant disproportionality.

Discussion: The Department appreciates all of these comments. We disagree, however, with several and believe that many of these comments misstate either the discipline requirements or the requirements in these regulations. First, it is not clear to the Department that determining whether significant disproportionality exists for suspensions of any length in any way burdens the overall ability of LEAs or schools to manage behavior. Further, § 300.646(c) is intended, in part, to identify systemic issues in discipline practices, whether discretionary or not, in order to correct them and improve the ability of schools to manage behavior overall. Examining LEAs for significant disproportionality in discipline gives State and local school officials the opportunity to see where policies, procedures and practices should be changed—to determine, for example, whether schools might do more to manage behavior through IEPs, services, and supports which could be used to address or reduce both short-term and long-term suspensions. We especially note that under IDEA section 615(k) and the current regulations at §§ 300.530 and 300.531, there is significant involvement by the IEP Team members in making a range of decisions related to discipline including manifestation determinations and interim alternative settings for services. Likewise, in 2016, the Department released guidance to clarify that, while IDEA section

615(k)(1)(B) (20 U.S.C. 1415(k)(1)(B)) authorizes school personnel to remove from their current placement children who violate a code of student conduct, that authority in no way negates the obligation of schools to provide behavioral supports to children with disabilities as needed to ensure FAPE. OSEP Dear Colleague Letter, August 1, 2016.

We further disagree that collecting discipline data in any way leads to the punitive treatment of LEAs. When we published the NPRM, States already were required under § 300.646(a) to determine whether there was significant disproportionality in disciplinary removals of fewer than 10 days, disciplinary removals of more than 10 days, and total disciplinary removals, and States were already obligated to collect and report the data upon which these determinations were made. See, OMB Control No. 1875-0240; OSEP Memorandum 07-09, April 24, 2007. The requirements under § 300.647(b), therefore, cannot reasonably be considered excessive.

Further, while calculating risk ratios for total disciplinary removals under § 300.646(b)(4)(vii) does involve using the data already included in § 300.646(b)(4)(iii) through (vi), is the Department does not view this as double counting but as an amalgamation of various types of removals. That is, § 300.646(b)(4)(vii) is intended to allow for a separate review of disciplinary removals that could include lower-incidence disciplinary actions that may happen too rarely to allow for a stable risk ratio calculation. This is similar to the inclusion, in § 300.646(b)(3)(i), of categories of disabilities set out in § 300.646(b)(3)(ii) and all other categories, including low-incidence disabilities.

With respect to the comment suggesting that the Department reorganize § 300.647(b)(4), we believe that the current structure is sufficiently clear to avoid confusion. The Department further disagrees that the requirements under § 300.647(b)(4) will force LEAs to develop quota targets for different types of discipline so as to avoid a finding of significant disproportionality. Nothing in these regulations is intended to require LEAs to overturn appropriate prior decisions or to otherwise affect individual decisions regarding the identification of children as children with disabilities, the placement of children with disabilities in particular educational environments, or the appropriate discipline of children with disabilities.

Finally, nothing in § 300.647 is intended to unfairly target those LEAs

that have a few short-term suspensions where behaviors are resolved through changes in IEPs by grouping these districts with those that have repeated removals of more than 10 days, whether or not the IEP Teams make changes in IEPs or services for the children involved. It is true that all LEAs are subject to the same State methodology for determining significant disproportionality, and every LEA where the State determines there is significant disproportionality is subject to the same statutory remedies of reserving 15 percent of IDEA Part B funds for comprehensive CEIS and reviewing, and revising, if appropriate, policies, practices, and procedures related to disciplinary removals. One of the purposes of the analyses, however, is to identify and address significant disproportionality that is indicative of systemic or otherwise persistent underlying problems, which may not be revealed when there are too few short-term or long-term suspensions, whether or not behaviors are proactively resolved through changes in IEPs.

Changes: None.

Comments: One commenter expressed a concern regarding the completeness of IDEA section 618 data with respect to the disciplinary removals of children ages three through five. The commenter stated that the field of early childhood often does not use the terms suspension or expulsion to describe a disciplinary removal.

Discussion: As we have discussed previously, the Department designed § 300.647(b)(4) to mirror IDEA section 618(a) (20 U.S.C. 1418(a)) provisions with respect to the collection of discipline data and the use of these data to review disciplinary removals, as explained in our previous guidance. OSEP Memorandum 08-09 (July 28, 2008). This guidance clearly specified our interpretation that States' review for significant disproportionality with respect to disciplinary removal must include children with disabilities, ages three through five.

That said, the Department generally agrees with the commenter that data completeness and quality is important and will consider ways to support the work of States to properly collect and report data to the Department, especially in situations where a State's terminology differs from the Department's data definitions.

Changes: None.

Comment: A commenter expressed concerns about the inclusion of residential facilities in proposed § 300.647(b)(4), as LEAs are generally not the agency responsible for placing children in residential facilities. In the

commenter's State, children are counted in the LEA where the facility is located.

Discussion: When States examine their data to determine whether an LEA has significant disproportionality, the Department expects that States will use education placement data that is consistent with those submitted to the Department for purposes of IDEA section 618(a) and OMB Control No. 1875-0240. Final § 300.647(b)(4) is consistent with these data collection requirements and with the Department's previous guidance regarding States' review of significant disproportionality with respect to placement in residential facilities. (See, IDEA section 618(d); and Questions and Answers on Disproportionality, June 2009, Response to Question B-1.) We repeat the Department's position here for convenience.

We interpret IDEA section 618(d) to require States to include, or exclude, a child with a disability in its calculation of significant disproportionality depending on the agency that placed the child in a residential facility and the location of the residential facility. All children with disabilities placed in a residential facility in the same State by an educational agency must be included in the calculation of significant disproportionality. For purposes of calculating significant disproportionality, however, a State should assign responsibility for counting a child with a disability placed in an out-of-district placement to the LEA that is responsible for providing FAPE for the child (the "sending" LEA) rather than the LEA in which the child has been placed (the "receiving" LEA). Children with disabilities placed in residential facilities or group homes in the same State by a noneducational agency (e.g., court systems, Department of Corrections, Department of Children, Youth and Families, Social Services, etc.) may be excluded from a State's calculation of significant disproportionality. Children with disabilities placed in a residential facility in a different State by an educational agency should be included in a State's calculation of significant disproportionality in the LEA responsible for providing FAPE for that child (the sending LEA). Children with disabilities placed in a residential facility in a different State by a noneducational agency (e.g., court systems, Department of Corrections, Department of Children, Youth and Families, Social Services, etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and

the State where the residential facility is located.

Changes: None.

Risk Ratio Thresholds (§ 300.647(a)(7); § 300.647(b)(1) and (2); § 300.647(b)(6))

Comments: One commenter questioned whether proposed § 300.647(b)(1) requires States to identify additional LEAs and noted that, expressing concern that the potential costs of the regulations outweigh the benefits. The commenter noted that, in the NPRM, the Department stated that it would examine each State's risk ratio threshold to determine its reasonableness.

Discussion: The section in the NPRM containing the analysis of costs and benefits, and the same section in this document, states that the standard methodology, applied nationwide, will likely result in more LEAs identified with significant disproportionality. That is different, however, than requiring States to identify additional LEAs. Under §§ 300.646 and 300.647, States are not required to identify additional LEAs.

Similarly, while the Department stated that the risk ratio thresholds selected by the States would be subject to its review, the Department did not state that this review must strictly adhere to a particular outcome that may be overly burdensome to States. In general, the Department does not intend to require States to submit their risk ratio thresholds for approval prior to the implementation of the standard methodology. Rather, after these regulations take effect, the Department will monitor States for any use of risk ratio thresholds that may be unreasonable and take steps, as needed, to ensure the States' compliance with § 300.647(b)(1).

To ensure that the Department may accurately and uniformly monitor all risk ratio thresholds for reasonableness, we have added a requirement that each State report to the Department all of its risk ratio thresholds and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

Changes: The Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all risk ratio thresholds developed under § 300.647(b)(1)(i)(A) and the rationale for each.

Comments: A number of commenters raised issues with respect to the process by which States will develop reasonable risk ratio thresholds. Several of these commenters strongly supported the Department's proposal to require States to involve their State Advisory Panels in setting the thresholds. One of these commenters added that we should require States currently using a method similar to the standard methodology to review their thresholds with stakeholders prior to gaining Department approval. One commenter requested that the Department, prior to the issuance of the final regulations, clarify the process by which States would assess the reasonableness of their proposed risk ratio thresholds.

Other commenters suggested that the Department require States to use a uniform standard-setting process to inform the State Advisory Panels in developing risk ratio thresholds. One commenter suggested that the Department require States to undertake a standard-setting process with stakeholders, including the State Advisory Panels, to revisit their existing risk ratio thresholds using the new calculations; generate impact data using these thresholds; and then apply different thresholds to examine the impact upon disability subgroups, placement categories, and impairments. The commenter also recommended that States' risk ratio thresholds, as well as their business rules for the application of the thresholds, be publicly posted. The commenter further suggested that States reexamine risk ratio thresholds every three years to study their impact, adjust for population changes or new research, and to revise the opportunities for stakeholder input. Finally, these commenters urged the Department to require States to include epidemiologists on State Advisory Panels.

Discussion: We agree with commenters that State Advisory Panels should play a critical role in the development of States' reasonable risk ratio thresholds. Under IDEA section 612(a)(21)(D)(iii) (20 U.S.C. 1412(a)(21)(D)(iii)), State Advisory Panels have among their duties a responsibility to "advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618." As the selection of risk ratio thresholds will affect the data States will submit to the Department under the IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection required under IDEA section 618—including the LEAs identified with significant

disproportionality and the category or categories under which the LEA was identified (*i.e.*, identification, identification by impairment, placement, or discipline)—the State Advisory Panel should have a meaningful role in advising the State on methods to use in establishing reasonable risk ratio thresholds for determining significant disproportionality.

However, while the Department does not preclude either a State or State Advisory Panel from undertaking a standard-setting process and evaluating impact data in developing a reasonable risk ratio threshold, we do not find it necessary to prescribe the exact steps States must take in order to gain input from State Advisory Panels in that process. Likewise, at this time, the Department does not intend to mandate a specific process by which a State and its State Advisory Panel should assess the reasonableness of its proposed threshold, nor do we currently find it necessary to require States to reestablish their risk ratio thresholds every three years. As a State has the flexibility to establish its own reasonable risk ratio threshold, and is required to do so with input from its State Advisory Panel, the Department expects that either or both entities may, at any time, seek to reexamine whether the State's risk ratio threshold continues to be reasonable. Absent any indication that this practice would not be effective, the Department currently prefers to allow States and State Advisory Panels the flexibility to review and revise risk ratio thresholds as necessary or appropriate, rather than increase their burden by requiring regular reviews or mandating a specific standard-setting process.

Finally, while epidemiologists may be useful stakeholders for States as they create reasonable risk ratio thresholds, we believe that States have sufficient expertise to determine the appropriate composition of their State Advisory Panels.

Changes: None.

Commenter: A few commenters recommended that the Department ensure that the regulations outline specific ways that States and LEAs can meaningfully include all stakeholders in addressing significant disproportionality. The commenters recommended that States be required to demonstrate outreach and incorporation of diverse stakeholder input and advice in setting thresholds and addressing significant disproportionality through: Documentation of outreach to stakeholders (including efforts to recruit a diverse State Advisory Panel); posting of detailed minutes of State Advisory

Panel meetings; transparent publication and communication about State efforts to set reasonable risk ratio thresholds; demonstration of how stakeholder feedback was incorporated in defining final thresholds above which disproportionality is significant; demonstration of stakeholder input in reviewing and revising State policies, practices, and procedures related to the identification or placement of children with disabilities in LEAs identified as having significant disproportionality; and transparency in noting State efforts and progress in remedying significant disproportionality.

Discussion: We do not believe it necessary to outline in these regulations the specific ways that States must document their efforts to involve stakeholders in the development of risk ratio thresholds. Under IDEA section 612(a)(21)(D)(iii) (20 U.S.C. 1412(a)(21)(D)(iii)), State Advisory Panels already have among their duties a responsibility to “advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618.” Given these and other long-standing responsibilities, it is the Department's belief that States already have in place processes and procedures to secure input from their State Advisory Panels. Further specific requirements for stakeholder involvement could add a new data collection or reporting burden on States, which we do not believe is necessary. As most of the commenters' suggestions would dramatically increase paperwork burden for States, and because we believe there are already sufficient procedures in place for States to work with their State Advisory Panels, the Department declines to include those requirements in these regulations.

As discussed elsewhere in this analysis of comments, we also note that public participation in the adoption and amendment of policies and procedures needed to comply with IDEA Part B is already addressed by IDEA section 612(a)(19) and § 300.165. To the extent that commenters sought requirements for public participation requirements beyond the ones contained in those provisions, we decline to adopt them for the reasons discussed above.

Changes: None.

Comments: One commenter expressed concerns that these regulations will weaken the role of State Advisory Panels and other stakeholder groups in each LEA. Another commenter asked the Department to clarify the authority of State Advisory Panels under the proposed regulations.

Discussion: We believe that these regulations help make more explicit and strengthen the role of State Advisory Panels and other stakeholders in how States identify significant disproportionality. Section 300.647(b)(1)(ii)(A) requires consultation with stakeholders, including the State Advisory Panels, in developing the State's risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for determining reasonable progress under § 300.647(d)(2). As discussed elsewhere in this analysis of comments, we also note that public participation in the adoption and amendment of policies and procedures needed to comply with IDEA Part B is addressed by IDEA section 612(a)(19) and § 300.165 would apply, as appropriate. This helps to ensure greater public awareness, transparency, and input into how States establish these values and implement these regulations.

Further, in the future, the Department anticipates that all risk ratios and alternative risk ratios will be made public but has not yet determined the precise time and manner for this to occur. We anticipate doing so through an information collection request, through the Department's own publication of these data, or some combination of the two. This will help reinforce the review and revision of risk ratio thresholds, cell sizes, and n-sizes as an iterative public process within each State.

Changes: None.

Comments: A few commenters asserted that, as State Advisory Panels have limited family participation, Parent Training and Information Centers and Community Parent Resource Centers should be required participants in States' implementation of the standard methodology.

Discussion: The Department agrees with commenters about the importance of the meaningful involvement of families in the development of reasonable risk ratio thresholds. We note that State Advisory Panels are composed of individuals “involved in, or concerned with, the education of children with disabilities,” and must include “parents of children with disabilities.” 20 U.S.C. 1412(a)(21)(B). Section 300.647(b)(1)(i) requires that States involve stakeholders, including State Advisory Panels, in the development of each State's risk ratio thresholds.

This advisory role is within the scope of the statutory responsibility of State Advisory Panels to advise States in developing evaluations and reporting on data to the Department under IDEA

section 618. IDEA section 612(a)(21)(D)(iii); 20 U.S.C. 1412(a)(21)(D)(iii). While IDEA does not include a similar statutory requirement for either Parent Training and Information Centers or Community Parent Resource Centers, nothing in these regulations that would prevent a State, or other members of the State Advisory Panel, from consulting with those entities in the development of risk ratio thresholds. To the extent that States believe that their input would be valuable, we encourage States to include Parent Training and Information Centers and Community Parent Resource Centers in their deliberations regarding the standard methodology.

Changes: None.

Comments: A number of commenters responded to Directed Question #9, which inquired, in part, whether there are any circumstances under which the use of different risk ratio thresholds for different categories of analysis could result in an unlawful disparate impact on racial and ethnic groups.

A few commenters expressed their general support for allowing States to use different risk ratio thresholds for different categories of analysis. Of these, one commenter specifically supported allowing three different risk ratio thresholds—one for identification, one for placement, and one for disciplinary removals. Other commenters noted that, given the varying incidence rates and resulting cell sizes across disability categories, placements, and discipline rates, different risk ratio thresholds would be important in helping to ensure that any identified disproportionality is indeed significant. A last commenter noted that States should be allowed to consider setting different risk ratio thresholds for different categories of analysis (e.g., analysis of identification, placement, and discipline) if those thresholds are consistent with advice from stakeholders, including State Advisory Panels.

Some commenters indicated only partial support for using different risk ratio thresholds for different categories of analysis. Of these, one commenter supported the use of different thresholds for the analyses regarding disciplinary removals, as well as different thresholds for placement categories, but suggested that all thresholds used to analyze impairments must be consistent. Other commenters agreed that thresholds used to determine significant disproportionality in identification should not change for each impairment.

Several commenters expressed concerns about, or opposed the use of, different risk ratio thresholds for

different categories of analysis. Of these, some suggested that different risk ratio thresholds would impede transparency for parents, educators, and the public at large; impede Federal efforts to monitor States; and make it difficult to understand why some LEAs would be identified as having significant disproportionality and not others. Two commenters suggested that the language allowing different thresholds for different categories of analysis appeared unconstitutional.

Several commenters cautioned that States should not be permitted to set higher risk ratios for the categories where racial disproportionality is most likely to negatively impact historically disadvantaged groups of children. Some of these commenters suggested that this flexibility would allow States to avoid identifying LEAs where disparities have historically been most problematic. These commenters noted that racial disparities in special education—notably, identification of intellectual disability and emotional disturbance, and placement outside the regular classroom—were the result of local efforts to use disability identification and placement to resist desegregation requirements and deny children of color access to the regular classroom and curriculum.

One commenter noted that the LEAs in one State have historically (1) only over-identified Black children in intellectual disability; (2) mostly over-identified Hispanic children in speech and language impairment; and (3) over-identified Black and Native American children in emotional disturbance and specific learning disabilities. This commenter and another commenter stated that when specific races are mostly or always over-identified in specific disability categories, then the use of different risk ratio thresholds for different categories of analysis may result in unlawful disparate impact on racial and ethnic groups.

One commenter suggested that the use of different thresholds for different disability categories might allow States to conceal disproportionality in disability categories that are commonly known to be significantly disproportionate.

Discussion: The Department agrees with commenters that States may need different risk ratio thresholds in order to reasonably identify significant disproportionality for categories with different degrees of incidence rates, and, therefore, different degrees of disparity. The Department sees no specific legal obstacle to setting different thresholds for different categories of analysis, though we recognize that it is possible

that any race-neutral threshold, just like any race-neutral policy, could have a disparate impact. In addition, as we state later in this section, setting different risk ratio thresholds for different racial or ethnic groups within the same category of analysis is unlikely to withstand constitutional scrutiny.

Further, under § 300.647(b)(1), the Department intends for States to have the flexibility to set reasonable risk ratio thresholds for each impairment and for various placements and disciplinary removals. With this provision, States have the flexibility to set up to 15 different risk ratio thresholds. While the Department understands commenters' concerns that States could set race-neutral risk ratio thresholds that may have a disparate impact on a particular race or ethnicity based on historical numbers, in the Department's view, a requirement to apply uniform race-neutral risk ratio thresholds across all impairments would be unlikely to address this concern. We believe that States will have greater flexibility to establish reasonable risk ratio thresholds that do not have a disparate impact based on race or ethnicity if allowed to set different thresholds for different disability categories. As it works with States as they determine their risk ratio thresholds, the Department will decide whether additional guidance in analyzing potential disparate impact in setting reasonable risk ratio thresholds is necessary. For general guidance about the application of the legal theory of disparate impact in other contexts, please see the joint Department of Education and Department of Justice Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> and the Department of Education Dear Colleague Letter on Resource Comparability at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

While we acknowledge that allowing States to set multiple risk ratio thresholds may mean some increase in the complexity of the standard approach, we do not believe that permitting multiple risk ratio thresholds substantively impedes the goals of improved transparency or comparability in State implementation of the standard methodology. For any one category of analysis—emotional disturbance, for example—it will still be possible to compare the reasonable risk ratio thresholds each State uses to identify significant disproportionality. Meanwhile, we believe that allowing

States this flexibility actually increases the likelihood that they may take action to address racial and ethnic disparities in each of the categories of analysis, rather than limit their efforts to only those categories with the greatest disparities.

The involvement and impact of State Advisory Panels in the State's setting of risk ratio thresholds is discussed elsewhere in this analysis of comments.

Changes: None.

Comment: Directed Question #9 also inquired whether there are any circumstances under which the use of different risk ratio thresholds for different racial and ethnic groups (within the same category of analysis) could be appropriate and meet constitutional scrutiny. A number of commenters opposed the use of different risk ratio thresholds for different racial or ethnic groups of children. One commenter stated that different thresholds for different racial or ethnic groups would not be useful or fair. Two commenters believed that allowing different thresholds for different racial or ethnic groups would make transparency difficult and make data analysis much more complex. Another commenter noted that, with different risk ratio thresholds, one could not make comparisons across racial or ethnic groups. One commenter noted that these thresholds would not likely meet constitutional scrutiny.

Discussion: The Department agrees with the concerns raised by the commenters. We believe that the use of different risk ratio thresholds, by race or ethnicity within the same category of analysis, would be unlikely to meet constitutional scrutiny because it is difficult to articulate a compelling justification for analyzing certain groups differently based on their race or ethnicity. For this reason, the Department will not change § 300.647(b)(2), which clarifies that the risk ratio thresholds developed for each category of analysis (under § 300.647(b)(1)) must be the same for each racial and ethnic group.

Changes: None.

Commenters: Several commenters suggested that the Department establish a cap above which States may not establish a risk ratio threshold, or otherwise limit States to a range of risk ratio thresholds.

A few commenters suggested 3.0 as a cap. One of the commenters noted that, in the years between 2006 and 2009, six States increased their risk ratio thresholds and asked that the Department establish an absolute maximum risk ratio threshold of 3.0 (based, according to the commenter, on

two median absolute deviations above the national median of all LEA risk ratios). Another commenter suggested a risk ratio threshold cap of 2.0. Still another commenter noted that using risk ratio thresholds over 2.0 may well mask significant disproportionality in identification, especially for impairments where children of color with disabilities have historically been over-identified, such as intellectual disability and emotional disturbance.

Several commenters suggested that the Department recommend a range within which States may choose to set their risk ratio threshold. These commenters recommended a range between 1.5 and 3.0, with some flexibility to allow States to use higher thresholds. The commenters suggested that, so long as the State has identified some LEAs in the prior two years and is able to provide evidence that it will identify some LEAs using a threshold that is higher than the recommended range, the State be allowed to set risk ratio thresholds that exceed the established range. Two commenters believed that no State with a risk ratio exceeding a level of two times discrepant or above the national average should be allowed to identify zero LEAs as having significant disproportionality.

Discussion: The Department considered and rejected the possibility of establishing an absolute cap on the States' choice of risk ratio thresholds and limiting States' choice to a range of thresholds. At this time, the Department has not identified a sufficient, broadly applicable justification on which to establish these limitations at any specific threshold. In lieu of a mandate that all States use the same risk ratio thresholds, or set thresholds within limits established by the Department, § 300.647(b)(1) requires States to develop risk ratio thresholds that are reasonable and to consider the advice of stakeholders in establishing these thresholds. Moving forward, we will review State policies and practices to determine whether there emerges a standard practice or set of practices that may provide sufficient rationale for those limitations.

As mentioned earlier in this section, we have added a requirement that States submit to the Department the risk ratio thresholds they set and the rationales for setting them. Though the principal purpose of the requirement is to enable the Department's uniform monitoring of risk ratio thresholds, submitting risk ratio thresholds and their underlying rationales will inform the Department's review of the question of the need for a nationwide risk ratio threshold.

Changes: As mentioned above, the Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all risk ratio thresholds, the standard for measuring progress under § 300.647(b)(1)(i)(A)–(D) and the rationale for each.

Comment: A number of commenters requested additional clarification regarding how the Department will determine whether States' risk ratio thresholds are reasonable. Of these, some commenters' requests were general in nature. One commenter noted that, theoretically, the provision could allow States to continue to set unreasonably high standards that will continue to result in the identification of few or no LEAs. Another commenter suggested that the Department presume risk ratio thresholds for certain categories of analysis to be unreasonable—if there has been consistent overrepresentation in a category—and require States to provide a reasonable justification. A few commenters noted that, if States are given too much flexibility to set their risk ratio thresholds, then the requirement that they collect and analyze data to identify significant disproportionality becomes less meaningful or results in little meaningful information. Another commenter expressed concern that a standard of reasonableness, without further qualification in the regulations, might be result in a different determination of reasonableness from State to State, and from year to year.

Other commenters recommended that the Department use specific definitions of reasonableness. One commenter expressed concern that the Department's proposal offers no national standard, criteria, benchmarks, or goals and targets on which to gauge State compliance with the proposed regulations and requested that the Department withdraw the regulations until it can clearly specify its standard of "reasonableness." One commenter requested that the Department notify all States of any Federal enforcement action taken to ensure the reasonableness of a State's risk ratio threshold.

Other commenters recommended that the Department make clear that States that did not identify a single LEA in any area in the past, or that identified very few LEAs because of an unreasonably high threshold, will be unlikely to have their threshold deemed "reasonable" if it exceeds a set range, or remains unchanged (even if falling within a range recommended by the Department).

Some commenters suggested that the Department include factors unique to each State when considering the reasonableness a risk ratio threshold. One commenter suggested that the Department consider both the racial and ethnic composition of States and LEAs and the presence of factors correlated with disability when evaluating risk ratio thresholds. Other commenters suggested that the Department provide States the flexibility to establish risk ratio thresholds that reflect the composition of States' and LEAs' unique demography.

One commenter suggested that, so long as the State's proposed risk ratio threshold represents a decision that is unbiased, data-driven, and responsive to the particular needs of the State, it should be deemed reasonable when analyzed by the Department.

Discussion: We appreciate all of the comments regarding the Department's review of a State's risk ratio thresholds. It is our intention to clarify in forthcoming guidance the specific processes the Department will use to review for reasonableness a State's risk ratio thresholds, including information on how, and under what circumstances, the Department will undertake this review. In the interim, however, States may choose to consider the four conditions that the Department included in the NPRM in their development of risk ratio thresholds.

First, if the selected threshold leads to a reduction in disparities on the basis of race or ethnicity in the State or if it results in identification of LEAs in greatest need of intervention, then the Department may be more likely to determine that a State has selected a reasonable threshold. Second, the Department may be more likely to determine that a State has selected an unreasonable risk ratio threshold if the State avoids identifying any LEAs (or significantly limits the identification of LEAs) with significant disproportionality in order to, for example, preserve State or LEA capacity that would otherwise be used for a review of policies, practices, and procedures and reserving IDEA Part B funds for comprehensive CEIS, or to protect LEAs from needing to implement comprehensive CEIS. Third, the Department noted that establishing a risk ratio threshold solely on an objective calculation does not guarantee that the Department would consider the resulting threshold to be reasonable when examined in light of racial and ethnic disparities taking place at the LEA level. As States have access to population data, there is no need to use statistical methods to make inferences

about the population data using sample data. Fourth, a State's selection of a risk ratio threshold that results in no determination of significant disproportionality may nonetheless be reasonable, particularly if that State has little or no overrepresentation on the basis of race or ethnicity.

Given this, § 300.647(b)(1)(ii), and § 300.647(b)(7), under which any State's selection of risk ratio threshold is submitted to the Department and subject to its monitoring and enforcement for reasonableness, we disagree with those commenters concerned that allowing States to set their own reasonable risk ratio thresholds will allow them to set inappropriately high thresholds or that this flexibility will undermine the value of the required data collection and analysis. While States have the flexibility to set reasonable risk ratio thresholds and will not be required to seek Departmental approval of risk ratio thresholds prior to the implementation of the standard methodology, the Department intends to review risk ratio thresholds, and, in cases where a risk ratio threshold may not appear reasonable on its face, request that a State justify how the risk ratio threshold is reasonable. If, upon review of a State's explanation, the Department determines that the threshold is not reasonable, the Department may notify the State that it is not in compliance with the requirement in these regulations to set a reasonable risk ratio threshold. The Department may then take appropriate enforcement action authorized by law, ranging from requiring a corrective action plan, to imposing special conditions, to designating the State as high-risk status, to withholding a portion of the State's IDEA Part B funds. While we currently do not intend to issue a separate notification to all States in each instance in which the Department takes enforcement action with respect to any one State, we note that many of the aforementioned examples of possible enforcement actions result in publicly available information.

Like the commenters, we believe it possible that States currently not identifying LEAs with significant disproportionality are using risk ratio thresholds that are not reasonable (for those States that are using the risk ratio as part of their current methodology for determining significant disproportionality). However, while we currently believe it would be unlikely for any State to have no significant disproportionality in any category of analysis, for purposes of these regulations, we do not find it appropriate to automatically consider a

State's selection of risk ratio threshold unreasonable solely because no LEAs are identified. Theoretically, if risk ratio thresholds were always unreasonable simply because no LEAs were identified, it would be impossible for a State to resolve its significant disproportionality. In this circumstance, significant disproportionality would become an ever-moving target, where States would be forced to reduce thresholds again and again, potentially to a degree where disproportionality could no longer be considered significant. That is, the Department does not believe that any and all levels of disparity are significant.

The Department also agrees with commenters that a State's unique characteristics can be helpful for the State and its stakeholders to consider when developing risk ratio thresholds. We believe it is reasonable, for example, for States to consider the racial and ethnic composition of the State and LEAs, unique enrollment demographics, as well as factors correlated with disability, when developing their risk ratio thresholds. These considerations should not, however, serve as bases for setting risk ratio thresholds that could allow LEAs with significant disproportionality not to be identified. In the end, the Department will assess the reasonableness of a given threshold by examining its capability to identify and address disproportionality that is significant and by taking into consideration all facts that bear upon the choice of a risk ratio threshold. The Department will, in short, determine reasonableness in the totality of the circumstances.

Finally, the Department agrees with commenters that unbiased, data-driven decision-making, tailored to the needs of a State, would more likely lead to the creation of a reasonable risk ratio threshold. However, we remind these commenters that, in setting risk ratio thresholds, States should do so with the intent of helping LEAs to identify, investigate, and address significant disproportionality.

Changes: None.

Comment: Several commenters requested the Department create a safe harbor for risk ratio thresholds that States could voluntarily adopt with the knowledge that it is reasonable under these regulations. Of these, one commenter suggested that the safe harbor be set in advance of the effective date of the regulations in order to ensure that the thresholds set by States do not result in an unlawful disparate impact on racial and ethnic groups and to minimize costs to States to correct risk ratio thresholds found to be

unreasonable. Another commenter recommended that the Department consider risk ratio thresholds within a range of 2.5 to 3.5 as a safe harbor. One commenter urged the Department to monitor whether States using thresholds higher than 2.0 are indeed capturing instances of significant disproportionality where they occur. Another commenter recommended that the final regulations include additional clarity regarding the criteria the Department will use to determine if a State's established threshold is reasonable, especially if risk ratio threshold is greater than those published in the Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race and Ethnicity.

Discussion: We appreciate the comments, in response to Directed Question #5, about a possible "safe harbor" that would allow States to set risk ratio thresholds that they know would be considered reasonable by the Department. The Department does not believe, however, that it is in a position to mandate a particular risk ratio threshold. We have yet to justify the establishment of specific requirements regarding thresholds, including ranges, "safe harbors," or other limitations. Moving forward, however, we intend to review State policies and practices to determine whether there emerges a standard practice or set of practices that may provide sufficient rationale for a particular threshold, a range of thresholds, or a cutoff under which the Department would consider a threshold reasonable.

We note that the Department's published set of example risk ratio thresholds—in Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity—were intended to provide the public with an illustration of racial and ethnic disparities in special education, and provide examples of what reasonable risk ratio threshold might look like. It was not the intent of the Department, in publishing those examples, to offer these thresholds to States as a "safe harbor," to suggest that higher thresholds could not be reasonable, or to otherwise restrict States' to those example thresholds. Further, we note the risk ratio thresholds were calculated with consideration for the standard methodology as proposed in the NPRM. Now that the Department has amended portions of the standard methodology—including the provisions regarding population requirements—the risk ratio

thresholds published in the report no longer function as appropriate examples.

Changes: None.

Comments: One commenter suggested that the median absolute deviation (MAD) may be inappropriate as a method to compute risk ratio thresholds. The commenter requested that the Department explain and justify, prior to the issuance of the final regulations, the use of risk ratio thresholds that exceed two MADs above the national median to determine significant disproportionality. The commenter also requested more detailed guidance to assist States in running this calculation on their own.

Discussion: The Department did not intend to mandate that States use median absolute deviations as a method to compute risk ratio thresholds; rather, the approach was intended to illustrate one way to develop risk ratio thresholds that might be considered reasonable given national IDEA section 618 data. While acknowledging that the NPRM could have provided greater clarity on this point, it was not the Department's prime objective to suggest that States use median absolute deviations on their own to calculate risk ratio thresholds. This is especially true given that States, in examining only their own data, would have fewer LEAs, and, therefore, fewer risk ratio calculations from which to calculate the MADs, which could lead to significantly higher, and potentially unreasonable, risk ratio thresholds.

The Department intends to provide guidance to States regarding how to work with stakeholders, and review data, to set reasonable risk ratio thresholds.

Changes: None.

Comment: A number of commenters responded to Directed Question #5, which inquired whether the Department should, at a future date, mandate national maximum risk ratio thresholds. Some commenters opposed this possibility outright. One commenter noted that a single national standard may not be feasible across the wide variety of regional, State, and local differences.

Commenters strongly supported allowing States to determine, in conjunction with stakeholders, how their own thresholds will identify disproportionality that is significant. Other commenters supported leaving States flexibility to set their own thresholds, so long as the Department is able to ensure that those thresholds are reasonable. Some commenters noted that, given the statutory and fiscal consequences associated with

significant disproportionality, States need to be able to defend their selected risk ratio thresholds to the States' constituents, which include legislators, State Education Departments, and LEAs. One commenter noted that each State is unique, and has its own plans with respect to IDEA and other Federal education programs to address those needs. The commenter concluded that requiring the same risk ratio thresholds in every State would fail to recognize each State's uniqueness. A number of commenters expressed support for permitting States to retain the discretion to determine the risk ratio threshold above which disproportionality is significant, so long as that threshold is reasonable and based on advice from their stakeholders, including their State Advisory Panels. One commenter stated that, if there is to be a mandated Federal requirement for consistent calculation of significant disproportionality across States using a risk ratio formula, States must be granted flexibility in applying those calculations and setting thresholds without onerous Federal involvement.

On the other hand, a few commenters strongly believed that the Department should move toward mandating that all States use the same risk ratio threshold. One commenter generally noted that a clear picture of national disparities was precluded due to different States using different thresholds for significant disproportionality.

Discussion: The Department recognizes the potential advantages and disadvantages of setting national risk ratio thresholds, and we thank the commenters for their thoughtful input on this important issue. At this time, the Department does not believe it has identified a sufficient justification for mandating any particular national risk ratio thresholds. However, moving forward, we will review State policies and practices to determine whether there emerges standard industry practice that may provide sufficient rationale at a later date for such a requirement.

Changes: None.

Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1))

Comments: This "comment/response/changes" section is not intended to respond to specific comments, but rather to provide a general introduction to minimum cell and n-sizes, and lay the foundation for responding to specific comments in the following sections.

Discussion: Risk ratios may produce unreliable results when the calculation is done with small numbers of children in a particular category of analysis, and this could result in LEAs being inappropriately identified with significant disproportionality. The most common method States use to address this problem is to identify a minimum number of children who must be enrolled in an LEA within a specific racial or ethnic group or experiencing a particular outcome in order for the LEA to be analyzed for significant disproportionality. That is, risk ratios are not calculated for a specific racial or ethnic group within a specific category of analysis if LEAs do not have or enroll a minimum number of children from that racial or ethnic group within that category of analysis or a minimum number of children not in that racial or ethnic group experiencing that particular outcome.

In this regulation, we refer to these minimum population requirements as minimum cell sizes and minimum n-sizes. (As noted elsewhere in this document, the term “minimum n-size” in this document aligns with the use of the term “minimum cell size” in the NPRM and the term “minimum cell size” herein refers to the number of children in a particular racial or ethnic group or groups experiencing a particular outcome.) As the minimum cell size and minimum n-size increase, the relative stability of the calculated risk ratios tends to increase. However, as these minimum population requirements increase, the number of districts that are excluded from the analysis in one or more specific categories of analysis also increases. The Department believes that States can balance the risks of inappropriately identifying districts because of small minimum cell sizes or n-sizes against the risk of inappropriately excluding large numbers of districts from analysis because of particularly large minimum cell sizes or n-sizes.

In the NPRM, we proposed that States would be required to use a minimum n-size (the number of children in a particular racial or ethnic group enrolled in an LEA) of not more than 10 to determine significant disproportionality. We received numerous comments about the importance of allowing States to establish an additional minimum cell size requirement (a minimum number of children within a race or ethnicity experiencing a particular outcome in an LEA). Those comments are set out and discussed in greater detail elsewhere in this section. Upon reflection, we agree with the commenters, and thus in the

final regulations, we will require States to set minimum n-sizes and cell sizes.

Additionally, as discussed elsewhere in this section, the proposed requirement of minimum n-size of 10 was questioned by a number of commenters. Following publication of the NPRM, we became aware of significant vulnerabilities in applying the analysis utilized in the primary article on which we relied to support the n-size requirements in the NPRM to the standard methodology. Therefore, in these final regulations, we do not include an n-size of 10 or less, but rather specify that the n- and cell sizes States set must be reasonable. We also establish in § 300.647(b)(1)(iv)(A) and (B), a rebuttable presumption that a minimum cell size of no greater than 10 and n-size of no greater than 30 are reasonable. A rebuttable presumption, in this context, means that, in reviewing minimum cell sizes and n-sizes established by States for reasonableness, and absent additional information to the contrary, the Department would consider a State’s use of 10 or less for cell size and 30 or less for n-size to be reasonable.

A Department review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell size or n-size requirements at 30 or less. Based on these data, the Department determined that cell sizes of 10 and n-sizes of 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that, to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data suppression to protect privacy. We also note that reasonable n-sizes and cell sizes could be less than 10 and 30 if smaller numbers are needed to maximize the number of LEAs examined for significant disproportionality. This is particularly relevant in categories of analysis where LEAs have small numbers, such as discipline. States, in making these determinations in consultation with their stakeholders, including State Advisory Panels, must carefully balance inclusion of LEAs and volatility.

Changes: Changes made in response to this issue are discussed in more depth throughout this section.

Comment: One commenter stated that, in the description of States’ current population requirements in the NPRM, it was not clear whether the requirements described by the

Department were minimum n-sizes or minimum cell sizes. The commenter further asserted that, in discussions with States, it appeared that many States are using a minimum cell size, and not a minimum n-size, as was proposed in the NPRM. One commenter expressed confusion as to whether the Department intended to allow States to set a minimum cell size of up to 10 children, or a minimum n-size of up to 10 children, or both.

Discussion: The Department intended with proposed § 300.647(b)(3) and (4) to limit States’ selection of minimum n-size to a figure no larger than 10. The NPRM included no provisions allowing States to set a minimum cell size. However, as we note earlier in this section, we agree with the commenters that States should be allowed to use a minimum cell size, in addition to a minimum n-size, in order to prevent inappropriate determinations of significant disproportionality.

To ensure that these provisions are clear, we have also included in the notice a definition of minimum n-size and a definition of minimum cell size.

Changes: We have revised § 300.647(a) to include a definition of minimum n-size and a definition of minimum cell size.

Comment: A few commenters agreed that, in combination with proposed § 300.647(c)(1) allowing States to determine significant disproportionality by looking across three consecutive years of data, it is appropriate to have a minimum n-size in the calculation of significant disproportionality under proposed § 300.647(b). These commenters stated that this will mean that the greatest number of LEAs will be able to examine their practices and to use funds to remediate the concerns they find.

Discussion: With § 300.647, it is the Department’s goal to support State efforts to appropriately identify LEAs with significant disproportionality. We agree with the commenters’ suggestion that, when LEAs are appropriately identified, they will benefit from the review (and, if necessary, revision) of policies, practices, and procedures, and from comprehensive CEIS. We also agree with the commenters that a reasonable minimum n-size, as well as the flexibility to use up to three consecutive years of data, will help States to both reduce and account for risk ratio volatility before making a determination of significant disproportionality. In this way, States can focus their efforts on LEAs with consistently high risk ratios, which may indicate systemic racial and ethnic disparities in need of intervention.

Changes: None.

Comment: A large number of commenters expressed their general support for efforts to standardize minimum n-sizes. Several commenters expressed support for retaining proposed § 300.647(b)(3) and (4), with a minimum n-size of 10, and expressed concerns about using a higher figure that would exclude racial and ethnic groups from a review for significant disproportionality. One commenter noted that States' selection of high minimum n-sizes for each racial and ethnic group, such as 25 or higher, has likely been one method of reducing the identification of significant disproportionality. The commenter expressed concerns that large n-sizes would weight monitoring towards large urban LEAs and inappropriately exclude smaller LEAs.

Discussion: The Department agrees with commenters that, as minimum n-sizes increase, fewer LEAs and fewer subgroups within LEAs are examined for significant disproportionality using the standard methodology. N-sizes that are too high increase the likelihood that States may fail to analyze and identify LEAs with highly disproportionate rates of identification, placement in particular settings, or discipline among racial and ethnic groups as having significant disproportionality. In such instances, States and LEAs may miss important opportunities to review and, if necessary, revise policies, practices, and procedures to ensure that all children are provided with the supports that they need to be successful.

The Department initially proposed in § 300.647(b)(3) and (4) to limit States' selection of minimum n-size (referred to as cell size in the NPRM) to a figure no larger than 10, based on an understanding that this figure represented an appropriate balance between two competing interests: the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. Smaller minimum n-sizes will include a larger number of LEAs in a State's annual analysis for significant disproportionality. However, smaller minimum n-sizes increase the volatility of the risk ratio, *i.e.* small changes in data from year to year could cause large changes in the risk ratio that do not reflect any other underlying change.

Our use of the proposed requirement for the minimum n-size of 10 was questioned by a number of commenters. Following publication of the NPRM, we became aware of significant

vulnerabilities in the application of the analysis behind the primary article on which we relied to support that proposal. Therefore, in these final regulations, we will not include the proposed minimum n-size requirement of 10, but rather specify that States must set, with input from stakeholders, a reasonable minimum n-size and cell size.

That said, § 300.647(b)(1)(iv)(A) and (B) establish a rebuttable presumption that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30 are reasonable. The Department's review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell size or n-size requirements at 30 or less. Based on these data, the Department determined that cell sizes of up to 10 and n-sizes of up to 30 would allow the majority of States currently using risk ratios to retain their already established population requirements.

We also note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy. We note as well that, in adopting the rebuttable presumption, the Department is, in part, responding to the requests of commenters for flexibility in the standard methodology. We think this addition provides significant flexibility to States in implementing the standard methodology.

Further, as stated in § 300.647(b)(1)(iv), the Department will review the States' selections of risk ratio thresholds for reasonableness. To ensure that the Department may accurately and uniformly monitor all cell and n-sizes for reasonableness, and to inform our policy position, we have added a requirement in § 300.647(b)(7) that each State report to the Department all of its cell and n-sizes and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

If the Department identifies a State that may have unreasonable minimum cell or n-sizes, it would notify the State and may request clarification regarding how the State believes the minimum cell or n-sizes the State is using are reasonable. If a State provides an insufficient response, the Department

would notify the State that it is not in compliance with § 300.647(b)(1)(i)(B) or (C), and the Department may take any enforcement action that is appropriate and authorized by law. Enforcement actions range from requiring a corrective action plan, imposing special conditions on the State's IDEA Part B grant, designating the State as a high-risk grantee, or withholding a portion of the State's IDEA Part B funds.

Generally, while there are a number of factors that may influence whether certain minimum cell or n-sizes are reasonable for a State, the optimal choice will be a balance between the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. For example, the Department is more likely to consider minimum cell and n-sizes to be reasonable if, in comparison to lower minimum cell and n-sizes, it substantially reduces the volatility of risk ratio calculations. By contrast, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if it results in the widespread exclusion of a racial or ethnic group from review for significant disproportionality in any of the categories of analysis. The Department may also consider smaller minimum cell or n-sizes to be reasonable for categories of analysis with lower incidence, such as some placement and discipline categories, to increase the number of LEAs analyzed despite the possibility of additional volatility. Further, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of LEAs from any review for significant disproportionality. As such, the Department has added in § 300.647(b)(7) a requirement that the rationales submitted for the minimum cell- and n-sizes not presumptively reasonable must include a detailed explanation of why these numbers are reasonable and how they ensure that the State is appropriately analyzing LEAs for significant disproportionality.

Changes: We have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than

30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comments: Many commenters stated that Federal investigators (which the Department interpreted to refer to the GAO) did not recommend that the Department set minimum n-sizes.

Discussion: We agree that the GAO did not specifically recommend that the Department establish a minimum n-size. However, the GAO did recommend that the Department establish a standard method for determining significant disproportionality, and nothing in the GAO report precludes a minimum n-size as part of the standard methodology. Indeed, to the extent that establishing a minimum n-size is consistent with establishing a standard methodology, it is in keeping with the GAO's primary recommendation.

Changes: None.

Comments: A large number of commenters expressed their strong opposition to any attempt by the Department to place limits on States' minimum n-sizes. Many commenters noted that there is no Federal n-size in the latest authorization of the ESEA or other Federal education laws.

Discussion: When possible, the Department prefers to provide States and LEAs with comparable policy provisions across programs, so long as those provisions meet the individual needs of both programs. However, nothing in the ESEA or IDEA precludes the Department from establishing requirements and provisions regarding the minimum n-size used for the analysis for significant disproportionality under IDEA section 618(d) that are different from the provisions affecting school accountability under ESEA.

Further, we believe that some limitation on States' selection of minimum cell and n-sizes is appropriate. As we note earlier in this section, as minimum cell and n-sizes increase, fewer LEAs and fewer racial and ethnic subgroups within LEAs are examined for significant disproportionality using the standard methodology. As a result, it becomes increasingly likely that States may fail to identify LEAs with highly

disproportionate rates of identification, placement in particular settings, or discipline among racial and ethnic groups as having significant disproportionality. For this reason, we believe it appropriate to limit States' choice of minimum cell and n-sizes to those that meet a standard of reasonableness that will be monitored and enforced by the Department.

Changes: As discussed previously, we have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comments: One commenter stated that Congress, in recent Federal education legislation, considered and rejected a federally imposed minimum n-size, clearly showing its preference that those decisions be left to States. Another commenter suggested that, in mandating that States use a Federal calculation, the regulation takes the opposite approach of the Every Student Succeeds Act, recent legislation that, according to the commenter, focuses on returning decision-making to States and LEAs, and that the matter is best left to Congress when it reauthorizes IDEA.

Discussion: The Department appreciates these and other recommendations to provide States additional flexibility to set n-sizes. After considering comments, the Department revised the final regulations to provide States a great deal of flexibility to set reasonable minimum n-sizes and cell sizes while balancing the need to place reasonable limits on this flexibility to ensure that as many LEAs are analyzed for significant disproportionality as is appropriate using the standard methodology. The Department has an interest in monitoring the conditions under which any LEA is so exempted from IDEA section 618(d). As we

discuss in *A Standard Methodology for Determining Significant Disproportionality* (§ 300.647)—General, as the risk ratio method of measuring significant disproportionality is susceptible to volatility, the Department aims to prevent “false positive” identification of significant disproportionality. Accordingly, States may exclude from their review any racial and ethnic groups within LEAs that do not meet State-set, reasonable population requirements, consistent with § 300.647(b)(1). Unreasonably high minimum cell or n-sizes may inappropriately exclude LEAs, or racial and ethnic groups within LEAs, from a State's review of significant disproportionality, increasing the likelihood that States may fail to appropriately identify LEAs with highly disproportionate rates of identification, placement, and discipline.

Given these issues, these regulations are an appropriate exercise of the Department's authority—in this case, to set reasonable population requirements necessary to ensure compliance with specific requirements of the statute. 20 U.S.C. 1406(a). Further, they are an appropriate exercise of the Department's authority—as the agency charged with administering IDEA (IDEA section 603(a), 20 U.S.C. 1402(a))—to monitor and enforce IDEA's implementing regulations.

When Congress begins the process of reauthorization, the Department intends to work closely with it on significant disproportionality, among other issues. In the interim, nothing in the ESEA or IDEA precludes the Department from establishing provisions regarding the minimum n-size used for the analysis for significant disproportionality under IDEA section 618(d), and it is appropriate for the Department to do so.

Changes: As described earlier, we have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for minimum n- and cell sizes that are not

presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comments: A large number of commenters argued that there would be confusion and less accurate data if LEAs were required to use one minimum n-size for assessment purposes and disaggregation (which the Department interpreted to refer to school assessment for purposes of ESEA accountability) and a different minimum n-size for significant disproportionality. Other commenters requested that States have the flexibility to use the same minimum n-sizes used for other Federal education programs. Another commenter stated that, in one State, the minimum n-size used for accountability purposes was 25 and that it might make sense to align the minimum n-size with that requirement.

Discussion: The Department appreciates the commenters' concerns about setting different population requirements across different Federal programs. When possible, the Department prefers to provide States and LEAs with comparable requirements across programs, so long as those requirements meet the individual needs of both programs.

As we discussed earlier in this section, we have adjusted our original proposal to allow States to set their own reasonable minimum n-sizes based on input from stakeholders, including State Advisory Panels, subject to the Department's monitoring and enforcement for reasonableness. With this change, States may set minimum cell and n-sizes comparable to what they use for other Federal programs.

However, to the extent that aligning population requirements between ESEA and IDEA would result in a minimum cell or n-size that is unreasonable for purposes of IDEA section 618(d)—that is, it would result in a failure to identify LEAs with significant disproportionality who are identifying or disciplining certain racial and ethnic subgroups, or placing them in restrictive settings, at highly disproportionate rates—the choice of cell or n-size would not comply with the requirements of IDEA.

Changes: None.

Comments: A large number of commenters felt that, generally, States are best positioned to determine minimum n-size.

Discussion: In the NPRM, the Department proposed to limit States' selection of a minimum n-size to a figure no larger than 10. Again, however, after further consideration and review of public comment, the

Department has modified the final regulations to provide States greater flexibility in determining reasonable minimum n- and cell sizes.

At the same time, we continue to believe that the Department has an interest—pursuant to OSEP's statutory obligation to ensure States' implementation of IDEA section 618(d)—in ensuring that States do not unreasonably exclude LEAs, or racial and ethnic groups within LEAs, from their review. Thus, we will monitor and enforce with regard to n- and cell-size reasonableness.

To ensure that the Department may accurately and uniformly monitor all cell and n-sizes, and to inform our policy position, we have added a requirement in § 300.647(b)(7) that each State report to the Department all of its cell and n-sizes and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

Generally, while there are a number of factors that may influence whether certain minimum cell or n-sizes are reasonable for a State, the optimal choice will be a balance between the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. For example, the Department is more likely to consider minimum cell and n-sizes to be reasonable if, in comparison to lower minimum cell and n-sizes, they substantially reduce the volatility of risk ratio calculations. By contrast, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of a racial or ethnic group from review for significant disproportionality in any of the categories of analysis. The Department may also consider smaller minimum cell or n-sizes to be reasonable for categories of analysis with lower incidence, such as some placement and discipline categories, to increase the number of LEAs analyzed despite the possibility of additional volatility. Further, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of LEAs from any review for significant disproportionality. As such, the Department has added in § 300.647(b)(7)

a requirement that the rationales submitted for the minimum cell- and n-sizes which are not presumptively reasonable must include a detailed explanation of why these numbers are reasonable and how they ensure that the State is appropriately analyzing LEAs for significant disproportionality.

Changes: Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable which must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comments: Many commenters noted that a minimum n-size of 10 will result in many LEAs, particularly small LEAs, being identified with significant disproportionality. One commenter stated that the Department should do away with regulatory language that would lead to the identification of almost every LEA, as, when this result occurred under another Federal education statute, subsequent legislative efforts reversed much of what the regulations intended to accomplish.

Discussion: As we note earlier in this section, the Department has amended its original proposal to restrict States to a minimum n-size no greater than 10, and, instead, will require States to set reasonable minimum cell and n-sizes. We believe this change to be responsive to both of the comments raised.

However, we wish to note that, in circumstances where a State has identified a large number of LEAs, it is not necessarily the case that these determinations are inappropriate. By requiring States to follow the standard methodology under § 300.647, it is the Department's intent to support more appropriate identification of significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. If, in implementing the standard methodology (which will include State-selected risk ratio thresholds, a State-selected minimum n-

size, and a State-selected minimum cell size) the State identifies a large number of LEAs, it may indicate the need for a broad-based State effort to improve practices and policies to address racial and ethnic disparities in special education.

In cases where small LEAs are disproportionately, and inappropriately, identified with significant disproportionality due to the use of a low minimum cell or n-size, it may be appropriate for a State to review its data, and consult with stakeholders and State Advisory Panels, to determine whether adjustments should be made to the State's implementation of the standard methodology.

Changes: We have amended § 300.647(b)(3) and (4) to no longer restrict States to a minimum n-size of 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. The rationales for n-sizes and cell sizes that are not presumptively reasonable which must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: One commenter added that, if States used a minimum n-size of 10, then many States and LEAs would spend a significant amount of time, money, and labor on addressing issues that may not be able to be simply changed by utilizing early intervening dollars. Other commenters have experienced issues with small n-sizes, where LEAs are identified and must develop solutions for problems that rarely existed. Still more commenters stated that, with an n-size of 10, it will be virtually impossible for LEAs identified with significant disproportionality to correct the disparity. One commenter expressed concerns that flaws in the proposed regulation—specifically, the potential for LEAs to implement mandatory comprehensive CEIS due a finding of significant disproportionality that is the result of small numbers of children—will make it impossible to identify

metrics that could evaluate the connection between a finding of significant disproportionality in an LEA and improved outcomes for all children.

Other commenters generally stated that a small LEA might be identified with significant disproportionality due to a few new families enrolling in the LEA with a child already diagnosed with autism.

Discussion: As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum cell or n-sizes. We believe this change to be responsive to the comments raised by reducing the likelihood that an LEA may be identified with significant disproportionality due to minor changes in LEA enrollment. We agree with commenters that States should focus on systemic cases of significant disproportionality—rather than LEAs with simple numerical disparities based on the enrollment or changing needs of one or two children—and that the statutory remedies provided under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) will be most effective in addressing the needs of LEAs with systemic racial and ethnic disparities.

Changes: As noted above, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Sections 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: One commenter noted that a minimum n-size of 10 was empirically validated, and, based on literature, could guarantee risk ratio reliability.

Two commenters stated that there is a significant increase in reliability in moving from a minimum n-size of 5 to 10 and a slightly greater increase when cell size moved up to 15. According to one commenter, one State chose to use a minimum n-size of 15, rather than 10,

in recognition of slightly greater reliability and LEA feedback. One commenter supported giving States flexibility to select a minimum n-size between 10 and 15. Another commenter supported a minimum n-size of 15 only if States made a determination of significant disproportionality based on a single year of data.

Two commenters stated that using a minimum n-size of 10 can lead to problems with reliability when using the risk ratio. The commenters stated that, in the case of an n-size of 10 in the denominator, very small numbers can lead to unstable estimates of the risk index, leading to large swings in the risk ratio and a possible finding of significant disproportionality for very few children identified in the target group. Commenters opposing a cap of 10 for the minimum n-size offered other suggestions: A few suggested 20, many suggested 30, and a few suggested 40. One commenter stated that a minimum n-size of 25 or higher has likely been one method of reducing the identification of significant disproportionality.

Discussion: The Department generally agrees with commenters that risk ratios are not reliable when calculated for a racial or ethnic group with too few children. As multiple commenters have expressed their concern that a minimum n-size of 10 may be small, and have provided a list of consequences that may ensue if minimum n-sizes are too low to safeguard against volatility (e.g., resistance to identifying children as children with disabilities or identifying children of a particular race or ethnicity as having disabilities, inability of small LEAs to resolve significant disproportionality, vulnerability of LEAs to small changes in enrollment), we now believe that it is appropriate to allow States flexibility to set their own reasonable minimum cell and n-sizes. We also find it appropriate that the States consult with stakeholders prior to setting minimum cell and n-sizes, as was done in one State mentioned by a commenter.

In the NPRM, the Department proposed to limit States' selection of minimum n-size to a figure no larger than 10, based on an understanding that this figure represented an appropriate balance between risk ratio reliability and LEA inclusion. Bollmer, J., Bethel, J., Garrison-Mogren, R., & Brauen, M., 2007. However, upon further examination of the study, which relied on 2001–2002 data from a non-representative, non-random sample of three States—we now believe that the study includes too many limitations to

provide the basis to mandate a national minimum n-size of 10.

In these final regulations, States must set reasonable cell and n-sizes, and in § 300.647(b)(1)(iv)(A) and (B), we are establishing a rebuttable presumption that a minimum cell size of no greater than 10 and n-size of no greater than 30, respectively, are reasonable thresholds. Again, as we stated earlier in this section, support for these thresholds includes information we have from the IDEA State Supplemental Survey, which shows that States tend to set their n-size or cell size at 30 or less. We also note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy. We do not have comparable or sufficient support for a national n-size of less than 30.

States have the option, but are not required, to set the same cell or n-size for each category of analysis. States should consider, in consultation with their stakeholders, the impact of minimum n- and cell sizes in conjunction with the risk ratio thresholds they select for each category of analysis. The Department encourages States to consider a smaller minimum n-size for categories of analysis where LEAs have small numbers, such as discipline. States, in making these determinations in consultation with their stakeholders, including State Advisory Panels, must carefully balance inclusion of LEAs and volatility. Further, in certain circumstances such as when coupled with a larger minimum n-size, it may be reasonable for a State to select a minimum cell size of zero or one. However, the Department notes that selecting different n- or cell sizes based on race or ethnicity is problematic and could raise issues of constitutionality. As we evaluate additional data and information in the future, we may consider whether there is additional guidance we can provide to States about what constitutes a reasonable cell or n-size.

Changes: Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the

rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comments: Some commenters noted that a minimum n-size of 10 is unrealistic and will result in unintended and inappropriate negative consequences for the LEAs (including charter schools) in one State. One commenter observed that, in its State, parent choice and charter schools create unique configurations in enrollment that may give the appearance of significant disproportionality when a minimum cell size of 10 is used. A large number of commenters noted that the Department must allow States to use minimum n-sizes greater than 10 to reduce the likelihood of "false positives" due to small numbers. One commenter claimed that a minimum n-size of 10 would impact one State's ability to screen out false positive findings of significant disproportionality of White children, given that many LEAs in the State are homogenous.

Discussion: As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum cell and n-sizes.

Changes: As noted previously, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: A few commenters described the experience of one State that previously used a minimum n-size of 10, with a risk ratio threshold of 2.0, to review LEAs for significant disproportionality. The commenters did not provide the number of years taken

into consideration. These commenters stated that the State experienced a number of unintended consequences.

First, the LEAs in the State perceived the calculations to be an implicit quota system, where LEAs delayed or refused to evaluate children for possible identification and parents were led to believe that the LEA had already exceeded a limit on the number of children in their racial group that could be identified. Second, LEAs questioned the ethnicity reported by parents, and more than one LEA provided photos of individual children and requested that their reported ethnicity be changed. Third, when the State used a minimum n-size of 10, it had to greatly increase the amount of State staff time devoted to identifying which calculations produced false positives. Meanwhile, both LEAs and State-level staff devoted considerable resources to the creation of corrective action plans and the implementation of prevention activities that impacted only one or two children. Fourth, the approach to identifying significant disproportionality often resulted in calculations that were not statistically significant.

The commenter further stated that, after the State adjusted its minimum n-size and risk ratio threshold to align with the State's accountability plan, it had better confidence that those LEAs that were identified had potential to benefit from the required comprehensive CEIS and corrective action planning.

One commenter provided a list of factors that, according to the commenter, unduly influenced an LEA's risk of identification with significant disproportionality when the State's minimum n-size was 10. The list includes small, rural LEAs with court-placed children from urban areas, families who adopt several non-White children with disabilities, charter schools with a special education focus, LEAs receiving families of color moving out of urban areas, and single events resulting in the discipline of multiple children.

Discussion: We appreciate commenters' sharing their experience implementing IDEA section 618(d). The example provided highlights some of the methods that comprise the standard methodology as required under § 300.647, including a minimum n-size and a risk ratio threshold.

We think the commenters' experience with a minimum n-size of 10 and how it potentially contributed to the inappropriate identification of LEAs with significant disproportionality is instructive. We note that, along with a minimum n-size of 10, the State also

used a relatively low risk ratio threshold of 2.0, which could have exacerbated issues of inappropriate identification of LEAs with significant disproportionality. The Department believes that it is important for States to consider both the impact of the reasonable minimum cell and n-sizes they select in conjunction with their selection of reasonable risk ratio thresholds. These factors can all potentially contribute to an inappropriate determination of significant disproportionality.

As we note earlier in this section, the Department has amended its original proposal in the NPRM, which should address the concerns raised by these and other commenters. These final regulations do not restrict States to a minimum n-size of no greater than 10. Instead, the Department will require States to set reasonable minimum cell and n-sizes.

Finally, we disagree with the commenters' suggestion that LEAs should only be identified with significant disproportionality if they have racial and ethnic disparities that are statistically significant. Given that States have access to population data on the identification, placement, and discipline of children with disabilities, tests of statistical significance are inappropriate for States' determination of significant disproportionality given that those analyses are intended to be used to draw inferences when working with sample data.

Changes: As noted previously, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: A number of commenters expressed concerns that the Department provided insufficient research support for its minimum n-size in proposed § 300.647(b)(3) and (4). Specifically, many commenters stated that there is no

data available to support 10 as an appropriate number for a minimum n-size. Other commenters noted that the Department provided little rationale for selecting 10 for the minimum n-size, instead of any other number.

Discussion: The Department recognizes commenters' concerns regarding the appropriateness of the research base to support our proposal to limit States to a minimum n-size no larger than 10. At the time of the NPRM, the Department's proposal was based on an understanding that this figure represented an appropriate balance between risk ratio reliability and LEA inclusion. However, upon further examination of the study, which relied on 2001–2002 data from a non-representative, non-random sample of three States, we now find that the study includes too many limitations to provide a basis for a minimum n-size of 10. Bollmer, J., Bethel, J., Garrison-Mogren, R., & Brauen, M., 2007.

Accordingly, the Department has amended the regulation so that it does not mandate a national minimum n-size. We will, rather, specify that States must set, with input from stakeholders, reasonable minimum n-size and cell sizes. In addition, § 300.647(b)(1)(iv)(A) and (B) establish a rebuttable presumption that a minimum cell size of 10 and n-size of 30, respectively, are reasonable thresholds. Again, as we stated earlier, Department review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell-size or n-size requirements at 30 or less. Based on these data, the Department determined that cell-sizes of no greater than 10 and n-sizes of no greater than 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy.

Changes: Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under

§ 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: A large number of commenters provided input as to whether the Department should allow States to set a minimum cell size—to apply to the numerator when calculating risk for a racial or ethnic group—as well as the appropriateness of particular minimum cell sizes. These commenters strongly cautioned the Department against limiting States solely to a minimum n-size of 10 when reviewing racial or ethnic groups within an LEA, as, in the absence of any consideration for the minimum cell size, these reviews will lead to false positive identifications of LEAs with significant disproportionality. A large number of commenters suggested that the Department allow States to adopt a minimum cell size, particularly when reviewing for significant disproportionality in the identification of children with disabilities, to decrease the likelihood of false positive identifications of significant disproportionality.

A few commenters stated that using only a minimum n-size of 10 allows very small groups of children—and potentially only one identified child (or one newly enrolled child with a disability)—to result in the LEA appearing to have significant disproportionality. Other commenters warned that, based on their previous experience with small n-sizes, having only one child in a subgroup has previously caused LEAs to be cited for significant disproportionality. One commenter provided examples of the number of LEAs, by State, that would be flagged for significant disproportionality, based on one child, if the Department's original proposal were implemented.

A few commenters stated that, without the adoption of a minimum cell size, there is an increased likelihood that a risk ratio of a certain size will be likely to have occurred by chance. Another commenter argued that the identification, placement, or discipline of a single child from a particular racial or ethnic group could occur by chance.

Discussion: The Department appreciates the commenters' suggestion to allow States to select a minimum cell size. The standard methodology, as originally proposed in § 300.647, did not contemplate minimum population requirements other than minimum

n-size when examining racial and ethnic groups within LEAs for significant disproportionality. However, we agree with the commenters that States should be allowed to use minimum cell sizes, as a component of the standard methodology in addition to a minimum n-size, in order to prevent inappropriate determinations of significant disproportionality, such as a finding of significant disproportionality based only on one or two children.

States will have the flexibility to set their own reasonable minimum cell sizes, limited, as is the selection of risk ratio threshold, by consultation with stakeholders, including the State Advisory Panels. It should be noted that States have the option to set a minimum cell size of zero or one if the State and its stakeholders believe their selection of a reasonable minimum n-size addresses the issues associated with small populations or low incidence categories of analysis.

Accordingly, we have amended the regulation to allow States to select reasonable minimum cell sizes in the standard methodology.

Changes: We have amended proposed § 300.647(b)(1) to require States to select a reasonable minimum cell size with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement.

Comment: One commenter noted that most disabilities are rare events, meaning that only one or two percent of the children will be identified as having them. As a result, when analyzing LEA-level data, many LEAs will have no children with a given disability, and for an LEA in which children are identified, the result may be a large risk ratio. One commenter stated that LEAs with only 10 children in any given racial or ethnic group will be automatically disadvantaged for low incidence disabilities like autism, intellectual disability, and emotional disturbance, which the commenter cited as having an incidence rate of one percent or less. The commenter concluded that, even if an LEA qualifies only one child of a racial or ethnic group in any of the three categories, it will be found to have significant disproportionality.

Discussion: We appreciate these commenters for raising their concerns regarding the low incidence of some impairments. In general, we agree with the commenters that LEAs with low incidence rates are likely to have more volatile risk ratios.

We have amended proposed § 300.647(b)(1)(i) to require States to select reasonable minimum cell sizes. With this change, States' use of minimum cell sizes will prevent the

inappropriate identification of LEAs with low incidence rates to the extent that those rates coincide with small populations of children.

Changes: Section 300.647(b)(1)(i)(B) requires States to set reasonable minimum cell sizes.

Comment: Two commenters warned that LEAs identified with significant disproportionality due to only one or two children will continue to be identified due to those children so long as they remain in school. Another commenter argued that the identification, placement, or discipline of a single child from a particular racial or ethnic could occur by chance, and is not sufficient to demonstrate bias or discrimination within an LEA. A few commenters expressed concern that, if LEAs are identified with significant disproportionality based on one or two children, the regulation could discourage LEAs from identifying children of color with disabilities, or encourage LEAs to stigmatize the child that is identified. One commenter stated that there may be FERPA issues inherent in basing a determination of significant disproportionality on a single child, especially if the child's recent enrollment pushes the LEA's risk ratio over the State's threshold.

Discussion: We agree with the commenters that a number of negative outcomes could result if LEAs are at risk of being identified with significant disproportionality based on the identification, placement, or discipline of only one or two children. We have amended proposed § 300.647(b)(1) to require States to select a reasonable minimum cell size so that, when a racial or ethnic group of interest within an LEA has too few children experiencing a particular outcome, the State is not required to calculate the risk ratio for that racial or ethnic group, for that outcome, for that LEA. We believe this amendment to be responsive to the concerns the commenters' raised.

Changes: Section 300.647(b)(1)(i)(B) requires States to set a reasonable minimum cell size.

Comment: To avoid risk ratio volatility, a few commenters noted that minimums should apply to both the numerator and denominator. These commenters indicated that allowing States to apply the minimum cell size to the numerator of the risk calculations for the target racial or ethnic group would ensure that the risk calculations are based on a sufficient number of identified children. One commenter noted that, among the current population requirements employed by the States, one requirement was a minimum cell size for all impairments.

Discussion: We agree with commenters that allowing the use of a minimum cell size and a minimum n-size will help prevent risk ratio volatility. We have amended the regulation to allow States to set both a reasonable minimum cell size and a reasonable minimum n-size.

Changes: Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable.

Comment: One commenter suggested that the Department allow States the flexibility to choose a minimum cell size between two and four, and not so high that the State overlooks disproportionality for low-incidence populations. The commenter noted that, for one western State, if the minimum cell size is set at 10, only about 10 percent of significant disproportionality findings would be for non-White children because of the small size of those populations. A number of commenters supported a minimum of 10, if applied to both the minimum cell size and minimum n-size. Two commenters suggested that a minimum cell size of at least six or greater would remove the possibility of an LEA being flagged for significant disproportionality based on chance. A few commenters noted that a minimum cell size and a minimum n-size for the target racial and ethnic group are necessary to avoid the inappropriate identification of LEAs and requested a minimum cell size of five to avoid false positive identification of significant disproportionality. Several commenters suggested the use of specific minimum cell sizes when calculating the risk of identification of a particular disability for a racial or ethnic group. A few commenters encouraged a minimum cell size of five children with a particular disability. Many more commenters encouraged minimum cell size of 10 children with a particular disability. One commenter noted that a minimum cell size of at least 10 is necessary for reliability and privacy and to avoid findings of significant disproportionality based on very small numbers of children. This commenter supported giving States flexibility to select a minimum cell size between 10 and 15. A few commenters noted that a minimum cell size of five would result in fewer false positive identification of significant disproportionality.

Discussion: The Department appreciates the suggestions to select various minimum cell sizes in order to limit risk ratio volatility and the potential for inappropriate finding of significant disproportionality. In response to these comments, these final regulations provide States the flexibility to set their own reasonable minimum cell sizes, limited, as is the selection of risk ratio threshold, by consultation with stakeholders, including the State Advisory Panels and subject to the Departments monitoring and review for reasonableness. Accordingly, as with n-size, to ensure that the Department may accurately and uniformly monitor all cell sizes, we have added a requirement that each State report to the Department the cell sizes it selects and the rationale for selecting each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through a subsequent information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's request.

As to reasonableness of cell sizes in general, the Department assumes that a minimum cell size of up to 10 may be reasonable for most States. Of commenters that suggested a particular minimum cell size, all but one requested that the Department allow States to use a minimum cell size of up to 10. The Department also found that—based on a review of the SY 2013–2014 State Supplement Survey (SSS)—States that used risk ratios in their determinations of significant disproportionality tended to set their cell-size or n-size requirements at 30 or less. Based on these data, the Department determined that cell- of 10 and n-sizes of 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy.

Further, when reviewing States' minimum cell sizes for reasonableness, the Department may consider the same criteria used for minimum n-size, with one addition: the Department is more likely to consider a minimum cell size reasonable if, in comparison to a lower minimum cell size, it substantially reduces the potential that an LEA will be identified with a significant disproportionality based on small fluctuations in the number of children.

The Department encourages States to consider a smaller minimum n-size for categories of analysis with particularly

low incidence, as appropriate, in order to include a larger percentage of LEAs in the review for significant disproportionality. Further, in certain circumstances such as when coupled with a larger minimum n-size, it may be reasonable for a State to select a minimum cell size of zero.

The Department will continue to collect data and review research to help refine the selection of reasonable minimum cell sizes in order to ensure that States are reviewing as many LEAs for significant disproportionality as possible while limiting the volatility of risk ratios if cell sizes that are too low. The obligation to report cell sizes and their rationales will assist in this effort.

Changes: The Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all cell sizes selected under § 300.647(b)(1)(i)(B) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

Comment: One commenter suggested that the Department consider scaling the minimum n-size to be larger for lower incidence disabilities.

Discussion: As we note earlier in this section, § 300.647(b)(1) requires States to select reasonable minimum cell sizes. Nothing in these final regulations precludes a State from setting higher minimum cell sizes or n-sizes for particular categories of analysis based, in part, on the level of incidence of a particular disability and the potential impact it could have on the volatility of calculated risk ratios. However, as noted previously, any minimum cell size or n-size set by the State, in consultation with stakeholders, must be reasonable. With this change, States' use of minimum cell sizes, along with States' flexibility to use up to three consecutive years of data to make a determination of significant disproportionality, should prevent the inappropriate identification of LEAs due to low incidence rates in either the racial or ethnic group of interest or the comparison group.

Changes: None.

Comment: One commenter argued that a minimum cell size would be particularly important when analyzing LEAs for significant disproportionality due to suspensions and expulsions. The commenter stated that LEAs cannot fully control the administration of disciplinary removals, as State or LEA regulations may require a child to be moved when weapons or drugs are

brought in the school. The commenter concluded that a minimum cell size would prevent those incidents from resulting a finding of significant disproportionality for the LEA.

Discussion: We agree with the commenter that a single incident that requires a mandatory disciplinary removal generally should not result in a finding of significant disproportionality by race and ethnicity and that States should have the flexibility to focus on their efforts on LEAs with consistently high risk ratios, which may indicate systemic racial and ethnic disparities in need of intervention. We believe that the standard methodology is responsive to the commenter, as, under § 300.647(b)(1), States may establish reasonable minimum cell sizes and, under § 300.647(d)(1), States may use up to three consecutive years of data prior to making a determination of significant disproportionality.

However, we also believe that, in cases where an LEA experiences multiple incidents requiring a mandatory removal, and, as a result, a particular racial or ethnic group faces consistently disproportionate treatment over the course of multiple years, it would be appropriate for the LEA to be identified with significant disproportionality.

Changes: None.

Comments: Two commenters noted that, when the n-size of a risk calculation falls below 20 children, at least 6 children are required in the numerator to achieve sufficient statistical power for results to be reliable.

Discussion: The Department agrees that the selection of minimum cell sizes should be made with consideration for minimum n-sizes and encourages States to take any interactions between the two into account when setting these two minimums. Further, we would encourage States to also take into consideration how its particular combination of reasonable risk ratio threshold, minimum n-sizes, and minimum cell sizes will help or hinder its efforts to identify significant disproportionality.

Changes: None.

Comment: A few commenters responded to Directed Question #6 in the NPRM, which inquired whether the Department's proposed limit on minimum n-size aligned with State privacy laws.

A few commenters indicated that Department's proposal to allow States to set a minimum n-size up to 10 was compliant with State privacy laws. Other commenters noted that a minimum n-size of 10 would not

comply with State privacy laws, but that a minimum cell size of 10 would. One of these commenters noted that a minimum cell size of less than 10 would raise privacy concerns. One commenter stated that a Federal statistical agency recommended a minimum population requirement of 10 for confidentiality purposes. (The Department was unable to determine whether the commenter intended to refer to cell size or n-size.)

A few commenters spoke more generally about the relationship between minimum cell sizes, minimum n-sizes, and privacy. One commenter noted that a minimum cell size requirement would resolve the issue of publishing data that violates privacy laws. However, a few commenters stated that, as there did not appear to be any requirement that States make the data utilized in the risk ratio calculations publicly available, the issue of privacy was not applicable. One commenter questioned how, if the Department limits minimum n-sizes to 10 for significant disproportionality, and States choose higher minimum n-sizes for other calculations to safeguard privacy, the inconsistency would be explained to the public.

One commenter recommended that the Department research the implications of its proposal for existing State privacy laws with the goal of ensuring the privacy rights of children with disabilities. Another commenter generally recommended that the Department require FERPA protections in situations in which there are fewer than 10 children in a group.

Discussion: We appreciate the thoughtful comments that we received on this issue and recognize that, at particular minimum n-sizes and minimum cell sizes, States would potentially have to suppress some data prior to public reporting, as they do in other reporting instances. As State and Federal privacy laws apply, additional privacy protections in these regulations are not necessary.

Changes: None.

Comment: A number of commenters requested that States have flexibility to apply both a minimum n-size and a minimum cell size to the comparison group. Commenters indicated that allowing States to apply the minimum cell size to the numerator of the risk calculations for the comparison group would ensure that the risk calculations are based on a sufficient number of identified children. One commenter suggested that the Department allow States to adopt a minimum cell size that will decrease the likelihood of identifying an LEA as having significant

disproportionality when the results are likely to have occurred by chance.

Another commenter strongly opposed the use of a minimum cell size for the comparison group, if the result was that the racial or ethnic group of interest would not be reviewed for significant disproportionality. The commenter expressed concern that the starkest disparities would be overlooked in racially homogenous LEAs.

Discussion: In reviewing the commenters' suggestions and perspectives, we were not always certain whether the commenters assumed that a population requirement, when applied to a comparison group, would (1) determine whether a particular racial or ethnic group in an LEA would be exempted from a review of significant disproportionality, or (2) determine whether the alternate risk ratio was necessary to review that racial or ethnic group.

We believe the challenge associated with an inappropriately low minimum cell size or minimum n-size for racial and ethnic groups is similar to those that arise when dealing with comparison groups—namely, risk ratio volatility. For this reason, it is our intent that, under § 300.647(b)(5), States will use their reasonable minimum cell sizes and n-sizes to determine whether there is an adequate number of children in the comparison group to calculate the risk ratio or if the alternate risk ratio must be used.

In general, the Department does not believe that the absence of a comparison group—or a small comparison group—within an LEA is a sufficient basis to exclude a racial or ethnic group from States' review for significant disproportionality. It is the Department's intention, rather, that States calculate the alternate risk ratio—using a State-level comparison group—when the comparison group within the LEA includes too few children for a reliable analysis or when the risk to the comparison group within the LEA is zero.

However, we have also added § 300.647(c)(2) to clarify that, when the alternate risk ratio is required, and the comparison group within the State does not meet the minimum cell size or minimum n-size, the State is not required to calculate either the risk ratio or alternate risk for the applicable racial and ethnic group and category.

Changes: We have added § 300.647(c)(2) to allow States to not calculate either the risk ratio or alternate risk ratio for a given racial or ethnic group if the comparison groups at the LEA level and State level do not meet

the State's minimum n-sizes and minimum cell sizes.

Comment: A large number of commenters strongly suggested that the Department not mandate an n-size of 10 be applied to number of children in the comparison group as this might lead to false positives.

Discussion: As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum n-sizes. We believe this change to be responsive to the comments raised by reducing the likelihood that an LEA may be identified with significant disproportionality due to small numbers of children.

Changes: None.

Comment: One commenter stated that a minimum cell size need not apply to the comparison group, as the commenter recommends that States use a different approach, including a risk ratio and risk difference to examine LEAs that are mostly homogenous. The Department interprets the comment to suggest that, as risk difference should be used to analyze homogenous LEAs, and can be calculated even when a comparison group has a cell size of zero, there is no need for a minimum cell size for the comparison group.

Discussion: As we explain earlier in *Risk Ratios* (§ 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b)), we decline to allow States to use risk difference to examine LEAs for significant disproportionality. States are required under § 300.646(b)(3), (4), and (5) to calculate the risk ratio—or the alternate risk ratio—and these methods cannot be calculated when the comparison group has a cell size of 0, and cannot be calculated reliably when the comparison group has a low cell or n-size. For these reasons, we disagree with the commenter and will require States to apply minimum cell sizes to comparison groups, under § 300.646(b)(5), to determine whether the alternate risk ratio will be used in place of the risk ratio.

Changes: None.

Comments: A number of commenters requested that, without the flexibility to include both a minimum n-size and a minimum cell size, States be allowed to include a test of statistical significance to determine whether the risk ratio is statistically different from the risk ratio threshold. Other commenters inquired about the use of statistical significance tests on specific pieces of the risk calculation prior to a finding of significant disproportionality.

Discussion: Given that States have access to population data on the identification, placement, and discipline of children with disabilities, tests of statistical significance would be inappropriate.

Further, the Department notes that commenters generally wanted States to have the flexibility to conduct these tests in the absence of flexibility to use minimum cell sizes. Given that States may set their own reasonable minimum cell sizes and minimum n-sizes, we believe the commenters' concerns to be addressed without allowing the use of statistical significance testing.

Changes: None.

Comments: A large number of commenters requested that the Department offer States flexibility to determine how to apply a minimum population requirement to LEAs. These commenters wanted States to have flexibility to add additional criteria beyond the minimum n-size to avoid identifying significant disproportionality that is simply the result of small numbers. One commenter noted that a minimum n-size of 10 fails to account for the overall size of an LEA. Another commenter noted that one State uses a population requirement for the general student population. A few commenters encouraged the Department to allow States to consider, in implementing the standard methodology, the size of the racial and ethnic group size in relation to the size of the LEA. One commenter requested flexibility to use additional criteria beyond a minimum n-size, such as requiring 30 or more children with an IEP for calculations.

Discussion: The Department recognizes that there are multiple ways that States could use data on the number of children in an LEA to determine whether to exclude that LEA from its analysis for significant disproportionality. For example, it is possible to devise a system in which LEAs that do not have at least 500 children enrolled are not subject to the standard methodology, or one in which an LEA is excluded from analyzing a particular racial or ethnic group if that group constitutes less than 1 percent of total enrollment in an LEA. However, we believe that exclusions on these bases would be inappropriate, as they are not closely related to concerns about data volatility and could result in an inappropriately high number of LEAs being excluded. Further, as every child with a disability is entitled to a free appropriate public education in the least restrictive environment, regardless of the size of the LEA or the proportion of enrolled children who are in their

particular racial or ethnic subgroup, we believe it would be inappropriate to allow the exclusion of LEAs for reasons unrelated to data volatility. We believe that State flexibility to set reasonable minimum cell sizes and minimum n-sizes is sufficient to address commenters' concerns regarding small numbers of children.

Changes: None.

Commenter: A commenter recommended that the Department require States to report risk ratios that are corrected—using advanced mathematical methods of correction or estimation—when LEAs have a cell size of zero.

Discussion: In developing the standard methodology, the Department placed a priority on selecting methods that were easy to comprehend, that supported transparency, and that facilitated comparisons between States' approaches to identifying significant disproportionality. With a population requirement, such as the minimum cell size included in § 300.647(b)(1), LEAs can easily determine which racial and ethnic groups the State will review for significant disproportionality, and what categories of analysis will be reviewed. Further, they can calculate for themselves the likely outcome of the review.

While the commenters' suggestion might enable States to review additional LEAs for significant disproportionality, it would do so at the cost of transparency, given the complexity of the analysis. For this reason, the Department declines to require States to use this analysis.

Changes: None.

Comment: One commenter stated that population requirements have varied between LEAs, with some having a minimum of just 9 children while other LEAs have set the minimum as large as 30 children. The commenter expressed concern that population requirements that require a greater number of children may result in significant disproportionality being missed entirely in some LEAs.

Discussion: We agree with the commenter that, in general, LEAs with significant disproportionality may be overlooked if either minimum n-sizes or minimum cell sizes are too large. For this reason, under § 300.647(b)(1), States will be required to set reasonable minimum cell sizes and reasonable minimum n-sizes with input from State Advisory Panels, and the States' chosen population requirements would also be subject to the Department's enforcement of reasonableness. Further, this provision requires States to identify and apply minimum n-sizes and minimum

cell sizes. LEAs will not be permitted to set their own population requirements to determine whether the LEA, or if the racial and ethnic groups within the LEA, will be reviewed by the State for significant disproportionality.

Changes: None.

Alternate Risk Ratios (§ 300.647(a)(1); § 300.647(b)(5); § 300.647(c)(2))

Comment: A number of commenters responded to Directed Question #7 in the NPRM, which requested public input regarding the use of the alternate risk ratio method in situations where the comparison group does not meet the minimum n-size. Directed Question #7 also asked for input on whether the use of the alternate risk ratio method would be appropriate in other situations.

Some commenters opposed the use of an alternate risk ratio method. Of these, some stated that an alternate risk ratio method would seldom be appropriate because, in some States, few LEAs have demographics that are similar to the State's overall demographics. This commenter suggested that using an alternate risk ratio method will increase the likelihood of false positive identification of LEAs with significant disproportionality. A number of commenters expressed concern that, with the alternate risk ratio, LEAs would be dependent upon States to provide the data to calculate their risk ratios. These commenters expressed a preference for calculations that LEAs would run independent of the State. Another commenter expressed opposition to a standard methodology in general and stated that the alternate risk ratio method is similarly deficient because it fails to take into account factors, such as poverty, that could affect the need for special education services. Similarly, some commenters stated that, while the use of an alternate risk ratio method may be appropriate in certain situations, the Department should further consider allowing States to use methodologies other than a risk ratio.

A few commenters expressed support for the use of an alternate risk ratio approach in limited situations, such as when subgroup sizes are small in number, or when the risk ratio is volatile across three years of data. Other commenters supported the Department's proposal to allow States to use the alternate risk ratio in instances where the total number of children in a comparison group is less than 10 or when the risk to children in a comparison group is zero.

Discussion: Under proposed § 300.647(b)(5), States would have used the alternate risk ratio, instead of the

risk ratio, whenever the comparison group at the LEA-level had an n-size of fewer than 10 children (or children with disabilities, as appropriate) or had a risk of 0 percent (*i.e.*, had a cell size of 0). This requirement was designed to prevent the possibility that States might, from LEA to LEA, choose from either the risk ratio or alternate risk ratio with the goal of avoiding an identification of significant disproportionality.

As the Department has revised § 300.647(b)(1) to allow States, with input from stakeholders (including the State Advisory Panel), to set reasonable minimum n-sizes and minimum cell sizes, we have likewise revised § 300.647(b)(5) to require States the use of the alternate risk ratio when, within an LEA, the comparison group does not meet either a reasonable minimum n-size or minimum cell size. While the flexibility to determine reasonable minimum n-sizes and minimum cell sizes will not allow States the option to simply choose, from LEA to LEA, whether to apply the alternate risk ratio due to concerns about risk ratio volatility, it would provide States the ability to avoid risk ratio volatility due to small comparison group sizes. Likewise, the ability of a State to determine reasonable minimum cell sizes and minimum n-sizes should provide sufficient flexibility to avoid false positives identification of significant disproportionality that might result when examining small target or comparison groups.

With respect to the comment regarding the potential difficulty in obtaining State data for use in the alternative risk ratio, we note that the requirement to analyze LEAs is applicable to States, and States have access to the State-wide data necessary to use when applying the alternate risk ratio method. In reviewing LEAs for significant disproportionality with respect to identification, we generally expect that States will use the same IDEA section 618 data that is reported to the Department for data regarding children with disabilities, and data submitted to the Institute for Education Sciences for the Common Core of Data, for enrollment data. OMB Control No. 1875–0240. In reviewing LEAs for significant disproportionality with respect to placement or discipline, we generally expect that States will use the same section 618 data reported to the Department. For IDEA section 618 data, discipline data is a cumulative count from July 1st through June 30th, while IDEA section 618 child count data is a point-in-time count that occurs in the fall. OMB Control No. 1875–0240.

We disagree with commenters that the Department should allow States to consider additional factors that might affect significant disproportionality. Under the current regulations, the GAO noted that “the discretion that states have in defining significant disproportionality has resulted in a wide range of definitions that provides no assurance that the problem [of significant disproportionality] is being appropriately identified across the nation.” It was this finding by the GAO, public comments the Department received in a response to a 2014 request for information (79 FR 35154), and the Department’s review of State definitions of significant disproportionality that convinced the Department to issue regulations to require that all States follow a standard methodology. The Department believes that the proposed standard methodology—including the use of the risk ratio or alternative risk ratio method—is a necessary step to achieve those goals.

Changes: We have revised § 300.647(b)(5) to require States the use of the alternate risk ratio when, within an LEA, the comparison group does not meet either a reasonable minimum n-size or minimum cell size, as determined by the State in accordance with revised § 300.647(b)(1).

Comment: A number of commenters suggested the Department provide the flexibility to allow States to determine when and under what circumstances the alternate risk ratio method would be most appropriate. One of these commenters noted that one State currently uses the alternate risk ratio in all instances and urged the Department to allow this State to continue to do so rather than limiting the use of the alternate risk ratio method to those situations when the risk ratio method is not applicable. According to the commenter, the LEAs in this State are familiar with the alternate risk ratio and understand its calculation. In addition, the commenter asserted that the alternate risk ratio provides the ability for comparability of results among the LEAs in the State.

Other commenters asserted that while flexibility to use the alternate risk ratio may be appropriate, a requirement to use the alternate risk ratio method was not. Some of these commenters argued that the alternate risk ratio, which uses the State’s risk for the comparison group, is inappropriate in States in which the racial and ethnic composition of LEAs differs significantly from that of the State. These commenters indicated that allowing States to use a minimum cell size for both the racial or ethnic group of interest and the comparison

group would eliminate the need for the alternate risk ratio calculation.

Another commenter noted that the use of an alternate risk ratio for some LEAs or some subgroups within an LEA will create disparities in the application of the regulation. The commenter requested that States have the flexibility to use either the risk ratio or the alternate risk ratio for all of the LEAs and subgroups within the State.

Still another commenter suggested that the Department allow, but not require, the alternate risk ratio method, stating that, while the alternate risk ratio may solve the problem of low cell size for the comparison population, it precludes an accurate measure of disproportionality because it relies on a comparison of two dissimilar populations. According to the commenter, if referral rates in an LEA are high in general, application of the risk ratio method would not suggest significant disproportionality; use of the alternate risk ratio method, however, where the LEA’s generally high referral rates would be compared to the State’s average referral rates, would result in all groups being found to be disproportionate. This commenter further stated that the alternate risk ratio will create a substantial risk in States with predominantly White rural areas that a large number of LEA findings will be due to significant overrepresentation for White children. The commenter questioned whether Congress, in framing IDEA in 2004, intended to address the disparate treatment of White children. The commenter argued that, while the issue of over-referral to special education could be an issue for OSEP or SEAs to address, comprehensive CEIS should be a vehicle to monitor significant disproportionality, not referral rates.

Another commenter noted that, when an LEA suspends just one or two children of one racial or ethnic group and none of any other racial or ethnic group, the alternate risk ratio will kick in and, due to small numbers that produce a high risk for one particular racial or ethnic group, a high alternate risk ratio will be produced and trigger a finding of significant disproportionality. Other commenters arrived at a similar conclusion: They advised the Department to not require the use of the alternate risk ratio calculation as, according to them, it only provides a viable option for examining racial or ethnic disparities in a limited number of circumstances (*e.g.*, when the comparison group does not meet the minimum n-size or cell size), failing to address very small target populations.

Discussion: We appreciate the comments regarding the required use of the alternative risk ratio. With respect to comments suggesting that the Department permit States to apply the alternate risk ratio whenever they deem it appropriate, we reiterate that the alternative risk ratio may be used only when the risk ratio method is not available. As we stated in the NPRM, it is the Department's position that, whenever possible, analyses for significant disproportionality under IDEA section 618(d) should compare identification, placement, and discipline rates in an LEA to those rates for other racial and ethnic groups in the same LEA.

We disagree with commenters suggesting that States should have flexibility to exclude from a review of significant disproportionality those racial or ethnic groups within LEAs that do not have a sufficiently large comparison group. For similar reasons, we disagree with commenters objecting to the alternate risk ratio due to demographic differences between the State and LEA. The Department believes that, in racially or ethnically homogenous LEAs—including rural, predominantly White districts—and LEAs with markedly different demographic characteristics than a State, there is a possibility that a particular racial or ethnic group is identified, placed, or disciplined, at markedly higher rates than their peers. In these cases, the absence of a comparison group should not excuse either the State or the LEA from their responsibility under IDEA section 618(d) to identify and address significant disproportionality.

We disagree with the suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children with disabilities.

We further disagree with commenters that an alternate risk ratio requirement does not measure racial and ethnic disparity. Most measures of racial and ethnic disparity include some comparison of risk; in the case of the alternate risk ratio, the comparison is not to a State risk index, but to a State-level comparison group (e.g., Black children in an LEA, compared with non-Black children in the State).

Finally, with respect to the possibility that, for any one LEA with high referral rates across all groups, all racial and ethnic groups could trigger a finding of significant disproportionality if an alternate risk ratio is required, we do not believe that there is a high likelihood of that scenario occurring. The alternate risk ratio would only be utilized in cases where, for a particular racial or ethnic group, there is a small comparison group at the LEA-level or the comparison group's risk is zero at the LEA-level. Likewise, the flexibility to set reasonable minimum cell sizes and minimum n-sizes should allow States to avoid identifying LEAs based on a small number of children in a particular group. In either case, it is likely that the racial and ethnic groups that comprise the comparison group would not be reviewed for significant disproportionality, as, per § 300.647(c)(1), States will have the flexibility to exclude from their review for significant disproportionality those racial and ethnic groups they do not meet both a minimum n-size and minimum cell size.

Changes: None.

Comment: One commenter suggested that the alternate risk ratio would be appropriate in situations where an LEA is home to highly specialized programs for children with autism or hearing impairments, or where the mobility rate is significantly discrepant from the State average.

Discussion: We disagree. As we stated in the NPRM, it is the Department's position that, whenever possible, analyses for significant disproportionality under IDEA section 618(d) should compare identification, placement, and discipline rates in an LEA to those rates for other racial and ethnic groups in the same LEA. Generally, variations from statewide trends is not an ideal indicator of whether significant disproportionality exists, which is why the Department initially proposed to limit the use of the alternate risk ratio to instances in which the comparison group is particularly small or the risk to that group is zero. In instances where an intra-LEA analysis either does not create mathematical quandaries (i.e., dividing by zero) or does not rely on particularly small comparison groups, racial and ethnic groups within an LEA should be compared with other groups within the LEA. Under § 300.647(b)(5), the Department will limit the use of the risk ratio to instances where the comparison group does not meet either the State's reasonable minimum cell size or minimum n-size.

In instances where LEAs have highly specialized programs, LEAs should work to ensure that these programs are equally accessible to all children eligible for the program, regardless of race or ethnicity. Similarly, LEAs should ensure that decisions to place particular children with disabilities in segregated settings are based on the individual needs of those children consistent with civil rights laws. Unnecessarily removing children with disabilities from an integrated setting and concentrating them in separate schools runs contrary to the integration goal that lies at the heart of the Americans with Disabilities Act (ADA). (See, e.g. 28 CFR 35.130(b)(1)(ii), (b)(1)(iv), (b)(2); see also, *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability” under title II of the ADA).)

Further, as discussed earlier, the level of student mobility in an LEA does not obviate that LEA's obligation under IDEA to ensure that all children with disabilities have access to a free appropriate public education in the least restrictive environment. LEAs should ensure that they are meeting this obligation for all children, and that they are doing so without regard to a child's race or ethnicity.

Finally, it is not clear to the Department how a calculation of an alternate risk ratio, rather than a risk ratio, would result in a more accurate assessment of significant disproportionality for LEAs with specialized programs or highly mobile student populations.

Changes: None.

Comments: One commenter suggested that if an SEA uses multiple years of data, and an LEA's racial composition requires the use of the alternate risk ratio in one year, then the State should have the flexibility to use the alternate risk ratio in the other years to determine significant disproportionality. The commenter suggested, for example, that an SEA using three years of data be permitted to apply the alternate risk ratio to years one and three of the data even if the alternate risk ratio was only triggered in year two of the data.

Discussion: The Department does not believe it appropriate to allow States to use the alternate risk ratio for LEAs in the years just prior to, or immediately following, years when it is required to do so because the comparison group does not meet the State's reasonable minimum n-size or reasonable minimum cell size. As we stated in the NPRM, it is the Department's position that, whenever possible, LEA data is

preferable to State-wide data for the purpose of identifying significant disproportionality as they best represent the practices of the LEA and the experiences of the children enrolled in the LEA. 81 FR 10967. In years when an LEA has a sufficiently large population of children, or children with disabilities, to meet the State's reasonable minimum cell size and minimum n-size, it is the Department's preference that States use the LEA's information to identify if significant disproportionality is taking place.

Changes: None.

Flexibilities—Three Consecutive Years of Data, § 300.647(d)(1)

Comment: One commenter expressed concern that allowing States to identify LEAs with significant disproportionality by examining up to three prior consecutive years in proposed § 300.647(c)(1) is ambiguous. Further, the commenter stated that it is not clear whether the regulation is written to mean that an LEA could be identified in the year in which their data exceeded the State-defined threshold or if the LEA could exceed the threshold for three years and then be determined to have significant disproportionality in the fourth year. If the regulation is written to mean the latter, the commenter expressed that four years is an unnecessarily long delay. Another commenter stated that it is unclear whether the State may begin consideration of the three years of data on the date the regulations go into effect.

Discussion: The Department appreciates the opportunity to clarify this flexibility. Under final § 300.647(d)(1), States may make a determination that an LEA has significant disproportionality after the LEA has exceeded a risk ratio threshold for a particular racial or ethnic group and category of analysis for up to three prior consecutive years preceding the identification. Under this provision, a State is prohibited from waiting four years to identify an LEA with significant disproportionality if it has exceeded the State's risk ratio threshold for up to three prior consecutive years. The use of the term "prior" is meant to clarify that any determination of significant disproportionality uses the most recent year for which data are available and up to two previous consecutive years of data.

For example, if a State is making a determination in the 2018–2019 school year, it can rely on up to three years of data to make its determinations (e.g., 2015–2016, 2016–2017, and 2017–2018). If an LEA exceeds the risk ratio

threshold for a particular racial or ethnic group for a particular category of analysis in each of those years, the State must identify that LEA as having significant disproportionality. The fact that the determination made in 2018–2019 is based, in part, on data from 2015–2016 does not constitute a delay of four years to make a determination, but is a result of data lags that occur regardless of how many prior years of data a State analyzes (e.g., 2018–2019 child count, placement, and discipline data are not typically available in time for States' determinations in the 2018–2019 school year).

The flexibility to determine significant disproportionality after one, two, or three consecutive years was designed to account for volatility—small changes in data from year to year that may cause large changes in a risk ratio and cause an LEA to be identified with significant disproportionality. Allowing States to take into consideration up to three consecutive years of data provides an opportunity for the States to determine which LEAs have significant disproportionality on the basis of consistently elevated risk ratios, rather than what may be a single year increase.

Also, as we noted in the NPRM, using three consecutive years of data was the most common approach to identifying significant disproportionality among the States in 2012–2013. Of the 23 States that reported using multiple years of data in the SY 2012–2013 State Supplement Survey (SSS), 13 States required an LEA to exceed the threshold for three consecutive years before finding significant disproportionality, while 9 States required 2 consecutive years.

Changes: None.

Comment: Regarding proposed § 300.647(c)(1), a large number of commenters expressed support for requiring, rather than allowing, States to rely on three years of data before making a determination of significant disproportionality. Several other commenters supported States choosing to identify an LEA as having significant disproportionality only after the LEA exceeds a risk ratio threshold over a period of time (such as three consecutive years) as a matter of best practice to avoid the identification of significant disproportionality due to data anomalies.

Discussion: Final § 300.647(d)(1) will permit, but not require, States to rely on up to three years of data in order to make a determination of significant disproportionality. The Department believes that States should have the flexibility to make a determination of significant disproportionality based on

one, two, or three consecutive years of data. The Department also believes that this flexibility will help States both account for year-to-year volatility in the risk ratio and focus on LEAs with consistently high risk ratios.

At the same time, we do not believe it appropriate to require States to use three consecutive years of data—rather than two consecutive years, or only one year—prior to identifying significant disproportionality. Given the flexibility States will have under § 300.647 to set reasonable population requirements—which will also reduce risk ratio volatility—reasonable risk ratio thresholds, and standards for reasonable progress, States may determine that a particular combination of these methods appropriately identifies significant disproportionality using one or two years of data. In these cases, the Department does not want to require States to wait an additional year, or an additional two years, to make an identification of significant disproportionality when they have confidence that the racial and ethnic disparities within an LEA require more immediate intervention.

Changes: None.

Comment: Many commenters expressed general support for allowing States to use up to three consecutive years of data, under proposed § 300.647(c)(1), prior to making a determination of significant disproportionality. One commenter expressed support for allowing up to three consecutive years of data, so long as States continue to be required to annually calculate risk ratios to determine significant disproportionality. That same commenter argued that analyzing three consecutive years of data gives LEAs more advanced notice, flexibility, and support in which to implement systemic changes before a finding of significant disproportionality can occur. A few commenters expressed that allowing States to wait for more than three consecutive years—that is, longer than the period specified in the Department's proposal—before identifying significant disproportionality would mean that thousands of misidentified, misplaced, and over-disciplined children would continue to be denied the high quality education they need.

Discussion: The Department appreciates the commenters' support and believes that this flexibility will help States account for volatility in risk ratios. Allowing States to take into consideration the data of up to three consecutive years provides an opportunity for the States to focus their efforts on LEAs with consistently high

risk ratios year over year, rather than only those with a single year of a high risk ratio. Further, we agree with the commenter's interpretation of proposed § 300.647(c)(1) (now § 300.647(d)(1)) that States must examine their LEAs for significant disproportionality every year. The flexibility in this section allows the State to limit their findings of significant disproportionality to LEAs that exceed the State's risk ratio threshold for up to three prior consecutive years, as is already the common practice in a number of States. As we noted in the NPRM (81 FR 10985), based on the SY 2013–14 State Supplement Survey, 23 States require that LEAs exceed a specified level of disparity for multiple years for at least one category of analysis for at least one racial or ethnic group before the LEA is identified as having significant disproportionality. Of these 23 States, 13 require 3 consecutive years of risk ratios exceeding an established threshold. We therefore agree with the comment that a longer period of analysis would not be appropriate.

Changes: None.

Flexibilities—Reasonable Progress, § 300.647(d)(2)

Comment: Many commenters expressed support for proposed § 300.647(c)(2) allowing States to exempt LEAs from a determination of significant disproportionality if they show reasonable progress.

Discussion: The Department appreciates commenters' support for this flexibility. We believe it is important to allow States the flexibility to not identify LEAs with significant disproportionality if, for example, a prior review and revision of policies, practices, and procedures and effective use of funds for comprehensive CEIS has resulted in a reasonable reduction in risk ratios in each of the two prior consecutive years. In such an LEA, a continued finding of significant disproportionality, including an ongoing annual review of policies, practices, and procedures, may actually divert State attention from LEAs in which substantial problems continue to occur and are not improving.

Changes: None.

Comments: Two commenters asked for additional Federal guidance regarding what constitutes reasonable progress because allowing States to interpret "reasonable progress" may allow LEAs to "backslide." One commenter stated that the Department should place restrictions on the definition of "reasonable progress" if trend data indicates that different rates of progress are appropriate for different

demographic groups across identification, placement, and discipline. Other commenters recommended clearly defining "reasonable progress" and including a rubric for determining whether the State is correctly applying "reasonable progress" and monitoring trends across States for appropriate definitions of reasonable progress. Finally, one commenter posited that, without a clearer definition of reasonable progress, the flexibility may become a loophole allowing States to avoid identifying LEAs.

Discussion: We appreciate commenters' concerns regarding the reasonable progress flexibility. While the Department believes that States should retain broad flexibility to set a standard for "reasonable progress," it was not our intent to allow States unfettered flexibility in this area. We have revised the regulations to ensure that a State's standard for reasonable progress is meaningful, and to reduce the likelihood that an LEA might meet the standard due to reductions in risk ratios resulting from a data anomaly. Under final § 300.647(d)(2), LEAs must be making reasonable progress in lowering the risk ratio or alternate risk ratio for the group and category for each of the two prior consecutive years, rather than the immediate preceding year. As such, if an LEA is not reducing risk ratios over each of the two prior consecutive years, a State cannot exercise this flexibility. Further, we have revised § 300.647(b)(1), to require each State to consult with its stakeholders, including State Advisory Panels, before setting a standard for reasonable progress. This revision also clarifies that the State's standard for reasonable progress, under § 300.647(d)(2), is subject to the Department's monitoring and enforcement for reasonableness.

While, in the NPRM, the Department suggested that States might make a determination of "reasonable progress" on a case-by-case basis, we no longer find this degree of flexibility to be appropriate. While States would retain the flexibility to set a standard for reasonable progress—including the flexibility to set a standard that requires different risk ratio reductions for each of the categories in paragraphs (b)(3) and (4)—this standard must be developed with the advice of stakeholders, including the State Advisory Panel, and implemented uniformly across the State. We do not, however, believe that a standard that requires different risk ratio reductions for LEAs that exceed the State's risk ratio threshold for different

racial or ethnic groups would meet constitutional scrutiny.

The proposed regulations also included additional restrictions to how a State may implement § 300.647(d)(2), which we retain in these final regulations. If an LEA is reducing risk ratios generally, but not for the specific group and category for which its risk ratio exceeded the State's risk ratio threshold, a State cannot exercise this flexibility. Similarly, if an LEA exceeds the risk ratio threshold in four areas and is making reasonable progress in only three of them, a State could not use this flexibility to not identify the LEA with significant disproportionality in the area in which the LEA is not making reasonable progress. Therefore, while States can determine specific standards for what constitutes reasonable progress (e.g., a reduction of the risk ratio by 0.5 in each of the two prior consecutive years), they can do so only within a specified set of circumstances.

In sum, the Department does not believe that this flexibility represents an unchecked loophole for States. The Department plans to monitor States' implementation of this flexibility and, as appropriate, will provide technical assistance on best practices as they become evident. The Department may also take appropriate enforcement action, ranging from requiring a corrective action plan, to imposing special conditions, to designating the State as high-risk status, to withholding a portion of the State's IDEA Part B funds.

Changes: We have revised § 300.647(b)(1) to clarify that the State's standard of "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have also revised § 300.647(b)(1) to clarify that a State may, but is not required to, set the standards for measuring reasonable progress at different levels for each of the categories described in paragraphs (b)(3) and (4). In addition, we have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the appropriate risk ratio (or alternate risk ratio) in each of two prior consecutive years, rather than the immediate preceding year.

Comments: Several commenters supported giving States significant flexibility in defining "reasonable progress," and emphasized that there should be no additional restrictions on State flexibility to define "reasonable progress."

Discussion: We appreciate the commenters' perspective. While we believe that States should have broad flexibility to set a standard for "reasonable progress," it was the Department's intent to restrict States to only those standards that are reasonable and are indicative of meaningful progress. As we note earlier in this section, we believe that two changes to regulation are necessary to help States to select a standard that is reasonable and to reduce the likelihood that data anomalies will prevent the appropriate identification of LEAs with significant disproportionality.

Changes: We have revised § 300.647(b)(1) to clarify that the State's standard of "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the appropriate risk ratio (or alternate risk ratio) in each of the two prior consecutive years, rather than the immediate preceding year.

Comment: A commenter requested clarity regarding the best way to determine whether an LEA has achieved reasonable progress such that a determination of significant disproportionality is no longer required.

Discussion: In general, the Department expects that States implementing the revised final § 300.647(d)(2) will examine LEAs for reasonable progress in reducing their risk ratios in each of the two prior consecutive years. For example, a State may choose to review LEAs for significant disproportionality in SY 2018–2019 based on data from SYs 2017–18, 2016–17, and 2015–16. Should the State identify an LEA that exceeds a particular risk ratio threshold for all three years, the State has the option, under final § 300.647(d)(2), not to make a finding of significant disproportionality if the LEA has achieved at least a reasonable decrease in their risk ratios between SYs 2015–2016 and 2016–17, and between SYs 2016–2017 and 2017–2018. The State does not have the option to postpone a finding of significant disproportionality if the LEA has only achieved a decrease in their risk ratios over a multiple year period; that is, if an LEA reduced its risk ratio from 2015–2016 to 2017–2018, but not from 2015–2016 to 2016–2017, the State does not have the flexibility to not identify the LEA as having significant disproportionality if it otherwise exceeds the State's risk ratio threshold. So long as an LEA exceeds a risk ratio

threshold, the LEA must make continuous progress, in each of the two prior consecutive years, in reducing its risk ratio to avoid a finding of significant disproportionality.

Changes: None.

Comment: One commenter stated that, in a State that uses three years of data, the data used to consider a determination of significant disproportionality is old and likely includes a substantial number of children who no longer attend the LEA. The commenter also stated that, because of the time it will take for the LEA to develop a plan, and report to the Department any improvement, years will have passed between the original identification of significant disproportionality and data showing the results of LEA-level changes.

Discussion: We recognize that, given the time necessary to collect, prepare, and analyze data, the information States will use to identify significant disproportionality may be delayed a number of years, particularly when States are also exercising the flexibility under § 300.647(d)(1) to consider up to three prior consecutive years of data. The data analyzed may indeed include children no longer enrolled within the LEA. However, the data lag is, in part, necessary to ensure accuracy of the information on which findings are based. It would be impossible for a State to make a determination of significant disproportionality regarding discipline for the current year based on the current year's data, as the school year is currently ongoing and the State would therefore be basing determinations on incomplete data. These limitations do not reduce the value of these analyses, particularly as IDEA section 618(d) was intended to address those LEAs with systemic racial and ethnic disparities in special education, rather than providing specific relief to specific children with disabilities. Other provisions of IDEA are meant to address the individual rights of children with disabilities to a free appropriate public education in the least restrictive environment.

Changes: None.

Comments: Two commenters suggested that reasonable progress should be defined so that it is meaningful.

Discussion: We agree with the commenters that the standard for reasonable progress should represent a meaningful degree of improvement in the performance of the LEA. To ensure this, the Department will now require States to consult with stakeholders, including State Advisory Panels, prior to setting a standard for reasonable progress under § 300.647(d)(2). Further,

each State's standard for reasonable progress will be subject to the Department's monitoring and enforcement for reasonableness.

In addition, States should set their reasonable progress standards based on whether the progress realized by LEAs in lowering risk ratios represents a meaningful benefit to children in the LEA, rather than statistical noise or chance. To increase the likelihood that States' standards will accomplish this goal, the Department will now allow States to make a determination of reasonable progress only after an LEA has made reasonable progress in reducing its risk ratio in each of the two prior consecutive years.

Changes: We have revised § 300.647(b)(1) to clarify that the State's standard for "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the risk ratio (or alternate risk ratio) in each of the two prior consecutive years, rather than only from the immediate preceding year.

Comments: One commenter suggested that, to show reasonable progress, an LEA must consistently reduce risk ratios across a three year period and requested clarification as to how consistent progress must be for a State using three years of data.

Discussion: The Department appreciates the recommendation. We understood the commenter to be recommending that, when looking across a three year period (e.g., 2015–16, 2016–17, and 2017–18), an LEA should both show a year to year decrease in their risk ratio and an overall downward trend across the period, regardless of whether the first year of the period (e.g., 2015–16) was a decrease from the preceding year (e.g., 2014–15). We agree with the commenter that the LEA should make progress each year in reducing its risk ratio, and have revised the regulations to allow States to not identify an LEA with significant disproportionality if the LEA achieves reasonable progress, under § 300.647(d)(2), in reducing its risk ratio (or alternate risk ratio) from the preceding year in each of the two prior consecutive years. We believe this mirrors the recommendation of the commenter. We decline to require that LEAs reduce their risk ratio over a longer period of time, as it would require States to examine four or more years of data to determine whether the LEA had achieved reasonable progress.

Under the revised regulation, the Department will allow States to implement both § 300.647(d)(1) and (2) using only three prior consecutive years of data.

For example, State A has a risk ratio threshold of 3.0 and two LEAs in the State have risk ratios 3.6 (LEA 1) and 4.3 (LEA 2) in SY 2020–2021. If the State opts to use the reasonable progress flexibility, the State would have to examine the risk ratios for those LEAs,

for the particular group and category, for the two preceding years. If LEA 1 had a risk ratio of 4.9 in 2018–2019 and a risk ratio of 4.3 in 2019–2020, the State could determine that this LEA had demonstrated reasonable progress in reducing its risk ratios and not make a determination of significant disproportionality (assuming a reduction from 4.9 to 4.3 to 3.6 met the State’s identified standard).

However, if LEA 2 had a risk ratio in 2018–2019 of 4.9 and a risk ratio of 3.6 in 2019–2020, the State must identify that LEA as having significant disproportionality because it did not reduce its risk ratio in each year for two consecutive years. Even though the risk ratio of 4.3 in 2020–2021 is less than the risk ratio in 2018–2019, the increase from 2019–2020 to 2020–2021 means the LEA has not made reasonable progress in reducing its risk ratio.

TABLE 1—EXAMPLE RISK RATIOS BY YEAR IN DEMONSTRATING REASONABLE PROGRESS

	2019	2020	2021	Notes
LEA 1	4.9	4.3	3.6	State can determine LEA made reasonable progress because of decrease in risk ratio from prior year for two consecutive years.
LEA 2	4.9	3.6	4.3	State may not determine LEA made reasonable progress because risk ratio increased from 2020 to 2021.

Changes: None.

Comment: A commenter suggested that the Department allow States to determine that an LEA has made reasonable progress if the LEA provides evidence that it is actively addressing the significant disproportionality, regardless of whether the LEA’s data reflects that progress has been achieved.

Discussion: As noted above, § 300.647(d)(2) allows a State not to identify an LEA with significant disproportionality if it is making reasonable progress in lowering the risk ratios for the group or category in each of the two prior consecutive years. Further, IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to base their determination of significant disproportionality on a collection and examination of data. For these reasons, States are not permitted to use information other than data on racial and ethnic disparities to distinguish whether significant disproportionality is occurring within an LEA or to determine whether that LEA is making reasonable progress under § 300.647(d)(2).

Changes: None.

Comments: One commenter stated that providing States with the flexibility not to identify LEAs demonstrating reasonable progress in lowering the risk ratio will not remedy matters of identification due solely to small cell size. The Department interpreted this comment to suggest that proposed § 300.647(c)(2) will not prevent the inappropriate identification of LEAs due to small populations of children.

Discussion: The Department agrees with the commenter and did not intend for proposed § 300.647(c)(2) (now § 300.647(d)(2)) to prevent the identification of LEAs with significant

disproportionality due to the volatility in risk ratios that can result from small numbers of children. Two other provisions are intended to address that issue. Under § 300.647(b)(1)(i)(B) and (C), States must set minimum n-sizes and minimum cell sizes. If a particular racial or ethnic group being analyzed in an LEA does not meet the minimum n-size and minimum cell size established by the State, the State is not required to use the standard methodology. We believe that this flexibility is sufficient to address concerns about identification of an LEA as having significant disproportionality on the basis of small numbers of children.

Changes: None.

Comment: Multiple commenters expressed concerns with the use of risk ratio as a measurement of reasonable progress under proposed § 300.647(c)(2). These commenters argued that absolute reductions in risk, and not risk ratios, should be used to measure progress, especially for restrictive placements and discipline.

Discussion: The Department appreciates the concerns raised by commenters. However, as noted above, IDEA section 618(d) (20 U.S.C. 1418(d)) is primarily concerned with significant disproportionality across racial and ethnic groups, rather than the specific rates of identification, placement in particular settings, or discipline for children with disabilities. As such, we believe it would be inappropriate to provide States the flexibility not to identify an LEA with significant disproportionality on the basis of a criterion that is not related to the relative numbers of children (or children with disabilities) experiencing

a particular outcome across racial or ethnic groups.

Changes: None.

Comments: A number of commenters stated that risk ratios are inappropriate measures of progress when the underlying risk of placement in restrictive settings or of disciplinary removal is unacceptably high. For example, they argued that increasing the risk level for the lower incidence group in the risk ratio comparison would also reduce the risk ratio but not the overall exclusion of children from the classroom; according to the commenters, that scenario should never be considered reasonable progress. Commenters stated that a necessary component of any State’s determination of reasonable progress must be that the racial or ethnic group with the highest risk level sees a reduction in its risk level.

Discussion: The Department recognizes and appreciates the commenters’ concerns. For several years, the Department has worked to assist States to strengthen behavioral supports to children with the goal of reducing schools’ reliance on suspensions and expulsions. For this reason, the Department appreciates that commenters examined this component of the regulation for potential unintended incentives that could inhibit the progress of States and LEAs in reducing disciplinary removals. However, in considering the issues that the commenters have raised, the Department disagrees that allowing States to use the risk ratio to measure reasonable progress with respect to disciplinary removals would create an incentive to raise rates of suspension or expulsion.

We find it highly unlikely that LEAs would respond to a finding of significant disproportionality by systematically seeking out children with disabilities in other racial or ethnic groups and suspending or expelling them solely to meet the State's definition of reasonable progress. Further, to the extent that an LEA was engaging in those practices, we would expect a State to take strong administrative action to prevent them, as they clearly represent a denial of a free appropriate public education in the least restrictive environment.

The Department has worked to provide educators and schools with easy access to information regarding school discipline reform. Tools, data, and resources are available at www.ed.gov/school-discipline.

Changes: None.

Comment: One commenter noted that, in general, reducing discipline frequencies will tend to increase, not reduce, relative difference in discipline rates.

Discussion: We recognize that, in an LEA that is generally reducing rates of discipline for all children with disabilities, it may become markedly more difficult to demonstrate reasonable progress in lowering risk ratios. For example, if an LEA suspended 15 percent of Hispanic children with disabilities and 3 percent of all other children with disabilities, it would have a risk ratio of 5.0. In order to demonstrate a reduction in the risk ratio of 0.1, the LEA would have to reduce the suspension rate for Hispanic children with disabilities to 14.7 percent if the rate for all other children remained the same. However, if the LEA reduced the suspension rates for non-Hispanic children with disabilities to 2 percent, an LEA would actually have to reduce its suspension rate for Hispanic children with disabilities to 9.8 percent to achieve the same 0.1 reduction in their risk ratio, a much larger reduction for the same "effect size." Nonetheless, the difficulty of demonstrating reasonable progress in lowering the risk ratio does not invalidate the worthy goal of reducing disparities on the basis of race and ethnicity. Further, we note that, to the extent that the number of children with disabilities being suspended or expelled in an LEA decreases below the State's minimum cell size, a State is not required to use the standard methodology for determining whether there is significant disproportionality in the LEA.

Changes: None.

Comment: One commenter suggested that proposed § 300.647 include a flexibility to not identify LEAs with

significant disproportionality if the State can identify through a review of data that the disproportionality is not the result of the actions of the LEA.

Discussion: The Department recognizes that States have a vested interest in ensuring that their support of LEAs identified with significant disproportionality is appropriately targeted and may wish to avoid the statutory remedies in the event that an LEA with apparently strong policies, practices, and procedures nonetheless has significantly disproportionate rates of identification, placement and discipline for particular racial or ethnic groups. However, as noted above, IDEA section 618(d) (20 U.S.C. 1418(d)) clearly establishes that the basis for a finding of significant disproportionality is a disparity in the identification, placement and discipline of children on the basis of race and ethnicity and the review of policies, practices, and procedures a consequence of, rather than a part of, a determination of significant disproportionality. As such, the Department is precluded from waiving, or allowing States to waive, such a finding on the basis of criteria unrelated to those disparities. Further, regardless of whether any particular disparity in the identification, placement, and discipline of children on the basis of race and ethnicity can be linked to a specific LEA action, LEAs may still benefit from the review and, if necessary, revision of their policies, practices, and procedures and the reservation of funds for comprehensive CEIS to address those disparities.

Changes: None.

Comment: None.

Discussion: Upon further consideration of the regulatory language originally proposed under § 300.647(c)(2), we believe that provision includes an inappropriate, and potentially confusing, reference to alternate risk ratio thresholds. Under § 300.647(b)(1), States are required to establish one or more reasonable risk ratio thresholds, and, under § 300.647(b)(6), identify an LEA with significant disproportionality if any of the LEA's risk ratios or alternate risk ratios exceed the reasonable risk ratio threshold. The Department did not include in § 300.647 any provision that would allow States to establish an alternate risk ratio threshold—both risk ratios and alternate risk ratios are to be compared to the State's reasonable risk ratio threshold.

While it was the Department's intention, with proposed § 300.647(c)(2), to allow States the flexibility to not identify an LEA that exceeds a risk ratio threshold when the

LEA makes reasonable progress in reducing the risk ratio or alternate risk ratio for the applicable racial and ethnic group and category of analysis, the proposed provision inappropriately extended this flexibility to circumstances where LEAs exceeded an alternate risk ratio threshold. This gives the mistaken impression that States have the option to create separate alternate risk ratio thresholds.

Changes: We have revised proposed § 300.647(c)(2), now § 300.647(d)(2), to remove the reference to an alternate risk ratio threshold.

III. Clarification that Statutory Remedies Apply to Disciplinary Actions (§ 300.646(a)(3) and (c))

Comments: A number of commenters supported our clarification in proposed § 300.646(c) that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions for children with disabilities, including suspensions and expulsions, just as they address significant disproportionality in the identification and placement of children with disabilities—by ensuring the review of and, if necessary, the revision of and reporting on LEAs' policies, practices, and procedures and by setting aside 15 percent of Part B IDEA funds to provide comprehensive CEIS.

Discussion: We appreciate commenters' support for the proposed regulation that would incorporate the Department's long-standing position on this issue.

Changes: None.

Comments: One commenter argued that the clarification, even if it embodies a long-standing position of the Department, misreads the statute. The plain language of IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to determine whether in the State and its LEAs there is significant disproportionality with respect to race and ethnicity in the identification, placement, and discipline of children with disabilities. Section 618(d)(2) (20 U.S.C. 1418(d)(2)), however, only mentions identification and placement. As such, the commenter argued that the application of the statutory remedies based on a finding related to discipline was not supported by the statute, a reading the commenter stated was supported by a number of canons of statutory construction.

Discussion: As we stated in the NPRM, when Congress added discipline to IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), it made no corresponding change to IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), which created an ambiguity because IDEA section

618(d)(2) does not explicitly state that the remedies in IDEA section 618(d)(2) apply to removals from placement that are the result of disciplinary actions. The Department reads the term “placement” in the introductory paragraph of section 618(d)(2) to include disciplinary actions that are also removals of the child from his or her current placement for varying lengths of time, including removals that may constitute a change in placement under certain circumstances. IDEA section 615(k)(1), 20 U.S.C. 1415(k)(1). A disciplinary removal of up to 10 school days is considered a removal from placement under section 615(k)(1)(B) (“[s]chool personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities)”), while a disciplinary removal from placement that exceeds 10 school days is considered a change in placement under section 615(k)(1)(C).

The Department is the agency charged with administering IDEA and has the authority under IDEA section 607(a) (20 U.S.C. 1406(a)) to issue regulations to ensure compliance with the specific requirements of IDEA. Therefore, the Department has the authority to resolve the statutory ambiguity and incorporate into the regulations its long-standing interpretation, which is and has been that the required remedies in IDEA section 618(d)(2) apply when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement. (See, 71 FR 46540, 46738 (August 14, 2006); OSEP Memorandum 07–09, April 24, 2007; OSEP Memorandum 08–09, July 28, 2008; June 3, 2008, letter to Ms. Frances Loose, Supervisor, Michigan Office of Special Education and Early Intervention.)

Changes: None.

Comments: Some commenters sought stronger monitoring, technical assistance, and guidance from the Department on significant disproportionality in discipline, others wrote in favor of applying discipline consistently, and one commenter asked the Department to establish national criteria for disciplining children and consistent guidelines for documenting and reporting disproportionate disciplinary actions.

Discussion: While these issues are largely beyond the scope of these regulations, we appreciate the

opportunity to address them. We agree with the commenters that discipline should be applied consistently regardless of race or ethnicity. The Department has recently engaged in extensive outreach, technical assistance, and guidance activities related to discipline, which can be found online at www.ed.gov/rethinkdiscipline. However, many aspects of this issue, including establishing national standards for school discipline, are beyond the Department’s statutory authority in the context of these regulations.

Changes: None.

Commenters: One commenter recommended a minor wording change in the regulation, to reduce confusion. This commenter suggested that the Department rewrite proposed § 300.647(b)(4) so that disciplinary removals, or proposed § 300.647(b)(4)(iv) through (viii), are separated from educational placements in proposed § 300.647(b)(4)(i) through (iii), and placed under a heading of discipline. The commenter argued that “given that many students with disabilities are removed from regular class settings, it is important to make clear that data must be collected on exclusionary removals of all students with disabilities regardless of the restrictiveness of the setting in which that are served.”

Discussion: We do not think it necessary, nor appropriate, to change proposed § 300.647(b)(4) so that disciplinary removals are separated and placed under a heading of discipline. As written, § 300.647(b)(4) is consistent with the language of IDEA section 618(d) (20 U.S.C. 1418(d)), which directs States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring with respect to “the incidence, duration and type of disciplinary actions, including suspensions and expulsion”. As we explained in the NPRM, we interpret the statute to require States to apply the statutory remedies if an LEA is identified with significant disproportionality with respect to disciplinary removals from placement. Therefore, we decline to change proposed § 300.647(b)(4) so that disciplinary removals are separated and placed under a heading of discipline.

Changes: None.

IV. Clarification of the Review and Revision of Policies, Practices, and Procedures (§ 300.646(c))

Review of Policies, Practices, and Procedures—Requirements

Comments: A number of commenters supported proposed § 300.646(c) and our clarifying the requirement for the annual review of an LEA’s policies, practices, and procedures in the case of a determination of significant disproportionality. One commenter noted that this review can change the behavior of LEAs that are improperly identifying children for special education and related services. Other commenters, however, objected to proposed § 300.646(c), stating that an annual review was unnecessary and burdensome.

Another commenter objected and suggested that most significant disproportionality arises as a result of poor practices, a problem not addressed by a review of policies and procedures. This commenter recommended that the review of policies and procedures only occur when an LEA amends its policies or procedures. Another commenter suggested that no review be required if an LEA’s policies, procedures, and practices are compliant with IDEA, appropriate, and fair, and suggested that a review occur only once every three years or at the end of a CEIS “cycle.” Additional commenters argued that the underlying issues affecting disproportionality in an LEA do not change as quickly as annually, and so the annual review, which can be expensive, does not make sense.

Discussion: As we stated in the NPRM, the requirement to review policies, practices, and procedures subsequent to a determination of significant disproportionality would impose no new obligations. Under IDEA section 618(d) (20 U.S.C. 1418(d)), every year a State is required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring the State and the LEAs of the State with respect to the identification, placement, and discipline of children with disabilities. Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)) and final § 300.646(c)(1), the review of policies, practices, and procedures must be conducted in every year in which an LEA is identified as having significant disproportionality. As the review and determinations occur annually, each year an LEA is identified as having significant disproportionality represents a separate determination and therefore triggers the requirements of IDEA section 618(d)(2). As such, the

requirements of final § 300.646(c)(1) are consistent with the statute and the Department does not have the authority to reduce the frequency of the review or change the conditions under which it is required by statute.

We understand and appreciate the complexity of the many social and societal factors that contribute to disproportionality. Nonetheless, under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), the review of policies, procedures, and practices must occur in every year in which an LEA is identified with significant disproportionality.

Changes: None.

Comments: A number of commenters suggested that the Department emphasize that, under proposed § 300.646(c)(1), an annual review of an LEA's policies, practices, and procedures in the case of a determination of significant disproportionality should include making certain that the LEA adheres to child find procedures; conducting robust and timely screenings and assessments, manifestation determinations, and functional behavioral assessments; and developing appropriate IEPs and behavioral intervention Plans.

Another commenter suggested that the review should include a review of any disciplinary practices that disrupt a child's placement, even if the disruption does not amount to a change in placement, such as a suspension for fewer than 10 days.

Discussion: We appreciate the commenters' suggestions regarding the scope of review required whenever a LEA reviews its policies, practices, and procedures subsequent to a determination of significant disproportionality. Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)) the State must provide for the review, and if appropriate, revision of policies, procedures, and practices used in the area in which an LEA is identified with significant disproportionality (identification, placement or disciplinary removals) to ensure they comply with the requirements of IDEA.

For example, in an LEA identified with significant disproportionality with respect to identification, the State must provide for the review of policies, practices, and procedures used in identification. This should include a review of child find and evaluation policies, practices, and procedures to ensure they comply with IDEA. Consider that LEA Y has a risk ratio for identification of white students as students with autism that exceeds the State-defined risk ratio threshold. As a result, the State identifies LEA Y as

having significant disproportionality and provides for a review of the LEA's policies, procedures, and practices as required by IDEA section 618(d)(2)(A). This review results in the LEA identifying that it has a long-standing practice of requiring students to have a medical diagnosis of autism in order to receive special education services as a child with autism. However, minority students in LEA Y were much less likely to be able to obtain such a diagnosis for a number of reasons, including a lack of consistent care and early screening and referral conducted by health professionals. Given that LEAs are not allowed, under the IDEA, to set eligibility criteria for special education and related services absent a State-wide requirement or criteria that is consistent with the IDEA (*i.e.*, the child's parent does not incur a cost for the medical diagnosis and the requirement does not result in a delay in the special education and related services that are required for a child to receive a free appropriate public education) and the fact that the State where LEA Y is located does not require a medical diagnosis for autism, the LEA's practice is inconsistent with IDEA.

In this instance, the overrepresentation that resulted in the LEA being identified with significant disproportionality in the identification of white children as children with autism is due to under-identification of minority children, as a result of a district practice that does not comply with the requirements of the IDEA and a failure of the LEA to appropriately screen children and help them secure diagnostic testing. To address the significant disproportionality, the LEA must eliminate or revise its practice of requiring students to have a medical diagnosis of autism in order to receive special education services. In addition, the LEA could address the impact of that criteria by using funds reserved for comprehensive CEIS to increase developmental screenings.

Similarly, for an LEA identified with significant disproportionality with respect to discipline, the State must provide for the review of policies, practices, and procedures used in the discipline of children with disabilities. This should include a review of the LEA's policies, practices, and procedures related to manifestation determinations, functional behavioral assessments, or behavioral intervention plans or school-wide discipline rules to ensure they comply with IDEA.

Changes: None.

Guidance

Comments: A number of commenters, remarking upon the complexity of the various underlying social and societal causes that may contribute to significant disproportionality and the limited ability of schools to provide a remedy through a review of its policies, practices and procedures, asked for additional oversight and guidance from the Department. Some sought evidence-based practices that address economic, cultural, and linguistic barriers to instruction. Others invited the Department to consult with the States to find alternative means of addressing the causes of significant disproportionality.

Discussion: Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), when States make a determination of significant disproportionality, they must provide for the review and, if appropriate, revision of the policies, procedures, and practices used in the identification, placement or discipline of children with disabilities. The purpose of the review is to determine if the policies, practices, and procedures comply with the requirements of IDEA. The review is statutorily required by IDEA section 618(d)(2) as a consequence of a determination of significant disproportionality in an LEA.

The Department understands that not all factors contributing to a determination of significant disproportionality can be remedied through a review of policies, practices, and procedures. However, when aligned with the other remedies required in final § 300.646(c) and (d), we believe that the review of policies, practices and procedures can be a valuable tool to LEAs when addressing significant disproportionality. IDEA does not prohibit States from using remedies, other than those required in § 300.646(c) and (d), to address significant disproportionality in conjunction with those required in § 300.646.

That said, as we evaluate additional information and research in the future, we will consider whether there is further guidance or technical assistance we can provide that will make evidence-based practices available.

Changes: None.

Clarifications

Comment: One commenter asked whether, under proposed § 300.646(c)(2), an LEA must publicly report on the revision of policies, practices, and procedures if it concludes after review of its policies, practices, and procedures that no change is necessary.

Discussion: No, an LEA is not required to publicly report if no

revisions to its policies, practices, or procedures are necessary.

Changes: None.

Comments: One commenter supported the Department's clarification, in proposed § 300.646(c)(2), that LEAs must safeguard children's individual confidential information when publicly posting any revisions to policies, practices, and procedures.

Discussion: We appreciate the commenter's support for incorporating into the regulation that LEAs must safeguard children's individual confidential information when publicly posting any revisions to their policies, practices, or procedures.

Changes: None.

Comment: Another commenter requested that the Department clarify whether and how the annual review of policies, practices, and procedures are not duplicative of a one-year verification process for correcting noncompliance as required by § 300.600(e) and explained in OSEP Memorandum 09–02. The commenter stated that, as correction of noncompliance in larger LEAs generally takes up to one year, a requirement that LEAs repeat review of policies practices, and procedures the following year is duplicative.

Discussion: A State's identification of significant disproportionality within an LEA is not the same as a finding of noncompliance. An LEA identified with significant disproportionality is not necessarily out of compliance with IDEA; rather, the significant disproportionality is an indication that the policies, practices, and procedures in the LEA warrant further attention. If an LEA is identified with significant disproportionality, the State must provide for review and, if appropriate, revision of policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure they comply with the requirements of IDEA. If the State identifies noncompliance with a requirement of IDEA through this review, the State must ensure, in accordance with § 300.600(e), that the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. As explained in OSEP Memorandum 09–02 when verifying the correction of identified noncompliance, the State must ensure that the LEA has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA and the State determines that the LEA is correctly implementing the

specific regulatory requirement(s) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system. If in a subsequent year, the LEA continues to be identified with significant disproportionality, the State must continue to provide for a review of policies, practices, and procedures to determine if there is any new or continuing non-compliance with IDEA. The fact that an LEA was previously identified with noncompliance through the review process does not relieve the State of its responsibility to conduct an annual review of the LEA's policies, practices, and procedures. We note that while IDEA section 618(d)(2)(A) requires that States provide for the review of policies, practices, and procedures, the State may select another entity, such as the LEA, to actually conduct the review.

Changes: None.

V. Expanding the Scope of Comprehensive Coordinated Early Intervening Services (§ 300.646(d))

Use of Comprehensive CEIS for Specific Populations

Comments: Most commenters supported proposed § 300.646(d)(2), which would expand the population of children who can be served with IDEA Part B funds reserved for comprehensive CEIS to include children with disabilities and children ages three through five, with and without disabilities. One commenter provided a legal argument supporting the Department's interpretation of IDEA to allow the use of comprehensive CEIS to serve children with disabilities and children ages three through five. The commenter argued that canons of statutory construction support the Department's position. Further, the commenter added that the proposed flexibility ensures that an LEA can address the significant disproportionality in ways appropriate to the context. The commenter also stated that the flexibility to serve children with disabilities recognizes that these children have the potential to develop behavioral needs if their disability is misidentified, if their placement is inappropriate, or if they receive inappropriate behavioral assessments and plans. Another commenter noted that the expansion of comprehensive CEIS removes a source of inequity in previous interpretations, in which the very children treated disproportionately could not be the beneficiaries of comprehensive CEIS. One commenter argued that providing comprehensive CEIS only to non-

disabled children is unlikely to address significant disproportionality in the discipline of children with disabilities.

Most commenters supported the use of funds reserved for comprehensive CEIS for children with disabilities and preschool children ages three through five, with and without disabilities. Some of these commenters elaborated on their reasons for supporting § 300.646(d)(2), noting that research on early intervention shows that it improves outcomes and reduces disproportionality. One noted that the existing requirement that comprehensive CEIS funds be used only for non-disabled children was a disincentive to change inappropriate practices in special education. Another commenter noted that the change would make clear that children with disabilities can participate in whole-school programs meant to address disproportionality, and a few stated that the change would be consistent with the September 14, 2015, statement by Federal agencies on including children with disabilities in early childhood programs. U.S. Department of Education & U.S. Department of Health and Human Services, 2015.

Discussion: We appreciate the commenters' support for the proposal, and agree that the expansion of comprehensive CEIS to include children with disabilities and children ages three through five, with and without disabilities, is consistent with IDEA section 618(d) (20 U.S.C. 1418(d)) and will help LEAs to better address significant disproportionality.

Changes: None.

Comments: Several commenters argued that the Department lacks the authority to expand the population that can be served with IDEA Part B funds reserved for comprehensive CEIS under IDEA. In particular, they argued that proposed § 300.646(d)(2) is inconsistent with IDEA because IDEA section 613(f) (20 U.S.C. 1413(f)) allows LEAs to voluntarily reserve IDEA Part B funds to provide coordinated early intervening services only to children in kindergarten through grade 12 who have not been identified as needing special education and related services.

These commenters also noted that proposed § 300.646(d)(2) represents a change in the Department's position. The commenters pointed out that OSEP Memorandum 08–09, dated July 28, 2008, stated that IDEA section 613(f) permits "IDEA funds for CEIS for children in kindergarten through grade 12 . . . who are not currently identified as needing special education or related services" The commenters also pointed out that the Department's

preamble to the 2006 IDEA Part B regulations, in discussing current § 300.226, stated that early intervening services “are for children who are not currently identified as needing special education or related services.” 71 FR 46626 (August 14, 2006).

Discussion: We disagree that the Department lacks the authority to permit LEAs identified with significant disproportionality to use IDEA Part B funds reserved for comprehensive CEIS to serve children with disabilities and preschool children ages three through five, with and without disabilities. We acknowledged in the NPRM that the Department has previously interpreted the terms “CEIS” and “comprehensive CEIS” to apply to children in kindergarten through grade 12 who are not currently identified as needing special education and related services but who need additional academic and behavioral support to succeed in a general education environment. (81 FR 10979)

The Department proposed to change its interpretation in a proper and legally permissible manner. Under IDEA section 607(a) (20 U.S.C. 1406(a)), the Secretary has the authority to issue regulations to the extent regulations are necessary to ensure compliance with the requirements of Part B of IDEA. Based on information in the 2013 GAO report, comments received in response to the June 2014 request for information expressing concern about the effectiveness of comprehensive CEIS, and the Department’s experience over the last twelve years in implementing IDEA section 618(d) (20 U.S.C. 1418(d)), the Department believes that these changes are necessary to ensure that the statutory remedies are implemented in a manner that meaningfully addresses any significant disproportionality identified.

Our proposal to change our interpretation was based on careful review of the statutory language and legislative history of the significant disproportionality provision in IDEA section 618(d) (20 U.S.C. 1418(d)).

Under IDEA section 613(f) (20 U.S.C. 1413(f)), an LEA may voluntarily reserve up to 15 percent of its IDEA Part B funds to provide coordinated early intervening services to students in kindergarten through grade 12 who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment (K–12 children). IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) provides that in a case of a determination of significant disproportionality, an LEA must reserve the maximum amount of funds under

section 613(f) (15 percent of its IDEA Part B funds) to provide “comprehensive” CEIS to serve children in the LEA, particularly children in those groups that were significantly overidentified. Congress did not define “comprehensive,” nor did it explain how “comprehensive CEIS” in IDEA section 618(d) differs from the “CEIS” in IDEA section 613(f). Congress’ inclusion of the term “comprehensive” in one provision and not the other creates an ambiguity. Therefore, the Department has the authority to interpret the term “comprehensive CEIS.”

We believe that this interpretation is consistent with the legislative history of this provision, which indicates that in prior versions of the bills, the House used the phrase “comprehensive coordinated prereferral support services” in section 618(d) and section 613(f) and that the Senate version did not include any provision for using section 613(f) funds for CEIS in section 618(d)(2)(B) but did use the phrase “coordinated, early intervening educational services” in section 613(f). In the final conference bill and enacted statute, however, without a clear explanation, Congress used “comprehensive” to describe CEIS only in section 618(d)(2)(B)—omitting the term from section 613(f).

We also believe that our interpretation, under final § 300.646(d), is reasonable given the purpose of the statutory remedies in IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)). Other commenters, both to the NPRM and to the June 2014 request for information, agreed and noted that States currently cannot use IDEA Part B funds reserved for comprehensive CEIS to provide services to children with disabilities, even if they were in the groups with significant disproportionality in identification, placement, and disciplinary removal. In other words, it is difficult for the very children whose significant disproportionality gives rise to the requirement to provide comprehensive CEIS to directly benefit from comprehensive CEIS.

It is our intent that § 300.646(d) improve comprehensive CEIS as a remedy for significant disproportionality. For example, as we noted in the NPRM, providing comprehensive CEIS to preschool children may help LEAs to address significant disproportionality in identification by allowing funds reserved for comprehensive CEIS to be used to provide more timely supports and services to younger children. For example, an LEA identified with significant disproportionality might use

IDEA Part B funds reserved for comprehensive CEIS to implement universal screening to better identify and support children with developmental delays before they enter kindergarten. These activities will also assist in ensuring that children with disabilities in the LEA are appropriately identified.

Further, as we noted in the NPRM, providing comprehensive CEIS to children with disabilities is more likely to address significant disproportionality in placement and discipline by allowing LEAs to directly improve the supplementary aids and services and positive behavioral interventions and supports provided to children with disabilities. We believe that final § 300.646(d)(2) is, therefore, consistent with the purpose of the statutory remedies, which is to reduce significant disproportionality.

Section 300.646(d)(2) does not address voluntary CEIS, implemented under IDEA section 613(f) (20 U.S.C. 1413(f)) and IDEA Part B funds an LEA voluntarily reserves for CEIS must be used to serve students in kindergarten through grade 12 who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

Changes: None.

Comments: Some commenters did not support the expansion of comprehensive CEIS to preschool children with or without disabilities. Some of these commenters stated that comprehensive CEIS was unproven and ineffective and that “more of the same” does not make for good public policy. Others took a broader view, stating that disproportionality in race and ethnicity has many causes beyond the ability of schools and LEAs to solve, such as poverty, drug abuse, incarceration, and the disproportionality of adverse childhood experiences among children of color. Expanding the use of comprehensive CEIS funds, some of these commenters stated, cannot address these causes, and, therefore, redirecting IDEA funds to comprehensive CEIS is unfair to the LEAs and the children who stand to lose the use of, and services funded by, the money diverted. Some commenters noted that, generally, comprehensive CEIS would negatively impact LEAs, especially small LEAs, by adversely impacting their ability to provide for the needs of children with disabilities.

Discussion: We understand that disproportionality is deeply complicated and that many social and societal causes may contribute to racial

disparities in special education. Nonetheless, the Department has an obligation to work within the statutory framework in IDEA and with the tools it provides.

The Department recognizes that providing comprehensive CEIS will not, by itself, eliminate all causes of racial and ethnic disproportionality and that LEAs cannot reach all of the causes of disproportionality. There are, however, causes of significant disproportionality that LEAs can address and effects that LEAs can mitigate. It is our intention that, in implementing final § 300.647(d)(1)(ii), an LEA will identify and address the factors that contribute to the significant disproportionality by carrying out activities that LEAs typically conduct, such as providing services and supports to students or professional development to staff.

We do not regard using comprehensive CEIS funds to identify and address factors contributing to the significant disproportionality and allowing LEAs to provide comprehensive CEIS to preschool children and children with disabilities as “more of the same.” Previously, IDEA’s implementing regulations did not require LEAs to identify and address factors contributing to the significant disproportionality as part of their implementation of comprehensive CEIS. In addition, we believe allowing LEAs to use funds reserved for comprehensive CEIS to serve children with disabilities is more likely to address significant disproportionality in placement and discipline. For example, as one commenter suggested, if LEAs can use IDEA Part B funds reserved for comprehensive CEIS to implement a schoolwide program to address problems in discipline and serve both children with and without disabilities, then significant disproportionality in discipline may be reduced or eliminated. Similarly, using funds reserved for comprehensive CEIS to serve preschool children, where their needs can be assessed and addressed early, is likely to address significant disproportionality in the identification of children with disabilities.

Based on its identification of the factors contributing to the significant disproportionality, an LEA may use IDEA Part B funds reserved for comprehensive CEIS to provide a targeted array of services and supports to address those factors, including professional development and educational and behavioral evaluations, services and supports in both the general and special education population. Section 300.646(d) underscores the importance of allowing

an LEA to determine which factors contribute to a determination of significant disproportionality and how to effectively target IDEA Part B funds reserved for comprehensive CEIS to address those factors.

It is important to note that while States are required to include preschool children in the State’s determination of significant disproportionality related to discipline and to identification (beginning July 1, 2020), final § 300.646(d)(2) allows, but does not require, LEAs to provide comprehensive CEIS to preschool children, with or without disabilities (unless, under § 300.646(d)(1)(ii), a State determines that there is significant disproportionality in an LEA, and the LEA determines that providing comprehensive CEIS to preschool children is necessary to address the factors contributing to the disproportionality).

Change: None.

Comments: One commenter recommended that the Department revise proposed § 300.646(d)(3) to limit the use of comprehensive CEIS for children with disabilities to an established proportion, set by the Department and based on an evidence-based determination of the relative advantages of (1) early intervention to prevent disparities in disability identification and (2) subsequent interventions to address disparities in placement and disciplinary removal.

Discussion: While we agree with the commenter that apportioning funds reserved for comprehensive CEIS based, in part, on the expectation that specific uses will lead to reducing significant disproportionality in the area or areas in which the LEA is identified, we do not believe it would be appropriate to set a single, national percentage of funds to be dedicated to each allowable activity under comprehensive CEIS. Those decisions are best made by LEAs based on determining the best ways to address the specific issues that face each LEA, in accordance with final § 300.646(d)(1)(ii). Therefore, we decline to make this change.

Further, under final § 300.646(d)(3), an LEA may not limit the provision of comprehensive CEIS to children with disabilities. Therefore, an LEA must use some of the funds reserved for comprehensive CEIS to serve children who are not currently identified as needing special education and related services, but who need additional academic and behavioral support to succeed in a general education environment. However, we decline to limit the amount of comprehensive CEIS funds an LEA may use to serve children

with disabilities because we want to give each LEA the flexibility to determine the amount of funds it will use for children with disabilities based on its analysis of the factors contributing to significant disproportionality in the LEA.

Change: None.

Comments: Some commenters, stating both that IDEA is underfunded and that there is a possibility of additional reservations of IDEA Part B money for comprehensive CEIS, argued that IDEA funds should be used primarily or exclusively for children with disabilities, not children without disabilities. One of the commenters suggested an amendment to the language at § 300.646(d)(3) which prohibits LEAs from providing comprehensive CEIS solely to children with disabilities.

Discussion: We understand these comments to refer to proposed § 300.646(d)(3), which prohibits LEAs from providing comprehensive CEIS solely to children with disabilities. As we explained in the NPRM at 81 FR 10986, recognizing the statutory emphasis on providing early behavioral and academic supports before a child is identified, we believe allowing LEAs to provide comprehensive CEIS only to children with disabilities works directly against the aims and intentions of IDEA. For example, limiting comprehensive CEIS solely to children with disabilities would prohibit an LEA from providing early behavioral and academic supports and services to children before they are identified as having a disability, which is one way to reduce significant disproportionality in the identification of children as children with disabilities. Limiting comprehensive CEIS solely to children with disabilities would prohibit an LEA from using IDEA Part B funds reserved for comprehensive CEIS to implement a schoolwide program to address problems in discipline, which is one way to reduce significant disproportionality in discipline. Therefore, the Department declines to revise § 300.646(d)(3) to allow LEAs to provide comprehensive CEIS solely to children with disabilities.

Under final § 300.646(d)(1)(ii), LEAs would have to use IDEA Part B funds reserved for comprehensive CEIS to identify and address the factors contributing to the significant disproportionality identified by the State. Nothing in the regulations prohibits an LEA from providing comprehensive CEIS primarily, but not exclusively, to children with disabilities.

Changes: None.

Comments: One commenter noted that the prohibition in proposed § 300.646(d)(3) on using comprehensive CEIS funds solely for children with disabilities does not make sense in the context of placement in a restrictive educational setting because only children with disabilities who have IEPs are subject to this kind of placement.

Discussion: We agree that final § 300.646(d)(3) prohibits an LEA identified with significant disproportionality in placement from using comprehensive CEIS funds solely to provide comprehensive CEIS to children with disabilities. However, we note that, in many instances, circumstances in the LEA that may give rise to disproportionate placement in segregated settings may have an impact on children with and without disabilities. We encourage LEAs that are identified with significant disproportionality to closely examine their policies, practices, and procedures to identify the root causes of their disproportionality and target their use of funds reserved for comprehensive CEIS to address those causes. There are appropriate ways that an LEA identified with significant disproportionality related to placement may use IDEA Part B funds reserved for comprehensive CEIS for children without disabilities. For example, an LEA may provide professional development to regular education teachers on the supports that they can provide to enable a child with a disability to be educated in the regular class and participate in extracurricular and other nonacademic activities with nondisabled children. We understand some LEAs may find that there are a number of children without disabilities who are impacted by the same root cause in other ways and could also benefit from the funding.

Changes: None.

Comments: One commenter objected on practical grounds to proposed § 300.646(d)(2) and the use of comprehensive CEIS funds for preschool children. The commenter indicated that, in some States, the range of possible placements for preschool children with disabilities includes settings where the State does not have general supervision authority to regulate discipline procedures or practices or require data reporting.

Discussion: We appreciate the commenter's concern and note that under final § 300.646(d)(2), an LEA may, but is not required to, use funds reserved for comprehensive CEIS for children ages three through five.

Separately, we note that under IDEA section 612(a), a State must make FAPE available to all eligible children with

disabilities residing in the State, including children with disabilities aged three through five, and in some States, two year old children who will turn three during the school year. Thus, all of the requirements in Part B of IDEA apply equally to all preschool children with disabilities. The SEA must ensure that a child with a disability, including a preschool child, who is placed in or referred to a private school or facility by a public agency is provided special education and related services in conformity with his or her IEP and at no cost to the parents; is provided an education that meets the standards that apply to education provided by the SEA and LEAs, including the requirements of IDEA; and has all of the rights of a child with a disability who is served by a public agency. (See, 34 CFR 300.146.)

Changes: None.

Funding Comprehensive CEIS

Comment: A number of commenters indicated that IDEA has never been fully funded, and a few of these commenters stated that they could not support proposed § 300.646(d) until Federal funding under Part B of IDEA is increased. Commenters stated that, as current IDEA funding only covers a fraction of special education's high total cost, some LEAs choose to devote the full amount of their Federal dollars to special education.

Discussion: The Department understands the concern about reserving IDEA Part B funds to provide comprehensive CEIS when IDEA is not funded at the maximum level allowed under IDEA section 611(a)(2)(B). However, under IDEA section 618(d) (20 U.S.C. 1418(d)), an LEA found to have significant disproportionality based on race or ethnicity must reserve 15 percent of its IDEA B funds for comprehensive CEIS while continuing to properly identify children in need of special education and related services and to provide them with a FAPE in accordance with the requirements of IDEA and its implementing regulations. Under IDEA sections 612(a)(11) and 616(a)(1)(C) (20 U.S.C. 1412(a)(11) and 1416(a)(1)(C)), the State must conduct monitoring activities to ensure that all LEAs meet these statutory requirements.

Changes: None.

Comment: Some commenters opposed proposed § 300.646(d), concerned that it would result in LEAs reserving more money for comprehensive CEIS. This, these commenters stated, may or may not address significant disproportionality but would create hardships for children with disabilities and their teachers and staff, such as reduced services and the inability to

hire special education teachers and other support staff. Other commenters noted that some LEAs already struggle to support the needs of children with disabilities. One commenter noted that any reduction in funding for special education services would be harmful, due to increases in the number of children identified with autism.

Discussion: The Department appreciates the commenters' concerns and recognizes that LEAs function within challenging funding environments. However, regardless of IDEA funding levels, States must comply with all IDEA requirements, including the requirements related to significant disproportionality.

Under IDEA section 618(d) (20 U.S.C. 1418(d)), an LEA found to have significant disproportionality based on race or ethnicity must reserve 15 percent of its IDEA B funds for comprehensive CEIS. Under § 300.646(d)(1)(ii), in implementing comprehensive CEIS, the LEA must identify and address the factors contributing to the significant disproportionality. We acknowledge that the provision of comprehensive CEIS has the potential to benefit both special education and general education. However, we emphasize that the LEA has the flexibility to determine, based on its identification of factors contributing to the significant disproportionality identified in the LEA, which activities will be funded using IDEA Part B funds reserved for comprehensive CEIS.

Changes: None.

Comment: Some commenters noted that ESEA, rather than IDEA, is the most appropriate mechanism for providing children not yet identified with disabilities with support and that IDEA is not the appropriate vehicle for addressing significant disproportionality. These commenters also stated that other Federal funds, such as those made available through title I of the ESEA, as amended, should also be used to provide comprehensive CEIS.

Discussion: The Department supports the flexible use of Federal funds, particularly in the area of school-wide reforms, as long as the Federal funds are used in accordance with applicable requirements. To that end, we issued guidance on maximizing flexibility in the administration of Federal grants. OESE Letter to State Directors (September 13, 2013).

Further, we note that section 613(f)(5) of IDEA states that funds an LEA voluntarily reserves for CEIS may be used to carry out services aligned with activities funded by, and carried out

under, ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for those activities. Thus, if IDEA funds an LEA voluntary reserves for CEIS, or is required to reserve for comprehensive CEIS, do not supplant ESEA funds, they may be used to supplement school improvement activities conducted under other programs, such as title I, that are being implemented in an LEA. See, IDEA section 613(f)(5) (20 U.S.C. 1413(f)(5)); OSEP Memorandum 08–09 (July 28, 2008).

That said, however, the Department does not have the authority to require the reservation of funds under the ESEA pursuant to a determination of significant disproportionality under IDEA unless specified in law.

Changes: None.

Comments: A number of commenters objected to proposed § 300.646(d), which would require an LEA, upon a determination of significant disproportionality by the State, to reserve 15 percent of its IDEA Part B funds, the “maximum amount of funds under section 613(f),” for comprehensive CEIS. These commenters argued that the requirement is rigid and unnecessarily redirects money from children with disabilities. The commenters suggested a variety of alternatives to requiring reservation of IDEA Part B funds to address significant disproportionality.

Some commenters suggested limiting the requirement for reserving 15 percent of IDEA Part B funds to only those circumstances in which a State finds an LEA uses discriminatory policies, practices, and procedures in implementing IDEA. Some commenters suggested taking the 15 percent from unspecified administrative costs or sources other than IDEA Part B funds. Others suggested that LEAs found with significant disproportionality be required to create remediation plans that may include reserving IDEA Part B funds for comprehensive CEIS. Still others suggested allowing LEAs to remedy significant disproportionality using whatever percentage of IDEA funds (up to 15 percent) is appropriate to the circumstances and the interventions needed. One commenter suggested that the Department provide an exemption from the 15 percent mandate for LEAs that already remedy significant disproportionality effectively. Another encouraged the Department to approach the regulation by providing supports, rather than administering punitive action, such as providing additional funds and support to LEAs with disproportionate disciplinary actions and identification

methods, since the root cause of disproportionality is an under-informed or under-resourced work force. A few commenters suggested eliminating the 15 percent mandate altogether or to allow Congress to address the issue in the next reauthorization of IDEA.

Discussion: We appreciate both the range of ideas suggested and the difficulties that reserving 15 percent of IDEA Part B funds may cause LEAs. Nevertheless, the language of IDEA section 618(d)(2)(B) is explicit: “the State shall . . . require” any LEA identified with significant disproportionality “to reserve the maximum amount of funds under section 613(f) to provide” comprehensive CEIS to serve children in the LEA. Under section 613(f)(1), the maximum amount that can be reserved is 15 percent of the amount of IDEA Part B funds the LEA receives for any fiscal year. Therefore, the Department lacks the authority either to vary the amount that must be reserved or to eliminate the requirement altogether.

Further, each LEA, in implementing comprehensive CEIS, may carry out activities that include professional development, behavioral evaluations, hiring reading or math specialists or providing other supports and services that the LEA has determined will address the factors contributing to the significant disproportionality. In addition, under certain conditions, comprehensive CEIS funds may be used in combination with funds available under title I to supplement school improvement activities that are being implemented in the LEA to address an “under-informed and under-resourced” work force, as long as IDEA funds and ESEA funds are used in accordance with applicable program requirements. See, OESE Letter to State Directors (September 13, 2013).

Changes: None.

Comments: A few commenters asked whether funds for providing comprehensive CEIS to preschool children under proposed § 300.646(d)(2) would have to come from funds awarded to an LEA under IDEA Part B section 611, IDEA section 619, or both.

Discussion: Neither the final regulations nor IDEA specify the specific source of funding (section 611 or section 619) from which an LEA is required to reserve funds if it is determined that said LEA has significant disproportionality. While the amount of the 15 percent reservation must be calculated on the basis of both the LEA’s section 611 and 619 allocations, LEAs retain full flexibility regarding whether they actually take the reservation from section 611 funds,

section 619 funds, or both. LEAs also retain this flexibility regardless of the age of the children receiving comprehensive CEIS.

Changes: None.

Comment: None.

Discussion: When an LEA is identified as having significant disproportionality, it is required to reserve funds for the provision of comprehensive CEIS. This requirement is, clearly, an LEA-level requirement. Each LEA is required to maintain documentation that 15 percent of its IDEA Part B funds were reserved for that purpose and that those funds were used to support allowable activities under § 300.646(d). However, an LEA does have flexibility in how these funds are allocated within the LEA how these funds are expended. Nothing in these regulations prevents an LEA from distributing funds reserved for comprehensive CEIS to its schools to carry out activities authorized under final § 300.646(d), nor are there requirements for the process an LEA must use when deciding how to allocate those funds if they choose to do so. As such, if an LEA determines that it is best able to address the root cause of the identified significant disproportionality by providing a portion of its reserved funds to a particular subset of schools to support comprehensive CEIS activities, it is permitted to do so under these regulations, so long as it ensures that those funds are expended in accordance with final § 300.646(d). Under § 300.202(a)(1), an LEA must expend IDEA Part B funds in accordance with the applicable provisions of Part B. Under 34 CFR 76.731, an LEA must keep records to show its compliance with program requirements. Therefore, an LEA must maintain documentation to demonstrate that it expended IDEA Part B funds reserved for comprehensive CEIS in accordance with final § 300.646(d).

In a growing number of LEAs nationwide, schools are implementing the flexibilities provided under ESEA section 1114(b) to consolidate Federal funds in a schoolwide program. Section 300.206(a) makes clear that IDEA Part B funds may be consolidated in such a school and instructs States and LEAs how to calculate the amount of funds that may be used for this purpose. Further, § 300.206(b)(1) and (2) provide that these funds must be considered Federal Part B funds for the purposes of calculating LEA MOE and excess cost under § 300.202(a)(2) and (3), and that these funds may be used without regard to the requirements of § 300.202(a)(1). Regardless, the LEA is still responsible for meeting all other requirements of

IDEA Part B, including ensuring that children with disabilities in schoolwide program schools “[r]eceive services in accordance with a properly developed IEP [individualized education program]” and “[a]re afforded all of the rights and services guaranteed to children with disabilities under the Act [IDEA].” See, § 300.206(c)(1) and (2).

LEAs are not prohibited from providing funds reserved for comprehensive CEIS to schools operating a schoolwide program. Further, the requirement to reserve funds for comprehensive CEIS does not override the flexibilities described in § 300.206. Instead, LEAs are only required to ensure that any school operating a schoolwide program to which it provides funds for comprehensive CEIS is able to appropriately document that at least the amount of funds provided to the school for that purpose were so expended. For example, if an LEA provides \$100 of the funds it has reserved for comprehensive CEIS to a school implementing a schoolwide program, that school is not required to separately track and account for those funds if it is otherwise consolidating IDEA Part B funds. Instead, the LEA would only need to ensure that it can document that the school spent at least \$100 on allowable activities under comprehensive CEIS. It is not required to demonstrate that the school expended \$100 of IDEA Part B funds. We believe that this interpretation of the applicable statutes and regulations provide maximum flexibility to both schools and LEAs in implementing both title I schoolwide programs and comprehensive CEIS.

Changes: None.

Implications for IEPs

Comments: Many commenters responded to the Department’s Directed Question #12, which sought comments on whether additional restrictions, beyond the requirement in § 300.646(d) to use comprehensive CEIS to identify and address the factors contributing to significant disproportionality, on the use of comprehensive CEIS funds, are appropriate for children who are already receiving services under Part B of IDEA. Most commenters objected to any restriction of how comprehensive CEIS funds should be used for children already receiving services under Part B of IDEA. Instead, these commenters discussed the many supports and services where comprehensive CEIS could be used to enhance student progress. For example, some suggested that the funds be used to provide functional behavioral assessments (FBAs) and behavioral intervention

plans (BIPs). Additionally, the commenters noted that comprehensive CEIS funds could be used to train key personnel on how to develop effective FBAs and BIPs or other instructional supports. Some of these commenters stated that local officials are best positioned to say how comprehensive CEIS funds should be used and that they should not be limited in their choices in how to address significant disproportionality.

Discussion: We appreciate the concerns expressed by the commenters and note that the services and activities they mention—training and professional development on effective FBAs and BIPs, a review of behavioral intervention and supports included in IEPs, positive behavioral interventions and supports, multi-tiered systems of supports—are all permitted under § 300.646(d)(1)(i) (“An LEA may carry out activities that include professional development and educational and behavioral evaluations, services, and supports . . .”). These services and activities are also permitted under § 300.646(d)(1)(ii) to the extent that they address factors that the LEA has identified as contributing to the significant disproportionality identified in the LEA. We agree that local officials should have the flexibility and discretion to decide how comprehensive CEIS funds are best allocated and spent.

Under proposed § 300.646(d)(1)(ii), the LEA must use comprehensive CEIS funds to address factors contributing to the significant disproportionality identified by the State. These factors may include, as enumerated in proposed § 300.646(d)(1)(ii), a lack of access to scientifically based instruction and economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings, including disciplinary removals. This requirement is fundamental to the use of comprehensive CEIS funds, and it carries with it a practical limitation: An LEA may use comprehensive CEIS funds for training and professional development and behavioral evaluations and supports, such as FBAs, BIPs, and positive behavioral interventions and supports, but only to the extent that it is doing so to address the factors identified by the LEA as contributing to the significant disproportionality identified by the State. Therefore, if comprehensive CEIS funds are used to provide services that address factors contributing to the significant disproportionality identified by the State, then the fact that those services are also identified in some children’s IEPs does not make the services

impermissible or the expenditures improper. Conversely, however, we generally would not expect that using comprehensive CEIS funds for the purpose of providing services already identified on a child’s IEP would address factors contributing to the significant disproportionality identified by the State, as is required by proposed § 300.646(d).

Changes: None.

Comment: One commenter asked for further explanation about how including children with disabilities within the scope of comprehensive CEIS under proposed § 300.646(d)(2)(ii) would affect services provided to these children in accordance with their IEPs. The commenter stated that, if a child is receiving services under an IEP, then receiving comprehensive CEIS is “contradictory.” In particular, the commenter asked whether the provisions guaranteeing FAPE to a child with disabilities takes precedent over provisions governing comprehensive CEIS, who decides which services a child gets, and whether proposed § 300.646(d) created a two-tiered system of services that could treat some children unfairly.

Discussion: We believe that the commenter’s concerns conflate the obligation to provide FAPE to a child with disabilities and the obligation to reserve 15 percent of IDEA Part B funds upon a finding by the State of significant disproportionality.

To begin with, it is optional under final § 300.646(d)(2) for an LEA to use IDEA Part B funds reserved for comprehensive CEIS to serve children with disabilities. If an LEA chooses to do so, this in no way affects any child’s entitlement to a FAPE.

In implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality identified by the State. As we stated earlier, these services may, but do not necessarily, overlap with services identified on a child’s IEP, given that we generally would not expect that using funds reserved for comprehensive CEIS to provide services already identified on a child’s IEP would address factors contributing to the significant disproportionality identified by the State. The fact that services provided as comprehensive CEIS may in some cases overlap with services already identified on a child’s IEP does not relieve the LEA of its responsibility to ensure that all of the special education and related services and supplementary aids and services identified on a child’s IEP are provided to that child in accordance with his or her IEP. There is no

contradiction, no displacement of IEP services by comprehensive CEIS services, and no “two-tier” system created.

To the extent that the commenter is concerned about there being insufficient Part B funds to fund services to children with disabilities if 15 percent of an LEA’s IDEA Part B funds are reserved for comprehensive CEIS, we address that issue under *Use of Comprehensive CEIS for Specific Populations* elsewhere in this document.

Implications for LEA Maintenance of Effort (MOE)

Comment: A few commenters asked whether extending comprehensive CEIS to children with disabilities would increase LEA maintenance of effort (MOE) expenditures under § 300.203. Several commenters indicated that they did not support these regulations because it could increase the amount of local, or State and local, funds an LEA would be required to expend for the education of children with disabilities to meet the LEA MOE requirement in subsequent years including years in which an LEA is no longer identified with significant disproportionality.

For example, one commenter wrote that if an LEA shifts special education spending from its Part B funds to local funds in order to meet its obligation to set aside 15 percent of its Part B funds for comprehensive CEIS, its local MOE expenditure increases. However, when the LEA is no longer identified with significant disproportionality, the LEA can’t subsequently reduce its local MOE expenditures. Further, to ensure that LEAs maintain their local expenditures in case of a year-over-year reduction in IDEA, Part B allocation, some commenters requested that the Department require that the maximum amount of funds available for comprehensive CEIS be reduced by the reduction in the subgrant. Similarly, another commenter noted that, given that IDEA is underfunded, the regulation would force LEAs to pass tax increases so that local funds could support the regulation. Other commenters expressed that, since special education must be provided regardless of Federal funding, LEAs will be forced to use State and local funds to backfill 15 percent used for comprehensive CEIS.

Discussion: Using IDEA Part B funds reserved to provide comprehensive CEIS for children with disabilities may, but does not necessarily, affect the amount of local, or State and local funds, an LEA must expend to meet the MOE requirement in § 300.203.

Generally, under § 300.203(b), an LEA may not reduce the amount of local, or State and local, funds that it spends for the education of children with disabilities below the amount it spent from the same source for the preceding fiscal year. The calculation is based only on local, or State and local—not Federal—funds.

We understand that when an LEA identified with significant disproportionality is required to use 15 percent of its IDEA Part B funds for comprehensive CEIS, it should consider the effect that decreasing the available IDEA Part B funds might have on the amount of local or State and local funds an LEA must expend to meet the LEA MOE requirement. As one commenter noted, if under § 300.646(d) an LEA is required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS after a determination of significant disproportionality, it may choose to use local, or State and local, funds to provide special education and related services to children with disabilities to replace IDEA Part B funds used to provide comprehensive CEIS. If that is the case, then the higher level of local, or State and local, expenditures for the education of children with disabilities becomes the LEA’s new required level of effort for the subsequent year.

The effect would be the same under prior § 300.646 if, after a finding of significant disproportionality, an LEA reserved 15 percent of its IDEA Part B funds for comprehensive CEIS and increased by 15 percent the amount of local, or State and local, funds it used to provide special education and related services to children with disabilities.

In short, § 300.646(d) makes no changes to the regulations governing LEA MOE.

We note that an LEA identified with significant disproportionality will not be able to take advantage of the LEA MOE adjustment that would otherwise be available under § 300.205 because of the way that the MOE adjustment provision and the authority to use Part B funds for CEIS are interconnected. As a result, no matter how much is available for comprehensive CEIS or for the MOE adjustment, an LEA that is required to reserve the maximum 15 percent of its Part B allocation for comprehensive CEIS will not be able to use § 300.205(a) to reduce its MOE obligation.

Appendix D to part 300 of the Code of Federal Regulations sets out a number of examples for the basic calculation. We provide the following example involving practical applications over multiple fiscal years.

Generally, an LEA may reserve IDEA Part B funds that it is required to reserve for comprehensive CEIS either from the funds awarded for the Federal fiscal year (FFY) following the date on which the State identified the significant disproportionality or from funds awarded from the appropriation for a prior FFY. For example, State X uses data on identification collected for school year 2015–2016, which is reported in April 2016, to make a determination in February 2017 that LEA Y has significant disproportionality related to identification and therefore must set aside 15% of its IDEA Part B funds for comprehensive CEIS. The State makes this determination before FFY 2017 funds become available on July 1, 2017. The LEA has the following three options. The LEA may set aside: (1) 15 percent of the funds that the LEA receives from its FFY 2017 IDEA Part B allocation (available for obligation from July 1, 2017, through September 30, 2019); (2) 15 percent of the funds that the LEA received from its FFY 2016 IDEA Part B allocation (available for obligation from July 1, 2016, through September 30, 2018); or (3) 15 percent of the funds that it received from the FFY 2015 IDEA Part B allocation (available for obligation from July 1, 2015 through September 30, 2017) only if the LEA did not use the adjustment to reduce its required level of effort in the fiscal year covering school year (FY) 2015–2016 under § 300.205.

If an LEA selects option 1, the LEA will not be able to use the adjustment to reduce its required level of effort under § 300.205 in FY 2017–2018.

If an LEA selects option 2, the LEA will not be able to use the adjustment to reduce its required level of effort under § 300.205 in FY 2016–2017.

An LEA can only select option 3 if the LEA did not use the adjustment in § 300.205 to reduce its required level of effort in FY 2015–2016. Because FY 2015–2016 would have ended at the time the LEA is identified with significant disproportionality in February 2017, the LEA would already know whether it used the adjustment in § 300.205 to reduce its required level of effort in FY 2015–2016, and if it had done so, could not use its FFY 2015 IDEA Part B funds to provide comprehensive CEIS because of the way the MOE adjustment provision and the authority to use IDEA Part B funds for comprehensive CEIS are interconnected.

Information describing the actions that States and LEAs must take to meet MOE requirements and answers to frequently asked questions about LEA MOE can be found at www2.ed.gov/about/offices/list/osep/policy.htm.

(See, OSEP Memorandum 08–09, Coordinated Early Intervening Services (CEIS) under Part B of the Individuals with Disabilities Education Act (IDEA) dated July 28, 2008, response to Question #23.)

Changes: None.

Comment: Some commenters indicated that an expansion of the allowable uses of comprehensive CEIS to include K–12 children with disabilities and preschool children with and without disabilities would cause a significant increase in the burden associated with the Department's IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection. Others suggested that the Department will have to expand this data collection to account for the additional children served by, and for the funds spent on, comprehensive CEIS. Some commenters suggested that the Department require States to submit data on CEIS expenditures, disaggregated to show spending related to identification, placement, and disciplinary removals.

Discussion: Current § 300.226(d) requires each LEA that implements CEIS to report to the State on the number of children who received CEIS and the number of those children who subsequently received special education and related services under Part B during the preceding two-year period (*i.e.*, the two years after the child has received CEIS). 71 FR 46540, 46628 (Aug. 14, 2006). A State's decision to provide comprehensive CEIS to children with disabilities and preschool children with or without disabilities may expand the number of children who receive CEIS and may increase the numbers reported. We are sensitive to the practical difficulties that might arise. After these regulations become final, the Department will consider what, if any, modifications to IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection may be needed to assist States and LEAs in meeting their obligations under IDEA section 613(f)(4) (20 U.S.C. 1413(f)(4)) and 34 CFR 300.226(d)). As we noted in the NPRM, after finalizing these regulations, the Department intends to provide additional guidance on relevant data collection and reporting requirements. (81 FR 10979).

Changes: None.

General Uses of Comprehensive CEIS Funds

Comments: Commenters suggested many uses for IDEA Part B funds reserved for comprehensive CEIS. These

included a wide variety of detailed suggestions for training and professional development in particular subject areas or in interventions, assessments, and forms of instruction; hiring teachers and staff with specific credentials, licenses, or experience; implementing various school-wide programs; and investing in technology.

Some of these commenters asked the Department whether comprehensive CEIS funds, when used to identify and address the factors contributing to significant disproportionality, could be “braided” with other funds.

Discussion: While the commenters suggested important uses for IDEA Part B funds reserved for comprehensive CEIS, the question of whether they are permissible uses of those funds depends upon a State's specific finding and analysis of significant

disproportionality. That is, funds reserved for comprehensive CEIS must be used in accordance with the requirements of § 300.646(d)(1)(i) and (ii). Under § 300.646(d)(1)(i), comprehensive CEIS funds may be used to carry out a broad range of activities that “include professional development and educational and behavioral evaluations, services, and supports.” Under § 300.646(d)(1)(ii), comprehensive CEIS funds must be used to identify and address factors contributing to the significant disproportionality identified by the State.

Finally, CEIS funds may be combined with other Federal funds, provided that the applicable requirements for both funding streams are met. On September 13, 2013, the Department issued guidance on maximizing flexibility in the administration of Federal grants. OESE Letter to State Directors.

Changes: None.

Comments: Some commenters supported proposed § 300.646(d)(1)(ii), which would require that in implementing comprehensive CEIS, an LEA must identify and address the factors contributing to significant disproportionality. These commenters stated that this promotes improved outcomes and a more focused use of resources and further added that the exercise of identifying and addressing contributing factors promoted better transparency and accountability when addressing significant disproportionality. Other commenters asked that the Department provide specific technical assistance to help States and LEAs to identify these factors and evidence-based practices to address significant disproportionality in the LEA. One of these commenters pointed out that there are practical limitations

on personnel and funds and, therefore, that States' ability to provide assistance to LEAs is limited. Another commenter noted that simply requiring LEAs to identify and address the factors contributing to disproportionality does not provide sufficient guidance or information for an LEA to know what those factors would be or how to bring about systems change. That commenter further noted that multiple indicators, beyond the risk ratio, might be necessary to self-assess and determine effective methods of addressing these factors. One commenter stated that, unless States are required to assist LEAs in their efforts to identify and address the factors contributing to the significant disproportionality, this portion of the § 300.646(d)(1)(ii) will be meaningless.

Discussion: We recognize the commenters' concern that LEAs would like additional guidance or information on identifying and addressing the factors that may contribute to significant disproportionality. Therefore, we have added examples such as inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality to the list of factors in § 300.646(d)(1)(ii) that may contribute to significant disproportionality. We encourage LEAs identified with significant disproportionality in identification that determine the overrepresentation of one racial or ethnic group is occurring due to under-identification of another racial or ethnic group or groups, to consider how differences in academic achievement levels may contribute to the significant disproportionality in identification.

We have also added a new § 300.646(d)(1)(iii) to clarify that as part of implementing comprehensive CEIS, an LEA must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice, or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups). An LEA has the discretion as to how to address the policy, practice or procedure, by eliminating, revising or changing how it is implemented to ensure that it does not contribute to the significant disproportionality, including that it does not result in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

In addition, the Department intends to issue guidance to provide responsible

public agencies with information to assist them in meeting their obligations under IDEA and its implementing regulations, including those provisions related to significant disproportionality. To that end, the Department maintains a technical assistance and dissemination network of services and supports that address a variety of topics. For more information, see

www.osepideasthatwork.org.

Changes: We have revised § 300.646(d)(1)(ii) to include additional factors that may contribute to significant disproportionality and added a new § 300.646(d)(1)(iii) to clarify that in implementing comprehensive CEIS, an LEA must address policies, practices, or procedures it identifies as contributing to significant disproportionality.

Comment: One commenter noted that, while administrators may choose to use Federal funding for de-leading, this type of expenditure may not be a wise use of Federal special education resources.

Discussion: While using funds reserved for comprehensive CEIS for de-leading activities is not specifically prohibited by the final regulations, it is our intention that LEAs will identify and address the factors that contribute to the significant disproportionality identified by the State by carrying out activities that LEAs typically conduct, such as providing services and supports to students or professional development to staff. We agree with the commenter that using funds reserved for comprehensive CEIS for de-leading activities may not be an effective use of IDEA Part B funds reserved for comprehensive CEIS, especially given other potential funding sources available for de-leading activities and the amount of funds that may be needed to carry out these activities. We note that under IDEA section 605 (20 U.S.C. 1404), an LEA must obtain approval from the State prior to using IDEA Part B funds for equipment, construction, or alteration of facilities. See also, 2 CFR 200.439.

Changes: None.

Implications for Voluntary Implementation of CEIS

Comments: Many commenters provided recommendations to address the low utilization rate of voluntary CEIS under IDEA section 613(f)(20 U.S.C. 1413(f)). A number of these commenters suggested that the Department should, or asked whether the Department intended to, extend voluntary CEIS to children with disabilities and children ages three through five under current § 300.226 (“voluntary CEIS”). One commenter in particular noted that this would enable

States and LEAs to provide CEIS prior to being identified for significant disproportionality and would address the current low rate of voluntary CEIS use among LEAs.

Further, commenters noted that the voluntary use of IDEA funds to provide early intervention services comes with additional reporting requirements.

Discussion: Under IDEA section 613(f) (20 U.S.C. 1413(f)), an LEA may voluntarily use up to 15 percent of its IDEA Part B funds to provide CEIS to children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment. Therefore, the Department lacks the authority to expand the population of children who can be provided voluntary CEIS under IDEA section 613(f).

As to reporting requirements, the State must report in the IDEA Part B LEA Maintenance of Effort Reduction and Coordinated Early Intervening Services data collection on the amount of IDEA Part B funds each LEA in the State voluntarily uses for CEIS and, consistent with the information each LEA must report annually to the State under § 300.226(d), the total number of children who received CEIS during the reporting period, and the number of children who received CEIS during the two school years prior to the reporting period and received special education and related services during the reporting year for each LEA. See, www.ed.gov/edfacts for further information.

Changes: None.

Comments: A few commenters, though not opposing proposed § 300.646(d)(2), noted that including children with disabilities and children from ages three through five within the scope of comprehensive CEIS, but not voluntary CEIS, could create some practical difficulties. One of these commenters noted that this would create different reporting requirements for comprehensive and voluntary CEIS. Another commenter stated that having different reporting requirements was burdensome and asked that the disparate reporting requirements be streamlined. Still another commenter noted that the different eligibility requirements for comprehensive CEIS might create budgeting, accounting, or documentation problems because voluntary CEIS funds cannot be freely substituted for comprehensive CEIS funds. Services for children with disabilities begun with funds reserved

for comprehensive CEIS, for example, could not be continued with funds reserved for voluntary CEIS, which cannot be used to provide comprehensive early intervening services to preschool children.

Discussion: We are sensitive to the practical difficulties that might arise from the differences between comprehensive and voluntary CEIS. As part of the Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection, States must report data submitted by LEAs, pursuant to IDEA section 613(f)(4) and § 300.226(d), including the total number of children who received CEIS during the reporting period, and the number of children who received CEIS during the two school years prior to the reporting period and received special education and related services during the reporting year.

After these regulations become final, the Department will consider what, if any, modifications to the Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection may be needed to assist States and LEAs in meeting their obligations under IDEA section 613(f)(4) (20 U.S.C. 1413(f)(4)) and § 300.226(d).

However, the Department disagrees with commenters that the differences in eligibility between CEIS and comprehensive CEIS will present significant challenges to LEAs working to address significant disproportionality and to prevent its reoccurrence. Consider an LEA that includes children with disabilities in its implementation of comprehensive CEIS, and, in so doing, successfully addresses the factors contributing to the significant disproportionality. In a year in which the State does not identify the LEA with significant disproportionality, the LEA is not required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS. The LEA may not use funds it voluntarily reserves under IDEA section 613(f) (20 U.S.C. 1413(f)) to provide children with disabilities with CEIS; however, the LEA may continue to serve these children using its IDEA, Part B funds in accordance with § 300.202 and IDEA section 613(a)(2)(A) (20 U.S.C. 1413(a)(2)(A)). Further, the LEA may not use funds it voluntarily reserves under IDEA section 613(f) (20 U.S.C. 1413(f)) to provide CEIS to preschool children ages three through five who are not in kindergarten; however, the LEA may continue to serve preschool children with disabilities ages three through five using its IDEA, Part B funds in accordance with § 300.202 and IDEA

section 613(a)(2)(A) (20 U.S.C. 1413(a)(2)(A)).

Changes: None.

Miscellany

Comment: Some commenters argued that proposed § 300.646(d) would create an incentive to not identify children for special education and related services in order to reduce disproportionality numbers and show that comprehensive CEIS is working.

Discussion: As we noted earlier in this document, under *General—Proposed Regulation Would Create Racial Quotas*, the Department recognizes the possibility that, in cases where States select particularly low risk ratio thresholds, LEAs may have an inappropriate incentive to avoid identifying children from particular racial or ethnic groups in order to avoid a determination of significant disproportionality and the reservation of IDEA Part B funds for comprehensive CEIS. However, these actions would be inconsistent with IDEA's child find requirements in section 612(a)(3) (20 U.S.C. 1412(a)(3)) and the evaluation requirements in section 612(a)(7) and section 614(a)–(c) of IDEA (20 U.S.C. 1412(a)(7) and 20 U.S.C. 1414(a)–(c)). All these provisions require an individualized determination of whether a child has a disability and the nature and extent of the special education and related services that a child needs. IDEA requires that these decisions be based solely on the individual needs of the child, and not to avoid a determination of significant disproportionality. For this reason, § 300.647(b)(1) provides States the flexibility to set their own reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels. It is the Department's expectation that, as part of the process of setting risk ratio thresholds, States will work with stakeholders to identify particular risk ratio thresholds that help the State to address large racial and ethnic disparities without undermining the appropriate implementation of child find and evaluation procedures. We note that States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find and evaluation procedures appropriately. (20 U.S.C. 1412(a)(3); 34 CFR 300.111).

Changes: None.

Comments: A commenter suggested that, in proposed § 300.646(d)(2), the Department replace the term “over-identified” with “overrepresented” to avoid misconceptions that the clause

only refers to the over-identification of disabilities.

Discussion: We appreciate the commenter's concern, however, the language in question is taken directly from IDEA and therefore we decline to change it. Section 300.646(d)(2) refers to comprehensive coordinated early intervening services. The underlying statute, IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)), specifically provides that States must require LEAs identified with significant disproportionality under section 618(d)(1) to reserve the maximum amount of funds under 613(f) to provide comprehensive coordinated early intervening services to children in the LEA, “particularly children in those groups that were significantly overidentified” under section 618(d)(1).

Changes: None.

Comment: One commenter suggested that the Department require States to specify, as part of their reporting on comprehensive CEIS, a listing of the types of technical assistance and professional development that will be offered to LEAs.

Discussion: While the Department encourages States to make technical assistance available to LEAs, and the Department intends to do the same, we decline to require States to specify, as part of their reporting on comprehensive CEIS, a listing of the types of technical assistance and professional development that will be offered to LEAs. We believe that the benefit of reporting on the technical assistance that will be offered to LEAs would not justify the burden of requiring States to collect and report this information to the Department.

Changes: None.

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Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an “economically significant” rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement 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 stated in the Executive order.

This regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that

their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things, and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

(5) Identify and assess available alternatives to direct regulation, including providing economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing these final regulations only upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In this Regulatory Impact Analysis we discuss the need for regulatory action, alternatives considered, the potential costs and benefits, net budget impacts, assumptions, limitations, and data sources.

Need for These Regulations

As we set out in detail in the preamble to the NPRM, the overrepresentation of children of color in special education has been a national concern for more than 40 years. In its

revisions of IDEA, Congress noted the problem and put a mechanism in place through which States could identify and address significant disproportionality on the basis of race and ethnicity for children with disabilities. For a description of how the significant disproportionality statutory provisions apply to States and LEAs along with the corresponding remedies, please refer to the text of the preamble.

Also, as stated in the preamble, IDEA does not define “significant disproportionality,” and, in our August 2006 regulations, the Department left the matter to the discretion of the States. Since then, States have adopted different methodologies across the country, and, as a result, far fewer LEAs are identified as having significant disproportionality than may be anticipated given the widespread disparities in rates of identification, placement, and disciplinary removal across racial and ethnic groups, as noted by the GAO study and supported by the Department’s own data analysis. The lack of consistency, and relatively low number of LEAs identified as having significant disproportionality, raises concerns about whether the prior approach was being implemented to meet Congress’ intent to address racial and ethnic disparities in special education and to ensure compliance with IDEA. Therefore, there is a need for a common methodology for States to apply when making determinations of significant disproportionality, to address the complex, manifold causes of the issue and ensure compliance with the requirements of IDEA.

In addition, there is a corresponding need to expand comprehensive CEIS to include children from age 3 through grade 12, with and without disabilities, and to require LEAs to provide comprehensive CEIS to identify and address factors contributing to the significant disproportionality. The current allowable uses of IDEA Part B funds reserved for comprehensive CEIS prohibit LEAs from directing resources to children with disabilities directly impacted by inappropriate identification, placement, or discipline and also prohibit LEAs from providing early intervening services to preschool children. This latter prohibition is especially problematic, since early intervening services have been shown to reduce the need for more extensive services in the future. Therefore, expanding the provision of comprehensive CEIS to preschool children allows LEAs to identify and address learning difficulties in early childhood, reducing the need for interventions and services later on.

Alternatives Considered

Currently, IDEA does not define “significant disproportionality” or prescribe to States how it must be measured. As a result, States have adopted numerous methodologies for determining if LEAs demonstrated significant disproportionality based on race and ethnicity. In the NPRM, the Department proposed that all States use a standard methodology—the risk ratio—to make determinations of significant disproportionality in the LEAs of the State. The Department reviewed and considered various alternatives to the proposed regulations submitted by commenters in response to the NPRM.

The Department considered comments requesting that the Department withdraw the NPRM and not require States to apply a standard methodology to identify significant disproportionality. Some of these commenters suggested that the Department first pilot a standard methodology in several States, gather that data for analysis, and then provide resources and technical assistance to help States and LEAs address significant disproportionality. Other commenters stated that LEAs are better positioned to determine the factors that contribute to significant disproportionality and are uniquely positioned to address those factors without the imposition of a standard methodology that did not consider local demographics. Other commenters stated that schools had no control over the poverty, health factors or other social ills that contribute to disability and that mandating a standard methodology would do nothing to address those issues or the number of children of color in special education. The Department’s effort to establish a standard methodology for States and LEAs to determine whether significant disproportionality exists based on race or ethnicity is designed to: (1) Address Congress’ concern “that more minority children continue to be served in special education than would be expected from the percentage of minority children in the general education.” IDEA section 601(c)(12)(B) (20 U.S.C. 1400(c)(12)(B)); and (2) address the GAO report (GAO–13–137) which stated that the Department’s oversight of racial and ethnic overrepresentation in special education is hampered by the flexibility States have to individually define significant disproportionality. The GAO recommended that the Department, to promote consistency, develop a standard approach to defining significant disproportionality to be used

by all States. As to the potential impact of a standard methodology, the Department acknowledges that mandating a standard methodology to measure significant disproportionality will not resolve poverty, poor health and environmental conditions or other factors thought to contribute to significant disproportionality. However, the Department believes that there is a need for a common methodology for determinations of significant disproportionality in order for States and the Department to better identify and address the complex, manifold causes of the issue and ensure compliance with the requirements of IDEA.

In applying the risk ratio method to determine significant disproportionality, the proposed regulations required States to use a standard methodology which included a risk ratio, or if appropriate, an alternate risk ratio; a reasonable risk ratio threshold; and a minimum n-size (referred to as “cell size” in the NPRM) as the standard methodology to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs. States would have to analyze an LEA for significant disproportionality if the LEA had at least 10 children in a racial or ethnic group (for purposes of identification), or at least 10 children with disabilities in the racial or ethnic group (for purposes of placement or discipline). In general, most comments about the minimum n-size addressed the tension between setting a n-size too low and producing unreliable results and setting a n-size too high and exempting LEAs from being reviewed for significant disproportionality. Many commenters opposed the n-size limitation of 10 and requested that it be raised to 30 or 40, or eliminated entirely and leave the n-size to State discretion. These commenters argued that a larger minimum n-size is necessary for reliable analysis to avoid LEA identification for significant disproportionality based on a very small numbers of children. Other commenters expressed support for the Department’s minimum n-size proposal of 10 but were willing to accept an increase to 15, to ensure that the maximum number of LEAs is reviewed for significant disproportionality. The Department recognizes that selecting an appropriate minimum number of children necessary to include an LEA in the State’s analysis of significant disproportionality can be difficult. If the minimum n-size is too small, more LEAs would be included in the analysis but the likelihood of dramatic,

statistically anomalous changes in risk ratio from one year to the next would increase. By contrast, if the minimum number is set too high, a larger number of LEAs would be excluded from the analysis and States would not identify as many LEAs with significant disproportionality as there might be. The Department has amended its proposal of a minimum n-size of 10 and will now allow States to select reasonable minimum n-sizes and reasonable minimum cell sizes, based on advice from stakeholders including State Advisory Panels and subject to monitoring and enforcement for reasonableness, that strike a balance between volatility and inclusion of LEAs in the analysis for significant disproportionality.

Many commenters agreed with the Department's requirement that all States use the risk ratio as the standard methodology for determining significant disproportionality. These commenters noted that the use of a common analytical method for determining significant disproportionality would increase transparency in LEA identification across States for LEA, State and Federal officials, as well as the general public. However, some commenters indicated that the Department should not allow States to set a reasonable risk ratio threshold or allow States to vary the application of the risk ratio analysis to account for State differences. These commenters stated that methodological alignment across States is needed to advocate on behalf of children with disabilities, reduce time and effort needed for data analysis and to enact appropriate policies, procedures and practices to address disproportionality on the basis of race or ethnicity. The Department considered these concerns and acknowledges the need for a common methodology for determinations of significant disproportionality in order to better identify and address the complex causes of significant disproportionality. However, as some commenters noted, LEAs vary widely as to size and population. Some LEAs include specialized schools, hospitals or community services that may draw large numbers of children with disabilities and their families. States are better positioned to identify and address the factors contributing to significant disproportionality in the LEAs. The final regulations allow States, in the determination of significant disproportionality, to set reasonable risk ratio thresholds, reasonable minimum cell sizes and reasonable minimum n-

sizes, based on advice from stakeholders including the State Advisory Panel.

Discussion of Costs, Benefits and Transfers

The Department has analyzed the costs of complying with the final requirements. Due to the considerable discretion the final regulations provide States (e.g., flexibility to determine their own risk ratio thresholds, reasonable minimum n-sizes and cell sizes, and the extent to which LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios), we cannot evaluate the costs of implementing the final regulations with absolute precision. However, we estimate that the total cost of these regulations over ten years would be between \$50.1 and \$91.4 million, plus additional transfers between \$298.4 and \$552.9 million. These estimates assume discount rates of three to seven percent. Relative to these costs, the major benefits of these requirements, taken as a whole, would include: Ensuring increased transparency regarding each State's definition of significant disproportionality; establishing an increased role for State Advisory Panels in determining States' risk ratio thresholds, minimum n-sizes, and minimum cell sizes; reducing the use of potentially inappropriate policies, practices, and procedures as they relate to the identification of children as children with disabilities, placements in particular educational settings for these children, along with the incidence, duration, and type of disciplinary removals from these placements, including suspensions and expulsions; and promoting and increasing comparability of data across States in relation to the identification, placement, and discipline of children with disabilities by race or ethnicity. Additionally, the Department believes that expanding the eligibility of children ages three through five to receive comprehensive CEIS would give LEAs new flexibility to use additional funds received under Part B of IDEA to provide appropriate services and supports at earlier ages to children who might otherwise later be identified as having a disability, which could reduce the need for more extensive special education and related services for these children in the future.

Benefits

The Department believes this regulatory action to standardize the methodology States use to identify significant disproportionality will provide clarity to the public, increase

comparability of data across States, and enhance the overall level of transparency regarding the appropriateness of State-level policies, practices, and procedures as they relate to the identification, placement, and discipline of children with disabilities in LEAs. The Department further believes that methodological alignment across States will improve upon current policy, which has resulted in numerous State definitions of significant disproportionality of varying complexity that may be difficult for stakeholders to understand and interpret. The wide variation in definitions and methodologies across States under current policy also makes it difficult for stakeholders to advocate on behalf of children with disabilities, and for researchers to examine the extent to which LEAs have adequate policies, practices, and procedures in place to provide appropriate special education and related services to children with disabilities. We believe that a standardized methodology will accrue benefits to stakeholders in reduced time and effort needed for data analysis and a greater capacity for meaningful advocacy. Additionally, we believe that the standardized methodology will accrue benefits to all children (including children with disabilities), by promoting greater transparency and supporting the efforts of all stakeholders to enact appropriate policies, practices, and procedures that address disproportionality on the basis of race or ethnicity.

Requiring that States set reasonable risk ratio thresholds, minimum n-sizes, and minimum cell sizes based on the advice from State Advisory Panels will also give stakeholders an increased role in setting State criteria for identifying significant disproportionality. The Department hopes that this will give States and stakeholders an opportunity, and an incentive, to thoughtfully examine existing State policies and ensure that they appropriately identify LEAs with significant and ongoing disparities in the identification of children with disabilities, their placements in particular educational settings, and their disciplinary removals. Further, we hope that States will also take this opportunity to consult with their State Advisory Panels on the States' approaches to reviewing policies, practices, and procedures, to ensure that they comply with IDEA and have the capacity to provide appropriate support.

In addition, there is widespread evidence on the short- and long-term negative impacts of suspensions and expulsions on student academic

outcomes. In general, suspended children are more likely to fall behind, to become disengaged from school, and to drop out of a school. (Lee, Cornell, Gregory, & Xitao, 2011; Brooks, Shiraldi & Zeidenberg, 2000; Civil Rights Project, 2000.) The use of suspensions and expulsions is also associated with an increased likelihood of contact with the juvenile justice system in the year following those disciplinary actions. (Council of State Governments, 2011.)

The Department believes that suspensions and expulsions can often be avoided, particularly if LEAs use appropriate school-wide interventions, and appropriate student-level supports and interventions, including proactive and preventative approaches that address the underlying causes or behaviors and reinforce positive behaviors. We believe that the final regulations clarify each State's responsibility to implement the statutory remedies whenever significant disproportionality in disciplinary removals is identified, and will prompt States and LEAs to initiate efforts to reduce schools' reliance on suspensions and expulsions as a core part of their efforts to address significant disproportionality. In so doing, we believe that LEAs will increase the number of children participating in the general education curriculum on a regular and sustained basis, thus accruing benefits to children and society through greater educational gains.

Under section 613(f) of IDEA and § 300.226, LEAs are not authorized to voluntarily use funds for CEIS to serve children with disabilities or children ages three through five. By clarifying that comprehensive CEIS can also be used to support children with disabilities and children ages three through five, the final regulations will allow LEAs to direct resources in a more purposeful and impactful way to improve outcomes for those children in subgroups that have been most affected by significant disproportionality. For example, LEAs would be able to use comprehensive CEIS to expand the use of multi-tiered systems of support, which could help LEAs determine whether children identified with disabilities have access to appropriate, targeted supports and interventions to allow them to succeed in the general education curriculum. Additionally, by expanding the eligibility of children ages three through five to receive comprehensive CEIS, LEAs identified as having significant disproportionality will have additional resources to provide high-quality early intervening services, which research has shown can

increase children's language, cognitive, behavioral, and physical skills, and improve their long-term educational outcomes. LEAs could use funds reserved for comprehensive CEIS to provide appropriate services and supports at earlier ages to children who might otherwise later be identified as having a disability, which could reduce the need for more extensive special education and related services for these children in the future.

While the Department cannot, at this time, meaningfully quantify the economic impacts of the benefits outlined above, we believe that they are substantial and outweigh the estimated costs of these final regulations.

The following section provides a detailed analysis of the estimated costs of implementing the requirements contained in the new regulations.

Number of LEAs Newly Identified

In order to accurately estimate the fiscal and budgetary impacts of these regulations, the Department must estimate not only the costs associated with State compliance with these regulations, but also the costs borne by any LEAs that would be identified as having significant disproportionality under this new regulatory scheme that would not have been identified had the Department not regulated. However, at this time, the Department does not know, with a high degree of certainty, how many LEAs will be newly identified in future years. Given that a large proportion of the cost estimates in this section are driven by assumptions regarding the number of LEAs that SEAs might identify in any given year, these estimates are highly sensitive to those assumptions. In 2012–2013, the most recent year for which data are available, States identified 449 out of approximately 16,000 LEAs nationwide as having significant disproportionality. For purposes of our estimates, the Department used this level of identification as a baseline, only estimating costs for the number of LEAs over 449 that would be identified in future years.

These regulations largely focus on methodological issues related to the consistency of State policies and do not require States to identify LEAs at a higher rate than they currently do. As such, it is possible that these regulations may not result in any additional LEAs being identified as having significant disproportionality. However, we believe that this is unlikely and therefore would represent an extreme lower bound estimate of the cost of this regulation.

We believe it is much more likely that the regulation will provide States and

advocates with an opportunity to make meaningful and substantive revisions to their current approaches to identifying and addressing significant disproportionality. To the extent that States and State Advisory Panels, as part of the shift to the new standard methodology, establish risk ratio thresholds, minimum n-sizes, and minimum cell sizes that identify more LEAs than they currently do, it is likely that there will be an increase in the number of LEAs identified nationwide. We do not specifically know what risk ratio thresholds, minimum n-sizes, and minimum cell sizes States will set in consultation with their State Advisory Panels and therefore do not know the number of LEAs that would be identified under those new thresholds. However, for purposes of these cost estimates, we assume that those changes would result in 400 additional LEAs being identified each year nationwide. This number represents an approximately ninety percent increase in the overall number of LEAs identified by States collectively each year. The Department assumes that changes in State policies and procedures are one potential and likely outcomes of these regulations; therefore, the number of new LEAs that may be identified is also reflected in our cost estimates.

As noted in the Costs and Burden of the Proposed Regulations section, the Department does not agree with commenters who assert that these final regulations will result in determinations of significant disproportionality for nearly half the LEAs in the country. Therefore, we have not changed the number of LEAs identified and corresponding costs associated with those LEAs. The Department also believes that changes in the final regulations, outlined in the Minimum Cell Sizes and Minimum N-Sizes Section, that allow States to set reasonable minimum n-sizes and cell sizes within the bounds prescribed in the preamble will likely result in far fewer LEAs identified than some commenters predict.

To the extent that States identify fewer than 400 additional LEAs in each year or that the number of LEAs identified decreases over time, the estimates presented below are overestimates of the actual costs. For a discussion of the impact of this assumption on our cost estimates, see the Sensitivity Analysis section of this Regulatory Impact Analysis.

General Changes in the Cost Estimates From the NPRM

The Department has increased the estimated cost of these regulations in

response to both changes to the final regulations and comments from the public. The final regulations require States to set reasonable minimum n-sizes, minimum cell sizes, and if the State uses the flexibility described in § 300.646(d)(2), standards for determining reasonable progress in consultation with their State Advisory Panels, which could result in additional burden for Federal and State level staff. States will also have some additional burden associated with reporting these data to the Department. The Department also agrees with commenters that the NPRM likely underestimated the time required to modify data collection protocols, technical assistance activities, and communication required to implement the rule. We have therefore increased the estimated number of hours to better reflect the work required to adequately implement these regulations in a number of sections, including the “State-level Review and Compliance With the New Rule,” the “Annual Calculation of Risk Ratios and Notification of LEAs,” and the “Federal Review of State Risk Ratio Thresholds” sections. Finally, the Department modified the State level cost estimates in the NPRM because the final regulations do not require the use of the standard methodology when both the LEA and the State fail to meet the State’s minimum n-size and minimum cell size. Therefore, in this final estimate, the Department removed costs associated the Bureau of Indian Education (BIE) because BIE will not typically have a comparison group and mathematically cannot calculate risk ratios for any racial or ethnic group. This change resulted in a slight decrease for State level costs associated with BIE.

Cost of State-Level Activities

These regulations require every State to use a standard methodology to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State with respect to the identification of children as children with disabilities, the placement in particular educational settings of these children, and the incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions. These regulations require States to set and report to the Department risk ratio thresholds, above which LEAs would be identified as having significant disproportionality, and provide States the flexibility to: (1) Use up to three years of data to make a determination of significant disproportionality; (2) set and report to the Department reasonable minimum n-

sizes and minimum cell sizes consistent with the limitations outlined in these regulations, and; (3) if a State uses the flexibility described in paragraph (d)(2), set and report standards for determining whether LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios. Finally, these regulations clarify that LEAs must identify and address the factors contributing to significant disproportionality when implementing comprehensive CEIS.

State-Level Review and Compliance With the New Rule

The extent of the initial burden placed on States by the regulation will depend on the amount of staff time required to understand the new regulation, modify existing data collection and calculation tools, meet with State Advisory Panels to develop and report to the Department risk ratio thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress, draft and disseminate new guidance to LEAs, and review and update State systems that examine the policies, practices, and procedures of LEAs identified as having significant disproportionality.

To comply with the final regulations, States will have to take time to review the regulations, determine how these regulations will affect existing State policies, practices, and procedures, and plan for any actions necessary to comply with the new requirements. To estimate the cost per State, we assume that State employees involved in this work would likely include a Special Education Director (\$63.04), a Database Manager (\$52.32), two Management Analysts (\$44.64), and a Lawyer (\$61.66), at 16 hours each for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$234,345.⁴

Since no State currently calculates significant disproportionality using the exact methodology in this regulation, each State will need to modify its data collection tools. To estimate the cost per State, the Department doubled the time estimates contained in the NPRM. We assume that State employees would likely include a Database Manager (\$52.32) and a Management Analyst (\$44.64) at 32 hours each for a total one-

time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$170,648. While we recognize that these costs will vary widely from State to State, we believe that this total represents an appropriate estimate of the costs across all States.

States will also need to draft, issue, and disseminate new guidance documents to LEAs regarding these regulatory changes, including a discussion of any new data collection tools or processes and revised procedures for identifying and notifying LEAs. We assume States would have to communicate changes in policy and would likely use a mixture of teleconferences, Webinars, and guidance documents to ensure that LEAs understand and comply with revised policies. To estimate the cost per State, the Department doubled the previous time estimates from the NPRM. We assume that State employees would likely include a Special Education Director (\$63.04) for 6 hours, 5 Management Analysts (\$44.64) for 32 hours, 2 Administrative Assistants (\$25.69) for 16 hours, a Computer Support Specialist (\$35.71) for 4 hours, and 2 lawyers (\$61.66) for 32 hours, for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$683,748.

Additionally, changes under § 300.646(d) require LEAs identified as having significant disproportionality to use funds reserved for comprehensive CEIS to identify and address the factors contributing to significant disproportionality. States will have to review their existing processes to ensure that LEAs are provided with appropriate support to identify these contributing factors and use funds for comprehensive CEIS in ways that are appropriately targeted to address those factors. To estimate the cost per State, we assume that State employees involved in these activities would likely include a Special Education Director (\$63.04) for 4 hours, 2 Management Analysts (\$44.64) for 16 hours, an Administrative Assistant (\$25.69) for 2 hours, and a Manager (\$51.50) for 8 hours for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$117,922.

Under the new regulations, States must also determine risk ratio thresholds, minimum n-sizes, minimum cell sizes, and a standard for reasonable progress, based on the advice of stakeholders, including State Advisory Panels, as provided under IDEA section 612(a)(21)(D)(iii). In order to estimate

⁴ Unless otherwise noted, all hourly wages are loaded wage rates and are based on median hourly earnings as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see www.bls.gov/oes/current/999201.htm) multiplied by an employer cost for employee compensation of 1.57 (see www.bls.gov/news.release/ecec.toc.htm).

the cost of implementing these requirements including the new requirement that States set reasonable minimum n-sizes and cell sizes, the Department doubled the previous time estimates from the NPRM. We assume that the average State would likely initially meet this requirement in Year 1 and revisit the thresholds and cell sizes every five years thereafter. We further assume that the meetings with the State Advisory Panels would include at least the following representatives from the statutorily required categories of stakeholders: One parent of a child with disabilities; one individual with disabilities; one teacher; one representative of an institution of higher education that prepares special education and related services personnel; one State and one local education official, including an official who carries out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act; one Administrator of programs for children with disabilities; one representative of other State agencies involved in the financing or delivery of related services to children with disabilities; one representative of private schools and public charter schools; one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; one representative from the State child welfare agency responsible for foster care; and one representative from the State juvenile and adult corrections agencies. To estimate the cost of participating in these meetings for the required categories of stakeholders, we assume that each meeting would require 16 hours of each participant's time (including preparation for and travel to and from the meeting and the time for the meeting itself) and use the following national median hourly wages⁵ for full-time State and local government workers employed in these professions: Postsecondary education administrators, \$44.28 (1 stakeholder); primary, secondary, and special education school teachers, \$35.66⁶ (1 stakeholder); State social and community service managers, \$32.86 (5 stakeholders); local social and community service managers, \$37.13 (1

⁵ Wages in this section do not reflect loaded wage rates.

⁶ Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of workdays and hours per day assuming 200 workdays and 8 hours per day.

stakeholder); other management occupations, \$40.22 (1 stakeholder); elementary and secondary school education administrator, \$42.74 (1 stakeholder).⁷ For the opportunity cost for the parent and individual with disabilities, we use the average median wage for all workers of \$17.09. We also assume that State staff would prepare for and facilitate each meeting, including the Special Education Director (\$63.04) for 4 hours, one State employee in a managerial position (\$51.50) for 32 hours, one Management Analyst (\$44.64) for 32 hours, and one Administrative Assistant (\$25.69) for 32 hours. Based on these participants, we estimate that consultation with the State Advisory Panels would have a cumulative one-year cost of \$578,988 for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

New § 300.647(b)(7) will require States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each to the Department at a time and in a manner determined by the Secretary. To estimate the cost per State, we assume that State employees would likely include a Database Manager (\$52.32) for 5 hours and a Management Analyst (\$44.64) for 20 hours for an annual cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$63,491.

Annual Calculation of Risk Ratios and Notification of LEAs

In addition to the costs outlined above, States will incur annual costs associated with calculating risk ratios, making determinations of significant disproportionality, and notifying LEAs of determinations.

New § 300.647 requires every State to annually calculate significant disproportionality for each LEA using a risk ratio or alternate risk ratio method in every category of analysis (as defined in this document) that meets the minimum n-size and cell size requirements, as determined by the State. States are required to identify LEAs above the risk ratio threshold with significant disproportionality. When making a determination of significant disproportionality, States will be

⁷ Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of work weeks and hours per week assuming 52 weeks and 40 hours per week.

allowed to use up to three years of data, and take into account whether LEAs demonstrate reasonable progress, under § 300.647(d)(2), in lowering their risk ratios or alternate risk ratios. To estimate the annual cost per State, the Department doubled the time estimates included in the NPRM. In this notice of final regulations, we assume that State employees involved in this calculation will include 3 Management Analysts (\$44.64) for 48 hours and one Administrative Assistant (\$25.69) for 12 hours for an annual cost of \$370,500 for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

After identifying LEAs with significant disproportionality, States would have to notify LEAs of their determination. We assume that a State employee in a managerial position (\$51.50) would call each identified LEA with the assistance of one Administrative Assistant (\$25.69) and take approximately 15 minutes per LEA. We assume 400 new LEAs will be identified with significant disproportionality, resulting in an annual cost of \$7,719.

Review and Revision of Policies, Practices, and Procedures

States are required to provide for the review and, if appropriate, revision of policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities to ensure the policies, practices, and procedures comply with requirements of IDEA and publicly report any revisions. We assume States will ensure LEAs are complying with these requirements through desk audits, meetings or phone calls with LEAs, analysis of data, or sampling of IEPs and evaluations. To estimate the annual cost at the State level, we assume that State employees would likely include one Special Education Director (\$63.04) for 0.5 hours, one State employee in a managerial position (\$51.50) for 1 hour, one Administrative Assistant (\$25.69) for 1 hour, and 1 Management Analyst (\$44.64) for 6 hours for each LEA. We assume 400 new LEAs are identified with significant disproportionality each year, the annual cost would be \$150,621 for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

States are required to ensure that LEAs identified with significant disproportionality review their policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities to ensure the policies, practices, and procedures comply with requirements

of IDEA. We assume this would require LEAs to examine data, identify areas of concern, visit schools, review IEPs and evaluations, and review any other relevant documents. To estimate the annual cost to review policies, practices, and procedures at the LEA level, we assume that LEA employees would likely include one District Superintendent (\$85.74) for 5 hours, one local employee in a managerial position (\$58.20) for 60 hours, one local Special Education Director (\$66.52) for 20 hours, two local Administrative Assistants (\$28.43) for 15 hours, four Special Education teachers (\$58.47⁸) for 2 hours, and two Education Administrators (\$70.37⁹) for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost to LEAs would be \$3,079,030.

After reviewing their policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities, LEAs are required, if appropriate, to revise those policies, practices, and procedures to ensure they comply with requirements of IDEA. We assume LEAs will have to spend time developing a plan to change any policies, practices, and procedures identified in their review based on relevant data. To estimate the annual cost to revise policies, practices, and procedures we assume that LEA staff would likely include one District Superintendent (\$85.74) for 2 hours, one local employee in a managerial position (\$58.20) for 60 hours, one local Special Education Director (\$66.52) for 20 hours, and two local Administrative Assistants (\$28.43) for 8 hours for each LEA. If we assume half of the new LEAs identified with significant disproportionality (200 LEAs) would need to revise their policies, practices, and procedures the annual cost would be \$1,089,730.

Planning for and Tracking the Use of Funds for Comprehensive CEIS

LEAs identified with significant disproportionality are required by statute to reserve 15 percent of their

IDEA Part B funds for comprehensive CEIS. Any LEAs fitting into this category will also have to plan for the use of funds reserved for comprehensive CEIS. To estimate the annual cost of planning for the use of IDEA Part B funds for comprehensive CEIS, we assume that LEA employees involved in these activities would likely include one District Superintendent (\$85.74) for 1 hour, one local employee in a managerial position (\$58.20) for 16 hours, one local Special Education Director (\$66.52) for 4 hours, and one local Budget Analyst (\$49.97) for 24 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$992,890.

LEAs reserving IDEA Part B funds for comprehensive CEIS will also have to track the actual use of those funds. We assume LEAs will have to commit staff time to ensure they are meeting the fiscal requirements associated with the use of funds for comprehensive CEIS. To estimate the annual cost of tracking the use of funds for comprehensive CEIS, we assume that one local Budget Analyst (\$49.97) would be required for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$159,900.

LEAs providing comprehensive CEIS are also currently required to track the number of children served under comprehensive CEIS and the number of children served under comprehensive CEIS who subsequently receive special education and related services during the preceding two-year period. To estimate the annual cost of tracking children receiving services under comprehensive CEIS, we assume that LEA employees would likely include one Database Manager (\$50.63) for 40 hours and one local Administrative Assistant (\$28.43) for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$901,016.

States are required to annually review each LEA's application for a subgrant under IDEA Part B. As noted above, LEAs identified with significant disproportionality are required to reserve 15 percent of their Part B funds for comprehensive CEIS and many States require LEAs to reflect that reservation as part of their application for IDEA Part B funds. To estimate the annual cost stemming from State reviews of LEA applications to ensure compliance for all newly identified LEAs, we assume that State employees would likely include one Management Analyst (\$44.64) and take 0.25 hours for

each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$4,464.

Federal Review of State Risk Ratio Thresholds

Under § 300.647(b)(1)(iii), the risk ratio thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress established by States are subject to monitoring and enforcement by the Department. At this time, the Department expects that it would conduct monitoring of all States in the first year that States set the thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress and then monitor the thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress again in any year in which a State changes these standards. To estimate the annual cost of reviewing risk ratio thresholds, minimum n-sizes, minimum cell sizes, and the standards for reasonable progress, the Department assumes the new requirements would increase staff time four fold. We assume that Department staff involved in these reviews would likely include one management analyst at the GS-13 level (\$73.95¹⁰), and take 4 hour each for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands. If we assume the Department would have to review every State in year one, 25 States in year 2, 10 States in year 3, and 5 States in each year thereafter, the average annual cost over the ten year time horizon would be \$3,058 at a 7 percent discount rate.

Transfers

Under IDEA, LEAs identified with significant disproportionality are required to reserve 15 percent of their IDEA Part B allocation for comprehensive CEIS. Consistent with the Office of Management and Budget Circular A-4, transfers are monetary payments from one group to another that do not affect total resources available to society; therefore, this reservation constitutes a transfer. Using data collected under section 618 from the SY 2011-2012, the Department estimates that 15 percent of the average LEA section 611 and section 619 subgrants will be \$106,220. Assuming 400 new LEAs are identified with significant disproportionality each year, the total annual transfer would be \$42,488,000. It is important to note that

⁸ Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see www.bls.gov/oes/current/999201.htm) divided by the number of work days and hours per day assuming 200 workdays and 8 hours per day.

⁹ Hourly earnings were determined using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see www.bls.gov/oes/current/999201.htm) divided by the number of work weeks and hours per week assuming 52 weeks and 40 hours per week.

¹⁰ This loaded hourly wage rate is based on the hourly earnings of a GS-13 step 3 federal employee in Washington, DC. (See: www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/html/DCB_h.aspx).

these formula funds would not be subgranted to new entities, but rather that the beneficiaries of these funds would change. As noted elsewhere in this final rule, the regulations clarify that funds reserved for comprehensive CEIS can be used to provide services to children with disabilities. To the extent that LEAs use their funds reserved for comprehensive CEIS to provide services to these children, the total amount of the transfer will be lower than what is estimated here.

Sensitivity Analysis

As noted elsewhere in the Discussion of Costs, Benefits, and Transfers, the estimated costs associated with this regulation are highly sensitive to the Department’s assumption regarding the total number of LEAs nationwide that States will identify in each year. For purposes of the estimates outlined above, the Department assumed that 400 additional LEAs above the baseline of 449 would be identified in each year.

However, since we do not know how many LEAs States will actually identify as a result of the changes, for the purpose of this sensitivity analysis, we develop and present what we consider to be reasonable upper- and lower-bound estimates. To establish a reasonable lower-bound, we estimate that no additional LEAs above the baseline number would be identified in the out years. We believe that this would represent an extreme lower bound for the likely costs of this regulation because we consider it highly unlikely that there would be no additional LEAs identified. As noted above, the Department’s estimate of 400 LEAs is based on a view that at least some, if not most, States will take advantage of the opportunity presented by the transition to the standard methodology to set risk ratio thresholds and reasonable n-size and cell size requirements that identify more LEAs. We believe that this assumption of 400 LEAs above baseline represents the most

reasonable estimate of the likely costs associated with these final rules. In order to estimate an upper bound, the Department assumes that States could set much more aggressive thresholds or small n-size or cell size requirements for identifying LEAs with significant disproportionality, ultimately identifying an additional 1,200 LEAs above baseline each year. As with the estimate of 400 LEAs, it is important to note that the regulation itself would not require States to identify additional LEAs. Rather, the Department is attempting to estimate a range of potential State-level responses to the regulation, including making proactive decisions to shift State policies related to identification of LEAs. In the table below, we show the impact of these varying assumptions regarding the number of additional LEAs identified on the estimated costs. Costs and transfers outlined in this table are calculated at a three percent discount rate.

TABLE 2—SENSITIVITY OF COST ESTIMATES TO NUMBER OF ADDITIONAL LEAS ASSUMED TO BE IDENTIFIED

Category	Costs		
	0 LEAs	400 LEAs	1,200 LEAs
State-level review and compliance with the new rule (modifying data collection tools, meeting with State Advisory Panels, drafting and issuing guidance to LEAs, reporting data)	\$3,362,902	\$3,362,902	\$3,362,902
Annual calculation of risk ratios and notification of LEAs	4,821,062	4,921,510	5,122,405
Review and, if necessary, revision of policies, practices, and procedures	0	56,312,177	168,722,536
Planning for and tracking the use of funds for comprehensive CEIS	0	26,782,849	80,348,546
Category	Transfers		
Reservation of funds for comprehensive CEIS	0	552,867,164	1,658,601,491

Paperwork Reduction Act of 1995

This final rule contains information collection requirements that are approved by OMB under OMB control number 1820–0689. It also contains a new regulatory requirement, in § 300.647(b)(7), that implicates the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA). We will meet all applicable PRA requirements before we collect any information pursuant to the new requirement.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of the Department’s specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: December 12, 2016.

John B. King, Jr.,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary of Education amends title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

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

Authority: 20 U.S.C. 1221e-3, 1406, 1411-1419, 3474, unless otherwise noted.

■ 2. Section 300.646 is revised to read as follows:

§ 300.646 Disproportionality.

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;

(2) The placement in particular educational settings of these children; and

(3) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.

(b) *Methodology.* The State must apply the methods in § 300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State under paragraph (a) of this section.

(c) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities or the placement in particular educational settings, including disciplinary removals of such children, in accordance with paragraphs (a) and (b) of this section, the State or the Secretary of the Interior must—

(1) Provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular educational settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of the Act.

(2) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (c)(1) of this section consistent with the requirements of the Family Educational Rights and Privacy Act, its implementing regulations in 34 CFR part 99, and Section 618(b)(1) of the Act.

(d) *Comprehensive coordinated early intervening services.* Except as provided in paragraph (e) of this section, the State or the Secretary of the Interior shall require any LEA identified under paragraphs (a) and (b) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to address factors contributing to the significant disproportionality.

(1) In implementing comprehensive coordinated early intervening services an LEA—

(i) May carry out activities that include professional development and educational and behavioral evaluations, services, and supports.

(ii) Must identify and address the factors contributing to the significant disproportionality, which may include, among other identified factors, a lack of access to scientifically based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality.

(iii) Must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

(2) An LEA may use funds reserved for comprehensive coordinated early intervening services to serve children from age 3 through grade 12, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) or (b) of this section, including—

(i) Children who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment; and

(ii) Children with disabilities.

(3) An LEA may not limit the provision of comprehensive coordinated

early intervening services under this paragraph to children with disabilities.

(e) *Exception to comprehensive coordinated early intervening services.* The State or the Secretary of the Interior shall not require any LEA that serves only children with disabilities identified under paragraphs (a) and (b) of this section to reserve funds to provide comprehensive coordinated early intervening services.

(f) *Rule of construction.* Nothing in this section authorizes a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

(Authority: 20 U.S.C. 1413(f); 20 U.S.C. 1418(d))

■ 3. Section 300.647 is added to read as follows:

§ 300.647 Determining significant disproportionality.

(a) *Definitions.* (1) *Alternate risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk of that outcome for children in all other racial or ethnic groups in the State.

(2) *Comparison group* consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality.

(3) *Minimum cell size* is the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

(4) *Minimum n-size* is the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

(5) *Risk* is the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a specified racial or ethnic group (or groups), calculated by dividing the number of children from a specified racial or ethnic group (or groups) experiencing that outcome by the total number of children from that racial or

ethnic group or groups enrolled in the LEA.

(6) *Risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk for children in all other racial and ethnic groups within the LEA.

(7) *Risk ratio threshold* is a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under § 300.646(a) and (b).

(b) *Significant disproportionality determinations.* In determining whether significant disproportionality exists in a State or LEA under § 300.646(a) and (b)—

(1)(i) The State must set a:
 (A) Reasonable risk ratio threshold;
 (B) Reasonable minimum cell size;
 (C) Reasonable minimum n-size; and
 (D) Standard for measuring reasonable progress if a State uses the flexibility described in paragraph (d)(2) of this section.

(ii) The State may, but is not required to, set the standards set forth in paragraph (b)(1)(i) of this section at different levels for each of the categories described in paragraphs (b)(3) and (4) of this section.

(iii) The standards set forth in paragraph (b)(1)(i) of this section:

(A) Must be based on advice from stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of the Act; and
 (B) Are subject to monitoring and enforcement for reasonableness by the Secretary consistent with section 616 of the Act.

(iv) When monitoring for reasonableness under paragraph (b)(1)(iii)(B) of this section, the Department finds that the following are presumptively reasonable:

(A) A minimum cell size under paragraph (b)(1)(i)(B) of this section no greater than 10; and

(B) A minimum n-size under paragraph (b)(1)(i)(C) of this section no greater than 30.

(2) The State must apply the risk ratio threshold or thresholds determined in paragraph (b)(1) of this section to risk ratios or alternate risk ratios, as appropriate, in each category described in paragraphs (b)(3) and (4) of this section and the following racial and ethnic groups:

(i) Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only;

(ii) American Indian or Alaska Native;

(iii) Asian;

(iv) Black or African American;
 (v) Native Hawaiian or Other Pacific Islander;

(vi) White; and

(vii) Two or more races.

(3) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to:

(i) The identification of children ages 3 through 21 as children with disabilities; and

(ii) The identification of children ages 3 through 21 as children with the following impairments:

(A) Intellectual disabilities;

(B) Specific learning disabilities;

(C) Emotional disturbance;

(D) Speech or language impairments;

(E) Other health impairments; and

(F) Autism.

(4) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to the following placements into particular educational settings, including disciplinary removals:

(i) For children with disabilities ages 6 through 21, inside a regular class less than 40 percent of the day;

(ii) For children with disabilities ages 6 through 21, inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools;

(iii) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of 10 days or fewer;

(iv) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of more than 10 days;

(v) For children with disabilities ages 3 through 21, in-school suspensions of 10 days or fewer;

(vi) For children with disabilities ages 3 through 21, in-school suspensions of more than 10 days; and

(vii) For children with disabilities ages 3 through 21, disciplinary removals in total, including in-school and out-of-school suspensions, expulsions, removals by school personnel to an interim alternative education setting, and removals by a hearing officer.

(5) The State must calculate an alternate risk ratio with respect to the categories described in paragraphs (b)(3) and (4) of this section if the comparison group in the LEA does not meet the minimum cell size or the minimum n-size.

(6) Except as provided in paragraph (d) of this section, the State must identify as having significant disproportionality based on race or ethnicity under § 300.646(a) and (b) any LEA that has a risk ratio or alternate risk ratio for any racial or ethnic group in any of the categories described in paragraphs (b)(3) and (4) of this section that exceeds the risk ratio threshold set by the State for that category.

(7) The State must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress selected under paragraphs (b)(1)(i)(A) through (D) of this section, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes not presumptively reasonable under paragraph (b)(1)(iv) of this section must include a detailed explanation of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying LEAs with significant disparities, based on race and ethnicity, in the identification, placement, or discipline of children with disabilities.

(c) *Exception.* A State is not required to calculate a risk ratio or alternate risk ratio, as outlined in paragraphs (b)(3), (4), and (5) of this section, to determine significant disproportionality if:

(1) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or

(2) In calculating the alternate risk ratio under paragraph (b)(5) of this section, the comparison group in the State does not meet the minimum cell size or minimum n-size.

(d) *Flexibility.* A State is not required to identify an LEA as having significant disproportionality based on race or ethnicity under § 300.646(a) and (b) until—

(1) The LEA has exceeded a risk ratio threshold set by the State for a racial or ethnic group in a category described in paragraph (b)(3) or (4) of this section for up to three prior consecutive years preceding the identification; and

(2) The LEA has exceeded the risk ratio threshold and has failed to demonstrate reasonable progress, as determined by the State, in lowering the risk ratio or alternate risk ratio for the group and category in each of the two prior consecutive years.

(Authority: 20 U.S.C. 1418(d).)

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Promulgation of Certain Federal Water Quality Standards Applicable to
Maine; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA-HQ-OW-2015-0804; FRL-9952-99-OW]

RIN 2040-AF59

Promulgation of Certain Federal Water Quality Standards Applicable to Maine

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing federal Clean Water Act (CWA) water quality standards (WQS) for certain waters under the state of Maine’s jurisdiction, including human health criteria (HHC) to protect the sustenance fishing designated use in waters in Indian lands and in waters subject to sustenance fishing rights under the Maine Implementing Act (MIA). EPA is promulgating these WQS to address various disapprovals of Maine’s standards that EPA issued in February, March, and June 2015, and to address the Administrator’s determination that Maine’s HHC are not adequate to protect the designated use of sustenance fishing for certain waters.

DATES: This final rule is effective on January 18, 2017. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 18, 2017.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2015-0804. All

documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Jennifer Brundage, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566-1265; email address: Brundage.jennifer@epa.gov.

SUPPLEMENTARY INFORMATION: This final rule is organized as follows:

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- I. National Technology Transfer and Advancement Act of 1995
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- K. Congressional Review Act (CRA)

I. General Information

A. Does this action apply to me?

Entities such as industries, stormwater management districts, or publicly owned treatment works (POTWs) that discharge pollutants to waters of the United States in Maine could be indirectly affected by this rulemaking, because federal WQS promulgated by EPA are applicable to CWA regulatory programs, such as National Pollutant Discharge Elimination System (NPDES) permitting. Citizens concerned with water quality in Maine, including members of the federally recognized Indian tribes in Maine, could also be interested in this rulemaking. Dischargers that could potentially be affected include the following:

TABLE 1—DISCHARGERS POTENTIALLY AFFECTED BY THIS RULEMAKING

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to waters of the United States in Maine.
Municipalities	Publicly owned treatment works or other facilities discharging pollutants to waters of the United States in Maine.
Stormwater Management Districts ..	Entities responsible for managing stormwater runoff in the state of Maine.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that could be indirectly affected by this action. Any parties or entities who depend upon or contribute to the quality of Maine’s waters could be affected by this rule. To determine whether your facility or activities could be affected by this action, you should carefully examine this rule. If you have questions regarding the applicability of this action to a particular entity, consult Jennifer Brundage, whose contact information

can be found in the **FOR FURTHER INFORMATION** section above.

B. How did EPA develop this final rule?

In developing this final rule, EPA carefully considered the public comments and feedback received from interested parties. EPA provided a 60-day public comment period after publishing the proposed rule in the **Federal Register** on April 20, 2016.¹ In

addition, EPA held two virtual public hearings on June 7 and 9, 2016, to discuss the contents of the proposed rule and accept verbal public comments.

Over 100 organizations and individuals submitted comments on a range of issues. Some comments addressed issues beyond the scope of the rulemaking, and thus EPA did not consider them in finalizing this rule. In section III of this preamble, EPA discusses certain public comments so that the public is aware of the Agency’s position. For a full response to these

¹ See Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 FR 23239, April 20, 2016.

and all other comments, see EPA's Response to Comments (RTC) document in the official public docket.

II. Background and Summary

A. Statutory and Regulatory Background

1. Clean Water Act (CWA)

CWA section 101(a)(2) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable." These are commonly referred to as the "fishable/swimmable" goals of the CWA. EPA interprets "fishable" uses to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish.²

CWA section 303(c) (33 U.S.C. 1313(c)) directs states to adopt water quality standards (WQS) for waters under their jurisdiction subject to the CWA. CWA section 303(c)(2)(A) and EPA's implementing regulations at 40 CFR part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters, and water quality criteria to protect those uses that are based on sound scientific rationale. EPA's regulations at 40 CFR 131.11(a)(1) provide that such criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." In addition, 40 CFR 131.10(b) provides that "[i]n designating uses of a waterbody and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

States are required to review applicable WQS at least once every three years and, if appropriate, revise or adopt new standards (CWA section 303(c)(1)). Any new or revised WQS must be submitted to EPA for review, to determine whether it meets the CWA's requirements, and for approval or disapproval (CWA section 303(c)(2)(A) and (c)(3)). If EPA disapproves a state's new or revised WQS, the CWA provides the state ninety days to adopt a revised WQS that meets CWA requirements, and if it fails to do so, EPA shall promptly propose and then within ninety days promulgate such standard

unless EPA approves a state replacement WQS first (CWA section 303(c)(3) and (c)(4)(A)). If the state adopts and EPA approves a state replacement WQS after EPA promulgates a standard, EPA then withdraws its promulgation. CWA section 303(c)(4)(B) authorizes the Administrator to determine, even in the absence of a state submission, that a new or revised standard is necessary to meet CWA requirements. Upon making such a determination, EPA shall promptly propose, and then within ninety days promulgate, any such new or revised standard unless prior to such promulgation, the state has adopted a revised or new WQS that EPA approves as being in accordance with the CWA.

Under CWA section 304(a), EPA periodically publishes water quality criteria recommendations for states to consider when adopting water quality criteria for particular pollutants to protect the CWA section 101(a)(2) goal uses. For example, in 2015, EPA updated its CWA section 304(a) recommended criteria for human health for 94 pollutants (the 2015 criteria update).³ Where EPA has published recommended criteria, states should adopt water quality criteria based on EPA's CWA section 304(a) criteria, section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods (40 CFR 131.11(b)(1)). CWA section 303(c)(2)(B) requires states to adopt numeric criteria for all toxic pollutants listed pursuant to CWA section 307(a)(1) for which EPA has published CWA section 304(a) criteria, as necessary to support the states' designated uses.

2. Maine Indian Settlement Acts

There are four federally recognized Indian tribes in Maine represented by five governing bodies. The Penobscot Nation and the Passamaquoddy Tribe have reservations and trust land holdings in central and coastal Maine. The Passamaquoddy Tribe has two governing bodies, one on the Pleasant Point Reservation and another on the Indian Township Reservation. The Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs have trust lands farther north in the state. To simplify the discussion, EPA will refer to the Penobscot Nation and the

Passamaquoddy Tribe together as the "Southern Tribes" and the Houlton Band of Maliseet Indians and Aroostook Band of Micmacs as the "Northern Tribes." EPA acknowledges that these are collective appellations the tribes themselves have not adopted, and the Agency uses them solely to simplify this discussion.

In 1980, Congress passed the Maine Indian Claims Settlement Act (MICSA) that resolved litigation in which the Southern Tribes asserted land claims to a large portion of the state of Maine. Public Law 96-420, 94 Stat. 1785. MICSA ratified a state statute passed in 1979, the Maine Implementing Act (MIA, 30 M.R.S. 6201, *et seq.*), which was designed to embody the agreement reached between the state and the Southern Tribes. In 1981, MIA was amended to include provisions for land to be taken into trust for the Houlton Band of Maliseet Indians, as provided for in MICSA. Public Law 96-420, 94 Stat. 1785 section 5(d)(1); 30 M.R.S. 6205-A. Since it is Congress that has plenary authority as to federally recognized Indian tribes, MIA's provisions concerning jurisdiction and the status of the tribes are effective as a result of, and consistent with, the Congressional ratification in MICSA.

In 1989, the Maine legislature passed the Micmac Settlement Act (MSA) to embody an agreement as to the status of the Aroostook Band of Micmacs. 30 M.R.S. 7201, *et seq.* In 1991, Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA), which ratified the MSA. Act of Nov. 26, 1991, Public Law 102-171, 105 Stat. 1143. One principal purpose of both statutes was to give the Micmacs the same settlement that had been provided to the Maliseets in MICSA. See ABMSA 2(a)(4) and (5). In 2007, the U.S. Court of Appeals for the First Circuit confirmed that the Micmacs and Maliseets are subject to the same jurisdictional provisions in MICSA. *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007). Where appropriate, this preamble discussion will refer to the combination of MICSA, MIA, ABMSA, and MSA as the "Indian settlement acts" or "settlement acts."

3. EPA's Disapprovals of Portions of Maine's Water Quality Standards

On February 2, March 16, and June 5, 2015, EPA disapproved a number of Maine's new and revised WQS. These decision letters are available in the docket for this rulemaking. They were prompted by an ongoing lawsuit

² USEPA. 2000. Memorandum #WQSP-00-03. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/sites/production/files/2015-01/documents/standards-shellfish.pdf>.

³ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, (80 FR 36986, June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <http://water.epa.gov/scitech/swguidance/standards/criteria/current/hhfinal.cfm>.

initiated by Maine against EPA.⁴ As discussed in the preamble to the proposed rule (see 81 FR 23239, 23241–23242), some of the disapprovals applied only to waters in Indian lands in Maine, while others applied to waters throughout the state or to waters in the state outside of Indian lands.⁵ EPA concluded that the disapproved WQS did not adequately protect designated uses related to the protection of human health and/or aquatic life.⁶ EPA requested the state to revise its WQS to address the issues identified in the disapprovals. The statutory 90-day timeframe provided to the state to revise its WQS has passed with respect to all of the disapproved WQS. EPA is required by the CWA to promptly propose and then, within 90 days of proposal, to promulgate federal standards unless, in the meantime, the state adopts and EPA approves state replacement WQS that address EPA's disapproval. The state has not adopted WQS revisions to address the disapprovals. Having published the proposed rule on April 20, 2016, EPA is today finalizing the rule. With the exception of minor revisions to several human health criteria as noted in

⁴ The state has filed an amended complaint in that lawsuit, challenging, among other things, EPA's February 2, 2015 approval of certain designated uses and disapprovals of Maine's HHC.

⁵ As discussed in the proposal for this rule, unlike in most other states, Maine has the authority to promulgate WQS for waters in Indian lands in Maine, as a result of the settlement acts.

⁶ After further consideration, by letter of January 19, 2016, EPA withdrew its February 2, 2015, disapprovals of Maine's HHC for six pollutants (copper, asbestos, barium, iron, manganese and nitrates) and instead approved them. EPA concluded that those criteria were not calculated using a fish consumption rate, and therefore the basis for EPA's disapprovals of the HHC in the February 2, 2015, decision letter did not apply. EPA approved them as being consistent with EPA's recommended CWA section 304(a) criteria. In addition, by letter of April 11, 2016, EPA withdrew its February 2, 2015, disapprovals of Maine's HHC for the following HHC and instead approved them: (1) For the consumption of water plus organisms for 1,2-dichloropropane, 1,4-dichlorobenzene, dichlorobromomethane, chlorodibromomethane, chrysene, methylene chloride, chlorophenoxy herbicide (2, 4, 5-TP), chlorophenoxy herbicide (2,4-D), and Nnitrosopyrrolidine; (2) for the consumption of organisms alone for acrolein and gamma-BHC (Lindane); and (3) for both the consumption of water plus organisms and for the consumption of organisms alone for 1,2-dichloroethane, acrylonitrile, benzidine, bis(chloromethyl) ether, chloroform, methyl bromide, and tetrachloroethylene. EPA calculated the HHC for these pollutants using the best science reflected in the 2015 criteria updates (which were finalized after the disapprovals), along with a fish consumption rate (FCR) of 286 g/day to protect the sustenance fishing use, and concluded that the resulting HHC were either the same or less stringent than Maine's HHC that EPA had disapproved. Accordingly, EPA withdrew the disapprovals and approved these HHC based on their being adequate to protect the sustenance fishing use.

section II.B.1.a and two small changes discussed in section II.B.2, EPA's final rule is identical to the proposed rule.

4. Scope of Action

a. Scope of Promulgation Related to Disapprovals

To address the disapprovals discussed in section II.A.3, EPA is promulgating human health criteria (HHC) for toxic pollutants and six other WQS that apply only to waters in Indian lands; two WQS for all waters in Maine including waters in Indian lands; and one WQS for waters in Maine outside of Indian lands. For the purpose of this rulemaking, "waters in Indian lands" are those waters in the tribes' reservations and trust lands as provided for in the settlement acts.

b. Scope of Promulgation Related to the Administrator's Determination

On April 20, 2016, EPA made a CWA section 303(c)(4)(B) determination that, for any waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, new or revised HHC for the protection of human health in Maine are necessary to meet the requirements of the CWA. EPA proposed (see 81 FR 23239, 23242–23243), and is now finalizing, HHC for toxic pollutants, in accordance with the CWA section 303(c)(4)(B) determination, for the following waters: (1) Waters in Indian lands in the event that a court determines that EPA's disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect;⁷ and (2) waters where there is a sustenance fishing designated use outside of waters in Indian lands.⁸

⁷ Maine has challenged EPA's disapprovals in federal district court, asserting that EPA did not have the authority to disapprove the HHC in waters in Indian lands. While EPA's position is that the disapprovals were authorized and Maine's existing HHC are not in effect, this determination ensures that EPA has the authority to promulgate the proposed HHC, and that the tribes' sustenance fishing use would be protected, even if Maine were to prevail in its challenge to EPA's disapproval authority.

⁸ In its February 2015 Decision, EPA concluded that section 6207(4) and (9) of MIA constituted a new or revised water quality standard and approved the provision as a designated use of sustenance fishing applicable to all inland waters of the Southern Tribes' reservations in which populations of fish are or may be found. Accordingly, EPA's approval of MIA section 6207(4) and (9) as a designated use of sustenance fishing applies to all waters where the Southern Tribes have a right to sustenance fish, irrespective of whether such waters are determined to be outside of the scope of their reservation for purposes other than sustenance fishing.

EPA notes that there may be one or more waters where the sustenance fishing designated use based on MIA section 6207(4) and (9) extends beyond "waters in Indian lands." For example, a federal

5. Applicability of Water Quality Standards

These water quality standards apply to the categories of waters for CWA purposes, as described in II.B below. Although EPA is finalizing WQS to address the standards that it disapproved or for which it has made a determination, Maine continues to have the option to adopt and submit to EPA new or revised WQS that remedy the issues identified in the disapprovals and determination, consistent with CWA section 303(c) and EPA's implementing regulations at 40 CFR part 131.

Some commenters urged EPA to finalize its rule without any further delay. Conversely, the state noted that EPA should give it additional time to adopt and submit its own WQS to address EPA's disapprovals. EPA acknowledges the perspectives of all of these commenters. EPA agrees that there is a compelling need to finalize the WQS, particularly in waters in Indian lands in Maine. For many pollutants, there are no criteria in effect for CWA purposes in waters in Indian lands, including most human health criteria, and it is important to remedy this gap in protection without further delay where possible. Further, the tribes have repeatedly expressed their desire for, and the importance of, their right to a sustenance fishing way of life, reserved for them under the settlement acts, to be protected. EPA, as a federal government agency, is taking action to protect that right, consistent with the settlement acts and CWA, as described further below.

EPA also agrees that the CWA is intended to protect the Nation's waters through a system of cooperative federalism, with states having the primary responsibility of establishing protective WQS for waters under their jurisdiction. However, Maine is challenging EPA's disapproval of the

district court recently held that the Penobscot Nation's "reservation" for sustenance fishing purposes, as contained in MIA section 6207(4), is broader in scope than its "reservation" under MIA section 6203(8). *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Maine Dec. 16, 2015) (formerly, *Penobscot v. Schneider*, appeal docketed, No. 16–1435 (1st Cir. April 26, 2016)). The court held that the Penobscot Nation has a right to sustenance fish throughout the main stem of the Penobscot River (from Indian Island to the confluence of the East and West Branches of the Penobscot River), though its reservation under section 6203(8) consists solely of the islands in that stretch of the river. The determination and corresponding final HHC apply to any water that is beyond the scope of "waters in Indian lands" and to which the sustenance fishing designated use based on MIA section 6207(4) and (9) applies. For a more detailed discussion, see section III.D.5 of this preamble, and also Topic 5 in EPA's Response to Comments document and the "Scope of Waters" Technical Support Document; both documents are in the docket for this rulemaking.

HHC for waters in Indian lands in federal court, and it commented adversely on EPA's proposed HHC, pH, bacteria, and tidal temperature criteria for waters in Indian lands.

Consequently, EPA has no assurance that Maine will develop WQS that EPA can approve as scientifically defensible and protective of Maine's designated uses.

Having considered these comments, EPA, in keeping with its statutory obligation to promulgate WQS within 90 days after proposing them and the need for these WQS to meet the requirements of the CWA, is finalizing the WQS.

In the April 20, 2016, **Federal Register** notice, EPA proposed that if Maine adopted and submitted WQS that meet CWA requirements after EPA finalized its proposed rule, they would become effective for CWA purposes upon EPA approval and EPA's corresponding promulgated WQS would no longer apply. No commenters supported this proposal. Two commenters objected to it, and one asked that EPA specify that WQS

adopted by the state would have to be at least as stringent as the federally proposed WQS for EPA to approve and make the state WQS effective for CWA purposes.

Upon consideration of comments received on its proposed rule, EPA decided not to finalize the above proposed approach. Consistent with 40 CFR 131.21(c), EPA's federally promulgated WQS are and will be applicable for purposes of the CWA until EPA withdraws those federally promulgated WQS. EPA would undertake a rulemaking to withdraw the federal WQS if and when Maine adopts and EPA approves corresponding WQS that meet the requirements of section 303(c) of the CWA and EPA's implementing regulations at 40 CFR part 131.

B. Description of Final Rule

1. Final WQS for Waters in Indian Lands in Maine and for Waters outside of Indian Lands in Maine Where the Sustenance Fishing Designated Use Established by 30 M.R.S. 6207(4) and (9) Applies

a. Human Health Criteria for Toxic Pollutants

After consideration of all comments received on EPA's proposed rule, EPA is finalizing the proposed criteria for 96 toxic pollutants in this rule applicable to waters in Indian lands.⁹ Table 2 provides the criteria for each pollutant as well as the HHC inputs used to derive each one. These criteria also apply to any waters that are covered by the determination referenced in section II.A.4.

⁹ Final human health criteria for antimony, dichlorobromomethane, nickel, nitrosamines, N-nitrosodibutylamine, N-nitrosodiethylamine, PCBs, selenium, and zinc have been modified slightly from the criteria as proposed to better reflect the appropriate number of significant figures (*i.e.*, precision) in the value.

TABLE 2—FINAL HHC AND KEY PARAMETERS USED IN THEIR DERIVATION

Chemical name	CAS No.	Cancer slope factor, CSF (per mg/kg-d)	Relative source contribution RSC (-)	Reference dose, RfD (mg/kg-d)	Bioaccumulation factor for trophic level 2 (L/kg tissue)	Bioaccumulation factor for trophic level 3 (L/kg tissue)	Bioaccumulation factor for trophic level 4 (L/kg tissue)	Bioconcentration factor (L/kg tissue) ^a	Water & organisms (µg/L)	Organisms only (µg/L)
1 1,1,2,2-Tetrachloroethane	79-34-5	0.2	.....	.....	5.7	7.4	8.4	.....	0.09	0.2
2 1,1,2-Trichloroethane	79-00-5	0.057	.....	.....	6.0	7.8	8.9	.....	0.31	0.66
3 1,1-Dichloroethylene	75-35-4	.....	.....	0.05	2.0	2.4	2.6	.....	300	1000
4 1,2,4,5-Tetrachlorobenzene	95-94-3	.....	0.20	0.0003	17,000	2,900	1,500	.....	0.002	0.002
5 1,2,4-Trichlorobenzene	120-82-1	0.029	.....	.....	2,800	1,500	430	.....	0.0056	0.0056
6 1,2-Dichlorobenzene	95-50-1	.....	0.20	0.3	52	71	82	.....	200	300
7 1,2-Dichloropropane	78-87-5	0.036	.....	.....	2.9	3.5	3.9	.....	.....	2.3
8 1,2-Diphenylhydrazine	122-66-7	0.8	.....	.....	18	24	27	.....	0.01	0.02
9 1,2-Trans-Dichloroethylene	156-60-5	.....	0.20	0.02	3.3	4.2	4.7	.....	90	300
10 1,3-Dichlorobenzene	541-73-1	.....	0.20	0.002	31	120	190	.....	1	1
11 1,3-Dichloropropene	542-75-6	0.122	.....	.....	2.3	2.7	3.0	.....	0.21	0.87
12 1,4-Dichlorobenzene	106-46-7	.....	0.20	0.07	28	66	84	.....	40	70
13 2,4,5-Trichlorophenol	95-95-4	.....	0.20	0.1	100	140	160	.....	40	40
14 2,4,6-Trichlorophenol	88-06-2	0.011	.....	.....	94	130	150	.....	0.20	0.21
15 2,4-Dichlorophenol	120-83-2	.....	0.20	0.003	31	42	48	.....	4	4
16 2,4-Dimethylphenol	105-67-9	0.167	.....	0.02	4.8	6.2	7.0	.....	80	200
17 2,4-Dinitrophenol	51-28-5	0.34	.....	0.002	a 4.4	a 4.4	a 4.4	.....	9	30
18 2,4-Dinitrotoluene	121-14-2	0.667	.....	.....	2.8	3.5	3.9	.....	0.036	0.13
19 2-Chloronaphthalene	91-58-7	17	.....	0.08	150	210	240	.....	90	90
20 2-Chlorophenol	95-57-8	6.3	.....	0.005	3.8	4.8	5.4	.....	20	60
21 2-Methyl-4,6-Dinitrophenol	534-52-1	.....	0.20	0.0003	6.8	8.9	10	.....	1	2
22 3,3-Dichlorobenzidine	91-94-1	0.45	.....	.....	44	60	69	.....	0.0096	0.011
23 4,4'-DDD	72-54-8	0.24	.....	.....	33,000	140,000	240,000	.....	9.3E-06	9.3E-06
24 4,4'-DDE	72-55-9	0.167	.....	.....	270,000	1,100,000	3,100,000	.....	1.3E-06	1.3E-06
25 4,4'-DDT	50-29-3	0.34	.....	.....	35,000	240,000	1,100,000	.....	2.2E-06	2.2E-06
26 Acenaphthene	83-32-9	.....	0.20	0.06	a 510	a 510	a 510	.....	6	7
27 Acrolein	107-02-8	.....	0.20	0.0005	1.0	1.0	1.0	.....	3	.....
28 Aldrin	309-00-2	17	.....	.....	18,000	310,000	650,000	.....	5.8E-08	5.8E-08
29 alpha-BHC	319-84-6	6.3	.....	.....	1,700	1,400	1,500	.....	2.9E-05	2.9E-05
30 alpha-Endosulfan	959-98-8	.....	0.20	0.006	130	180	200	.....	2	2
31 Anthracene	120-12-7	.....	0.20	0.3	a 610	a 610	a 610	.....	30	30
32 Antimony	7440-36-0	.....	0.40	0.0004	.....	.....	.....	.....	5	40
33 Benzene	71-43-2	b 0.055	.....	.....	3.6	4.5	5.0	.....	0.40	1.2
34 Benzo (a) Anthracene	56-55-3	0.73	.....	.....	a 3,900	a 3,900	a 3,900	.....	9.8E-05	9.8E-05
35 Benzo (a) Pyrene	50-32-8	7.3	.....	.....	a 3,900	a 3,900	a 3,900	.....	9.8E-06	9.8E-06
36 Benzo (b) Fluoranthene	205-99-2	0.73	.....	.....	a 3,900	a 3,900	a 3,900	.....	9.8E-05	9.8E-05
37 Benzo (k) Fluoranthene	207-08-9	0.073	.....	.....	a 3,900	a 3,900	a 3,900	.....	0.00098	0.00098
38 beta-BHC	319-85-7	1.8	.....	.....	110	160	180	.....	0.0010	0.0011
39 beta-Endosulfan	33213-65-9	.....	0.20	0.006	80	110	130	.....	3	3
40 Bis(2-Chloro-1-Methylethyl) Ether	108-60-1	.....	0.20	0.04	6.7	8.8	10	.....	100	300
41 Bis(2-Chloroethyl) Ether	111-44-4	1.1	.....	.....	1.4	1.6	1.7	.....	0.026	0.16
42 Bis(2-Ethylhexyl) Phthalate	117-81-7	0.014	.....	.....	a 710	a 710	a 710	.....	0.028	0.028
43 Bromoform	75-25-2	0.0045	.....	.....	5.8	7.5	8.5	.....	4.0	8.7
44 Butylbenzyl Phthalate	85-68-7	0.0019	.....	.....	a 19,000	a 19,000	a 19,000	.....	0.0077	0.0077
45 Carbon Tetrachloride	56-23-5	0.07	.....	.....	9.3	12	14	.....	0.2	0.3
46 Chloroform	57-74-9	0.35	.....	.....	5,300	44,000	60,000	.....	2.4E-05	2.4E-05
47 Chlorobenzene	108-90-7	.....	0.20	0.02	14	19	22	.....	40	60
48 Chlorodibromomethane	124-48-1	0.040	.....	.....	3.7	4.8	5.3	.....	1.5	1.5
49 Chrysene	218-01-9	0.0073	.....	.....	a 3,900	a 3,900	a 3,900	.....	.....	0.0098
50 Cyanide	57-12-5	7.3	.....	.....	a 3,900	a 3,900	a 3,900	.....	4	30
51 Dibenzo (a, h) Anthracene	53-70-3	0.034	.....	.....	3.4	4.3	4.8	.....	9.8E-06	9.8E-06
52 Dichlorobromomethane	75-27-4	16	.....	.....	14,000	210,000	410,000	.....	2.0	2.0
53 Dieldrin	60-57-1	.....	0.20	0.8	a 920	a 920	a 920	.....	9.3E-08	9.3E-08
54 Diethyl Phthalate	84-66-2	.....	0.20	0.1	a 4,000	a 4,000	a 4,000	.....	50	50
55 Dimethyl Phthalate	131-11-3	.....	0.20	0.1	a 2,900	a 2,900	a 2,900	.....	100	100
56 Di-n-Butyl Phthalate	84-74-2	.....	0.20	0.002	88	120	140	.....	2	2
57 Dinitrophenols	25550-58-7	.....	0.20	0.006	4,600	36,000	46,000	.....	10	70
58 Endosulfan Sulfate	1031-07-8	.....	0.20	0.0003	.....	.....	.....	.....	3	3
59 Endrin	72-20-8	.....	0.80	.....	.....	.....	.....	.....	0.002	0.002

60	Endrin Aldehyde	7421-93-4	0.0003	440	920	850	0.09
61	Ethylbenzene	100-41-4	0.022	100	140	160	9.5
62	Fluoranthene	206-44-0	0.04	a 1,500	a 1,500	a 1,500	1
63	Fluorene	86-73-7	0.04	230	450	710	5
64	gamma-BHC (Lindane)	58-89-9	0.0047	1,200	2,400	2,500	0.33
65	Heptachlor	76-44-8	4.1	12,000	180,000	330,000	4.4E-07
66	Heptachlor Epoxide	1024-57-3	5.5	4,000	28,000	35,000	2.4E-06
67	Hexachlorobenzene	118-74-1	1.02	18,000	46,000	90,000	5.9E-06
68	Hexachlorobutadiene	87-68-3	0.04	23,000	2,800	1,100	0.0007
69	Hexachlorocyclohexane-Technical	608-73-1	1.8	160	220	250	0.00073
70	Hexachlorocyclopentadiene	77-47-4	0.20	620	1,500	1,300	0.3
71	Hexachloroethane	67-72-1	0.04	1,200	280	600	0.01
72	Indeno (1,2,3-cd) Pyrene	193-39-5	0.73	a 3,900	a 3,900	a 3,900	9.8E-05
73	Isophorone	78-59-1	0.00095	1.9	2.2	2.4	28
74	Methoxychlor	72-43-5	0.80	1,400	4,800	4,400	0.001
75	Methylene Chloride	75-09-2	0.002	1.4	1.5	1.6	90
76	Methylmercury	22967-92-6	2.70E-05	0.0001	0.0001	0.0001	c 0.02 (mg/kg)
77	Nickel	7440-02-0	0.20	2.3	2.8	3.1	20
78	Nitrobenzene	98-95-3	0.20	0.002	0.002	0.002	40
79	Nitrosamines	924-16-3	43.46	0.0001	0.0001	0.0001	0.032
80	N-Nitrosodibutylamine	55-18-5	5.43	0.0001	0.0001	0.0001	0.032
81	N-Nitrosodiethylamine	62-75-9	43.46	0.0001	0.0001	0.0001	0.0152
82	N-Nitrosodimethylamine	621-64-7	51	0.0001	0.0001	0.0001	0.032
83	N-Nitrosodi-n-propylamine	86-30-6	7.0	0.0001	0.0001	0.0001	0.21
84	N-Nitrosodiphenylamine	930-55-2	0.0049	0.0001	0.0001	0.0001	0.035
85	N-Nitrosopyrrolidine	608-93-5	2.13	0.0001	0.0001	0.0001	0.42
86	Pentachlorobenzene	87-86-5	0.4	3,500	4,500	10,000	2.4
87	Pentachlorophenol	108-95-2	0.20	44	290	520	0.008
88	Phenol	1336-36-3	0.20	1.5	1.7	1.9	0.003
89	Polychlorinated Biphenyls (PCBs)	129-00-0	0.6	0.0001	0.0001	0.0001	20,000
90	Pyrene	7782-49-2	0.03	a 860	a 860	a 860	d 4E-06
91	Selenium	108-88-3	0.005	11	15	17	2
92	Toluene	8001-35-2	0.20	0.0097	0.0097	0.0097	60
93	Toxaphene	79-01-6	1.1	1,700	6,600	6,300	39
94	Trichloroethylene	75-01-4	0.05	8.7	12	13	5.3E-05
95	Vinyl Chloride	7440-66-6	1.5	1.4	1.6	1.7	0.5
96	Zinc		0.20	0.3	0.3	0.3	0.12
							400

^a This bioaccumulation factor was estimated from laboratory-measured bioconcentration factors; EPA multiplied this bioaccumulation factor by the overall fish consumption rate of 286 g/day to calculate the human health criteria.

^b EPA's CWA section 304(a) HHC for benzene use a CSF range of 0.015 to 0.055 per mg/kg-day. EPA used the higher end of the CSF range (0.055 per mg/kg-day) to derive the final benzene criteria.

^c This criterion is expressed as the fish tissue concentration of methylmercury (mg methylmercury/kg fish) and applies equally to fresh and marine waters. See Water Quality Criterion for the Protection of Human Health: Methylmercury (EPA-823-R-01-001, January 3, 2001) for how this value is calculated using the criterion equation in EPA's 2000 Methodology rearranged to solve for a protective concentration in fish tissue rather than in water.

^d This criterion applies to total PCBs (i.e., the sum of all congener or isomer or homolog or Aroclor analyses)

^e EPA multiplied this bioconcentration factor by the overall fish consumption rate of 286 g/day to calculate the human health criteria.

i. Sustenance Fishing Designated Use and Tribal Target Population

In its February 2015 decision, EPA concluded that MICSA granted the state authority to set WQS in waters in Indian lands. EPA also concluded that in assessing whether the state's WQS were approvable for waters in Indian lands, EPA must effectuate the CWA requirement that WQS must protect applicable designated uses and be based on sound science in consideration of the fundamental purpose for which land was set aside for the tribes under the Indian settlement acts in Maine. EPA found that those settlement acts provide for land to be set aside as a permanent land base for the Indian tribes in Maine, in order for the tribes to be able to continue their unique cultural practices, including the ability to exercise sustenance fishing practices. Accordingly, EPA interpreted the state's "fishing" designated use, as applied to waters in Indian lands, to mean "sustenance fishing" and approved it as such. EPA also approved a specific sustenance fishing right reserved in MIA sections 6207(4) and (9) as a designated use for all inland waters of the Southern Tribes' reservations. Against this backdrop, EPA approved or disapproved all of Maine's HHC for toxic pollutants as applied to waters in Indian lands after evaluating whether they satisfied CWA requirements.

EPA determined that the tribal populations must be treated as the general target population in waters in Indian lands. EPA disapproved many of Maine's HHC for toxic pollutants based on EPA's conclusion that they do not adequately protect the health of tribal sustenance fishers in waters in Indian lands. EPA concluded that the disapproved HHC did not support the designated use of sustenance fishing in such waters because they were not based on the higher, unsuppressed fish consumption rates that reflect the tribes' sustenance fishing practices. Accordingly, EPA proposed, and is now finalizing, HHC that EPA has determined will protect the sustenance fishing designated use, based on sound science and consistent with the CWA and EPA regulations and policy.

ii. General Recommended Approach for Deriving HHC

HHC for toxic pollutants are designed to minimize the risk of adverse cancer and non-cancer effects occurring from lifetime exposure to pollutants through the ingestion of drinking water and consumption of fish/shellfish obtained from inland and nearshore waters. EPA's practice is to establish CWA

section 304(a) HHC for the combined activities of drinking water and consuming fish/shellfish obtained from inland and nearshore waters, and separate CWA section 304(a) HHC for consuming only fish/shellfish originating from inland and nearshore waters. The latter criteria apply in cases where the designated uses of a waterbody include supporting fish/shellfish for human consumption but not drinking water supply sources (e.g., in non-potable estuarine waters).

The criteria are based on two types of biological endpoints: (1) Carcinogenicity and (2) systemic toxicity (i.e., all adverse effects other than cancer). EPA takes an integrated approach and considers both cancer and non-cancer effects when deriving HHC. Where sufficient data are available, EPA derives criteria using both carcinogenic and non-carcinogenic toxicity endpoints and recommends the lower value. HHC for carcinogenic effects are typically calculated using the following input parameters: Cancer slope factor, excess lifetime cancer risk level, body weight, drinking water intake rate, fish consumption rate(s), and bioaccumulation factor(s). HHC for noncarcinogenic and nonlinear carcinogenic effects are typically calculated using reference dose, relative source contribution (RSC), body weight, drinking water intake rate, fish consumption rate(s) and bioaccumulation factor(s). EPA selects a mixture of high-end and central (mean) tendency inputs to the equation in order to derive recommended criteria that "afford an overall level of protection targeted at the high end of the general population (i.e., the target population or the criteria-basis population)." ¹⁰

EPA received comments supporting and opposing specific input parameters EPA used to derive the proposed HHC. The specific input parameters used are explained in the following paragraphs.

iii. Maine-Specific HHC Inputs

I. Cancer Risk Level. As set forth in EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (the "2000 Methodology"), EPA calculates its CWA section 304(a) HHC at concentrations corresponding to a 10^{-6} cancer risk level (CRL), meaning that if exposure were to occur as set forth in the CWA section 304(a) methodology at the prescribed concentration over the course of one's lifetime, then the risk of

¹⁰ United States Environmental Protection Agency (U.S. EPA). 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. EPA-822-B-00-004, p. 2-1.

developing cancer from the exposure as described would be a one in a million increment above the background risk of developing cancer from all other exposures.¹¹

In this rule, EPA derived the final HHC for carcinogens using a 10^{-6} CRL, consistent with EPA's 2000 Methodology and with Maine Department of Environmental Protection (DEP) Rule Chapter 584, which specifies that water quality criteria for carcinogens must be based on a 10^{-6} CRL, and which EPA approved for waters in Indian lands on February 2, 2015.¹² The HHC provide the tribes engaged in sustenance fishing in waters in Indian lands in Maine with an equivalent level of cancer risk protection (i.e., 10^{-6}) as is afforded to the general population in Maine outside of waters in Indian lands.

EPA received comments in favor of using the proposed 10^{-6} CRL level as well as recommendations for higher and lower CRLs. Responses to those comments are summarized in section III.D.5.

II. Cancer Slope Factor and Reference Dose. For noncarcinogenic toxicological effects, EPA uses a chronic-duration oral reference dose (RfD) to derive HHC. An RfD is an estimate (with uncertainty spanning perhaps an order of magnitude) of a daily oral exposure of an individual to a substance that is likely to be without an appreciable risk of deleterious effects during a lifetime. For carcinogenic toxicological effects, EPA uses an oral cancer slope factor (CSF) to derive HHC. The oral CSF is an upper bound, approximating a 95% confidence limit, on the increased cancer risk from a lifetime oral exposure to a stressor.

EPA did not receive any comments on the pollutant-specific RfDs or CSFs used in the derivation of the proposed criteria, which were based on EPA's National Recommended Water Quality Criteria.¹³ EPA has used the same values to derive the final HHC.

III. Body Weight. The final HHC were calculated using the proposed body weight of 80 kilograms (kg), consistent with the default body weight used in EPA's most recent National

¹¹ Id., p. 2-6.

¹² The only exception from the requirement to use a CRL of 10^{-6} in Chapter 584 is for arsenic, for which a CRL of 10^{-4} is required. EPA disapproved the arsenic CRL for waters in Indian lands.

¹³ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

Recommended Water Quality Criteria.¹⁴ This body weight is the average weight of a U.S. adult age 21 and older, based on National Health and Nutrition Examination Survey (“NHANES”) data from 1999 to 2006.¹⁵ EPA received one comment regarding body weight, which requested that EPA use a body weight of 70 kg. However, the commenter did not present a sound scientific rationale to support the use of a different body weight. See Topic 6 of the RTC document for a more detailed response.

IV. Drinking water intake. The final HHC were calculated using the proposed drinking water intake rate of 2.4 liters per day (L/day), consistent with the default drinking water intake rate used in EPA’s most recent National Recommended Water Quality Criteria.¹⁶ This rate represents the per capita estimate of combined direct and indirect community water ingestion at the 90th percentile for adults ages 21 and older.¹⁷ EPA did not receive any comments regarding the proposed drinking water intake rate.

V. Bioaccumulation Factors (BAFs) and Bioconcentration Factors (BCFs). The final HHC were calculated using the proposed pollutant-specific BAFs or BCFs, consistent with the factors used in EPA’s most recent National Recommended Water Quality Criteria.¹⁸ These factors are used to relate aqueous pollutant concentrations to predicted pollutant concentrations in the edible portions of ingested species. EPA did

not receive any comments regarding specific proposed BAFs or BCFs.

VI. Fish Consumption Rate (FCR). In finalizing the HHC, EPA used the proposed FCR of 286 g/day to represent present day sustenance level fish consumption for waters in Indian lands. This FCR supports the designated use of sustenance fishing. EPA selected this consumption rate based on information contained in an historical/anthropological study, entitled the Wabanaki Cultural Lifeways Exposure Scenario¹⁹ (“Wabanaki Study”), which was completed in 2009. EPA also consulted with the tribes in Maine about the Wabanaki Study and their sustenance fishing uses of the waters in Indian lands. There has been no contemporary local survey of current fish consumption that documents fish consumption rates for sustenance fishing in the waters in Indian lands in Maine. In the absence of such information, EPA concluded that the Wabanaki Study contains the best currently available estimate for contemporary tribal sustenance level fish consumption for waters where the sustenance fishing designated use applies.

EPA received many comments that agreed and some that disagreed with EPA’s selection of the proposed FCR of 286 g/day. Responses to those comments can be found in section III.D of this preamble and, in further detail, in Topic 3 of the RTC document.

VII. Relative Source Contribution (RSC). For pollutants that exhibit a threshold of exposure before deleterious effects occur, as is the case for noncarcinogens and nonlinear carcinogens, EPA applied a RSC to account for other potential human exposures to the pollutant.²⁰ Other sources of exposure might include, but are not limited to, exposure to a particular pollutant from non-fish food consumption (e.g., consumption of fruits, vegetables, grains, meats, or poultry), dermal exposure, and inhalation exposure. For substances for which the toxicity endpoint is carcinogenicity based on a linear low-dose extrapolation, only the exposures from drinking water and fish ingestion are reflected in HHC; no other potential sources of exposure to pollutants or other potential exposure pathways have

been considered in developing HHC.²¹ In these situations, HHC are derived with respect to the incremental lifetime cancer risk posed by the presence of a substance in water, rather than an individual’s total risk from all sources of exposure.

As in the proposed HHC, for the pollutants included in EPA’s 2015 criteria update, EPA used the same RSCs in the final HHC as were used in the criteria update. Also as in the proposed HHC, for pollutants where EPA did not update the section 304(a) HHC in 2015, EPA used a default RSC of 0.20 to derive the final HHC except for antimony, for which EPA used an RSC of 0.40 consistent with the RSC value used the last time the Agency updated this criterion. EPA did not receive any comments on specific RSCs used in the derivation of the proposed criteria.

2. Final WQS for Waters in Indian Lands in Maine

a. Bacteria Criteria

i. Recreational Bacteria Criteria

EPA is finalizing the proposed year-round recreational bacteria criteria for Class AA, A, B, C, GPA, SA, SB and SC waters in Indian lands. The magnitude criteria are expressed in terms of *Escherichia coli* colony forming units per 100 milliliters (cfu/100 ml) for fresh waters and *Enterococcus spp.* colony forming units per 100 milliliters (cfu/100 ml) for marine waters and are based on EPA’s 2012 Recreational Water Quality Criteria (RWQC) recommendations.²²

Several comments supported EPA’s proposed rule and the year round applicability of the criteria. Maine DEP objected to EPA’s inclusion of wildlife sources in the scope of the bacteria criteria and requested that the criteria not be applicable from October 1–May 14, similar to Maine’s disapproved criteria. For the reasons discussed in section III.E.2., EPA has determined that, based on best available information, it is necessary to include wildlife sources in the scope of the criteria, and to apply the criteria year round, in order to protect human health and the designated use of recreation in and on the water.

ii. Shellfishing Bacteria Criteria

EPA’s final bacteria rule for Class SA shellfish harvesting areas for waters in

¹⁴ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

¹⁵ USEPA. 2011. EPA Exposure Factors Handbook. United States Environmental Protection Agency, Washington, DC EPA 600/R-090/052F. <http://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=236252>.

¹⁶ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

¹⁷ USEPA. 2011. EPA Exposure Factors Handbook. United States Environmental Protection Agency, Washington, DC. EPA 600/R-090/052F. <http://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=236252>.

¹⁸ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

¹⁹ Harper, B., Ranco, D., et al. 2009. Wabanaki Traditional Cultural Lifeways Exposure Scenario. <https://www.epa.gov/tribal/wabanaki-traditional-cultural-lifeways-exposure-scenario>.

²⁰ USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA-822-B-00-004.

²¹ Id.

²² USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058. <https://www.epa.gov/wqc/2012-recreational-water-quality-criteria>.

Indian lands differs slightly from the proposed numeric total coliform bacteria criteria, as a result of comments from the state. Maine DEP requested EPA to express the criteria in terms of fecal coliform bacteria rather than total coliform bacteria, noting that the National Shellfish Sanitation Program (NSSP) allows the use of either indicator, that Maine DEP sets permit limits on fecal coliform bacteria rather than total coliform, and that Maine Department of Marine Resources (DMR) uses fecal coliform bacteria as its indicator parameter when making shellfish area opening/closure decisions. Maine DMR requested EPA not to specify a specific numeric standard but rather to promulgate the same narrative criterion that applies to Class SB and SC waters. For those classes of waters, Maine's WQS provide that instream bacteria levels may not exceed the criteria recommended under the NSSP.

The NSSP is the federal/state cooperative program recognized by the U.S. Food and Drug Administration (FDA) and the Interstate Shellfish Sanitation Conference (ISSC) for the sanitary control of shellfish produced and sold for human consumption.

EPA agrees that the NSSP allows for the use of either fecal coliform bacteria or total coliform bacteria as the indicator organism to protect shellfish harvesting. The current NSSP recommendations²³ for those organisms are consistent with EPA's national recommended water quality criteria.²⁴ The NSSP recommendations for fecal coliform standards and sampling protocols are set forth in Section II, Model Ordinance Chapter IV, Growing Areas .02 Microbial Standards (pages 51–54). The NSSP recommendations for total coliform standards and sampling protocols are set forth in Section IV, Guidance Documents Chapter II, Growing Areas .01 Total Coliform Standards (pages 216–219). Both sets of recommendations apply to various types of shellfish growing areas including remote status, areas affected by point source pollution, and areas affected by nonpoint source pollution.

In light of the state's concerns and suggestions, EPA's final rule contains a narrative criterion similar to Maine's approved criterion for Class SB and SC waters. The final rule provides "The numbers of total coliform bacteria or other specified indicator organisms in

samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration as set forth in the Guide for the Control of Molluscan Shellfish, 2015 Revision." EPA has added a specific reference to the date of the NSSP recommendations because there are legal constraints on incorporating future recommendations by reference. The NSSP 2015 recommendations are available online at: <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2006754.htm>. The recommendations are also included in the docket for this rulemaking, which is available both online at regulations.gov and in person at the EPA Docket Center Reading Room, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, and (202) 566–1744. Finally, the 2015 NSSP recommendations are obtainable from the U.S. Food and Drug Administration's Center for Food Safety and Applied Nutrition, Shellfish and Aquaculture Policy Branch, 5100 Paint Branch Parkway (HFS–325), College Park, MD 20740.

b. Ammonia Criteria for Fresh Waters

EPA is finalizing the proposed ammonia criteria for fresh waters in Indian lands to protect aquatic life. The criteria are based on EPA's 2013 updated CWA section 304(a) recommended ammonia criteria.²⁵ They are expressed as functions of temperature and pH, so the applicable criteria vary by waterbody, depending on the temperature and pH of those waters. EPA received several comments in support of the proposed ammonia criteria, and received no comments requesting changes.

c. pH Criterion for Fresh Waters

EPA is finalizing the proposed pH criterion of 6.5 to 8.5 to protect aquatic life in fresh waters in Indian lands. The criterion is based on EPA's 1986 national recommended criterion.²⁶ EPA received comments from the state and one industry, both requesting that Maine's pH criterion of 6.0–8.5 be retained. However, EPA does not agree

that 6.0 adequately protects aquatic life and notes in particular that pH values of 6.0 and lower have been shown to be detrimental to sensitive aquatic life, such as developing Atlantic salmon eggs and smolts.^{27 28 29} See Topic 11 of the RTC document for more detailed responses to comments.

d. Temperature Criteria for Tidal Waters

EPA is finalizing the proposed temperature criteria for tidal waters in Indian lands. The criteria will assure protection of the indigenous marine community characteristic of the intertidal zone at Pleasant Point in Passamaquoddy Bay, and are consistent with EPA's CWA section 304(a) recommended criteria for tidal waters.³⁰ They include a maximum summer weekly average temperature and a maximum weekly average temperature rise over reference site baseline conditions.

Maine DEP commented with concerns about the difficulty of finding reference sites to determine baseline temperatures and a question about whether there should be a baseline established for each season. EPA is confident that reference sites will not be difficult to identify, and there is no need to establish separate baselines outside the defined summer season. See Topic 12 of the RTC document for a more detailed response.

e. Natural Conditions Provisions

EPA is finalizing the proposed rule for waters in Indian lands that stated that Maine's natural conditions provisions in 38 M.R.S. 420(2.A) and 464(4.C) do not apply to water quality criteria intended to protect public health. EPA received several comments in support of the proposed rule, and received no comments requesting changes.

f. Mixing Zone Policy

EPA is finalizing the proposed mixing zone policy for waters in Indian lands with one small change to the

²⁷ Peterson, R.H., P.G. Daye, J.L. Metcalfe. 1980. Inhibition of Atlantic salmon (*Salmo salar*) hatching at low pH. *Can. J. Fish. Aquat. Sci.* 37: 770–774.

²⁸ Staurnes, M., F. Kroglund and B.O. Rosseland. 1995. Water quality requirement of Atlantic salmon (*Salmo salar*) in water undergoing acidification or liming in Norway. *Water, Air and Soil Pollution* 85: 347–352.

²⁹ Staurnes, M., L.P. Hansen, K. Fugelli, R. Haraldstad. 1996. Short-term exposure to acid water impairs osmoregulation, seawater tolerance, and subsequent marine survival of smolts of Atlantic salmon (*Salmo salar* L.) *Can. J. Fish. Aquat. Sci.* 53: 1965–1704.

³⁰ USEPA. 1986. Quality Criteria for Water 1986, U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA 440/5–86–001. Temperature section. <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=00001MGA.txt>.

²³ <http://www.fda.gov/downloads/Food/GuidanceRegulation/FederalStateFoodPrograms/UCM505093.pdf>.

²⁴ USEPA. 1986. Quality Criteria for Water 1986, United States Environmental Protection Agency, Washington, DC. EPA 440/5–86–001.

²⁵ USEPA. 2013. Aquatic Life Ambient Water Quality Criteria for Ammonia-Freshwater 2013. United States Environmental Protection Agency, Washington, DC. EPA 822–R–13–001. <https://www.epa.gov/wqc/aquatic-life-criteria-ammonia>.

²⁶ USEPA. 1986. Quality Criteria for Water 1986, U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA 440/5–86–001. pH section. <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=00001MGA.txt>.

prohibition of mixing zones for bioaccumulative pollutants.

Specifically, in order to avoid confusion over what is meant by “bioaccumulative pollutants” for the purpose of this rule, EPA has added a parenthetical definition which specifies that bioaccumulative pollutants are those “chemicals for which the bioconcentration factors (BCF) or bioaccumulation factors (BAF) are greater than 1,000.” This definition is based on EPA’s definition of bioaccumulation for chemical substances found at 64 FR 60194 (November 4, 1999).

EPA received several comments in support of the mixing zone policy. One of those commenters added that a total ban on mixing zones would be preferable. Two commenters asserted that EPA does not have the legal authority or the scientific basis to ban mixing zones for bioaccumulative pollutants outside the Great Lakes. EPA disagrees, for the reasons discussed in section III.E.1 of this preamble. One commenter raised comments about thermal mixing zones specific to its facility, and EPA’s response to those comments are contained in the RTC document at Topic 9.

3. Final WQS for All Waters in Maine

a. Dissolved Oxygen for Class A Waters

EPA is finalizing the proposed dissolved oxygen criteria for all Class A waters in Maine. The rule provides that dissolved oxygen shall not be less than 7 ppm (7 mg/L) or 75% of saturation, whichever is higher, year-round. For the period from October 1 through May 14, in fish spawning areas, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 ppm (9.5 mg/L), and the 1-day minimum dissolved oxygen concentration shall not be less than 8 ppm (8.0 mg/L). EPA received several comments in support of the proposed criteria, and received no comments requesting changes.

b. Waiver or Modification of WQS

EPA is finalizing the proposed rule stating that 38 M.R.S. 363–D, which allows waivers of state law in the event of an oil spill, does not apply to state or federal WQS applicable to waters in Maine, including designated uses, criteria to protect designated uses, and antidegradation requirements. EPA received several comments in support of the proposed rule, and received no comments requesting changes.

4. Final WQS for Waters in Maine Outside of Indian Lands

a. Phenol HHC for Consumption of Water Plus Organisms

EPA is finalizing the proposed phenol HHC for consumption of water plus organisms of 4000 µg/L, for waters in Maine outside of Indian lands. The criterion is consistent with EPA’s June 2015 national criteria recommendation,³¹ except that EPA used Maine’s default fish consumption rate for the general population of 32.4 g/day, consistent with DEP Rule Chapter 584.³² EPA received several comments in support of the proposed rule, and received no comments requesting changes.

III. Summary of Major Comments Received and EPA’s Response

A. Overview of Comments

EPA received 104 total comments, 100 of which are unique comments. The vast majority of the comments were general statements of support for EPA’s proposed rule from private citizens, including tribal members. Tribes and others provided substantive comments that also were generally supportive regarding the importance of protecting the designated use of sustenance fishing, identifying tribes as the target population, and using a 286 g/day fish consumption rate.

EPA also received comments critical of the proposal, principally from the Maine Attorney General and DEP, a single discharger and a coalition of dischargers, and two trade organizations. The focus of the remainder of this section III identifies and responds to the major adverse comments. Additionally, a comprehensive RTC document addressing all comments received is included in the docket for this rulemaking.

B. Maine Indian Settlement Acts

Before providing a more detailed discussion of the rationale relating to each element of EPA’s analysis supporting this promulgation, the Agency first addresses a general complaint made by several commenters that EPA has developed a complex rationale for its disapproval of Maine’s HHC and corresponding promulgation.

³¹ Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015). See also: USEPA. 2015. Final 2015 Updated National Recommended Human Health Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

³² 06–096 Code of Maine Rules, Chapter 584, Surface Water Quality Criteria for Toxic Pollutants.

EPA acknowledges that there are several steps in the Agency’s analysis of how Maine’s WQS must protect the uses of the waters in Indian lands, including application of the Agency’s expert scientific and policy judgment. The basic concepts are as follows:

- The Indian settlement acts provide for the Indian tribes to fish for their individual sustenance in waters in Indian lands and effectively establish a sustenance fishing designated use cognizable under the CWA for such waters.
- The CWA and EPA’s regulations mandate that water quality criteria must protect designated uses of waters provided for in state law. Designated uses are use goals of a water, whether or not they are being attained.
- When analyzing how water quality criteria protect a designated use, an agency must focus on the population that is exercising that use, and must assess the full extent of that use’s goal, where data are available.

The relevant explanatory details for each step of this rationale are presented below. But the underlying structure of the analysis is straightforward and appropriate under and consistent with applicable law.

Another general comment EPA received was that the agency’s approach “would impermissibly give tribes in Maine an enhanced status and greater rights with respect to water quality than the rest of Maine’s population.” Comments of Janet T. Mills, Maine Attorney General, (page 2). EPA explains below why the analysis EPA presented in its February 2015 decision and the proposal for this action is not only permissible, but also mandated by the CWA as informed by the Indian settlement acts. But as a general matter EPA disagrees that this action is impermissible because it accords the tribes in Maine “greater rights” or somehow derogates the water quality protection provided to the rest of Maine’s population.

EPA is addressing the particular sustenance fishing use provided for these tribes under Maine law and ratified by Congress. Because that use is confirmed in provisions in the settlement acts that pertain specifically and uniquely to the Indian tribes in Maine, EPA’s analysis of the use and the protection of that use must necessarily focus on how the settlement acts intend for the tribes to be able to use the waters at issue here. However, Maine’s claim that EPA is providing tribes in Maine “greater rights” than the general population is incorrect. In this action, EPA is not granting “rights” to anyone. Rather, EPA is simply promulgating

WQS in accordance with the requirements of the CWA—*i.e.*, identifying the designated use for waters in Indian lands, and establishing criteria to protect the target population exercising that use. As explained above, in light of the Indian settlement acts, the designated use is sustenance fishing, the tribes are the target population, and EPA has selected the appropriate FCR of that target population. This approach, together with EPA's selection of 10⁻⁶ CRL, is consistent with Maine's approach to protecting the target population in Maine waters outside of Indian lands. EPA's rule provides a comparable level of protection for the target population (sustenance fishers) for the waters in Indian lands that Maine provides to the target population for its fishing designated use (recreational fishers) that applies to waters outside Indian lands.³³ Further, the resulting HHC that EPA is promulgating in this rule protect both non-tribal members and tribal members in Maine. The great majority of the waters subject to the HHC are rivers and streams that are shared in common with non-Indians in the state or that flow into or out of waters outside Indian lands. It is not just the members of the Indian tribes in Maine who will benefit from EPA's action today.

One striking aspect of the comments EPA received on its proposal is that every individual who commented supported EPA's proposed action, including many non-Indians. Nearly all of the comments were individualized expressions of support, ranging from a profound recognition of the need to honor commitments made to the tribes in the Indian settlement acts to an acknowledgement that everyone in Maine benefits from improved water quality. It is notable that the record for this action shows that individuals in Maine who commented did not express concern that the tribes are being accorded a special status or that this action will in any way disadvantage the rest of Maine's population.

As described in section II.B.1, EPA previously approved MIA sections 6207(4) and (9) as an explicit designated use for the inland waters of the reservations of the Southern Tribes and interpreted and approved Maine's designated use of "fishing" for all waters in Indian lands to mean "sustenance fishing." Several commenters challenged EPA's

conclusion that the Indian settlement acts in Maine have the effect of establishing a designated use that includes sustenance fishing. This section explains how the Indian settlement acts provide for the Indian tribes in Maine to fish for their sustenance, and responds to arguments that this conclusion violates the settlement acts. Section III.C explains how EPA, under the CWA, interprets those provisions of state law as a sustenance fishing designated use which must be protected by the WQS applicable to the waters where that use applies.

As explained in more detail in the RTC document, MICSA, MIA, ABMSA, and MSA include different provisions governing sustenance practices, including fishing, depending on the type of Indian lands involved. In the reservations of the Southern Tribes, MIA explicitly reserves to the tribes the right to fish for their individual sustenance.³⁴ In the trust lands of the Southern Tribes, MIA provides a regulatory framework that requires consideration of "the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes," among other factors.³⁵ Congress clearly intended the Northern Tribes to be able to sustain their culture on their trust lands, consistent with Maine law, which amply accommodates a sustenance fishing diet.³⁶ Therefore, each of these provisions under the settlement acts in its own way is designed to establish a land base for these tribes where they may practice their sustenance lifeways. Indeed, EPA received an opinion from the Solicitor of the United States Department of the Interior (DOI), which analyzed the settlement acts and concluded that the tribes in Maine "have fishing rights connected to the lands set aside for them under federal and state statutes."³⁷

In its February 2015 decision, EPA analyzed how the settlement acts include extensive provisions to confirm and expand the tribes' land base. The legislative record makes it clear that a key purpose behind that land base is to preserve the tribes' culture and support their sustenance practices. MICSA section 5 establishes a trust fund to allow the Southern Tribes and the Maliseets to acquire land to be put into trust. In addition, the Southern Tribes' reservations are confirmed as part of

their land base.³⁸ MICSA combines with MIA sections 6205 and 6205-A to establish a framework for taking land into trust for those three Tribes, and laying out clear ground rules governing any future alienation of that land and the Southern Tribes' reservations. Sections 4(a) and 5 of the ABMSA and section 7204 of the state MSA accomplish essentially the same result for the Micmacs, consistent with the purpose of those statutes to put that tribe in the same position as the Maliseets.

EPA has concluded that one of the overarching purposes of the establishment of this land base for the tribes in Maine was to ensure their continued opportunity to engage in their unique cultural practices to maintain their existence as a traditional culture. An important part of the tribes' traditional culture is their sustenance lifeways. The legislative history for MICSA makes it clear that one critical purpose for assembling the land base for the tribes in Maine was to preserve their culture. The Historical Background in the Senate Report for MICSA opens with the observation that "All three Tribes [Penobscot, Passamaquoddy and Maliseet] are riverine in their land-ownership orientation."³⁹ Congress also specifically noted that one purpose of MICSA was to avoid acculturation of the tribes in Maine:

Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.⁴⁰

As both the Penobscot and Maliseet extensively documented in their comments on this action, their culture relies heavily on sustenance practices, including sustenance fishing. So if a purpose of MICSA is to avoid acculturation and protect the tribes' continued political and cultural existence on their land base, then a key purpose of that land base is to support those sustenance practices.

Several comments dispute that the settlement acts are intended to provide for the tribes' sustenance lifeways, and assert instead that their key purpose was to subject the tribes to the jurisdictional

³³ EPA recognizes that the final HHC also reflect inputs consistent with EPA's 2015 section 304(a) recommendations, which are not currently reflected in Maine's HHC. EPA anticipates that Maine will update its HHC consistent with these inputs in its next triennial review.

³⁴ 30 M.R.S. section 6207(4).

³⁵ 30 M.R.S. section 6207(1), (3).

³⁶ 102 S. Rpt. 136 (1991).

³⁷ Letter from Hilary C. Tompkins, Solicitor, Department of Interior, to Avi S. Garbow, General Counsel, EPA, January 30, 2015, a copy of which is in the docket supporting this action.

³⁸ 30 M.R.S. section 6205(1)(A) and (2)(A).

³⁹ Sen. Rep. No. 96–957, at 11.

⁴⁰ Id. at 17.

authority of the state and treat tribal members identically to all citizens in the state. These comments do not dispute the evidence EPA relied on in February 2015 to find that Congress intended to support the continuation of the tribes' traditional culture. Rather, the commenters argue that the overriding purpose of the settlement acts was to impose state law, including state environmental law, on the tribes, which the commenters believe the state could do without regard to the settlement act provisions for sustenance fishing. These assertions reflect an overly narrow interpretation of the settlement acts, and EPA, with a supporting opinion from DOI, has concluded that the settlement acts both provide for the tribes' sustenance lifeways and subject the tribal lands to state environmental regulation. Those two purposes are not inconsistent, but rather support each other. It would be inconsistent for the state to codify provisions for tribal sustenance fishing in one state law, which was congressionally ratified, and then in another state law subject that practice to environmental conditions that render it unsafe.

EPA disagrees with the comment that promulgation of the HHC violates the jurisdictional arrangement in MICSA and MIA. The assertion appears to be that the grant of jurisdiction to the state in the territories of the Indian tribes in Maine means that the tribes must always be subject to the same environmental standards as any other person in Maine. As EPA made clear in its February 2015 decision, the Agency agrees that MICSA grants the state the authority to set WQS in Indian territories. Making that finding, however, does not then lead to the conclusion that the state has unbounded authority to set WQS without regard to the factual circumstances and legal framework that apply to the tribes under both the CWA and the Indian settlement acts. No state has authority or jurisdiction to adopt WQS that do not comply with the requirements of the CWA. The state, like EPA and the tribes, is bound to honor the provisions of the Indian settlement acts. Here, the CWA, as informed by and applied in light of the requirements of the settlement acts, requires that WQS addressing fish consumption in these waters adequately protect the sustenance fishing use applicable to the waters. Because this use applies only to particular waters that pertain to the tribes, the WQS designed to protect the use will necessarily differ from WQS applicable to other waters generally in the state.

This result does not violate the grant of jurisdiction to the state. Rather, the state retains the authority to administer the WQS program throughout the state, subject to the same basic requirements to protect designated uses of the waters as are applicable to all states.

EPA also disagrees that promulgation of the HHC violates the so-called savings clauses in MICSA, Pub. L. 96–420, 94 Stat. 1785 sections 6(h) and 16(b), which block the application of federal law in Maine to the extent that law “accords or relates to a special status or right of or to any Indian” or is “for the benefit of Indians” and “would affect or preempt” the application of state law. EPA has consistently been clear that this action does not treat tribes in Maine in a similar manner as a state (TAS) or in any way authorize any tribe in Maine to implement tribal WQS under the federal CWA. Therefore, arguments about whether MICSA blocks the tribes from applying to EPA for TAS under CWA section 518(e) are outside the scope of, and entirely irrelevant to, EPA’s promulgation of federal WQS.

Additionally, EPA disagrees that its disapproval of certain WQS in tribal waters and this promulgation will “affect or preempt the application of the laws of the State of Maine” using a federal law that accords a special status to Indians within the meaning of MICSA section 6(h) or a federal law “for the benefit of Indians” within the meaning of section 16(b). With this promulgation, EPA is developing WQS consistent with the requirements of the CWA as applied to the legal framework and factual circumstances created by the Indian settlement acts. EPA here is acting under CWA section 303, which was not adopted “for the benefit of Indians,” but rather sets up a system of cooperative federalism typical of federal environmental statutes, where states are given the lead in establishing environmental requirements for areas under their jurisdiction, but within bounds defined by the CWA and subject to federal oversight. In this case, the Indian settlement acts provide for the tribes to fish for their sustenance in waters in or adjacent to territories set aside for them, which has the effect of establishing a sustenance fishing use in those waters. Because that sustenance fishing use applies in those waters, CWA section 303 requires Maine and EPA to ensure that use is protected. It cannot be the case that the savings clauses in MICSA are intended to block implementation of the Indian settlement acts or MICSA itself.

In the RTC document, EPA addresses in detail the distinctions contained in the Indian settlement acts for the Maine

tribes and comments received by EPA on this point. In short, the settlement acts clearly codify a tribal right of sustenance fishing for inland, anadromous, and catadromous fish in the inland waters of the Penobscot Nation’s and Passamaquoddy’s reservations.⁴¹ EPA approved this right, contained in state law, as an explicit designated use. The Southern Tribes also have trust lands, to which the explicit sustenance fishing right in section 6207 of MIA does not apply, but which are covered by a regulatory regime under MIA that specifically provides for the Southern Tribes to exercise their sustenance fishing practices. The statutory framework for the Northern Tribes’ trust lands provides for more direct state regulation of those tribes’ fishing practices. Nevertheless, as confirmed by an opinion from the U.S. Department of the Interior,⁴² the Northern Tribes’ trust lands include sustenance fishing rights appurtenant to those land acquisitions, subject to state regulation. Accordingly, EPA appropriately approved the “fishing” designated use as “sustenance fishing” for all waters in Indian lands.

Tribal representatives and members commented that EPA’s promulgation of HHC is consistent with EPA’s trust responsibility to the Indian tribes in Maine, and some suggested that EPA’s trust relationship with the tribes compels EPA to take this action. Conversely, one commenter argued that this action is not authorized because the federal government has no obligation under the trust responsibility to take this action, and the Indian settlement acts create no specific trust obligation to protect the tribes’ ability to fish for their sustenance. These comments raise questions about the nature and extent of the federal trust responsibility to the Indian tribes in Maine and the extent to which the trust is related to this action. EPA agrees that this action is consistent with the United States’ general trust responsibility to the tribes in Maine. EPA also agrees that the trust relationship does not create an independent enforceable mandate or specific trust requirement beyond the Agency’s obligation to comply with the legal requirements generally applicable to this situation under federal law, in this case the CWA as applied to the circumstances of the tribes in Maine under the settlement acts.

⁴¹ 30 M.R.S. section 6207.

⁴² Letter from Hilary C. Tompkins, Solicitor, Department of Interior, to Avi S. Garbow, General Counsel, EPA, January 30, 2015, a copy of which is in the docket supporting this action.

Consulting with affected tribes before taking an action that affects their interests is one of the cornerstones of the general trust relationship with tribes. EPA has fulfilled this responsibility to the tribes in Maine. EPA has consulted extensively with the tribes to understand their interests in this matter. EPA has also carefully weighed input from the tribes, as it has all the comments the Agency received on this action.

EPA does not agree that the substance of this action is compelled or authorized by the federal trust relationship with the tribes in Maine independent of generally applicable federal law. This action is anchored in two sets of legal requirements: First, the Indian settlement acts, which reserve the tribes' ability to engage in sustenance fishing; second, the CWA, which requires that this use must be protected. The trust responsibility does not enhance or augment these legal requirements, and EPA is not relying on the trust responsibility as a separate legal basis for this action. The Indian settlement acts created a legal framework with respect to these tribes that triggered an analysis under the CWA about how to protect the sustenance fishing use provided for under the settlement acts. This analysis necessarily involves application of EPA's WQS regulations, guidance, and science to yield a result that is specific to these tribes, but each step of the analysis is founded in generally applicable requirements under the CWA, not an independent specific trust mandate.

C. Sustenance Fishing Designated Use

Several commenters challenged EPA's approval, in its February 2015 Decision, of sections 6207(4) and (9) of the MIA as a designated use of sustenance fishing applicable to inland waters of the Southern Tribes' reservations. Several commenters also argued that EPA had no authority to approve Maine's "fishing" designated use with the interpretation that it means "sustenance fishing" for waters in Indian lands. Related to both approvals, the commenters argued that Maine had never adopted a designated use of "sustenance fishing," thus EPA could not approve such a use, and that EPA did not follow procedures required under the CWA in approving any "sustenance fishing" designated use. EPA disagrees, as discussed in sections III.C.1 and 2.

1. EPA's Approval of Certain Provisions in MIA as a Designated Use of Sustenance Fishing in Reservation Waters.

State laws can operate as WQS when they affect, create or provide for, among other things, a use in particular waters, even when the state has not specifically identified that law as a WQS.⁴³ EPA has the authority and duty to review and approve or disapprove such a state law as a WQS for CWA purposes, even if the state has not submitted the law to EPA for approval.⁴⁴ Indeed, EPA has previously identified and disapproved a Maine law as a "de facto" WQS despite the fact that Maine did not label or present it as such.⁴⁵

The MIA is binding law in the state, and sections 6207(4) and (9) in that law clearly establish a right of sustenance fishing in the inland reservation waters of the Southern Tribes. See Topic 3 of the RTC document for a more detailed discussion. In other words, the state law provides for a particular use in particular waters. It was therefore appropriate for EPA to recognize that state law as a water quality standard, and more specifically, as a designated use. EPA's approval of these MIA provisions as a designated use of sustenance fishing does not create a new federal designated use of tribal "sustenance fishing," but rather gives effect to a WQS in state law for CWA purposes in the same manner as other state WQS. Furthermore, contrary to commenters' assertions, EPA did not fail

⁴³ See *Florida Pub. Interest Grp v. EPA*, 386 F.3d 1070, 1089–90 (11th Cir. 2004) (holding that in order to determine whether a state law constitutes a WQS, a district court must "look beyond the [state's] characterization of [the law]" and "determine[] whether the practical impact of the [law] was to revise [the state's WQS]" irrespective of the state's "decision not to describe its own regulations as new or revised [WQS]"); *Pine Creek Valley Watershed Ass'n v. United States*, 137 F. Supp. 3d 767, 776 (E.D. Pa. 2015) (deferring to EPA's determination on whether or not a state law constitutes a WQS).

⁴⁴ See EPA, What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions, October 2012. See also, *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 375 (D. Me. 2012) ("The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review."); *Micosukee Tribe of Indians v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997) ("Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards.")

⁴⁵ Letter from Stephen S. Perkins, Director of Office of Ecosystem Protection, EPA, to William J. Schneider, Maine Attorney General (July 9, 2012) (disapproving as a WQS a state law that required prevention of river herring passage on St. Croix River); see *Friends of Merrymeeting Bay*, 839 F. Supp. 2d at 375 (indicating EPA must consider whether such state law has the effect of changing a WQS).

to abide by any required procedures before approving the MIA provisions as a designated use. They were a "new" WQS for the purpose of EPA review, because EPA had never previously acted on them. When EPA acts on any state's new or revised WQS, there are no procedures necessary for EPA to undertake prior to approval.⁴⁶ The Maine state legislature, which has the authority to adopt designated uses, held extensive hearings reviewing the provisions of the MIA, including those regarding sustenance fishing.

2. EPA's Interpretation and Approval of Maine's "Fishing" Designated Use To Include Sustenance Fishing.

In addition to approving certain provisions of MIA as a designated use in the Southern Tribes' inland reservation waters, EPA also interpreted and approved Maine's designated use of "fishing" to mean "sustenance fishing" for all waters in Indian lands. EPA disagrees with comments that claim that EPA had no authority to do so because EPA had previously approved that use for all waters in Maine without such an interpretation. While EPA approved the "fishing" designated use in 1986 for other state waters, prior to its February 2015 decision, EPA had not approved any of the state's WQS, including the "fishing" designated use, as being applicable to waters in Indian lands.

Under basic principles of federal Indian law, states generally lack civil regulatory jurisdiction within Indian country as defined in 18 U.S.C. 1151.⁴⁷ Thus, EPA cannot presume a state has authority to establish WQS or otherwise regulate in Indian country. Instead, a state must demonstrate its jurisdiction, and EPA must determine that the state has made the requisite demonstration and has authority, before a state can implement a program in Indian country. Accordingly, EPA cannot approve a state WQS for a water in Indian lands if it has not first determined that the state has authority to do so.

EPA first determined on February 2, 2015, that Maine has authority to establish WQS for waters in Indian lands. Consistent with the principle articulated above, it is EPA's position that all WQS approvals that occurred prior to this date were limited to state

⁴⁶ See 33 U.S.C. 1313(c)(3) and 40 CFR part 131.

⁴⁷ *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1. (1998) ("[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States."); see also *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) ("[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian Country . . .").

waters outside of waters in Indian lands. With regard to the “fishing” designated use, Maine submitted revisions to its water quality standards program now codified at 38 M.R.S. section 464–470, to EPA in 1986. This submittal included Maine’s designated use of “fishing” for all surface waters in the state. On July 16, 1986, EPA approved most of the revised WQS, including the designated uses for surface waters, without explicit mention of the “fishing” designated use or of the standards’ applicability to waters in Indian lands. Maine did not expressly assert its authority to establish WQS in Indian waters until its 2009 WQS submittal, and EPA did not expressly determine that Maine has such authority until February 2015. Therefore, EPA did not approve Maine’s designated use of “fishing” to apply in Indian waters in 1986, and EPA’s approval of that use for other waters in Maine at that time was not applicable to Indian waters in Maine.

EPA acknowledges the comment that, prior to February 2015, EPA had not previously taken the position that Maine’s designated use of “fishing” included a designated use of “sustenance fishing.” As explained herein, it was not until February 2, 2015, that EPA determined that Maine’s WQS were applicable to waters in Indian lands, so it was not until then that EPA reviewed Maine’s “fishing” designated use for those waters and concluded that, in light of the settlement acts, it must include sustenance fishing as applied to waters in Indian lands.

EPA disagrees with comments that asserted that EPA could not approve the “fishing” designated use as meaning “sustenance fishing” for waters in Indian lands unless EPA first made a determination under CWA section 303(c)(4)(B) that the “fishing” designated use was inconsistent with the CWA. Because EPA had not previously approved the “fishing” designated use for waters in Indian lands, EPA had the duty and authority to act on that use in its February 2015 decision, and was not required to make a determination under CWA section 303(c)(4)(B) before it could interpret and approve the use for waters in Indian lands. Additionally, because the term “fishing” is ambiguous in Maine’s WQS, even if EPA had previously approved it for all waters in the state, it is reasonable for EPA to explicitly interpret the use to include sustenance fishing for the waters in Indian lands in light of the Indian settlement acts.⁴⁸

⁴⁸ See *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (holding that EPA’s interpretation of state

This is consistent with EPA’s recent actions and positions regarding tribal fishing rights and water quality standards in the State of Washington.⁴⁹

In acting on the “fishing” designated use for waters in Indian lands for the first time, it was reasonable and appropriate for EPA to explicitly interpret and approve the use to include sustenance fishing for the waters in Indian lands. This interpretation harmonized two applicable laws: The provision for sustenance fishing contained in the Indian settlement acts, as explained above in section III.B, and the CWA. Indeed, where an action required of EPA under the CWA implicates another federal statute, such as MICA, EPA must harmonize the two statutes to the extent possible.⁵⁰ This is consistent with circumstances where federal Indian laws are implicated and the Indian canons of statutory construction apply.⁵¹ Because the Indian settlement acts provide for sustenance fishing in waters in Indian lands, and EPA has authority to reasonably interpret state WQS when taking action on them, EPA necessarily interpreted the “fishing” use as “sustenance fishing” for these waters, lest its CWA approval action contradict and, as a practical matter, effectively limit or abrogate the Indian settlement acts (a power that would be beyond EPA’s authority).⁵² Accordingly, EPA’s interpretation of Maine’s “fishing” designated use reasonably and appropriately harmonized the intersecting provisions of the CWA and the Indian settlement acts.

Finally, one commenter argued that the settlement acts’ provisions for sustenance fishing are merely exceptions to otherwise applicable creel

WQS in the NPDES context is entitled to “substantial deference”).

⁴⁹ See Revision of Certain Federal Water Quality Criteria Applicable to Washington: 81 FR 85417 (November 28, 2016).

⁵⁰ See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (acknowledging EPA’s duty to harmonize CWA and Endangered Species Act to give effect to both statutes where the Agency has discretion to do so); see also *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”).

⁵¹ See *Penobscot Nation v. Mills*, 151 F. Supp. 3d at 213–214 (applying the Indian canons of statutory construction to MIA and MICA); see also *Penobscot Nation v. Fellenner*, 164, F.3d 706, 709 (1st Cir. 1999) (applying Indian canon to MICA and citing to *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit”).

⁵² See *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”).

limits and have no implications for the WQS that apply to the waters where the tribes are meant to fish. EPA does not agree with this narrow interpretation of the relationship between the provisions for tribal sustenance practices on the one hand and water quality on the other. Fundamentally, the tribes’ ability to take fish for their sustenance under the settlement acts would be rendered meaningless if it were not supported under the CWA by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance.

When Congress identifies and provides for a particular purpose or use of specific Indian lands, it is reasonable and supported by precedent for an agency to consider whether its actions have an impact on a tribe’s exercise of that purpose or use and to ensure through exercise of its authorities that its actions protect that purpose or use. For example, the Ninth Circuit Court of Appeals recently determined that the right of tribes in the State of Washington to fish for their subsistence in their “usual and accustomed” places necessarily included the right to an adequate supply of fish, despite the absence of any explicit language in the applicable treaties to that effect.⁵³ Specifically, the Court held that “the Tribes’ right of access to their usual and accustomed fishing places would be worthless without harvestable fish.”⁵⁴ Similarly, it would defeat the purpose of MIA, MICA, MSA, and ABMSA for the

⁵³ *United States v. Washington*, No. 13–35474, 2016 U.S. App. Lexis 11709 (9th Cir. June 27, 2016). See also *United States v. Winans*, 198 U.S. 371, 384 (1905) (tribe must be allowed to cross private property to access traditional fishing ground); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033–34 (9th Cir. 1985) (tribe’s fishing right protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch); *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Mich. Dept of Nat. Resources*, 141 F.3d 635 (6th Cir. 1998) (treaty right to fish commercially in the Great Lakes found to include a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–48 (9th Cir. 1981) (implying reservation of water to preserve tribe’s replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598–601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).

⁵⁴ *United States v. Washington*, No. 13–35474, 2016 U.S. App. Lexis 11709 (9th Cir. June 27, 2016). The court also acknowledged that the fishing clause of the Stevens Treaties could give rise to other environmental obligations, but that those would need to be addressed on a case-by-case basis depending on the precise nature of the action. *Id.* at *18–19.

tribes in Maine to be deprived of the ability to safely consume fish from their waters at sustenance levels. Consistent with this case law, the Department of the Interior provided EPA with a legal opinion which concludes that “fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right.”⁵⁵ If EPA were to ignore the impact that water quality, and specifically water quality standards under the CWA, could have on the tribes’ ability to safely engage in their sustenance fishing practices on their lands, the Agency would be contradicting the clear purpose for which Congress ratified the settlement acts in Maine and provided for the establishment of Indian lands in the state. Therefore, it is incumbent upon EPA when applying the requirements of the CWA to harmonize those requirements with this Congressional purpose.

D. Human Health Criteria for Toxics for Waters in Indian Lands

1. Target Population

EPA received two comments that it improperly and without justification identified the tribes as the target population, as opposed to a highly exposed subpopulation, for the HHC for waters in Indian lands. On the contrary, EPA’s approach is entirely consistent with EPA regulations and policy, as informed by the settlement acts.

Pursuant to 40 CFR 131.11(a)(1), water quality criteria must be adequate to protect the designated uses. Developing HHC to protect the sustenance fishing designated use in waters in Indian lands necessarily involves identifying the population exercising that use as the target population.⁵⁶ The tribes are not a highly exposed or high-consuming subpopulation in their own lands; they are the general population for which the federal set-aside of these lands and their waters was designed.⁵⁷ Treating tribes

as the target general population results in HHC sufficient under the CWA to ensure that the tribes’ ability to exercise the designated use of sustenance fishing, as provided for in the settlement acts, is not substantially affected or impaired. Therefore, the tribal population must be the focus of the risk assessment supporting HHC for the waters to which the sustenance fishing use applies. To do otherwise risks undermining the purpose for which Congress established and confirmed the tribes’ land base, as described more fully in section III.B.

Contrary to the commenters’ claims, EPA’s 2000 Methodology does not mandate that the tribes be treated as a highly exposed subpopulation. EPA’s general approach in the 2000 Methodology, and in deriving national CWA section 304(a) recommended criteria, is for HHC to provide a high level of protection for the general population, while recognizing that more highly exposed “subpopulations” may face greater levels of risk.⁵⁸ However, in addition to recommending protection of the general population based on fish consumption rates designed to represent “the general population of fish consumers,” the 2000 Methodology recommends that states assess whether there might be more highly exposed subpopulations or “population groups” that require the use of a higher fish consumption rate to protect them as the “target population group(s).”⁵⁹ The 2000 Methodology does not speak to or expressly envision the unique situation of setting HHC for waters where there is a tribal sustenance fishing designated use. Nevertheless, it is entirely consistent with the 2000 Methodology for EPA to identify the tribes as the target general population for protection, rather than as a highly exposed subpopulation, and to apply the 2000 Methodology’s recommendations on exposure for the general population, including the FCR and CRL, to the tribal target population.

waters. On major rivers such as the Penobscot River, for example, the general population has the right to pass through the waters in Indian lands. The presence of some nonmembers fishing on these waters, however, does not change the fact that the resident population in the Indian lands is made up of tribal members who expect to fish for their sustenance in the waters in Indian lands pursuant to the settlement acts.

⁵⁸ USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). U.S. Environmental Protection Agency, Office of Science and Technology, Washington, DC. EPA 822-B-00-004, pp. 2-1 to 2-3.

⁵⁹ Id., pp. 4-24 to 4-25.

2. Wabanaki Study

EPA received several comments that the FCR of 286 g/day, derived to support the sustenance fishing use, and used in the calculation of the promulgated HHC, is too high and not based on sound science. In particular, commenters asserted that it was improper for EPA to rely on the Wabanaki Study because it is irrelevant and aspirational. These commenters instead prefer the use of a 1992 study conducted by McLaren/Hart—ChemRisk of Portland, Maine (“the 1992 ChemRisk Study”).⁶⁰ EPA disagrees for the following reasons.

After considering other sources, including the 1992 ChemRisk Study (see discussion below), EPA derived the FCR from a peer-reviewed estimate of traditional sustenance fish consumption from the Wabanaki Study. EPA finds that the Wabanaki Study used a sound methodology (peer reviewed, written by experts in risk assessment and anthropology), and contains the best currently available information for the purpose of deriving an FCR for HHC adequate to protect present day sustenance fishing for such waters. It is the only local study focused on the tribal members and areas most heavily used by those members today. While it relies on daily caloric and protein intake to derive heritage FCRs, the FCR of 286 g/day is also the best currently available estimate for contemporary tribal sustenance level fish consumption for waters where the sustenance fishing designated use applies.

In addition, EPA consulted with tribal governments to obtain their views on the suitability of the Wabanaki Study and any additional relevant information to select a FCR for this final rulemaking. The tribes represented that the Wabanaki study and corresponding rate of 286 g/day is an appropriate and accurate portrayal of their present day sustenance fishing lifeway, absent significant improvement in the availability of anadromous fish species, and EPA gave significant weight to the tribes’ representations.⁶¹

⁶⁰ ChemRisk, A Division of McLaren Hart, and HBRS, Inc., *Consumption of Freshwater Fish by Maine Anglers*, as revised, July 24, 1992.

⁶¹ Indeed, in developing its own 2014 tribal water quality criteria, the Penobscot Nation used a FCR of 286 g/day. The Nation explained that it chose the inland non-anadromous total FCR of 286 g/day presented in the Wabanaki Study because, although the Penobscot lands are in areas that would have historically supported an inland anadromous diet (with total FCR of 514 g/day), the contemporary populations of anadromous species in Penobscot waters are currently too low to be harvested in significant quantities. Penobscot Nation, Department of Natural Resources, *Response to Comments on Draft Water Quality Standards*, September 23, 2014, p. 9.

⁵⁵ Letter from Hilary C. Tompkins, Solicitor, Department of Interior, to Avi S. Garbow, General Counsel, EPA, January 30, 2015, a copy of which is in the docket supporting this action.

⁵⁶ One of the commenters, Maine’s Attorney General, concedes as much. Her objection to EPA’s approach rests on her assertion that there is no designated use of sustenance fishing for the waters in Indian lands. But she recognizes that had the Maine Legislature adopted proposed legislation for a “subsistence fishing” designated use for a portion of the Penobscot River, the adoption of that use would have protected the subsistence fishers as the target population for the stretch of the river to which the use applied. See Comments of Maine’s Attorney General at 11.

⁵⁷ EPA recognizes that tribal members will not be the only population fishing from some of these

As explained in EPA's disapproval and preamble to the proposed rule, the data from the ChemRisk Study are not suitable as a source for deriving the FCR for waters in Indian lands in Maine. That study was not a survey of tribal sustenance fishers in tribal waters. Rather, it was a statewide recreational angler survey that polled anglers with state fishing licenses and was not a survey intended to characterize tribal fish consumption in tribal waters. As explained by tribal representatives both in comments on Maine's 2012 revisions and in comments on this rule, and by DEP in its response to comments on the 2012 revisions, tribal members are not necessarily required to get state licenses to fish and therefore were likely underrepresented in the survey.⁶²

In addition, EPA disagrees with commenters who assert that there were no fish advisories or that there were an insignificant number of river miles covered by fish advisories during the time of the ChemRisk Study. It is well documented that fish advisories were in place on some waters in Maine at the time of the ChemRisk Study. As documented by Maine's Department of Health and Human Services in a 2008 history of dioxin fish consumption advisories in Maine,⁶³ fish advisories were first issued in Maine on the Androscoggin River in 1985 and on the Kennebec and Penobscot River in 1987, before the ChemRisk Study survey was conducted. While relative to the state as a whole this may seem to be a small portion of river miles that were affected by a fish consumption advisory, the Penobscot River is a very large portion of the sustenance fishery for the Penobscot Indian Nation, and it is a waterbody with a high profile and symbolic significance in the Indian community.

Further, as documented by DEP in its response to comments on its 2012 WQS revisions, during the time that the ChemRisk survey was conducted:

[P]ublic awareness of historical pollution in industrialized rivers can be expected to have suppressed fish consumption on a local basis. The Department is unable to quantify the extent of suppression due to historical pollution in the major rivers or the dioxin advisories in place at the time of the ChemRisk study, but believes that the ChemRisk (Ebert *et al.*) estimates of fish

consumption for rivers and streams as well as the inclusive 'all waters' categories are likely to have been affected to some degree.⁶⁴

3. Cancer Risk Level

With respect to the cancer risk management value used in deriving the HHC of 10^{-6} , one commenter noted that this value was unduly protective of public health while another implied the Agency could adopt a more protective risk management level, and several supported EPA's use of 10^{-6} . In promulgating HHC for the tribes in Maine, EPA incorporated an excess cancer risk level of 10^{-6} as the appropriate target level for two reasons. First, it is consistent with Maine DEP Rule 06-096, Chapter 584, which EPA approved for waters in Indian lands on February 2, 2015, and which specifies that water quality criteria for carcinogens must be based on a 10^{-6} CRL.⁶⁵ Second, it is consistent with EPA guidance that states, "For deriving CWA section 304(a) criteria or promulgating water quality criteria for states and tribes under Section 303(c) based on the 2000 Human Health Methodology, EPA intends to use the 10^{-6} risk level, which the Agency believes reflects an appropriate risk for the general population."⁶⁶ As explained above, EPA considers the tribes to be the general target population for waters in Indian lands. In promulgating HHC that correspond to an excess cancer risk level of 10^{-6} for tribes in Maine, not only is EPA acting consistent with both EPA guidance and Maine's existing rule, but EPA is providing the tribes engaged in sustenance fishing in waters in Indian lands with an equivalent level of cancer risk protection as is afforded to the general population in Maine outside of waters in Indian lands.

4. Trophic Level Specific Fish Consumption Rates

Since the Wabanaki Study presented estimates of the total amount of fish and aquatic organisms consumed but not the amount consumed from each trophic level, for the purpose of developing HHC for the Maine tribes, EPA assumed that Maine tribes consume the same relative proportion of fish and aquatic

organisms from the different trophic levels 2 through 4 as is consumed by the adult U.S. population. As identified in the 2015 criteria update, the relative percent of the total fish consumption rate for trophic levels 2 through 4 for the adult U.S. population amounts to 36%, 40%, and 24%.⁶⁷ Accordingly, EPA adjusted the 286 g/day total tribal fish consumption rate by these same percentages and arrived at trophic-specific fish consumption rates of 103 g/day (trophic level 2), 114 g/day (trophic level 3), and 68.6 g/day (trophic level 4). These trophic specific fish consumption rates were thus used in deriving the HHC for those compounds for which the 2015 criteria update included trophic level specific BAFs. For compounds where, in 2015, EPA estimated BAFs from laboratory-measured BCFs and therefore derived a single pollutant-specific BAF for all trophic levels, and where EPA's existing 304(a) recommended human health criteria for certain pollutants still incorporate a single BCF and those pollutants are included in this final rule, EPA derived the HHC using a total fish consumption rate of 286 g/day.

The Penobscot Nation requested EPA use a slightly different weighting scheme when refining the fish consumption rate based on the trophic levels of the fish and shellfish species they consume. While EPA recommends the use of local data relevant to the population of interest whenever possible in deriving human health criteria, such data must be from a sound scientific study before it can be utilized. The Penobscot Nation did not provide adequate information to support a different trophic level weighting scheme. See Topic 5 in the RTC document for a more detailed response.

5. Geographic Extent of Waters To Which the HHC Apply

The HHC contained in the rule are designed to protect the designated use of sustenance fishing as exercised by the tribes in Maine. The HHC thus apply to waters where that designated use is approved. EPA approved a sustenance fishing designated use in two general categories of waters: (1) Waters in Indian lands, and (2) waters outside Indian lands where the sustenance fishing right reserved in MIA section

⁶⁴ January 14, 2013, Letter from Patricia Aho, DEP to Curt Spalding, EPA, regarding "USEPA Review of P.L. 2011, Ch. 194 and revised 06-096 CMR 584", Exhibit 8, pages 20-21.

⁶⁵ The only exception from the requirement to use a CRL of 10^{-6} in Chapter 584 is for arsenic, for which a CRL of 10^{-4} is required. EPA disapproved the arsenic CRL for waters in Indian lands.

⁶⁶ USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA-822-B-00-004, p. 2-6.

⁶⁷ USEPA. 2014. Estimated Fish Consumption Rates for the U.S. Population and Selected Subpopulations (NHANES 2003-2010). EPA-820-R-14-002. <https://www.epa.gov/sites/production/files/2015-01/documents/fish-consumption-rates-2014.pdf>.

⁶² Id., Exhibit 8, pages 14 and 19; June 20, 2016, Letter from Chief Brenda Commander, Houlton Band of Maliseet Indians, to Gina McCarthy, Administrator, EPA, page 15.

⁶³ Smith, Andrew E., and Frohberg, Eric, *Evaluation of the Health Implications of Levels of Polychlorinated Dibenzo-p-Dioxins (dioxins) and Polychlorinated Dibenzofurans (furans) in Fish from Maine Rivers*, Maine Department of Health and Human Service, January, 2008, pages 2-3.

6207(4) applies.⁶⁸ The first category, “waters in Indian lands,” covers waters within the tribes’ reservations and trust lands as provided for under the settlement acts. The second category applies in the limited circumstances where it is determined that a Southern Tribe’s sustenance fishing right reserved in MIA section 6207(4) extends to a waterbody outside of its reservation as provided for under the settlement acts. As explained below, this situation currently exists in only one waterbody, a clearly delineated stretch of the Penobscot River.

The outer bounds of waters that may fall within the two categories of the rule are based on the settlement acts and are thereby generally identifiable. The rule, however, does not identify the specific boundaries of each waterbody or portion thereof to which the HHC apply. Whether a specific waterbody falls within one of these categories will depend on the status of such water under applicable federal and state law. The status of such a waterbody may therefore be determined as a result of litigation or other legal developments regarding that specific waterbody. The two general categories of waters to which the HHC apply, however, will remain constant.

Three commenters asserted that this approach is overly broad and vague. EPA disagrees. Here, EPA has clearly described the specific categories of waters to which this rule applies, which flow directly from and are bounded by the express provisions of the settlement acts. The purpose of the rule is to establish WQS that address EPA’s disapprovals and necessity determination and adequately protect applicable designated uses. It is both reasonable and appropriate, and consistent with prior practice under the CWA, for EPA to promulgate these WQS without a final adjudication or determination of the precise boundaries of each specific waterbody that falls within each category, so long as the WQS protect the uses and clearly apply only to waters subject to those uses. As

⁶⁸ For “waters in Indian lands,” this final rule promulgates HHC as well as six other WQS (narrative and numeric bacteria criteria for the protection of primary contact recreation and shellfishing; ammonia criteria for protection of aquatic life in fresh waters; provisions that ensure that WQS apply to HHC even if they are naturally occurring; a mixing zone policy; a pH criterion for fresh waters; and tidal temperature criteria). For the second category of waters, where there is a sustenance fishing designated use outside of waters in Indian lands, the rule promulgates only the HHC. This response focuses on the HHC because the HHC apply to the broadest set of tribal-related waters and because the comments addressing the geographical scope of the rule are largely framed in terms of concerns about the HHC.

described below, the extent of waters in Indian lands is largely established under the settlement acts and subsequent trust conveyances that have occurred under the terms of those acts. But there are isolated disputes and one pending lawsuit regarding the boundaries of Indian lands and the geographic extent of tribal sustenance fishing rights. EPA’s approach is designed to be responsive to the potential that these disputes could result in clarifications of the particular boundaries of the disputed waters, while maintaining protection of the tribes’ sustenance fishing use.⁶⁹

a. Adequate Notice

Although this rulemaking does not identify the exact boundaries of each waterbody or portion thereof covered by the rule, it nevertheless provides adequate notice to potentially regulated parties because the categories are clearly described, and waters that could reasonably fall within these two categories are either precisely described in the settlement acts or, in circumstances where there are ongoing disputes or uncertainties, located in limited areas in Maine representing a small fraction of all waters within the state. In fact, any uncertainties as to the scope of waters in Indian lands largely pertain to particular stretches of the Penobscot and St. Croix Rivers. EPA anticipates that any existing uncertainty will be addressed by the current litigation regarding the Main Stem of the Penobscot River and DOI’s work with the Passamaquoddy Tribe to determine the status of the relevant stretch of the St. Croix River.

The first category—“waters in Indian lands”—covers waters within a tribe’s reservation or trust lands. The tribes’ trust lands are all the result of modern conveyances recorded after the 1980 settlements, the boundaries of which are described in the deeds for those parcels. Although there are ongoing disputes over the extent of some of the reservation lands, the Indian settlement acts identify the outer bounds of what could reasonably be identified as reservation land. In the Economic Analysis conducted for this rulemaking,

⁶⁹ It is important to note that EPA has expressly answered the question of who has jurisdiction over all the waters involved in this matter, irrespective of which category they fall under or which use(s) and criteria apply. EPA did so in its February 2015 decision when it determined that the state has jurisdiction to set WQS over all waterbodies in Maine, including those within tribal reservations and trust lands. EPA is also determining that the HHC at issue will apply only where designated use of sustenance fishing applies. EPA is not, however, making any determinations in this rulemaking on the narrower technical question regarding the full extent of precise waters to which that use, and thus the HHC, apply.

EPA took a conservative approach and identified all discharges for which there is any reasonable potential that they discharge to waters in Indian lands or their tributaries. In doing so, EPA identified a total of only 33 facilities, a small subset of the 478 Maine Pollutant Discharge Elimination System (MEPDES) permitted dischargers in the state.

One commenter expressed concern that the boundaries of the sustenance fishing designated use as it applies to the tribes’ trust lands may expand if any of the tribes exercise what remaining authority they may have under the settlement acts to purchase and take more land into trust outside the reservations. However, EPA did not intend for its approval and disapproval decisions on WQS for waters in Indian lands, or for this rule, to apply to waters that may be part of after-acquired trust lands. EPA’s promulgation of HHC to address the disapprovals is thus limited to waters in trust lands as of February 2, 2015, and waters in the Southern Tribes’ reservations. EPA’s promulgation of HHC in accordance with the Administrator’s determination is likewise limited. The sustenance fishing designated use and appropriate HHC would not apply to any waters in after-acquired trust lands until such time as the state or EPA took further action under the CWA. This step would give interested parties an opportunity to comment on that action. EPA also notes that where the settlement acts have not already specifically identified parcels that qualify to be taken into trust, they clearly provide for the state to receive notice of any trust acquisition.⁷⁰

The second category is quite narrow, limited to waterbodies outside of Indian lands where the Southern Tribes’ sustenance fishing right reserved in MIA section 6207(4) applies. Currently, the Main Stem of the Penobscot River is the only waterbody in the state that has been adjudicated to be a waterbody outside of Indian lands to which a tribe, the Penobscot Nation, has a right to sustenance fish based in MIA.⁷¹ The “Main Stem” addressed by the court in the *Mills* litigation is clearly identified as “a portion of the Penobscot River and stretches from Indian Island north to the confluence of the East and West Branches of the Penobscot River.”⁷² Significantly, the court in *Mills* concluded that the Penobscot Nation has a sustenance fishery reservation, under MIA section 6207, in “the waters

⁷⁰ 30 MRSA 6205–A(1); 30 MRSA 7204.

⁷¹ *Penobscot Nation v. Mills*, 151 F. Supp. 3d at 222–223.

⁷² *Id.* at 186.

adjacent to its island reservation,” under MIA section 6203.⁷³ Accordingly, in scenarios like the one addressed by the court in *Mills*, waters that fall under this second category will likely share a geographic nexus with the Southern Tribes’ reservations.

This second category thus represents a limited universe of potential waters that fall outside the existing waters in Indian lands only to the extent the fishing right reserved in MIA section 6207(4) extends beyond the reservation of a Southern Tribe under MIA section 6203 under the reasoning of the U.S. District Court in the *Mills* litigation. In the event the law of the case in the *Mills* litigation changes, it is also possible that no waters would fall within this second category. Accordingly, the waters covered by this rule are at most the waters in Indian lands and the limited additional waters where a Southern Tribe has a right to sustenance fish, which will likely share a geographic nexus with the tribes’ reservations.

b. General Approach

Under the CWA, it is not uncommon for a state, authorized tribe, or EPA to take an approach, when promulgating WQS (*i.e.*, designated uses, water quality criteria, and antidegradation policies), of identifying a category of waters to which the WQS apply, where additional information will need to be gathered before the implementing agency can determine whether such WQS applies to any specific waterbody. For these WQS, any uncertainties regarding applicability to a specific waterbody are appropriately resolved as the standards are implemented through various actions under the CWA, such as NPDES permitting and listing of impaired waters under section 303(d) of the CWA, among others.

An example of this approach already in effect in Maine involves the state’s criteria for dissolved oxygen (DO). Maine’s longstanding DO criteria for Class B and C waters include generally applicable criteria as well as more protective criteria that apply only to fish spawning areas in the colder months.⁷⁴ The DO criteria do not list each specific fish spawning area in Class B or C waters, nor do the more general classifications of fresh waters at 38 M.R.S. 467 and 468. Rather, Maine must determine whether a spawning area is implicated on a permit-by-permit

basis.⁷⁵ Similarly, Maine’s WQS contain certain natural conditions provisions that alter the way in which pollutants may be treated for WQS purposes if they are naturally occurring.⁷⁶ The waters in which such conditions occur are not identified in the WQS themselves but rather must be determined on a case-by-case basis.

There are numerous examples from other states identifying general categories of waters to which certain standards apply. For example, the State of Wisconsin has several narrative water quality criteria that apply to “wetlands,” defined as “an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.”⁷⁷ Florida has promulgated numeric interpretations of its narrative nutrient criteria that apply to “streams,” defined as “a predominantly fresh surface waterbody with perennial flow in a defined channel with banks during typical climatic and hydrologic conditions for its region within the state,” but excluding certain non-perennial stream segments, ditches, canals, and other conveyances that have various characteristics as defined in the regulation.⁷⁸ Whether a specific discharge implicates a waterbody that falls within these general categories, and thus whether the associated water quality criteria apply, is left to the implementing agency to determine by applying the case-specific facts to the general category definition.

EPA is taking a similar approach here, by defining two general categories of waters covered by this rule. The determination of whether a specific waterbody falls within one of these categories will be made, in the first instance, by the implementing (*e.g.*, permitting) authority. Determining whether a waterbody is within one of the two categories covered by EPA’s rule will require application of the facts relevant to that particular waterbody to the definition of the category. However, disputes regarding the extent of waters which may be subject to this rule are

primarily limited to stretches of two waterbodies, as described above. Therefore, EPA anticipates that the case-by-case identification of whether a waterbody is covered by this rule will be straight-forward in most instances.

E. Other Water Quality Standards

1. Mixing Zone Policy for Waters in Indian Lands

Two commenters asserted that EPA does not have the legal authority or the scientific basis to ban mixing zones for bioaccumulative pollutants outside the Great Lakes. EPA disagrees. EPA’s authority to promulgate a mixing zone policy, and to prohibit its use for bioaccumulative pollutants, derives from section 303(c) of the CWA. While states are not required to adopt mixing zone policies, when a state includes a mixing zone policy in its water quality standards, the policy is subject to EPA’s review and approval or disapproval. 40 CFR 131.13. Adoption of a mixing zone policy is necessary for a mixing zone to be authorized in the issuance of a CWA discharge permit. EPA disapproved Maine’s mixing zone policy for waters in Indian lands because it did not meet the requirements of the CWA. Recognizing that Maine intended to authorize mixing zones as part of its water quality standards, EPA, pursuant to CWA section 303(c)(4)(A), is now promulgating a mixing zone policy that includes protections that were missing from Maine’s policy that EPA disapproved. EPA has determined that a ban on a mixing zone for bioaccumulating pollutants is reasonable and appropriate for the reasons discussed below, and nothing in CWA section 303(c) or EPA’s implementing regulations constrains EPA’s legal authority to do so.

EPA guidance has long cautioned states and tribes against mixing zone policies that allow mixing zones for discharges of bioaccumulative pollutants, since they may cause significant ecological and human health risks such that the designated use of the waterbody as a whole may not be protected.^{79 80 81} EPA’s WQS Handbook notes that this is particularly the case where mixing zones may encroach on

⁷⁵ 06–096–585 Code of Maine Rules, Chapter 584, Surface Water Quality Criteria for Toxic Pollutants.

⁷⁶ This rule includes provisions to ensure that these natural conditions WQS are not applied to HHC.

⁷⁷ Wis. Admin. Code NR section 103.03 (2016). For additional examples of states with WQS for “wetlands,” see 5 Colo. Code Regs. section 1002–31.11 (LexisNexis 2016); Iowa Admin. Code r. 567–61.3 (2016); Minn. R. 7050.0186 (2016) 117 Neb. Admin. Code section 7–001 (2015); 15A N.C. Admin. Code 02B.0231 (2016); Ohio Admin Code 3475–1–50.

⁷⁸ Fla. Admin. Code. Ann. r. 62–302.200 (2016).

⁷⁹ USEPA. 1991. Technical Support Document for Water Quality-based Toxics Control. US Environmental Protection Agency, Office of Water, Washington, DC. Section 2.2.2, p. 34; Section 4.3.1, p. 71; Section 4.3.4, p. 72; Section 4.6.2, p. 87. EPA 505–290–001.

⁸⁰ Final Rule to Amend the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern, 65 FR 67638, 67641–42 (November 13, 2000); 40 CFR part 132.

⁸¹ USEPA. 2014. Water Quality Standards Handbook, Chapter 5 at 5–8. EPA 820–B–14–008.

⁷³ *Id.* at 221–222.

⁷⁴ 38 M.R.S. sections 465.3.B and 465.4.B, respectively. Note that as part of this rulemaking, EPA is promulgating dissolved oxygen criteria for Class A waters, also with specific criteria that apply to fish spawning areas.

areas used for fish harvesting. The waters in Indian lands, to which this mixing zone policy will apply, not only are used for fish harvesting but have a designated use of sustenance fishing. By their very nature, bioaccumulative pollutants are those that accumulate in fish and shellfish and other organisms. Moreover, as EPA has explained elsewhere, the effects of such pollutants are not short term, nor are they limited to a localized zone of initial dilution.⁸² Since the effects could be persistent and occur well beyond the mixing zone, there is no assurance that all designated uses would be protected. EPA is particularly concerned about the potential adverse effects of such a mixing zone on the sustenance fishing use for those reasons. EPA also notes that the state has not in the past granted mixing zones for bioaccumulative pollutants, and neither the state nor the regulated community in Maine have raised a concern in their comments about EPA's proposal that mixing zones cannot be authorized for bioaccumulative pollutants. Therefore, EPA's final rule includes the prohibition on a mixing zone for bioaccumulative pollutants.

2. Bacteria Criteria for Waters in Indian Lands

a. Recreational Bacteria Criteria

EPA received one comment in opposition to the proposed recreational bacteria criteria. Maine DEP objected to EPA's inclusion of wildlife sources in the scope of the bacteria criteria for several reasons. It argued that inclusion of wildlife sources is beyond the scope of the CWA, which DEP asserts is only concerned with human pollution, and that *E. coli* are used only as an indicator of human sewage. It also asserted that EPA incorrectly "construed 'animal sources' of bacteria from studies as equivalent to naturally occurring 'wildlife sources' in the proposed rule"; that EPA cited to only one study in EPA's 2012 Recreational Water Quality Criteria (RWQC) that links potential human health risks with non-human sources of fecal contamination; and that because bacteria from natural sources are likely to be "temporal," removing a use (recreation in and on the water) simply due to a high level of *E. coli* where the bacteria source is of natural origins "is, at best, unwise."⁸³ None of

these comments provides a basis for excluding wildlife sources from EPA's rule, which is based on the 2012 recommended RWQC.

First, the CWA does not limit EPA to consideration of human causes of pollution when developing water quality criteria protective of human health. CWA section 502(23) defines "pathogen indicator" to mean "a substance that indicates the potential for human infectious disease" with no limitation on source. EPA's recommended RWQC identify levels of fecal indicator bacteria (which include fecal coliforms, *E. coli*, enterococci or *Enterococcus* spp.) that will be protective of human health. Those pathogen indicators are not limited to pathogens coming only from human sources.⁸⁴

Second, *E. coli* are typically found in the digestive systems of warm-blooded animals, and can be used to indicate the presence of fecal material in surface waters regardless of their origin, whether from humans, domestic animals, or wildlife. The literature provides many studies documenting wildlife as sources of *E. coli*.^{85 86 87} For decades, EPA's regulatory premise concerning recreational water quality has been that nonhuman-derived human pathogens, including those from wildlife, in fecally contaminated waters present a potential risk to human health.⁸⁸ EPA has investigated sources of fecal contamination in its *Review of Published Studies to Characterize Relative Risks from Different Sources of Fecal Contamination in Recreational Waters*⁸⁹ and *Review of Zoonotic*

bacteria. . . ." EPA did not cite to that guidance in the context of the proposed bacteria criteria, and it has no bearing on EPA's decision to include wildlife sources in the scope of the criteria.

⁸⁴ USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058, pages 1-9.

⁸⁵ Levesque, B., P. Brousseau, P. Simard, E. Dewailly, M. Meisels, D. Ramsay, and J. Joly. 1993. Impact of the ring-billed gull (*Larus delawarensis*) on the microbiological quality of recreational water. *Applied and Environmental Microbiology* 59 (4) 1128-1230.

⁸⁶ Center for Watershed Protection. 1999. Microbes and urban watersheds: concentrations, sources, and pathways. *Watershed Protection Techniques*. 3(1):554-565.

⁸⁷ Makino, S., H. Kobori, H. Asakura, M. Watarai, T. Shirahata, T. Ikeda, K. Takeshi and T. Tsukamoto. 2000. Detection and characterization of Shiga toxin-producing *Escherichia coli* from seagulls. *Epidemiol. Infect.* 125: 55-61.

⁸⁸ USEPA. 2009. Review of Published Studies to Characterize Relative Risks from Different Sources of Fecal Contamination in Recreational Water. U.S. Environmental Protection Agency, Office of Water, Health and Ecological Criteria Division. Washington, DC. EPA 822-R-09-001.

⁸⁹ Id.

Pathogens in Ambient Waters,⁹⁰ and determined that both human and animal feces, including feces from wildlife, in recreational waters do pose potential risks to human health. EPA again confirmed, in the development of the 2012 RWQC, that wildlife can carry both zoonotic pathogens capable of causing illness in humans and fecal indicator bacteria, and these microbes can be transmitted to surface waters.⁹¹

Contrary to the commenter's assertion, EPA cited more than one study in the RWQC that links potential human health risks with non-human sources of fecal contamination.⁹² Furthermore, in the development of the RWQC, EPA did not, as the commenter claimed, equate bacteria from domestic animal sources to those of naturally occurring wildlife. On the contrary, EPA's research for the development of the RWQC clearly recognized that there is a risk differential between human and non-human animal sources, as well as among non-human animal sources.⁹³ Nevertheless, because zoonotic pathogens are present in animal (including wildlife) fecal matter, creating a potential risk from recreational exposure to zoonotic pathogens in animal-impacted waters, EPA found no scientific basis on which to exclude wildlife altogether from the scope of the RWQC, nor has the commenter provided any scientific basis for excluding wildlife sources altogether from the scope of the EPA's rule for waters in Indian lands in Maine.

Maine DEP commented that because bacteria from natural sources are likely to be "temporal," removing a use (recreation in and on the water) simply due to a high level of *E. coli* where the bacteria source is of natural origins "is, at best, unwise." This circumstance is not a justification for excluding wildlife sources altogether from the scope of recreational bacteria criteria. EPA recognizes that health risks associated with exposure to waters impacted by animal sources can vary substantially, depending on the animal source. In some cases, these risks can be similar to exposure to human fecal contamination, and in other cases, the risk is lower.^{94 95 96 97} In situations with

⁹⁰ USEPA. 2009. Review of Zoonotic Pathogens in Ambient Waters. U.S. Environmental Protection Agency, Office of Water, Health and Ecological Criteria Division. Washington, DC. EPA-822-R-09-002.

⁹¹ USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058.

⁹² Id., pages 34-38.

⁹³ Id., pages 36-38.

⁹⁴ Schoen, M.E. and N.J. Ashbolt. 2010. Assessing pathogen risk to swimmers at non-sewage impacted

⁸² Id.

⁸³ The commenter also refers to the 1997 Guidance ("Establishing Site Specific Aquatic Life Criteria Equal to Natural Background") "cited by EPA," and states that it "stands for possible reevaluation of uses based on known background concentrations not establishing criteria which necessitates regulation of naturally occurring

non-human sources of fecal contamination, the state may choose to conduct sanitary surveys, epidemiological studies and/or a Quantitative Microbial Risk Assessment (QMRA). If sanitary surveys, water quality information, or health studies show the sources of fecal contamination to be non-human, and the indicator densities reflect a different risk profile, then the state has the option to develop and adopt site-specific alternative recreational bacteria criteria to reflect the local environmental conditions and human exposure patterns.⁹⁸ For waterbodies where non-human fecal sources predominate, QMRA can be used to determine a different enterococci or *E. coli* criteria value that is equally protective as the criteria EPA is promulgating today.⁹⁹

Maine DEP also objected to EPA's proposal to apply the bacteria criteria year round, and requested that EPA exclude the period of October 1–May 14, similar to Maine's disapproved criteria. The state asserted that EPA had not demonstrated that recreational activities occur in this time frame. Other commenters supported the year round criteria. EPA disagrees with the state's characterization of the record. First, the activities cited by EPA in the proposal were merely examples of readily available information that recreation does occur during the period October 1 to May 14. The record also included information from one tribal member confirming that activities in and on the Penobscot River occur whenever the waters are ice free. In its comment supporting the proposed criteria, the Penobscot Nation specifically noted that the tribe engages in year round activities in and on the Penobscot River, including for paddling, fishing, and ceremonial uses. EPA had invited

recreational beaches. *Environmental Science and Technology* 44(7): 2286–2291.

⁹⁵ Soller, J.A., M.E. Schoen, T. Bartrand, J.E. Ravenscroft, N.J. Ashbolt. 2010. Estimated human health risks from exposure to recreational waters impacted by human and non-human sources of faecal contamination. *Water Research* 44: 4674–4691.

⁹⁶ Soller, J.A., T. Bartrand, J. Ravenscroft, M. Molina, G. Whelan, M. Schoen, N. Ashbolt. 2015. Estimated health risks from recreational exposures to stormwater runoff containing animal faecal material. *Environmental Modelling and Software* 72: 21–32.

⁹⁷ USEPA. 2010. Quantitative Microbial Risk Assessment to Estimate Illness in Freshwater Impacted by Agricultural Animals Sources of Fecal Contamination. U.S. Environmental Protection Agency, Office of Water, Washington, DC. EPA 822-R-10-005.

⁹⁸ USEPA. 2012. Recreational Water Quality Criteria. U.S. Environmental Protection Agency, Office of Water, Washington, DC. Office of Water 820-F-12-058. Section 6.2.

⁹⁹ Id., Section 6.2.2.

comment on whether a seasonal term shorter than October 1–May 14, during which the recreational bacteria criteria would not apply, would still adequately protect recreational uses. EPA received no comments that provided specific information that could support the establishment of a seasonal timeframe in which the absence of bacteria criteria would be protective of uses. Therefore, EPA has retained the year round applicability in the final rule.

IV. Economic Analysis

EPA is not required under CWA section 303(c) or its implementing regulations at 40 CFR part 131 to conduct an economic analysis regarding implementation of these EPA-promulgated WQS. For the purpose of transparency, EPA conducted a cost analysis for the WQS in this final rule. Potential economic effects of this rule are presented here.

These WQS may serve as a basis for development of NPDES permit limits. Maine has NPDES permitting authority and retains considerable discretion in implementing standards. EPA evaluated the potential costs to NPDES dischargers associated with state implementation of EPA's final criteria. This analysis is documented in “Final Economic Analysis for Promulgation of Certain Federal Water Quality Criteria Applicable to Maine,” which can be found in the docket for this rulemaking.

Any NPDES-permitted facility that discharges pollutants for which the revised WQS are more stringent than the previously applicable WQS could potentially incur increased compliance costs. The types of affected facilities could include industrial facilities and POTWs discharging wastewater to surface waters (*i.e.*, point sources). EPA did not attribute compliance with water quality-based effluent limitations (WQBELs) reflective of Maine's existing (hereafter “baseline”) WQS to the final rule. Once in compliance with WQBELs reflective of baseline criteria, EPA expects that dischargers will continue to use the same types of controls to come into compliance with any revised WQBELs reflective of the more stringent WQS.

The following final criteria are not expected to result in incremental costs to permitted dischargers: pH, temperature, ammonia, and all but one HHC (for waters in Indian lands); phenol (for state waters outside Indian lands); and dissolved oxygen (for all state waters). As described below, the cost analysis identifies potential costs of compliance with one HHC (bis(2-ethylhexyl)phthalate), bacteria, and the

final mixing zone policy for waters in Indian lands.

EPA did not fully evaluate the potential for costs to nonpoint sources. Very little data were available to assess the potential for the rule to result in WQS exceedances attributable to nonpoint sources. It is difficult to model and evaluate the potential cost impacts of this final rule to nonpoint sources because they are intermittent, variable, and occur under hydrologic or climatic conditions associated with precipitation events. Finally, legacy contamination (*e.g.*, in sediment) may be a source of ongoing loading. Atmospheric deposition may also contribute loadings of the pollutants of concern (*e.g.*, mercury). EPA did not estimate sediment remediation costs, or air pollution control costs, for this analysis.

A. Identifying Affected Entities

EPA identified 33 facilities (major and non-major) that discharge to waters in Indian lands or their tributaries, two facilities that discharge phenol to other state waters, and 26 facilities that discharge to Class A waters throughout the state. EPA identified 16 point source facilities that could incur additional costs as a result of this final rule. Of these potentially affected facilities, eight are major dischargers and eight are minor dischargers. Two are industrial dischargers and the remaining 14 are publicly owned treatment works (POTWs). EPA did not include general permit facilities in its analysis because data for such facilities are limited. EPA evaluated all of the potentially affected facilities.

EPA does not agree with the comment that its economic analysis (“EA”) was deficient because uncertainty—including with respect to the geographic scope of the rule's applicability—constrained the Agency's ability to assess the economic impacts of the rule. Although the commenter is correct that the geographic extent of the waters covered by this promulgation could change due to litigation or other legal developments regarding Indian land status, EPA used an inclusive approach in its analysis that accounted for all facilities that could reasonably fall within the two general categories of waters to which the HHC may apply. If the geographic scope of waters to which the HHC apply is smaller, then fewer facilities will be affected by the rule and costs will be lower.

B. Method for Estimating Costs

For the 16 facilities that may incur costs, EPA evaluated existing baseline permit conditions and the potential to exceed new effluent limits based on the

final rule. In instances of exceedances of projected effluent limitations under the final criteria, EPA determined the likely compliance scenarios and costs. Only compliance actions and costs that would be needed above the baseline level of controls are attributable to the rule.

EPA assumed that dischargers will pursue the least cost means of compliance with WQBELs. Incremental compliance actions attributable to the rule may include pollution prevention, end-of-pipe treatment, and alternative compliance mechanisms (e.g., variances). EPA annualized capital costs, including study (e.g., variance) and program (e.g., pollution prevention) costs, over 20 years using a 3% discount rate to obtain total annual costs per facility.

C. Results

1. Costs From Final Human Health Criteria Applicable to Waters in Indian Lands

Based on this approach, EPA identified one facility that has reasonable potential to exceed permit effluent limits based on one final criterion (bis(2-ethylhexyl)phthalate). EPA calculated a projected effluent limitation based on the same procedures utilized by Maine in its NPDES

permitting practices. To estimate potential costs to this facility from meeting the projected effluent limits, EPA considered source controls, end-of-pipe treatments, and alternative compliance mechanisms (e.g., variances). For this provision, EPA estimated total annual compliance costs of \$28,000 (for source controls) to \$43,000 (for end-of-pipe treatments).

2. Costs From Final Recreational Bacteria Criteria for Waters in Indian Lands

EPA does not expect the final recreational bacteria criteria to result in any new treatment processes being added to facilities, but does expect that 14 facilities with existing limitations for bacteria will need to operate their disinfection systems year-round, extending treatments for an additional 226 days per year. EPA estimated the costs of chemicals and monitoring during this extended period based on the facilities' effluent flow rate, type of treatment, and monitoring costs. For this provision, EPA estimated total annual compliance costs of \$185,000 to \$705,000.

3. Costs From Final Mixing Zone Policy

EPA identified one facility with an existing permit that establishes a

thermal mixing zone that may affect waters in Indian lands. It is unknown whether reductions in thermal loads will be necessary to reduce the mixing zone to a size and configuration that would meet the new mixing zone policy at this facility; possible outcomes include the need for facility-specific studies, revisions to permit conditions that could require recalculating thermal discharge limits, or changes in facility processes or operations to reduce the thermal load. To estimate the costs of this provision, EPA used as lower-bound the cost to conduct a study to characterize the discharger's existing thermal plume and support evaluation of whether the current mixing zone complies with the new mixing zone policy (\$1,000, annual cost for 20 years) and as upper-bound the potential cost impacts for installing new cooling towers at the facility (\$273,000, annualized over 30 years at a 3 percent discount rate).

4. Total Costs

Table 3 summarizes the estimated point source compliance costs from the final WQS. EPA estimates that the total annual compliance costs for all provisions may be in the range of \$214,000 to \$1.0 million.

TABLE 3—SUMMARY OF ESTIMATED POINT SOURCE COMPLIANCE COSTS

Final WQS	Annualized costs (thousands; 2014\$) ¹
Human health criteria for waters in Indian lands	\$28–\$43
Recreational bacteria criteria for waters in Indian lands	185–705
Mixing zone policy	1–273
Total	214–1,021

¹ One-time costs are annualized over 20 years (30 years in the case of cooling towers under the mixing zone policy) using a 3% discount rate.

V. Statutory and Executive Order Reviews

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is summarized in section IV of the preamble and is available in the docket.

B. Paperwork Reduction Act

This action does not impose any direct new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Actions to implement these WQS could entail additional paperwork burden. Burden is defined at 5 CFR 1320.3(b). This action does not include any information collection, reporting, or record-keeping requirements.

C. Regulatory Flexibility Act

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. Small entities, such as small businesses or small governmental

jurisdictions, are not directly regulated by this rule. This rule will thus not impose any requirements on small entities.

EPA-promulgated standards are implemented through various water quality control programs including the NPDES program, which limits discharges to navigable waters except in compliance with an NPDES permit. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable WQS. Thus, under the CWA, EPA's promulgation of WQS establishes standards that the state implements through the NPDES permit process. The state has discretion in developing discharge limits, as needed to meet the standards. As a result of this action, the

State of Maine will need to issue permits that include limitations on discharges necessary to comply with the standards established in the final rule. In doing so, the state will have a number of approaches available to it associated with permit writing. While Maine's implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, including small entities, EPA's action, by itself, does not directly impose any requirements on small entities. Any impact from EPA's action on small entities would therefore only be indirect because the requirements of this rule are not self-implementing.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. As these water quality criteria are not self-implementing, EPA's action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that could significantly or uniquely affect small governments.

E. Executive Order 13132

This action 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. This rule does not alter Maine's considerable discretion in implementing these WQS, nor will it preclude Maine from adopting WQS in the future that EPA concludes meet the requirements of the CWA, which will eliminate the need for federal standards. Thus, Executive Order 13132 does not apply to this action.

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

This action has tribal implications, however, it would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. Therefore, consultation is not required under the Executive Order. In the state of Maine, there are four federally recognized Indian tribes represented by five tribal

governments. As a result of the unique jurisdictional provisions of the Maine Indian Claims Settlement Act, as described above, the state has jurisdiction for setting water quality standards for all waters in Indian lands in Maine. This rule will have no effect on that jurisdictional arrangement. This rule would affect federally recognized Indian tribes in Maine because the water quality standards will apply to all waters in Indian lands. Some will also apply to waters outside of Indian lands where the sustenance fishing designated use established by 30 M.R.S. 6207(4) and (9) applies. Finally, many of the final criteria for such waters are protective of the sustenance fishing designated use, which is based in the Indian settlement acts in Maine.

The EPA consulted with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this rule to permit them to have meaningful and timely input into its development. Summaries of those consultations are provided in the following documents: "Maine WQS Tribal Leaders Consultation 4–27–16;" "Maine WQS Technical Consultation 4–11–16;" and "Summary of Tribal Consultations Regarding Water Quality Standards Applicable to Waters in Indian Lands within the State of Maine," which are available in the docket for this rulemaking.

G. 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 it does not concern an environmental health risk or safety risk that may disproportionately affect children.

H. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act of 1995

This action does not involve technical standards.

J. Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)

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.

Conversely, this action will increase protection for indigenous populations in Maine from disproportionately high and adverse human health effects. EPA developed the criteria included in this rule specifically to protect Maine's designated uses, using the most current science, including local and regional information on fish consumption. Applying these criteria to waters in the state of Maine will afford a greater level of protection to both human health and the environment.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 131

Environmental protection, Incorporation by reference, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: December 8, 2016.

Gina McCarthy,
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

- 1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

- 2. Add § 131.43 to read as follows:

§ 131.43 Maine.

(a) *Human health criteria for toxics for waters in Indian lands and for Waters outside of Indian lands where the sustenance fishing designated use established by 30 M.R.S. 6207(4) and (9) applies.* The criteria for toxic pollutants for the protection of human health are set forth in the following table 1:

TABLE 1—HUMAN HEALTH CRITERIA

Chemical name	CAS No.	Water and organisms (µg/L)	Organisms only (µg/L)
1. 1,1,2,2-Tetrachloroethane	79-34-5	0.09	0.2
2. 1,1,2-Trichloroethane	79-00-5	0.31	0.66
3. 1,1-Dichloroethylene	75-35-4	300	1000
4. 1,2,4,5-Tetrachlorobenzene	95-94-3	0.002	0.002
5. 1,2,4-Trichlorobenzene	120-82-1	0.0056	0.0056
6. 1,2-Dichlorobenzene	95-50-1	200	300
7. 1,2-Dichloropropane	78-87-5	.....	2.3
8. 1,2-Diphenylhydrazine	122-66-7	0.01	0.02
9. 1,2-Trans-Dichloroethylene	156-60-5	90	300
10. 1,3-Dichlorobenzene	541-73-1	1	1
11. 1,3-Dichloropropene	542-75-6	0.21	0.87
12. 1,4-Dichlorobenzene	106-46-7	.....	70
13. 2,4,5-Trichlorophenol	95-95-4	40	40
14. 2,4,6-Trichlorophenol	88-06-2	0.20	0.21
15. 2,4-Dichlorophenol	120-83-2	4	4
16. 2,4-Dimethylphenol	105-67-9	80	200
17. 2,4-Dinitrophenol	51-28-5	9	30
18. 2,4-Dinitrotoluene	121-14-2	0.036	0.13
19. 2-Chloronaphthalene	91-58-7	90	90
20. 2-Chlorophenol	95-57-8	20	60
21. 2-Methyl-4,6-Dinitrophenol	534-52-1	1	2
22. 3,3'-Dichlorobenzidine	91-94-1	0.0096	0.011
23. 4,4'-DDD	72-54-8	9.3E-06	9.3E-06
24. 4,4'-DDE	72-55-9	1.3E-06	1.3E-06
25. 4,4'-DDT	50-29-3	2.2E-06	2.2E-06
26. Acenaphthene	83-32-9	6	7
27. Acrolein	107-02-8	3	.....
28. Aldrin	309-00-2	5.8E-08	5.8E-08
29. alpha-BHC	319-84-6	2.9E-05	2.9E-05
30. alpha-Endosulfan	959-98-8	2	2
31. Anthracene	120-12-7	30	30
32. Antimony	7440-36-0	5	40
33. Benzene	71-43-2	0.40	1.2
34. Benzo (a) Anthracene	56-55-3	9.8E-05	9.8E-05
35. Benzo (a) Pyrene	50-32-8	9.8E-06	9.8E-06
36. Benzo (b) Fluoranthene	205-99-2	9.8E-05	9.8E-05
37. Benzo (k) Fluoranthene	207-08-9	0.00098	0.00098
38. beta-BHC	319-85-7	0.0010	0.0011
39. beta-Endosulfan	33213-65-9	3	3
40. Bis(2-Chloro-1-Methylethyl) Ether	108-60-1	100	300
41. Bis(2-Chloroethyl) Ether	111-44-4	0.026	0.16
42. Bis(2-Ethylhexyl) Phthalate	117-81-7	0.028	0.028
43. Bromoform	75-25-2	4.0	8.7
44. Butylbenzyl Phthalate	85-68-7	0.0077	0.0077
45. Carbon Tetrachloride	56-23-5	0.2	0.3
46. Chlordane	57-74-9	2.4E-05	2.4E-05
47. Chlorobenzene	108-90-7	40	60
48. Chlorodibromomethane	124-48-1	.....	1.5
49. Chrysene	218-01-9	.....	0.0098
50. Cyanide	57-12-5	4	30
51. Dibenzo (a,h) Anthracene	53-70-3	9.8E-06	9.8E-06
52. Dichlorobromomethane	75-27-4	.....	2.0
53. Dieldrin	60-57-1	9.3E-08	9.3E-08
54. Diethyl Phthalate	84-66-2	50	50
55. Dimethyl Phthalate	131-11-3	100	100
56. Di-n-Butyl Phthalate	84-74-2	2	2
57. Dinitrophenols	25550-58-7	10	70
58. Endosulfan Sulfate	1031-07-8	3	3
59. Endrin	72-20-8	0.002	0.002
60. Endrin Aldehyde	7421-93-4	0.09	0.09
61. Ethylbenzene	100-41-4	8.9	9.5
62. Fluoranthene	206-44-0	1	1
63. Fluorene	86-73-7	5	5
64. gamma-BHC (Lindane)	58-89-9	0.33	.....
65. Heptachlor	76-44-8	4.4E-07	4.4E-07
66. Heptachlor Epoxide	1024-57-3	2.4E-06	2.4E-06
67. Hexachlorobenzene	118-74-1	5.9E-06	5.9E-06
68. Hexachlorobutadiene	87-68-3	0.0007	0.0007
69. Hexachlorocyclohexane-Technical	608-73-1	0.00073	0.00076
70. Hexachlorocyclopentadiene	77-47-4	0.3	0.3

TABLE 1—HUMAN HEALTH CRITERIA—Continued

Chemical name	CAS No.	Water and organisms (µg/L)	Organisms only (µg/L)
71. Hexachloroethane	67-72-1	0.01	0.01
72. Indeno (1,2,3-cd) Pyrene	193-39-5	9.8E-05	9.8E-05
73. Isophorone	78-59-1	28	140
74. Methoxychlor	72-43-5	0.001	
75. Methylene Chloride	75-09-2	.....	90
76. Methylmercury	22967-92-6	.....	0.02 ^a (mg/kg)
77. Nickel	7440-02-0	20	20
78. Nitrobenzene	98-95-3	10	40
79. Nitrosamines .....	.....	0.00075	0.032
80. N-Nitrosodibutylamine	924-16-3	0.00438	0.0152
81. N-Nitrosodiethylamine	55-18-5	0.00075	0.032
82. N-Nitrosodimethylamine	62-75-9	0.00065	0.21
83. N-Nitrosodi-n-propylamine	621-64-7	0.0042	0.035
84. N-Nitrosodiphenylamine	86-30-6	0.40	0.42
85. N-Nitrosopyrrolidine	930-55-2	.....	2.4
86. Pentachlorobenzene	608-93-5	0.008	0.008
87. Pentachlorophenol	87-86-5	0.003	0.003
88. Phenol	108-95-2	3,000	20,000
89. Polychlorinated Biphenyls (PCBs)	1336-36-3	^b 4E-06	4E-06 ^b
90. Pyrene	129-00-0	2	2
91. Selenium	7782-49-2	20	60
92. Toluene	108-88-3	24	39
93. Toxaphene	8001-35-2	5.3E-05	5.3E-05
94. Trichloroethylene	79-01-6	0.3	0.5
95. Vinyl Chloride	75-01-4	0.019	0.12
96. Zinc	7440-66-6	300	400

^a This criterion is expressed as the fish tissue concentration of methylmercury (mg methylmercury/kg fish) and applies equally to fresh and marine waters.

^b This criterion applies to total PCBs (i.e., the sum of all congener or isomer or homolog or Aroclor analyses).

(b) *Bacteria criteria for waters in Indian lands.* (1) The bacteria content of Class AA and Class A waters shall be as naturally occurs, and the minimum number of *Escherichia coli* bacteria shall not exceed a geometric mean of 100 colony-forming units per 100 milliliters (cfu/100 ml) in any 30-day interval; nor shall 320 cfu/100 ml be exceeded more than 10% of the time in any 30-day interval.

(2) In Class B, Class C, and Class GPA waters, the number of *Escherichia coli* bacteria shall not exceed a geometric mean of 100 colony forming units per 100 milliliters (cfu/100 ml) in any 30-day interval; nor shall 320 cfu/100 ml be exceeded more than 10% of the time in any 30-day interval.

(3) The bacteria content of Class SA waters shall be as naturally occurs, and the number of *Enterococcus* spp. bacteria shall not exceed a geometric mean of 30 cfu/100 ml in any 30-day interval, nor shall 110 cfu/100 ml be exceeded more than 10% of the time in any 30-day interval.

(4) In Class SA shellfish harvesting areas, the numbers of total coliform bacteria or other specified indicator

organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration, as set forth in the Guide for the Control of Molluscan Shellfish, 2015 Revision. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition, Shellfish and Aquaculture Policy Branch, 5100 Paint Branch Parkway (HFS-325), College Park, MD 20740 or <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2006754.htm>. You may inspect a copy at the U.S. Environmental Protection Agency Docket Center Reading Room, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, (202) 566-1744, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030,

or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(5) In Class SB and SC waters, the number of *Enterococcus* spp. bacteria shall not exceed a geometric mean of 30 cfu/100 ml in any 30-day interval, nor shall 110 cfu/100 ml be exceeded more than 10% of the time in any 30-day interval.

(c) *Ammonia criteria for fresh waters in Indian lands.* (1) The one-hour average concentration of total ammonia nitrogen (in mg TAN/L) shall not exceed, more than once every three years, the criterion maximum concentration (i.e., the “CMC,” or “acute criterion”) set forth in Tables 2 and 3 of this section.

(2) The thirty-day average concentration of total ammonia nitrogen (in mg TAN/L) shall not exceed, more than once every three years, the criterion continuous concentration (i.e., the “CCC,” or “chronic criterion”) set forth in Table 4.

(3) In addition, the highest four-day average within the same 30-day period as in (2) shall not exceed 2.5 times the CCC, more than once every three years.

Table 2. Temperature and pH-Dependent Values of the CMC (Acute Criterion Magnitude)—*Oncorhynchus* spp. Present. (Figure 5a in Aquatic Life Ambient Water Quality Criteria for Ammonia-Freshwater, EPA 822-R-13-001, April 2013.)

pH	Temperature (°C)																
	0-14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
6.5	33	33	32	29	27	25	23	21	19	18	16	15	14	13	12	11	9.9
6.6	31	31	30	28	26	24	22	20	18	17	16	14	13	12	11	10	9.5
6.7	30	30	29	27	24	22	21	19	18	16	15	14	13	12	11	9.8	9.0
6.8	28	28	27	25	23	21	20	18	17	15	14	13	12	11	10	9.2	8.5
6.9	26	26	25	23	21	20	18	17	15	14	13	12	11	10	9.4	8.6	7.9
7.0	24	24	23	21	20	18	<u>17</u>	15	14	13	12	11	10	9.4	8.6	8.0	7.3
7.1	22	22	21	20	18	17	15	14	13	12	11	10	9.3	8.5	7.9	7.2	6.7
7.2	20	20	19	18	16	15	14	13	12	11	9.8	9.1	8.3	7.7	7.1	6.5	6.0
7.3	18	18	17	16	14	13	12	11	10	9.5	8.7	8.0	7.4	6.8	6.3	5.8	5.3
7.4	15	15	15	14	13	12	11	9.8	9.0	8.3	7.7	7.0	6.5	6.0	5.5	5.1	4.7
7.5	13	13	13	12	11	10	9.2	8.5	7.8	7.2	6.6	6.1	5.6	5.2	4.8	4.4	4.0
7.6	11	11	11	10	9.3	8.6	7.9	7.3	6.7	6.2	5.7	5.2	4.8	4.4	4.1	3.8	3.5
7.7	9.6	9.6	9.3	8.6	7.9	7.3	6.7	6.2	5.7	5.2	4.8	4.4	4.1	3.8	3.5	3.2	3.0
7.8	8.1	8.1	7.9	7.2	6.7	6.1	5.6	5.2	4.8	4.4	4.0	3.7	3.4	3.2	2.9	2.7	2.5
7.9	6.8	6.8	6.6	6.0	5.6	5.1	4.7	4.3	4.0	3.7	3.4	3.1	2.9	2.6	2.4	2.2	2.1
8.0	5.6	5.6	5.4	5.0	4.6	4.2	3.9	3.6	3.3	3.0	2.8	2.6	2.4	2.2	2.0	1.9	1.7
8.1	4.6	4.6	4.5	4.1	3.8	3.5	3.2	3.0	2.7	2.5	2.3	2.1	2.0	1.8	1.7	1.5	1.4
8.2	3.8	3.8	3.7	3.5	3.1	2.9	2.7	2.4	2.3	2.1	1.9	1.8	1.6	1.5	1.4	1.3	1.2
8.3	3.1	3.1	3.1	2.8	2.6	2.4	2.2	2.0	1.9	1.7	1.6	1.4	1.3	1.2	1.1	1.0	0.96
8.4	2.6	2.6	2.5	2.3	2.1	2.0	1.8	1.7	1.5	1.4	1.3	1.2	1.1	1.0	0.93	0.86	0.79
8.5	2.1	2.1	2.1	1.9	1.8	1.6	1.5	1.4	1.3	1.2	1.1	0.98	0.90	0.83	0.77	0.71	0.65
8.6	1.8	1.8	1.7	1.6	1.5	1.3	1.2	1.1	1.0	0.96	0.88	0.81	0.75	0.69	0.63	0.59	0.54
8.7	1.5	1.5	1.4	1.3	1.2	1.1	1.0	0.94	0.87	0.80	0.74	0.68	0.62	0.57	0.53	0.49	0.45
8.8	1.2	1.2	1.2	1.1	1.0	0.93	0.86	0.79	0.73	0.67	0.62	0.57	0.52	0.48	0.44	0.41	0.37
8.9	1.0	1.0	1.0	0.93	0.85	0.79	0.72	0.67	0.61	0.56	0.52	0.48	0.44	0.40	0.37	0.34	0.32
9.0	0.88	0.88	0.86	0.79	0.73	0.67	0.62	0.57	0.52	0.48	0.44	0.41	0.37	0.34	0.32	0.29	0.27

Table 3. Temperature and pH-Dependent Values of the CMC (Acute Criterion Magnitude)—*Oncorhynchus* spp. Absent. (Figure 5b in Aquatic Life Ambient Water Quality Criteria for Ammonia-Freshwater, EPA 822-R-13-001, April 2013.)

pH	Temperature (°C)																				
	0-10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
6.5	51	48	44	41	37	34	32	29	27	25	23	21	19	18	16	15	14	13	12	11	9.9
6.6	49	46	42	39	36	33	30	28	26	24	22	20	18	17	16	14	13	12	11	10	9.5
6.7	46	44	40	37	34	31	29	27	24	22	21	19	18	16	15	14	13	12	11	9.8	9.0
6.8	44	41	38	35	32	30	27	25	23	21	20	18	17	15	14	13	12	11	10	9.2	8.5
6.9	41	38	35	32	30	28	25	23	21	20	18	17	15	14	13	12	11	10	9.4	8.6	7.9
7.0	38	35	33	30	28	25	23	21	20	18	<u>17</u>	15	14	13	12	11	10	9.4	8.6	7.9	7.3
7.1	34	32	30	27	25	23	21	20	18	17	15	14	13	12	11	10	9.3	8.5	7.9	7.2	6.7
7.2	31	29	27	25	23	21	19	18	16	15	14	13	12	11	9.8	9.1	8.3	7.7	7.1	6.5	6.0
7.3	27	26	24	22	20	18	17	16	14	13	12	11	10	9.5	8.7	8.0	7.4	6.8	6.3	5.8	5.3
7.4	24	22	21	19	18	16	15	14	13	12	11	9.8	9.0	8.3	7.7	7.0	6.5	6.0	5.5	5.1	4.7
7.5	21	19	18	17	15	14	13	12	11	10	9.2	8.5	7.8	7.2	6.6	6.1	5.6	5.2	4.8	4.4	4.0
7.6	18	17	15	14	13	12	11	10	9.3	8.6	7.9	7.3	6.7	6.2	5.7	5.2	4.8	4.4	4.1	3.8	3.5
7.7	15	14	13	12	11	10	9.3	8.6	7.9	7.3	6.7	6.2	5.7	5.2	4.8	4.4	4.1	3.8	3.5	3.2	2.9
7.8	13	12	11	10	9.3	8.5	7.9	7.2	6.7	6.1	5.6	5.2	4.8	4.4	4.0	3.7	3.4	3.2	2.9	2.7	2.5
7.9	11	9.9	9.1	8.4	7.7	7.1	6.6	3.0	5.6	5.1	4.7	4.3	4.0	3.7	3.4	3.1	2.9	2.6	2.4	2.2	2.1
8.0	8.8	8.2	7.6	7.0	6.4	5.9	5.4	5.0	4.6	4.2	3.9	3.6	3.3	3.0	2.8	2.6	2.4	2.2	2.0	1.9	1.7
8.1	7.2	6.8	6.3	5.8	5.3	4.9	4.5	4.1	3.8	3.5	3.2	3.0	2.7	2.5	2.3	2.1	2.0	1.8	1.7	1.5	1.4
8.2	6.0	5.6	5.2	4.8	4.4	4.0	3.7	3.4	3.1	2.9	2.7	2.4	2.3	2.1	1.9	1.8	1.6	1.5	1.4	1.3	1.2
8.3	4.9	4.6	4.3	3.9	3.6	3.3	3.1	2.8	2.6	2.4	2.2	2.0	1.9	1.7	1.6	1.4	1.3	1.2	1.1	1.0	0.96
8.4	4.1	3.8	3.5	3.2	3.0	2.7	2.5	2.3	2.1	2.0	1.8	1.7	1.5	1.4	1.3	1.2	1.1	1.0	0.93	0.86	0.79
8.5	3.3	3.1	2.9	2.7	2.4	2.3	2.1	1.9	1.8	1.6	1.5	1.4	1.3	1.2	1.1	0.98	0.90	0.83	0.77	0.71	0.65
8.6	2.8	2.6	2.4	2.2	2.0	1.9	1.7	1.6	1.5	1.3	1.2	1.1	1.0	0.96	0.88	0.81	0.75	0.69	0.63	0.58	0.54
8.7	2.3	2.2	2.0	1.8	1.7	1.6	1.4	1.3	1.2	1.1	1.0	0.94	0.87	0.80	0.74	0.68	0.62	0.57	0.53	0.49	0.45
8.8	1.9	1.8	1.7	1.5	1.4	1.3	1.2	1.1	1.0	0.93	0.86	0.79	0.73	0.67	0.62	0.57	0.52	0.48	0.44	0.41	0.37
8.9	1.6	1.5	1.4	1.3	1.2	1.1	1.0	0.93	0.85	0.79	0.72	0.67	0.61	0.56	0.52	0.48	0.44	0.40	0.37	0.34	0.32
9.0	1.4	1.3	1.2	1.1	1.0	0.93	0.86	0.79	0.73	0.67	0.62	0.57	0.52	0.48	0.44	0.41	0.37	0.34	0.32	0.29	0.27

Table 4. Temperature and pH-Dependent Values of the CCC (Chronic Criterion Magnitude). (Figure 6 in Aquatic Life Ambient Water Quality Criteria for Ammonia-Freshwater, EPA 822-R-13-001, April 2013.)

pH	Temperature (°C)																													
	0-7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30						
6.5	4.9	4.6	4.3	4.1	3.8	3.6	3.3	3.1	2.9	2.8	2.6	2.4	2.3	2.1	2.0	1.9	1.8	1.6	1.5	1.5	1.4	1.3	1.2	1.1						
6.6	4.8	4.5	4.3	4.0	3.8	3.5	3.3	3.1	2.9	2.7	2.5	2.4	2.2	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.3	1.2	1.1						
6.7	4.8	4.5	4.2	3.9	3.7	3.5	3.2	3.0	2.8	2.7	2.5	2.3	2.2	2.1	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1						
6.8	4.6	4.4	4.1	3.8	3.6	3.4	3.2	3.0	2.8	2.6	2.4	2.3	2.1	2.0	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.1	1.1						
6.9	4.5	4.2	4.0	3.7	3.5	3.3	3.1	2.9	2.7	2.5	2.4	2.2	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1	1.0						
7.0	4.4	4.1	3.8	3.6	3.4	3.2	3.0	2.8	2.6	2.4	2.3	2.2	2.0	<u>1.9</u>	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.1	1.1	0.99						
7.1	4.2	3.9	3.7	3.5	3.2	3.0	2.8	2.7	2.5	2.3	2.2	2.1	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1	1.0	0.95						
7.2	4.0	3.7	3.5	3.3	3.1	2.9	2.7	2.5	2.4	2.2	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.3	1.2	1.1	1.0	0.96	0.90						
7.3	3.8	3.5	3.3	3.1	2.9	2.7	2.6	2.4	2.2	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.3	1.2	1.1	1.0	0.97	0.91	0.85						
7.4	3.5	3.3	3.1	2.9	2.7	2.5	2.4	2.2	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.3	1.2	1.1	1.0	0.96	0.90	0.85	0.79						
7.5	3.2	3.0	2.8	2.7	2.5	2.3	2.2	2.1	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1	1.0	0.95	0.89	0.83	0.78	0.73						
7.6	2.9	2.8	2.6	2.4	2.3	2.1	2.0	1.9	1.8	1.6	1.5	1.4	1.4	1.3	1.2	1.1	1.1	0.98	0.92	0.86	0.81	0.76	0.71	0.67						
7.7	2.6	2.4	2.3	2.2	2.0	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.1	1.1	1.0	0.94	0.88	0.83	0.78	0.73	0.68	0.64	0.60						
7.8	2.3	2.2	2.1	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1	1.0	0.95	0.89	0.84	0.79	0.74	0.69	0.65	0.61	0.57	0.53						
7.9	2.1	1.9	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.2	1.1	1.0	0.95	0.89	0.84	0.79	0.74	0.69	0.65	0.61	0.57	0.53	0.50	0.47						
8.0	1.8	1.7	1.6	1.5	1.4	1.3	1.2	1.1	1.1	1.0	0.94	0.88	0.83	0.78	0.73	0.68	0.64	0.60	0.56	0.53	0.50	0.44	0.44	0.41						
8.1	1.5	1.5	1.4	1.3	1.2	1.1	1.1	0.99	0.92	0.87	0.81	0.76	0.71	0.67	0.63	0.59	0.55	0.52	0.49	0.46	0.43	0.40	0.38	0.35						
8.2	1.3	1.2	1.2	1.1	1.0	0.96	0.90	0.84	0.79	0.74	0.70	0.65	0.61	0.57	0.54	0.50	0.47	0.44	0.42	0.39	0.37	0.34	0.32	0.30						
8.3	1.1	1.1	0.99	0.93	0.87	0.82	0.76	0.72	0.67	0.63	0.59	0.55	0.52	0.49	0.46	0.43	0.40	0.38	0.35	0.33	0.31	0.29	0.27	0.26						
8.4	0.95	0.89	0.84	0.79	0.74	0.69	0.65	0.61	0.57	0.53	0.50	0.47	0.44	0.41	0.39	0.36	0.34	0.32	0.30	0.28	0.26	0.25	0.23	0.22						
8.5	0.80	0.75	0.71	0.67	0.62	0.58	0.55	0.51	0.48	0.45	0.42	0.40	0.37	0.35	0.33	0.31	0.29	0.27	0.25	0.24	0.22	0.21	0.20	0.18						
8.6	0.68	0.64	0.60	0.56	0.53	0.49	0.46	0.43	0.41	0.38	0.36	0.33	0.31	0.29	0.28	0.26	0.24	0.23	0.21	0.20	0.19	0.18	0.16	0.15						
8.7	0.57	0.54	0.51	0.47	0.44	0.42	0.39	0.37	0.34	0.32	0.30	0.28	0.27	0.25	0.23	0.22	0.21	0.19	0.18	0.17	0.16	0.15	0.14	0.13						
8.8	0.49	0.46	0.43	0.40	0.38	0.35	0.33	0.31	0.29	0.27	0.26	0.24	0.23	0.21	0.20	0.19	0.17	0.16	0.15	0.14	0.13	0.13	0.12	0.11						
8.9	0.42	0.39	0.37	0.34	0.32	0.30	0.28	0.27	0.25	0.23	0.22	0.21	0.19	0.18	0.17	0.16	0.15	0.14	0.13	0.12	0.12	0.11	0.10	0.09						
9.0	0.36	0.34	0.32	0.30	0.28	0.26	0.24	0.23	0.21	0.20	0.19	0.18	0.17	0.16	0.15	0.14	0.13	0.12	0.11	0.11	0.10	0.09	0.09	0.08						

(d) *pH Criteria for fresh waters in Indian lands.* The pH of fresh waters shall fall within the range of 6.5 to 8.5.

(e) *Temperature criteria for tidal waters in Indian lands.* (1) The maximum acceptable cumulative increase in the weekly average temperature resulting from all artificial sources is 1 °C (1.8 °F) during all seasons of the year, provided that the summer maximum is not exceeded.

(i) Weekly average temperature increase shall be compared to baseline thermal conditions and shall be calculated using the daily maxima averaged over a 7-day period.

(ii) Baseline thermal conditions shall be measured at or modeled from a site where there is no artificial thermal addition from any source, and which is in reasonable proximity to the thermal discharge (within 5 miles), and which has similar hydrography to that of the receiving waters at the discharge.

(2) Natural temperature cycles characteristic of the waterbody segment shall not be altered in amplitude or frequency.

(3) During the summer months (for the period from May 15 through September 30), water temperatures shall not exceed a weekly average summer maximum threshold of 18 °C (64.4 °F) (calculated using the daily maxima averaged over a 7-day period).

(f) *Natural conditions provisions for waters in Indian lands.* (1) The provision in Title 38 of Maine Revised Statutes 464(4.C) which reads: "Where natural conditions, including, but not limited to, marshes, bogs and abnormal concentrations of wildlife cause the dissolved oxygen or other water quality criteria to fall below the minimum standards specified in section 465, 465-A and 465-B, those waters shall not be considered to be failing to attain their classification because of those natural conditions," does not apply to water quality criteria intended to protect human health.

(2) The provision in Title 38 of Maine Revised Statutes 420(2.A) which reads "Except as naturally occurs or as provided in paragraphs B and C, the board shall regulate toxic substances in the surface waters of the State at the levels set forth in federal water quality criteria as established by the United States Environmental Protection Agency pursuant to the Federal Water Pollution Control Act, Public Law 92-500, Section 304(a), as amended," does not apply to water quality criteria intended to protect human health.

(g) *Mixing zone policy for waters in Indian lands.* (1) *Establishing a mixing zone.* (i) The Department of Environmental Protection

("department") may establish a mixing zone for any discharge at the time of application for a waste discharge license if all of the requirements set forth in paragraphs (g)(2) and (3) of this section are satisfied. The department shall attach a description of the mixing zone as a condition of a license issued for that discharge. After opportunity for a hearing in accordance with 38 MRS section 345-A, the department may establish by order a mixing zone with respect to any discharge for which a license has been issued pursuant to section 414 or for which an exemption has been granted by virtue of 38 MRS section 413, subsection 2.

(ii) The purpose of a mixing zone is to allow a reasonable opportunity for dilution, diffusion, or mixture of pollutants with the receiving waters such that an applicable criterion may be exceeded within a defined area of the waterbody while still protecting the designated use of the waterbody as a whole. In determining the extent of any mixing zone to be established under this section, the department will require from the applicant information concerning the nature and rate of the discharge; the nature and rate of existing discharges to the waterway; the size of the waterway and the rate of flow therein; any relevant seasonal, climatic, tidal, and natural variations in such size, flow, nature, and rate; the uses of the waterways that could be affected by the discharge, and such other and further evidence as in the department's judgment will enable it to establish a reasonable mixing zone for such discharge. An order establishing a mixing zone may provide that the extent thereof varies in order to take into account seasonal, climatic, tidal, and natural variations in the size and flow of, and the nature and rate of, discharges to the waterway.

(2) *Mixing zone information requirements.* At a minimum, any request for a mixing zone must:

(i) Describe the amount of dilution occurring at the boundaries of the proposed mixing zone and the size, shape, and location of the area of mixing, including the manner in which diffusion and dispersion occur;

(ii) Define the location at which discharge-induced mixing ceases;

(iii) Document the substrate character and geomorphology within the mixing zone;

(iv) Document background water quality concentrations;

(v) Address the following factors:

(A) Whether adjacent mixing zones overlap;

(B) Whether organisms would be attracted to the area of mixing as a result of the effluent character; and

(C) Whether the habitat supports endemic or naturally occurring species.

(vi) Provide all information necessary to demonstrate whether the requirements in paragraph (g)(3) of this section are satisfied.

(3) *Mixing zone requirements.* (i) Mixing zones shall be established consistent with the methodologies in Sections 4.3 and 4.4 of the "Technical Support Document for Water Quality-based Toxics Control" EPA/505/2-90-001, dated March 1991.

(ii) The mixing zone demonstration shall be based on the assumption that a pollutant does not degrade within the proposed mixing zone, unless:

(A) Scientifically valid field studies or other relevant information demonstrate that degradation of the pollutant is expected to occur under the full range of environmental conditions expected to be encountered; and

(B) Scientifically valid field studies or other relevant information address other factors that affect the level of pollutants in the water column including, but not limited to, resuspension of sediments, chemical speciation, and biological and chemical transformation.

(iii) Water quality within an authorized mixing zone is allowed to exceed chronic water quality criteria for those parameters approved by the department. Acute water quality criteria may be exceeded for such parameters within the zone of initial dilution inside the mixing zone. Acute criteria shall be met as close to the point of discharge as practicably attainable. Water quality criteria shall not be violated outside of the boundary of a mixing zone as a result of the discharge for which the mixing zone was authorized.

(iv) Mixing zones shall be as small as practicable. The concentrations of pollutants present shall be minimized and shall reflect the best practicable engineering design of the outfall to maximize initial mixing. Mixing zones shall not be authorized for bioaccumulative pollutants (*i.e.*, chemicals for which the bioconcentration factors (BCF) or bioaccumulation factors (BAF) are greater than 1,000) or bacteria.

(v) In addition to the requirements above, the department may approve a mixing zone only if the mixing zone:

(A) Is sized and located to ensure that there will be a continuous zone of passage that protects migrating, free-swimming, and drifting organisms;

(B) Will not result in thermal shock or loss of cold water habitat or otherwise

interfere with biological communities or populations of indigenous species;

(C) Is not likely to jeopardize the continued existence of any endangered or threatened species listed under section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) or result in the destruction or adverse modification of such species' critical habitat;

(D) Will not extend to drinking water intakes and sources;

(E) Will not otherwise interfere with the designated or existing uses of the receiving water or downstream waters;

(F) Will not promote undesirable aquatic life or result in a dominance of nuisance species;

(G) Will not endanger critical areas such as breeding and spawning grounds, habitat for state-listed threatened or endangered species, areas with sensitive biota, shellfish beds, fisheries, and recreational areas;

(H) Will not contain pollutant concentrations that are lethal to mobile,

migrating, and drifting organisms passing through the mixing zone;

(I) Will not contain pollutant concentrations that may cause significant human health risks considering likely pathways of exposure;

(J) Will not result in an overlap with another mixing zone;

(K) Will not attract aquatic life;

(L) Will not result in a shore-hugging plume; and

(M) Is free from:

(1) Substances that settle to form objectionable deposits;

(2) Floating debris, oil, scum, and other matter in concentrations that form nuisances; and

(3) Objectionable color, odor, taste, or turbidity.

(h) *Dissolved oxygen criteria for class A waters throughout the State of Maine, including in Indian lands.* The dissolved oxygen content of Class A waters shall not be less than 7 ppm (7 mg/L) or 75% of saturation, whichever is higher, year-round. For the period

from October 1 through May 14, in fish spawning areas, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 ppm (9.5 mg/L), and the 1-day minimum dissolved oxygen concentration shall not be less than 8 ppm (8.0 mg/L).

(i) *Waiver or modification of protection and improvement laws for waters throughout the State of Maine, including in Indian lands.* For all waters in Maine, the provisions in Title 38 of Maine Revised Statutes 363–D do not apply to state or federal water quality standards applicable to waters in Maine, including designated uses, criteria to protect existing and designated uses, and antidegradation policies.

(j) *Phenol criterion for the protection of human health for Maine waters outside of Indian lands.* The phenol criterion to protect human health for the consumption of water and organisms is 4000 micrograms per liter.

[FR Doc. 2016–30331 Filed 12–16–16; 8:45 am]

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FEDERAL REGISTER

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Part X

The President

Proclamation 9554—Bill of Rights Day, 2016

Presidential Documents

Title 3—

Proclamation 9554 of December 14, 2016

The President

Bill of Rights Day, 2016

By the President of the United States of America

A Proclamation

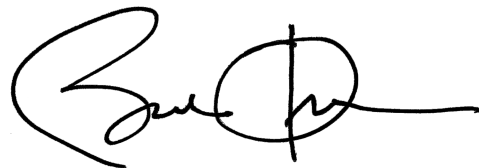
After much debate and deliberation among the Framers, the first 10 Amendments to our Constitution were written to reflect a compromise between preserving the rights of individual citizens and supporting a strong and secure Federal Government. Since its ratification on December 15, 1791, the Bill of Rights has enshrined many of our most fundamental liberties and unalienable rights—including the freedoms of speech, worship, and assembly; the rights to trial by jury and due process, and the protections from unreasonable search and seizure and cruel and unusual punishment. For 225 years, the Bill of Rights has shaped our Nation and protected our citizens, and today, in honor of all those who have worked to secure these freedoms, we strive to continue forming a more perfect Union guided by an enduring belief in these highest ideals.

As it was originally created, the Bill of Rights safeguarded personal liberties and ensured equal justice under the law for many—but not for all. In the centuries that followed its ratification, courageous Americans agitated and sacrificed to extend these rights to more people, moving us closer to ensuring opportunity and equality are not limited by one's race, sex, or circumstances. The desire and capacity to forge our own destinies have propelled us forward at every turn in history. The same principles that drove patriots to choose revolution over tyranny, a country to cast off the stains of slavery, women to reach for the ballot, and workers to organize for their rights still remind us that our freedom is intertwined with the freedom of others. If we are to ensure the sacred ideals embodied in the Bill of Rights are afforded to everyone, each generation must do what those who came before them have done and recommit to holding fast to our values and protecting these freedoms.

Two and a quarter centuries later, these 10 Constitutional Amendments remain a symbol of one of our Nation's first successful steps in our journey to uphold the rights of all citizens. On Bill of Rights Day, we celebrate the long arc of progress that transformed our Nation from a fledgling and fragile democracy to one in which civil rights are the birthright of all Americans. This progress was never inevitable, and as long as people remain willing to fight for justice, we can work to swing open more doors of opportunity and carry forward a vision of liberty and equality for generations to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 15, 2016, as Bill of Rights Day. I call upon the people of the United States to mark this observance with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of December, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

[FR Doc. 2016-30711
Filed 12-16-16; 11:15 am]
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To name the Department of Veterans Affairs temporary

lodging facility in Indianapolis, Indiana, as the "Dr. Otis Bowen Veteran House". (Dec. 14, 2016; 130 Stat. 1360)

H.R. 5995/P.L. 114-260

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S. 795/P.L. 114-261

To enhance whistleblower protection for contractor and grantee employees. (Dec. 14, 2016; 130 Stat. 1362)

S. 817/P.L. 114-262

To provide for the addition of certain real property to the reservation of the Siletz Tribe in the State of Oregon. (Dec. 14, 2016; 130 Stat. 1364)

S. 818/P.L. 114-263

To amend the Grand Ronde Reservation Act to make technical corrections, and for other purposes. (Dec. 14, 2016; 130 Stat. 1366)

S. 1550/P.L. 114-264

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S. 1632/P.L. 114-266

To require a regional strategy to address the threat posed by Boko Haram. (Dec. 14, 2016; 130 Stat. 1382)

S. 1808/P.L. 114-267

Northern Border Security Review Act (Dec. 14, 2016; 130 Stat. 1385)

S. 1915/P.L. 114-268

First Responder Anthrax Preparedness Act (Dec. 14, 2016; 130 Stat. 1387)

S. 2234/P.L. 114-269

Office of Strategic Services Congressional Gold Medal Act (Dec. 14, 2016; 130 Stat. 1391)

S. 2873/P.L. 114-270

Expanding Capacity for Health Outcomes Act (Dec. 14, 2016; 130 Stat. 1395)

S. 2974/P.L. 114-271

To ensure funding for the National Human Trafficking Hotline, and for other purposes. (Dec. 14, 2016; 130 Stat. 1398)

S. 3028/P.L. 114-272

To redesignate the Olympic Wilderness as the Daniel J. Evans Wilderness. (Dec. 14, 2016; 130 Stat. 1399)

S. 3076/P.L. 114-273

Charles Duncan Buried with Honor Act of 2016 (Dec. 14, 2016; 130 Stat. 1400)

S. 3183/P.L. 114-274

Better Online Ticket Sales Act of 2016 (Dec. 14, 2016; 130 Stat. 1401)

S. 3395/P.L. 114-275

Prescribed Burn Approval Act of 2016 (Dec. 14, 2016; 130 Stat. 1405)

S. 3492/P.L. 114-276

To designate the Traverse City VA Community-Based

Outpatient Clinic of the Department of Veterans Affairs in Traverse City, Michigan, as the "Colonel Demas T. Craw VA Clinic". (Dec. 14, 2016; 130 Stat. 1407)

H.R. 6297/P.L. 114-277

Iran Sanctions Extension Act (Dec. 15, 2016; 130 Stat. 1409)

Note: Upon expiration of the 10-day period prescribed by the Constitution of the United States, H.R. 6297 became law on Dec. 15, 2016, without the President's signature.

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