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Contents

Federal Register

Vol. 86, No. 118

Wednesday, June 23, 2021

Agency for Healthcare Research and Quality

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 32931–32933

Agricultural Marketing Service

RULES

Walnuts Grown in California:
Decreased Assessment Rate, 32721–32723

Agriculture Department

See Agricultural Marketing Service

See Rural Business-Cooperative Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 32882

Bureau of Consumer Financial Protection

RULES

Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents, 32723–32728

Centers for Disease Control and Prevention

NOTICES

Meetings:

Advisory Committee on Immunization Practices;
Amended, 32933–32934

Board of Scientific Counselors, National Center for Injury Prevention and Control, 32934–32935

Disease, Disability, and Injury Prevention and Control
Special Emphasis Panel: Rigorously Evaluating
Programs and Policies to Prevent Child Sexual
Abuse; Amended, 32934

Centers for Medicare & Medicaid Services

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 32935–32936

Civil Rights Commission

NOTICES

Meetings; Sunshine Act, 32889–32890

Coast Guard

RULES

Special Local Regulation:
Ohio River, New Martinsville, WV, 32768–32770

PROPOSED RULES

Safety Zones:
Sabine River, Orange, TX, 32846–32848

Commerce Department

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

RULES

Rescission of Identification of Prohibited Transactions with
Respect to TikTok and WeChat, 32757–32758

Consumer Product Safety Commission

RULES

Safety Standard:
Infant Sleep Products, 33022–33072

Standard for the Flammability of Mattresses and Mattress
Pads, 32758–32764

Defense Acquisition Regulations System

NOTICES

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

Defense Federal Acquisition Regulation Supplement and
Related Clause, Earned Value Management System,
32902

Defense Federal Acquisition Regulation Supplement;
Construction and Architect-Engineer Contracts,
32901–32902

Defense Department

See Defense Acquisition Regulations System

Drug Enforcement Administration

NOTICES

Bulk Manufacturer of Controlled Substances Application:
Purisys, LLC, 32976–32977

Education Department

RULES

Rehabilitation Short-Term Training:

Client Assistance Program; Final Priority, 32770–32775

NOTICES

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

Health Education Assistance Loan Program: Forms,
32902–32903

Applications for New Awards:

Expanding Opportunity through Quality Charter Schools
Program: Grants for Credit Enhancement for Charter
School Facilities, 32903–32908

Rehabilitation Short-Term Training: Client Assistance
Program, 32909–32915

Peer Review Opportunities:

Office of Elementary and Secondary Education, Office of
Postsecondary Education, and Office of Special
Education and Rehabilitative Services, 32908–32909

Employee Benefits Security Administration

PROPOSED RULES

Request for Information:

Reporting on Pharmacy Benefits and Prescription Drug
Costs, 32813–32817

Energy Department

See Federal Energy Regulatory Commission

Environmental Protection Agency

PROPOSED RULES

Air Quality State Implementation Plans; Approvals and
Promulgations:

Arizona; Maricopa County Air Quality Department,
32848–32850

North Carolina; Revision to Approved Motor Vehicle
Emissions Budgets, 32850–32856

Lead and Copper Rule Revisions Virtual Engagements,
32856–32857

NOTICES

Cross-Media Electronic Reporting:

Authorized Program Revision Approval, State of Wyoming, 32920

Pesticide Product Registration:

Applications for New Uses—June 2021, 32920–32921

Product Cancellation Order for Certain Pesticide

Registrations; Correction, 32921–32922

Request for Nominations:

Pesticide Program Dialogue Committee, 32926–32927

Requests to Voluntarily Cancel Certain Pesticide

Registrations and/or Amend Registrations to Terminate Certain Uses:

Atrazine, Simazine, and Malathion, 32922–32926

Federal Aviation Administration**RULES**

Airworthiness Directives:

The Boeing Company Airplanes, 32735–32737

Federal Communications Commission**RULES**

Auction of Flexible-Use Service Licenses in the 3.45–3.55 GHz Band for Next-Generation Wireless Services:

Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 110, 32775–32804

NOTICES

Privacy Act; Matching Program, 32927–32930

Federal Deposit Insurance Corporation**RULES**

Statement of Policy Regarding Minority Depository Institutions, 32728–32734

NOTICES

Meetings; Sunshine Act, 32931

Federal Election Commission**NOTICES**

Meetings; Sunshine Act, 32931

Federal Energy Regulatory Commission**NOTICES**

Application:

California Department of Water Resources, 32918–32919

Combined Filings, 32915–32918

Complaint:

ConocoPhillips Co. v. El Paso Natural Gas Co., LLC, 32917

Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:

Haystack Wind Project, LLC, 32919–32920

IR Energy Management, LLC, 32917

Institution of Section 206 Proceeding and Refund Effective Date:

Bluestone Farm Solar, LLC, 32915–32916

Waiver Period for Water Quality Certification Application:

Topsham Hydro Partners Limited Partnership, 32916

Federal Motor Carrier Safety Administration**NOTICES**

Qualification of Drivers; Exemption Applications:

Hearing, 33013–33014

Federal Reserve System**NOTICES**

Change in Bank Control:

Acquisitions of Shares of a Bank or Bank Holding Company, 32931

Fish and Wildlife Service**PROPOSED RULES**

Endangered and Threatened Species:

Reclassification of the Hawaiian Stilt from Endangered to Threatened, 32857–32859

Reclassifying the Fender's Blue Butterfly from Endangered to Threatened, 32859–32878

Revision of Federal Migratory Bird Hunting and

Conservation Stamp (Duck Stamp) Contest Regulations, 32878–32881

NOTICES

Endangered and Threatened Species:

Draft Recovery Plan for the Alaska-breeding Population of Steller's Eider, First Revision, 32968–32969

Initiation of 5-Year Status Reviews for 37 Southeastern Species, 32965–32968

Food and Drug Administration**NOTICES**

Authorization and Revocation of Emergency Use of Drugs during the COVID–19 Pandemic; Availability, 32938–32950

Determination of Regulatory Review Period for Purposes of Patent Extension:

GIVLAARI, 32936–32938

TURALIO, 32950–32951

Foreign-Trade Zones Board**NOTICES**

Authorization of Production Activity:

Bosch Security Systems, LLC (Surveillance, Detection, Evacuation, and Management Systems) Greer, SC; Foreign-Trade Zone 38, Spartanburg County, SC, 32890–32891

Health and Human Services Department

See Agency for Healthcare Research and Quality

See Centers for Disease Control and Prevention

See Centers for Medicare & Medicaid Services

See Food and Drug Administration

See National Institutes of Health

See Substance Abuse and Mental Health Services Administration

PROPOSED RULES

Request for Information:

Reporting on Pharmacy Benefits and Prescription Drug Costs, 32813–32817

Homeland Security Department

See Coast Guard

See U.S. Customs and Border Protection

NOTICES

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

Chemical Facility Anti-Terrorism Standards, 32953–32956

Chemical Facility Anti-Terrorism Standards Personnel Surety Program, 32960–32965

Cybersecurity and Infrastructure Security Agency Visitor Request Form, 32956–32957

Interoperable Communications and Technical Assistance Program Training Survey, 32957–32958

SAFECOM Nationwide Surveys Generic Clearance, 32958–32960

Housing and Urban Development Department**RULES**

Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 32767–32768

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Single Family Premium Collection Subsystem—Periodic, 32965

Indian Affairs Bureau**NOTICES**

Indian Child Welfare Act Grants to Indian Organizations for Off-Reservation Indian Child and Family Service Programs, 32970–32974
Land Acquisition:
Wilton Rancheria, 32974–32975

Interior Department

See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau

Internal Revenue Service**PROPOSED RULES**

Request for Information:
Reporting on Pharmacy Benefits and Prescription Drug Costs, 32813–32817

International Trade Administration**NOTICES**

Determination of Sales at Less Than Fair Value:
Standard Steel Welded Wire Mesh from Mexico, 32891–32893

Joint Board for Enrollment of Actuaries**NOTICES**

Meetings:
Advisory Committee, 32976

Justice Department

See Drug Enforcement Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 32977

Labor Department

See Employee Benefits Security Administration
See Occupational Safety and Health Administration
See Wage and Hour Division

PROPOSED RULES

Tip Regulations under the Fair Labor Standards Act:
Partial Withdrawal, 32818–32846

NOTICES

Update to the List of Goods Produced by Child Labor or Forced Labor, 32977–32978

Land Management Bureau**NOTICES**

Meetings:
San Rafael Swell Recreation Area Advisory Council, Utah, 32975–32976

National Credit Union Administration**NOTICES**

Meetings; Sunshine Act, 32981

National Institutes of Health**NOTICES**

Meetings:
Center for Scientific Review, 32951–32952

National Oceanic and Atmospheric Administration**RULES**

Fisheries off West Coast States:

Pacific Coast Groundfish Fishery; 2021 Harvest Specifications for Pacific Whiting, and 2021 Pacific Whiting Tribal Allocation; Magnuson-Stevens Act Provisions, 32804–32812

Wisconsin Shipwreck Coast National Marine Sanctuary Designation, 32737–32757

NOTICES

Meetings:

Mid-Atlantic Fishery Management Council, 32894
Pacific Fishery Management Council, 32894–32895, 32901

Takes of Marine Mammals Incidental to Specified Activities:

Seattle Multimodal Project at Colman Dock in Washington State, 32895–32901

Nuclear Regulatory Commission**PROPOSED RULES**

Retrospective Review of Administrative Requirements, 32817–32818

Occupational Safety and Health Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Asbestos in Construction Standard, 32980–32981
Permit-Required Confined Spaces, 32978–32980

Pension Benefit Guaranty Corporation**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 32983
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Mergers and Transfers between Multiemployer Plans, 32983–32984
Survey of Multiemployer Pension Plan Withdrawal Liability Information, 32982–32983

Personnel Management Office**PROPOSED RULES**

Request for Information:

Reporting on Pharmacy Benefits and Prescription Drug Costs, 32813–32817

Postal Regulatory Commission**NOTICES**

New Postal Products, 32984

Presidential Documents**PROCLAMATIONS**

Special Observances:

Father's Day (Proc. 10230), 32719–32720
Juneteenth Day of Observance (Proc. 10229), 32717–32718

ADMINISTRATIVE ORDERS

North Korea; Continuation of National Emergency (Notice of June 21, 2021), 33073–33076

Rural Business-Cooperative Service**NOTICES**

Request for Applications:

Socially Disadvantaged Groups Grants, 32882–32889

Securities and Exchange Commission**NOTICES**

Application:

Nationwide Mutual Funds, et al., 33006–33007

Meetings; Sunshine Act, 32993

Order:

Approving Adjustment for Inflation of the Dollar Amount
Tests under the Investment Advisers Act, 32993–
32994

Self-Regulatory Organizations; Proposed Rule Changes:

BOX Exchange, LLC, 32989

Cboe BZX Exchange, Inc., 32985–32987

Cboe Exchange, Inc., 33005–33006

ICE Clear Credit, LLC, 32994–32997

Nasdaq ISE, LLC, 32997–33001

Nasdaq PHLX, LLC, 32989–32993

New York Stock Exchange, LLC, 33001–33005

The Depository Trust Co., 32987–32989

Social Security Administration**NOTICES**Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 33007–33011

Privacy Act; Matching Programs, 33011–33012

State Department**NOTICES**

Culturally Significant Objects Imported for Exhibition:

Paintings, Politics and the Monuments Men: The Berlin
Masterpieces in America, 33012–33013**Substance Abuse and Mental Health Services
Administration****NOTICES**

Meetings:

Center for Substance Abuse Treatment, 32952–32953

Transportation Department

See Federal Aviation Administration

See Federal Motor Carrier Safety Administration

Treasury Department

See Internal Revenue Service

U.S. Customs and Border Protection**RULES**

Temporary Travel Restrictions:

Land Ports of Entry and Ferries Service between the
United States and Canada, 32764–32766Land Ports of Entry and Ferries Service between the
United States and Mexico, 32766–32767**Veterans Affairs Department****NOTICES**Agency Information Collection Activities; Proposals,
Submissions, and Approvals:Survey of Healthcare Experiences of Patients, 33014–
33015

Privacy Act; Systems of Records, 33015–33019

Wage and Hour Division**PROPOSED RULES**Tip Regulations under the Fair Labor Standards Act:
Partial Withdrawal, 32818–32846

Separate Parts In This Issue**Part II**

Consumer Product Safety Commission, 33022–33072

Part IIIPresidential Documents, 33073–33076

Reader AidsConsult the Reader Aids section at the end of this issue for
phone numbers, online resources, finding aids, and notice
of recently enacted public laws.To subscribe to the Federal Register Table of Contents
electronic mailing list, go to [https://public.govdelivery.com/](https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new)
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CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR**Proclamations:**

10229.....32717
10230.....32719

Administrative Orders:**Notices:**

Notice of June 21,
2021 33075

5 CFR**Proposed Rules:**

890.....32813

7 CFR

984.....32721

10 CFR**Proposed Rules:**

Ch. I.....32817

12 CFR

Ch. III.....32728

Ch. X.....32723

14 CFR

39.....32735

15 CFR

Ch. VII.....32757

922.....32737

16 CFR

1112.....33022

1130.....33022

1236.....33022

1632.....32758

19 CFR

Ch. I (2 documents).....32764,
32766

24 CFR

92.....32767

26 CFR**Proposed Rules:**

54.....32813

29 CFR**Proposed Rules:**

10.....32818

531.....32818

2590.....32813

33 CFR

100.....32768

Proposed Rules:

165.....32846

34 CFR

Ch. III.....32770

40 CFR**Proposed Rules:**

52 (2 documents) 32848,

32850

141.....32856

45 CFR**Proposed Rules:**

149.....32813

47 CFR

1.....32775

27.....32775

50 CFR

660.....32804

Proposed Rules:

17 (2 documents) 32857,

32859

91.....32878

Presidential Documents

Title 3—

Proclamation 10229 of June 18, 2021

The President

Juneteenth Day of Observance, 2021

By the President of the United States of America

A Proclamation

On June 19, 1865—nearly nine decades after our Nation’s founding, and more than 2 years after President Lincoln signed the Emancipation Proclamation—enslaved Americans in Galveston, Texas, finally received word that they were free from bondage. As those who were formerly enslaved were recognized for the first time as citizens, Black Americans came to commemorate Juneteenth with celebrations across the country, building new lives and a new tradition that we honor today. In its celebration of freedom, Juneteenth is a day that should be recognized by all Americans. And that is why I am proud to have consecrated Juneteenth as our newest national holiday.

Juneteenth is a day of profound weight and power.

A day in which we remember the moral stain and terrible toll of slavery on our country—what I’ve long called America’s original sin. A long legacy of systemic racism, inequality, and inhumanity.

But it is a day that also reminds us of our incredible capacity to heal, hope, and emerge from our darkest moments with purpose and resolve.

As I said on the 100th Anniversary of the Tulsa Race Massacre, great nations don’t ignore the most painful chapters of their past. Great nations confront them. We come to terms with them.

On Juneteenth, we recommit ourselves to the work of equity, equality, and justice. And, we celebrate the centuries of struggle, courage, and hope that have brought us to this time of progress and possibility. That work has been led throughout our history by abolitionists and educators, civil rights advocates and lawyers, courageous activists and trade unionists, public officials, and everyday Americans who have helped make real the ideals of our founding documents for all.

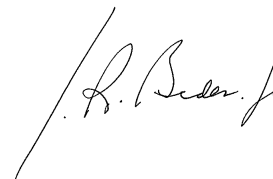
There is still more work to do. As we emerge from the long, dark winter of the COVID–19 pandemic, for example, racial equity remains at the heart of our efforts to vaccinate the Nation and beat the virus. We must recognize that Black Americans, among other people of color, have shouldered a disproportionate burden of loss—while also carrying us through disproportionately as essential workers and health care providers on the front lines of the crisis.

Psalm 30 proclaims that “weeping may endure for a night, but joy cometh in the morning.” Juneteenth marks both the long, hard night of slavery and discrimination, and the promise of a brighter morning to come. My Administration is committed to building an economy—and a Nation—that brings everyone along, and finally delivers our Nation’s founding promise to Black Americans. Together, we will lay the roots of real and lasting justice, so that we can become the extraordinary country that was promised to all Americans.

Juneteenth not only commemorates the past. It calls us to action today.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim June 19, 2021, as Juneteenth Day of Observance. I call upon the people of the United States to acknowledge and celebrate the end of the Civil War and the emancipation of Black Americans, and commit together to eradicate systemic racism that still undermines our founding ideals and collective prosperity.

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

A handwritten signature in black ink, appearing to read "J. R. Biden Jr.", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10230 of June 18, 2021

Father's Day, 2021

By the President of the United States of America

A Proclamation

Like so many fathers, my dad was a man of decency, honor, generosity, and kindness. He had a profound impact on me, and instilled in me the understanding of the basic truth that everyone is entitled to be treated with dignity and respect. The value set my father taught me, I taught to my children and my grandchildren. I hold his words, his wisdom, and his influence in my heart every day and every time I sign my name as President, Joseph R. Biden, Jr.

Father's Day is a time to recognize, appreciate, and celebrate the fathers and father figures in our lives who lift us up on their shoulders and shape our lives for the better. We thank the dads who have guided, taught, coached, cared for us, and supported us through life's trials and tribulations. And, we celebrate all that they impart: character and perspective, lessons borne from experience, and the sacrifices made from love.

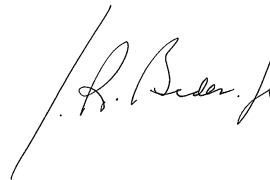
We also know this can be a hard day for many—for those who have lost a father, a grandfather, a stepfather, or a fatherly role model; and for those fathers who have lost a child of their own. During the past year, too many families lost fathers too soon because of and during this pandemic. We think of them today and every day, and we honor their enduring memories and legacies.

My Administration is committed to strengthening American families and easing the burdens of caregiving, so that more fathers and mothers can raise children while pursuing fulfilling lives and careers of their own. The American Families Plan would provide 12 weeks of paid family leave, so that all parents who work outside the home can spend precious time with their newborn children or care for their children and other loved ones when they get sick. By investing in our caregiving infrastructure, we can help ensure that no father or mother has to choose between putting food on the table or caring for their children. My Administration is also committed to helping single moms and dads, many of whom shoulder all of the parenting responsibility in their children's lives, sacrificing greatly to ensure that their kids have the same opportunities as everyone else.

Today, we express our appreciation for the fathers, stepfathers, grandfathers, and father figures who enrich our character, love us unconditionally, and give so much of themselves every day so we can live lives worthy of their dreams and sacrifices.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, in accordance with a joint resolution of the Congress approved April 24, 1972, as amended (36 U.S.C. 109), do hereby proclaim June 20, 2021, as Father's Day. I direct the appropriate officials of the Government to display the flag of the United States on all Government buildings on this day. Let us remember our fathers, living and deceased, and give them the honor and gratitude they deserve.

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

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a diagonal line that serves as a signature line.

Rules and Regulations

Federal Register

Vol. 86, No. 118

Wednesday, June 23, 2021

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS–SC–20–0075; SC20–984–2 FR]

Walnuts Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements a recommendation from the California Walnut Board (Board) to decrease the assessment rate established for the 2020–21 and subsequent marketing years. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective July 23, 2021.

FOR FURTHER INFORMATION CONTACT: Bianca Bertrand, Management and Program Analyst, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: Biancam.Bertrand@usda.gov or Gary Olson, Acting Regional Director; Telephone: (503) 326–2055, or Email: GaryD.Olson@usda.gov.

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

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, implements an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 984, as amended (7

CFR part 984), regulating the handling of walnuts grown in California. Part 984, (referred to as “the Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Board locally administers the Order and is comprised of growers and handlers operating within the area of production, and a public member.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. In accordance with Executive Order 13175, AMS has not identified any tribal implications as a result of this rule. This rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

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 be applicable to all assessable walnuts for the 2020–21 marketing year, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such 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 decreases the assessment rate from \$0.0400 per kernelweight pound assessable walnuts, the rate that was established for the 2017–18 and subsequent marketing years, to \$0.0250 per kernelweight pound of assessable

walnuts handled for the 2020–21 and subsequent marketing years.

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. The members are familiar with the Board’s needs and with the costs of goods and services in their local area and are thus able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting and all directly affected persons have an opportunity to participate and provide input.

For the 2017–18 and subsequent marketing periods, the Board recommended, and USDA approved, an assessment rate of \$0.0400 per kernelweight pound of assessable walnuts handled. That assessment rate continued until modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

On September 11, 2020, the Board unanimously recommended 2020–21 expenditures of \$17,990,000 and an assessment rate of \$0.0250 per kernelweight pound of assessable walnuts. In comparison, last year’s budgeted expenditures were \$25,760,000. The assessment rate of \$0.0250 is \$0.0150 lower than the rate currently in effect. The Board recommended decreasing the assessment rate to reduce the assessment burden on handlers. Funds from assessments and from the Board’s reserve will be sufficient to cover proposed expenses, while maintaining the Board’s reserve within the requirements of the Order at no more than two years’ budgeted expenses.

The major expenditures recommended by the Board for the 2020–21 marketing year include \$1,930,000 for employee expenses, \$283,000 for office expenses, \$1,600,000 for production research, \$825,000 for grades and standards activities, and \$13,112,000 for domestic market development. Budgeted expenses for these items in 2019–20 were \$1,896,000, \$293,000, \$2,000,000, \$825,000, and \$20,700,000, respectively.

The Board derived the recommended assessment rate by considering anticipated expenses; estimated certification (“certification” means

having the walnuts inspected) of 650,000 tons (inshell), based on a three-year average; and the amount of funds available in the authorized reserve.

Pursuant to § 984.51(b) of the Order, the estimated production is converted to a merchantable kernelweight basis using a factor of 0.45 (650,000 tons $\times$ 2,000 pounds per ton $\times$ 0.45), which yields 585,000,000 kernelweight pounds. At \$0.0250 per pound, the assessment rate will generate \$14,625,000 in assessment income and, along with funds from the reserve, will meet estimated expenses of \$17,990,000.

Funds in the reserve (currently \$20,133,075) will be kept within the maximum permitted in § 984.69 of the Order of approximately two marketing years' budgeted expenses. The reserve at the end of the 2020–21 marketing year is anticipated to be \$13,258,075.

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 the 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 would be undertaken as necessary. The Board's 2020–21 budget and those for subsequent marketing years will 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 90 handlers subject to regulation under the Order and approximately 4,400 walnut growers in the production area. The Small Business Administration (SBA) defines small agricultural service firms as those having annual receipts of less than \$30,000,000, and small agricultural producers as those having annual receipts of less than \$1,000,000 (13 CFR 121.201).

The Board reported that approximately 82 percent of California's walnut handlers shipped merchantable walnuts valued under \$30 million during the 2018–2019 marketing year and would, therefore, be considered small handlers according to the SBA definition.

Data from the 2017 Agricultural Census, published by USDA's National Agricultural Statistics Service (NASS), show that 86 percent of California farms growing walnuts had walnut sales of less than \$1 million.

An alternative computation includes more recent NASS data, starting with a three-year average value of utilized production of \$1.263 billion for the most recent seasons for which data is available (2017/18 through 2019/20). Dividing that figure by the number of walnut growers (4,400) yields an average annual crop value per grower of approximately \$287,045. This figure is well below the SBA small agricultural producer threshold of \$1,000,000 in annual sales. Assuming a normal distribution, this provides evidence that a large majority of walnut growers can be considered small agricultural producers according to the SBA definition.

This rule decreases the assessment rate collected from handlers for the 2020–21 and subsequent marketing years from \$0.0400 to \$0.0250 per kernelweight pound of assessable walnuts. The Board unanimously recommended 2020–21 expenditures of \$17,990,000 and an assessment rate of \$0.0250 per kernelweight pound of assessable walnuts. The assessment rate of \$0.0250 is \$0.0150 lower than the rate currently in effect. The quantity of assessable walnuts for the 2020–21 marketing year is estimated at 650,000 tons (inshell), which is equivalent to 585,000,000 kernelweight pounds. Thus, the \$0.0250 rate should provide \$14,625,000 in assessment income. The Board anticipates that the income derived from handler assessments, along with funds from the Board's authorized reserve, will be adequate to cover budgeted expenses for the 2020–2021 marketing year.

The major expenditures recommended by the Board for the 2020–21 marketing year include \$1,930,000 for employee expenses, \$283,000 for office expenses, \$1,600,000 for production research, \$825,000 for grades and standards activities, and \$13,112,000 for domestic market development. Budgeted expenses for these items in 2019–20 were \$1,896,000, \$293,000, \$2,000,000, \$825,000, and \$20,700,000, respectively.

The Board unanimously recommended decreasing the assessment rate to reduce the assessment burden on handlers, and recommended utilizing funds from the authorized reserve to help cover the portion of the Board expenses.

Prior to arriving at this budget and assessment rate, the Board considered information from various sources, such as the Board's Executive Committee. The Board discussed alternative expenditure levels, based upon the relative value of various activities to the California walnut industry. The Board recommended the assessment rate of \$0.0250 to provide \$14,625,000 in assessment income based on the estimation. The Board determined that assessment revenue, along with funds from the authorized reserve will be adequate to cover budgeted expenses for the 2020–21 marketing year.

Based upon information from the National Agricultural Statistics Service (NASS), the grower price reported for walnuts in 2019 was \$1,970 per ton (\$0.99 per pound) of walnuts. In order to determine the estimated assessment revenue as a percentage of the total grower revenue, we calculate the assessment rate (\$0.0250 per kernelweight pound) times the estimated production (585,000,000 kernelweight pounds), which equals the assessment revenue of \$14,625,000. The grower revenue is calculated by multiplying the grower price of \$1,970 per ton (\$0.99 per kernelweight pound) times the estimated production (585,000,000 kernelweight pounds), which equals the grower revenue of \$579,150,000. The final step, dividing the assessment revenue by the grower revenue, indicates that, for the 2020–21 marketing year, the estimated assessment revenue as a percentage of total grower revenue would be about 2.5 percent.

This rule decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to growers. However, decreasing the assessment rate reduces the burden on handlers and may also reduce the burden on growers.

The Board's meeting was widely publicized throughout the California walnut industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 11, 2020, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons were invited to submit comments on this rule, including the regulatory and information collection impacts of this action on small businesses.

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

This rule will not impose any 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.

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

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

A proposed rule concerning this action was published in the **Federal Register** on March 5, 2021 (86 FR 12837). The Board notified all California walnut handlers of the proposed assessment rate decrease. The proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending April 5, 2021, was provided for interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the proposed rule.

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

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

List of Subjects in 7 CFR Part 984

Marketing agreements, Reporting and recordkeeping requirements, and Walnuts.

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 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, 2020, an assessment rate of \$0.0250 per kernelweight pound is established for California merchantable walnuts.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2021–13039 Filed 6–22–21; 8:45 am]

BILLING CODE P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interpretive rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) has statutory authority to conduct examinations, at those institutions that it supervises, regarding the risks to active-duty servicemembers and their covered dependents that are presented by conduct that violates the Military Lending Act. This interpretive rule explains the basis for that authority.

DATES: This interpretive rule is effective on June 23, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Senior Counsel, Legal Division, (202) 435–7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Consumer Financial Protection Act of 2010 (CFPA) authorizes the Bureau to conduct examinations of supervised nonbanks for the purposes of assessing and detecting “risks to consumers.” As explained below, the risks to active-duty servicemembers and their dependents from conduct that violates the Military Lending Act (MLA) fall squarely within that category. The CFPA also authorizes the Bureau to conduct examinations of very large banks and credit unions for purposes of detecting and assessing those “risks to consumers” that are “associated” with “activities subject to” Federal consumer financial laws, such as the Truth in Lending Act (TILA) or the CFPA.¹ Because conduct that violates the MLA is associated with activities that are subject to TILA and the CFPA, that standard is also satisfied here. The Bureau's interpretation is also entirely consistent with the enforcement scheme of the MLA, which by incorporating TILA's enforcement scheme authorizes the Bureau to use formal administrative adjudications, civil enforcement actions, and other authorities to enforce the MLA. That enforcement scheme is complemented by the Bureau's use of the examination process to detect and assess risks to consumers arising from violations of the MLA. This reading also avoids an unworkable gap in Bureau examinations that can otherwise only be potentially filled by the formal enforcement process; based on the Bureau's experience, that gap leads to wasteful inefficiencies for both the Bureau and supervised institutions. Additionally, the Bureau is no longer persuaded by counterarguments that it does not have the relevant authority, for reasons that will also be discussed below.

This part I is followed by part II, which provides some general background about the CFPA, the MLA, TILA, and the history of Bureau examinations regarding the MLA. Part III sets out the Bureau's analysis of its authority with respect to supervised nonbanks, including the statutory text; the statutory scheme; and counterarguments that the Bureau no

¹ This interpretive rule uses the terms “supervised nonbank” and “very large bank or credit union” for convenience. The more precise definitions of the persons that are subject to the Bureau's supervisory authority under sections 1024 and 1025 of the CFPA are set out in the statute. 12 U.S.C. 5514(a), 5515(a). The Bureau also has certain additional supervisory authority regarding service providers to these persons, and the reasoning of this interpretive rule also extends to those service providers. 12 U.S.C. 5514(e), 5515(d).

longer finds persuasive. Part IV addresses the parallel issue in the context of very large banks and credit unions. Part V concludes with some regulatory matters.

II. Background

A. Consumer Financial Protection Act of 2010

The CFPA establishes the Bureau as an independent bureau in the Federal Reserve System and assigns the Bureau a range of rulemaking, enforcement, supervision, and other authorities.² Many of these authorities relate to the body of “Federal consumer financial law,” which the CFPA defines to include the CFPA itself, TILA, and a number of other statutes, rules, and orders, but it does not include the MLA.³ For example, one of the Bureau’s authorities is to “prescribe rules . . . as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”⁴ A notable substantive provision of the CFPA is its prohibition on unfair, deceptive, or abusive acts or practices.⁵ The CFPA also requires the Director of the Bureau to establish several offices, including an Office of Service Member Affairs.⁶

The key CFPA provisions that are relevant to this interpretive rule are sections 1024 and 1025. Section 1024 addresses Bureau supervision of specified categories of nonbanks—for example, any covered person who “offers or provides to a consumer a payday loan”—while section 1025 addresses Bureau supervision of “very large” depository institutions and credit unions, which are generally those with more than \$10 billion in total assets and their affiliates.⁷

Section 1024(b)(1) provides that the Bureau “shall require reports and conduct examinations on a periodic basis of” a supervised nonbank for purposes of: “(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of such person; and (C) detecting and assessing risks to consumers and to

markets for consumer financial products and services.”⁸

Section 1025(b)(1) contains parallel but slightly different language. It provides that the Bureau “shall have exclusive authority to require reports and conduct examinations on a periodic basis of” very large banks and credit unions for purposes of: “(A) assessing compliance with the requirements of Federal consumer financial laws; (B) obtaining information about the activities *subject to such laws* and the *associated* compliance systems or procedures of such persons; and (C) detecting and assessing *associated* risks to consumers and to markets for consumer financial products and services.”⁹

These differences in wording between section 1024(b)(1) and section 1025(b)(1) are explained by the structure of the statute. Very large banks and credit unions have long been subject to supervisory examinations by the prudential regulators, who continue to examine these institutions for a broad range of purposes.¹⁰ By contrast, the supervised nonbanks that are covered by section 1024(b)(1) were generally not subject to examination by the Federal government before the creation of the Bureau.¹¹ The purposes of Bureau examinations under sections 1024(b)(1) and 1025(b)(1) are both broad. But it was natural, to ensure thorough Federal examination of supervised nonbanks, for Bureau examinations of those nonbanks to cover an even broader range of subject matters than the Bureau’s examinations of very large banks and credit unions. (For example,

the Bureau can obtain information about all of a supervised nonbank’s compliance systems or procedures, not only those that are “associated” with activities subject to Federal consumer financial laws.)

Accordingly, with respect to supervised nonbanks that are covered by section 1024(b)(1), the relevant question here is whether there are “risks to consumers” arising from conduct that violates the MLA that the Bureau may detect and assess. In the case of very large banks and credit unions that are covered by section 1025(b)(1), there is the additional question of whether such “risks to consumers” are “associated” with “activities subject to” Federal consumer financial laws, such as TILA or the CFPA.¹²

B. Military Lending Act

The MLA, also known as the Talent Amendment, was bipartisan legislation first enacted in 2006.¹³ As Senator Talent explained during the passage of the MLA: “The fact is, predatory payday lenders are targeting American troops and are trying to make a buck off of their service to our country. . . . This is a national problem. Predatory payday lenders set up shop near our military bases throughout the country and prey on our servicemembers. . . . Our troops deserve uniform, national protection against abusive financial practices that target them.”¹⁴

The MLA establishes safeguards when creditors extend consumer credit to certain active-duty members of the armed forces or their covered dependents. The statute is implemented through regulations issued by the Department of Defense, in consultation with other specified agencies including the Bureau.¹⁵ The Department of

⁸ 12 U.S.C. 5514(b)(1).

⁹ 12 U.S.C. 5515(b)(1) (emphasis added).

¹⁰ Under the CFPA, the “prudential regulators” are the Board of Governors of the Federal Reserve System (Federal Reserve), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA). See CFPA section 1002(24), 12 U.S.C. 5481(24). For convenience, this interpretive rule also uses that term anachronistically to refer to the Federal Home Loan Bank Board, which existed until 1989, and the Office of Thrift Supervision, which existed from 1989 until 2011.

¹¹ As the legislative history of the CFPA explains, the Bureau’s new authority with respect to these nonbanks remedied the previous situation, where the “lack of any effective supervision on nondepositories led to a ‘race to the bottom’ in which the institutions with the least effective consumer regulation and enforcement attracted more business” S. Rept. 111–176, at 10 (2010). At the same time, the Bureau’s authorities are not limited to addressing the specific problems that existed prior to the CFPA. See *id.* at 11 (“The CFPB will have enough flexibility to address future problems as they arise. Creating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short-sighted. Experience has shown that consumer protections must adapt to new practices and new industries.”).

¹² Note that the term “associated” in section 1025(b)(1)(C) is best read as meaning “associated” with “the activities subject to such laws” in section 1025(b)(1)(B), where “such laws” refers back to “Federal consumer financial laws” in section 1025(b)(1)(A). This reading flows naturally from the order in which the provisions appear. However, as discussed below, this interpretive rule would reach the same conclusion if “associated” in section 1025(b)(1)(C) were read to mean “associated” with violations of Federal consumer financial laws. MLA violations are both associated with activities subject to Federal consumer financial law and associated with violations of Federal consumer financial law. Also note that, since the Bureau concludes that the above standards are satisfied, this interpretive rule does not need to consider whether there are also other statutory bases for the Bureau’s authority to conduct examinations of supervised nonbanks and very large banks and credit unions related to the MLA.

¹³ 10 U.S.C. 987.

¹⁴ 152 Cong. Rec. S6406 (June 22, 2006) (statement of Sen. Talent).

¹⁵ 10 U.S.C. 987(h). Congress added the Bureau to the list of agencies that the Department of Defense consults in 2013.

² CFPA section 1011(a), 12 U.S.C. 5491(a); see generally Public Law 111–203, tit. X, 124 Stat. 1376, 1955–2113 (2010).

³ CFPA section 1002(14), 12 U.S.C. 5481(14).

⁴ CFPA section 1022(b)(1), 12 U.S.C. 5512(b)(1).

⁵ CFPA sections 1031, 1035, 12 U.S.C. 5531, 5535.

⁶ CFPA section 1013(e), 12 U.S.C. 5493(e).

⁷ 12 U.S.C. 5514, 5515. As explained in note 1, this interpretive rule uses the terms “supervised nonbank” and “very large bank or credit union” for convenience.

Defense has explained that under its implementing regulations, as revised in 2015, consumer credit for purposes of the MLA is, in general, “defined consistently with credit that for decades has been subject to the disclosure requirements of the Truth in Lending Act (TILA), codified in [the Bureau’s] Regulation Z.”¹⁶ However, there are some instances where the definition of consumer credit under the MLA and its implementing regulations is narrower than under TILA.¹⁷

One of the MLA’s safeguards is a prohibition on imposing interest at a military annual percentage rate (MAPR) of greater than 36 percent, where MAPR is calculated by reference to TILA’s annual percentage rate (APR), with some specified differences.¹⁸ The MLA also establishes a number of other limitations on the terms of credit transactions, such as a prohibition on rolling over credit under certain circumstances; a prohibition on requiring, as a condition for the extension of credit that, the borrower establish an allotment to repay an obligation; and a prohibition on prepayment penalties or fees.¹⁹ The MLA requires disclosures that are based on TILA disclosures with additional supplementary information, such as a statement regarding the MAPR in addition to the disclosure of the TILA APR.²⁰

Conduct that violates the MLA may also violate TILA’s disclosure requirements, or occur concurrently with violations of TILA’s disclosure requirements, since the MLA’s disclosure requirements incorporate and supplement TILA’s. Conduct that violates the MLA may also overlap with violations of the CFPB’s prohibition on deceptive acts or practices or other violations of Federal consumer financial law.

Congress provided that any contract prohibited by the MLA “is void from the inception of such contract.”²¹ As the MLA’s implementing regulations further explain, any contract with a covered borrower that fails to comply with the MLA or which contains one or more provisions prohibited under the MLA is void from the inception of the contract.²² The MLA also provides criminal penalties for creditors that

knowingly violate the statute.²³ However, as originally enacted in 2006, the MLA did not address administrative enforcement.

In 2013, Congress amended the MLA to provide that it “shall be enforced by the agencies specified” in section 108 of TILA, “in the manner set forth in that section or under any other applicable authorities available to such agencies by law.”²⁴ As the conference report explained, “for the purposes of the enforcement authority under this section, a violation of the Military Lending Act would be treated as though it were a violation of the Truth in Lending Act.”²⁵ Thus, the authorities in section 108 of TILA, which are discussed below, are applicable to the MLA.

C. Truth in Lending Act

Section 108 addresses administrative enforcement of TILA. It provides that TILA “shall be enforced” by a list of enforcing agencies, including the applicable prudential regulators and, since 2010, the Bureau.²⁶ In the case of the prudential regulators, section 108 specifies that they shall enforce TILA under statutory provisions that authorize, among other things, administrative adjudications for cease-and-desist orders and civil money penalties.²⁷ In the case of the Bureau, section 108 provides that TILA shall be enforced under subtitle E of the CFPB. Subtitle E authorizes the Bureau to, among other things, conduct administrative adjudications, initiate civil enforcement actions, and send civil investigative demands.²⁸ Section 108 further provides that each of the enforcing agencies “may exercise, for the purpose of enforcing compliance” with TILA, “any other authority conferred on it by law.”²⁹

²³ 10 U.S.C. 987(f)(1).

²⁴ Public Law 112–239, sec. 662(b), 126 Stat. 1631, 1786 (Jan. 2, 2013) (adding 10 U.S.C. 987(f)(6)). The provision of the MLA concerning criminal penalties is excepted from this authority; that provision is outside the scope of this interpretive rule. *Id.* (cross-referencing 10 U.S.C. 987(f)(1)).

²⁵ H.R. Conf. Rep. No. 112–705, at 775 (2012).

²⁶ 15 U.S.C. 1607(a), (c), as amended by Public Law 111–203, title X, § 1100A, 124 Stat. 1376, 2107–09 (2010). The agencies’ authority to enforce TILA under section 108 is “subject to” subtitle B of the CFPB. *Id.* Subtitle B, among other things, allocates supervisory and enforcement authority between the Bureau and the prudential regulators. See 12 U.S.C. 5514–16.

²⁷ 15 U.S.C. 1607(a)(1), (a)(2) (citing section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, and the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*).

²⁸ *E.g.*, CFPB sections 1052–54, 12 U.S.C. 5562–64.

²⁹ 15 U.S.C. 1607(b).

As general background, since TILA’s enactment in 1968, the prudential regulators have relied heavily on bank examinations in order to implement TILA. As noted above, each of the prudential regulators has longstanding statutory authority to “examine” or conduct “examinations” of banks or credit unions.³⁰ As the Federal Reserve reported to Congress in 1972, in its capacity as the agency that wrote regulations to implement TILA: “For the most part, compliance [with TILA] is determined by [the prudential regulators] during the regular periodic examinations of the creditors under their jurisdiction.”³¹ The Federal Reserve similarly reported to Congress in 1983 that the five prudential regulators “enforce compliance with [TILA and three other consumer finance statutes] mainly through periodic examinations.”³² Along the same lines, the Comptroller of the Currency testified to Congress in 2007 that the “primary method that federal banking agencies use to implement consumer protection standards is direct supervision—not formal enforcement actions—of the banks we supervise.”³³

D. History of Bureau Examinations Regarding the MLA

In September 2013, the Bureau amended its short-term, small-dollar lending examination procedures to advise examiners that they “should review for MLA violations, which evidence risks to consumers and may require supervisory or enforcement action.”³⁴ This was about two years into the history of the Bureau’s examination program and about nine months after the MLA was amended to provide the Bureau with authority to enforce the MLA in the same manner as it is authorized to enforce TILA. As far as the Bureau is aware, no supervised entity ever disputed the propriety of this aspect of the Bureau’s examinations by

³⁰ *E.g.*, 12 U.S.C. 248, 325, 481, 1464(a), (d)(1)(B)(ii), (d)(1)(B)(v), 1756, 1784(a), 1819(a)(Eighth), 1820(b), (c), (d)(1).

³¹ Federal Reserve, Truth in Lending for the Year 1971, *reprinted in* 118 Cong. Rec. 816, 817 (Jan. 24, 1972).

³² Federal Reserve, Annual Report to Congress for 1982 (Apr. 1983).

³³ Statement by John C. Dugan, Comptroller of the Currency, Before the H. Comm. on Fin. Servcs. (June 13, 2007).

³⁴ CFPB Examination Procedures, Short Term, Small Dollar Lending, at Procedures 11 (Sept. 2013), https://files.consumerfinance.gov/f/201309_cfpb_payday_manual_revisions.pdf. These particular procedures are no longer applicable, among other reasons because they do not reflect subsequent revisions to the Department of Defense’s regulations implementing the MLA.

¹⁶ 80 FR 43559, 43560 (July 22, 2015).

¹⁷ See, e.g., 32 CFR 232.3(f)(2) (exceptions from definition of “consumer credit” for purposes of the MLA).

¹⁸ 10 U.S.C. 987(b); 32 CFR 232.4(c).

¹⁹ 10 U.S.C. 987(e); 32 CFR 232.8.

²⁰ 10 U.S.C. 987(c); 32 CFR 232.6.

²¹ 10 U.S.C. 987(f)(3).

²² 32 CFR 232.9(c).

appealing a supervisory determination regarding the MLA.

In 2018, the Bureau discontinued examination activity regarding the MLA. This was because the Bureau changed its position, taking the view that it lacked the authority to engage in MLA-related examination activity, for reasons that will be discussed below.³⁵ In 2019, the Bureau wrote to Congress to suggest legislation to “clarify the [Bureau’s] authority to supervise for compliance with the [MLA].”³⁶

The Bureau is now returning to the original position that it took from 2013 until 2018. The Bureau believes that it does have the requisite authority, and that the view that it originally took in 2013 was the correct one, for the reasons discussed below.

III. Analysis of Section 1024(b)(1)(C) (Supervised Nonbanks)

A. Statutory Text

Section 1024(b)(1)(C) of the CFPA, in relevant part, straightforwardly authorizes the Bureau to conduct examinations of supervised nonbanks for purposes of detecting and assessing “risks to consumers.”³⁷ As the Supreme Court has explained in another context: “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”³⁸

“Risks to consumers” that arise from conduct that violates the MLA fall well within that capacious phrase. Such conduct risks having adverse financial consequences for active-duty service members and their covered dependents. One reason why these consequences can be particularly significant for military families is that financial status can affect servicemembers’ ability to maintain their security clearances and therefore maintain their military careers. Congress considered the risk of harm from contracts made in violation of the MLA so severe that it made such contracts entirely void.

³⁵ See Letter from Kathleen L. Kraninger, Director of the Bureau, to Senator Sherrod Brown (Feb. 1, 2019).

³⁶ Letter from Kathleen L. Kraninger, Director of the Bureau, to the Hon. Nancy Pelosi, Speaker, House of Representatives (Jan. 17, 2019), https://files.consumerfinance.gov/f/documents/cfpb_MLA-legislative-proposal-to-Pelosi.pdf. No legal conclusion can be drawn from the fact that this particular proposal has not as yet been enacted.

³⁷ The statute also includes the authority to “require reports.” CFPB sections 1024(b)(1), 1025(b)(1), 12 U.S.C. 5514, 5515. This analysis focuses on the authority to conduct examinations for simplicity, but the same analysis would be applicable to requiring reports, because the same operative statutory language is also applicable to requiring reports.

³⁸ *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (Scalia, J.).

B. Statutory Scheme

A statute should be interpreted “as a symmetrical and coherent regulatory scheme.”³⁹ Here, the statutory scheme provides additional confirmation that “risks to consumers” include conduct that violates the MLA, for three main reasons.

First, the Bureau believes that risks of harm to consumers that the Bureau can address through its enforcement authority, when that proves necessary, are logically within the core of “risks to consumers” that the Bureau can detect and assess. There can be many types of risks to consumers, and the Bureau’s ability to use its range of authorities to remedy those risks can vary in effectiveness. But if “risks to consumers” did not include, at the very least, those risks that are so severe and so central to the Bureau’s consumer-protection mission that they can lead to a Bureau enforcement action for civil money penalties, restitution, disgorgement, and other relief,⁴⁰ it is unclear what remaining meaning the category would have. It would be anomalous to read out of the category of “risks to consumers” a type of risk that the Bureau can—out of all the potential risks to consumers—forcefully remedy through enforcement action if that becomes necessary. Thus, not only does conduct that violates the MLA fall within the plain language of “risks to consumers,” in the Bureau’s view it is not a borderline case, but sits within the core of the provision.

Second, the Bureau’s textual interpretation is the most effective way of carrying out the statutory scheme of the CFPA and MLA. When the Bureau is already examining a supervised nonbank or very large bank or credit union for potential violations of TILA that are intertwined with potential violations of the MLA, it is especially inefficient for both the Bureau and the supervised institution if the Bureau relies exclusively on enforcement tools under Subtitle E of the CFPA to identify and address MLA violations, closing off any use of the Bureau’s supervisory process to detect and assess these risks to consumers. As one example, under the contrary interpretation, verifying TILA disclosures may be the work of a Bureau examiner, but scrutinizing the related MLA disclosures in the very same document would be reserved to a Bureau enforcement attorney, who would normally obtain copies of those

³⁹ *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 103 (2012) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995))).

⁴⁰ See CFPB section 1055, 12 U.S.C. 5565.

disclosures by sending a civil investigative demand. The Bureau believes that the capacious reference to “risks to consumers” in section 1024(b)(1)(C)—when read according to its plain terms—avoids this incongruous result by allowing examiners to consider the potentially overlapping MLA and TILA issues together in one review.

A third reason why examinations regarding the MLA complement the Bureau’s enforcement authority under Subtitle E is that such examinations can play a role in preventing violations of the MLA before they occur. In a Bureau examination to detect and assess the risk that consumers will be harmed by violations of the MLA, the Bureau is able to detect and assess not only fully completed violations of the MLA, but also practices by the supervised institution that present a danger of violations of the MLA and therefore risk harm to consumers. For example, one important practical step that creditors generally need to take, in order to avoid violations of the MLA, is to correctly identify which of their borrowers are active-duty servicemembers or covered dependents and therefore protected by the MLA.⁴¹ If examiners observe an error or deficiency in the processes that a supervised institution uses to identify borrowers that are covered by the MLA, they can alert the institution of their assessment in their examination report or supervisory letter, and this may occur before the danger manifests in an actual violation of the MLA that in turn harms consumers. When Bureau examiners work cooperatively with supervised institutions to identify and address risks to consumers before they harm consumers, both the Bureau and supervised institutions can often avoid an after-the-fact enforcement action under Subtitle E of the CFPA. The Bureau believes that this is a prime example of a proper exercise of its authority under section 1024(b)(1)(C) to conduct examinations for the purpose of detecting and assessing risks to consumers.

C. Discussion of Counterarguments

During the period when it ceased MLA-related examination activity, the Bureau was persuaded by arguments that it lacked this authority. But for the following reasons, the Bureau no longer finds these arguments persuasive.

First, the Bureau’s interpretation during this period was informed by the fact that the MLA is not a Federal consumer financial law, which is the focus of the examination authority in the separate section 1024(b)(1)(A) of the

⁴¹ See 32 CFR 232.5.

CFPA. The Bureau asserted that Congress confined the Bureau's authority to assess compliance to Federal consumer financial law and not compliance with other laws; that Congress intended not to confer examination authority with respect to the MLA, since it did not add the MLA to the definition of Federal consumer financial law; and that the Bureau would be circumventing Congress's intentions by conducting examinations related to the MLA.

The Bureau no longer accepts this argument, because the argument relies on assumptions about Congress's intentions that are not expressed anywhere in the statutory text or any legislative history. There is nothing in the statute to suggest that "risks to consumers" can never include violations of law. (Indeed, in the case of the MLA, Congress enacted it precisely because there were risks to active-duty servicemembers and their families.) Moreover, to the extent it is appropriate to speculate about Congress' choice to not amend the definition of Federal consumer financial law, it is understandable why Congress would not have added the MLA to that definition. As noted above, the Bureau has general *rulemaking* authority with respect to Federal consumer financial law, but Congress gave the Department of Defense, not the Bureau, general rulemaking authority for the MLA. Adding the MLA to the definition of Federal consumer financial law would have led to potential confusion about which agency, or both, has this significant rulemaking authority. Lastly, to assert that the Bureau is circumventing Congress's intentions is conclusory. Again, had Congress wished to more closely "circumscribe . . . agency discretion," it would not have used the "capacious terms" that it did.⁴²

Second, the Bureau's prior interpretation was informed by the fact that Congress conferred authority on the Bureau to enforce the MLA through subtitle E of the CFPA, by incorporating TILA's enforcement scheme, without *specifically* addressing the Bureau's supervisory authority under section 1024. According to this line of argument, this specific conferral of certain enforcement authorities implies an unstated exclusion of supervisory authority. But the Supreme Court has rejected just such an argument. The Court has recognized that where financial regulators have formal enforcement powers regarding a specific subject but also "broad statutory authority to supervise financial

institutions," there is nothing that prevents "the regulators from invoking less formal means of supervision of financial institutions," given that there is "no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation."⁴³ This is particularly true here, where Congress has expressly authorized the Bureau to rely upon "any other applicable authorities available to" the Bureau to enforce the MLA, and where TILA's enforcement regime likewise authorizes the Bureau to exercise "any other authority conferred on it by law" to aid in its enforcement of that statute.⁴⁴ Thus, there is no reason to infer that Congress's conferral of certain specific enforcement authorities foreclosed the use of other authorities to ensure conformity with the MLA and securing its protections for servicemembers and their families. Moreover, when Congress incorporated TILA's enforcement scheme into the MLA in 2013, there had been forty years of consistent history of regulators taking this kind of approach in the TILA context—using their generally-framed authorities to examine supervised institutions in order to supplement the formal enforcement measures that section 108 of TILA specifically references.

Third, the Bureau's prior interpretation was influenced by a concern that reading the phrase "risks to consumers" in sections 1024(b)(1)(C) to include those risks to consumers that arise from conduct that violates the MLA might lead to a similar reading with respect to other statutes that, like the MLA, are not covered by sections 1024(b)(1)(A). But, as already explained, there is nothing in the statutory text to suggest that "risks to consumers" are somehow limited to conduct that is lawful and that "risks to consumers" can *never* include conduct that violates the law. It is also appropriate to step back and recognize that this is a "slippery slope" argument. "Like all slippery-slope arguments, the . . . point can be inverted with equal logical force."⁴⁵ Not exercising the Bureau's authority to identify these important risks to active-duty servicemembers and their families would be a slippery slope towards making the authority that Congress expressly conferred on the Bureau, to seek out "risks to consumers," a dead letter. As discussed above, the Bureau believes that the very

harmful conduct that Congress sought to prevent in the MLA, which the Bureau has the authority to remedy through its other authorities (specifically enforcement action), sits within the core of this authority. There could doubtless be debate about the outer limits of the authority, but that is simply because Congress chose to frame it in such flexible terms, and that is not a reason for the Bureau to boycott this core application of the authority.

The Bureau would note, in conclusion, that a common feature of the above arguments against the Bureau's authority is that they do not dispute the plain fact that conduct that violates the MLA presents risks to consumers. Instead, the arguments all implicitly rely on variations of a mistaken premise: that Congress could not have meant what it said when it used the words "risks to consumers" to confer examination authority on a consumer protection agency in the aftermath of a financial crisis. But it is "a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. This principle applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text."⁴⁶

IV. Analysis of Section 1025(b)(1)(C) (Very Large Banks and Credit Unions)

Section 1025(b)(1)(C) of the CFPA authorizes the Bureau, in relevant part, to conduct examinations of very large banks and credit unions for purposes of detecting and assessing "risks to consumers" that are "associated" with "activities subject to" Federal consumer financial laws. This requirement that there be an association with activities subject to Federal consumer financial laws is present in section 1025(b)(1)(C) but not section 1024(b)(1)(C), which narrows section 1025(b)(1)(C) in comparison to section 1024(b)(1)(C). The Bureau previously assumed that MLA-related issues could not be "associated" risks to consumers under section 1025(b)(1)(C). But as explained above, the activity of extending "consumer credit" under the MLA is a subset of the activity of extending "consumer credit" under TILA. Indeed, violations of the MLA can overlap with violations of TILA's disclosure requirements, as well as the CFPA's prohibition on deceptive acts or practices or other violations of Federal

⁴³ *United States v. Gaubert*, 499 U.S. 315, 319–20, 329–30 (1991).

⁴⁴ 10 U.S.C. 987(f)(6); 15 U.S.C. 1607(b).

⁴⁵ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 317 (3d Cir. 2013).

⁴⁶ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (Thomas, J.) (internal citations, brackets, and quotation marks omitted).

⁴² *City of Arlington*, 569 U.S. at 296.

consumer financial law. The analysis under section 1025(b)(1)(C) of the CFPA is otherwise similar to that under section 1024(b)(1)(C) of the CFPA, and so there is no need to repeat it here.⁴⁷

The Bureau recognizes the role of the prudential regulators in conducting MLA supervision, including examinations, at very large banks and credit unions. Applicable statutes grant the prudential regulators broad supervisory and examination powers, which they use for various purposes, including assuring the safety and soundness of supervised institutions, assuring compliance with laws and regulations at those institutions, and other purposes. By contrast, the Bureau's authority under section 1025(b)(1)(C) concerns a targeted purpose: Detecting and assessing those "risks to consumers" that are "associated" with "activities subject to" Federal consumer financial laws, such as TILA. Conducting examinations for that particular purpose is distinct from the prudential regulators' authority to conduct examinations for the purpose of assessing compliance with the MLA (or for safety and soundness or other purposes) —including the fact that the prudential regulators' purposes are not based on the association with Federal consumer financial law discussed above. Even though some of the activities in Bureau examinations may be similar to activities in prudential regulators' examinations, they are for a different purpose. Nothing in the CFPA or in this interpretive rule limits in any way, or should be deemed to limit in any way, the prudential regulators' consumer compliance examinations of very large banks or credit unions, or their subsidiaries, for the purpose of assessing compliance with the MLA.

Section 1025 has a number of provisions that promote coordination and efficiency among the Bureau and the prudential regulators. The agencies work with each other to minimize regulatory burden that may result from their complementary authorities, while ensuring the efficient and effective protection of covered borrowers.

V. Regulatory Matters

This is an interpretive rule issued under the Bureau's authority to interpret the CFPA, including under section 1022(b)(1) of CFPA, which authorizes guidance as may be necessary or appropriate to enable the Bureau to

administer and carry out the purposes and objectives of Federal consumer financial laws, such as the CFPA.⁴⁸

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.⁴⁹ Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.⁵⁰ The Bureau has also determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.⁵¹

Pursuant to the Congressional Review Act,⁵² the Bureau will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a "major rule" as defined by 5 U.S.C. 804(2).

Dated: June 16, 2021.

David Uejio,

Acting Director, Bureau of Consumer Financial Protection.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

RIN 3064-ZA19

Statement of Policy Regarding Minority Depository Institutions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final statement of policy.

SUMMARY: The FDIC is issuing its Statement of Policy Regarding Minority Depository Institutions. Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 established several goals related to encouraging, assisting, and preserving minority depository institutions. The FDIC has long recognized the unique

role and importance of minority depository institutions and historically has taken steps to preserve and encourage minority-owned and minority-led financial institutions. The Statement of Policy updates, strengthens, and clarifies the agency's policies and procedures related to minority depository institutions.

DATES: The Statement of Policy is effective August 23, 2021.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. The Proposed Statement of Policy
 - A. Proposed Revisions
 - B. Comments
- III. Final Statement of Policy Regarding Minority Depository Institutions
- IV. Administrative Matters

I. Background

Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)¹ established several goals related to minority depository institutions (MDIs): (1) Preserving the number of MDIs; (2) preserving the minority character in cases of merger or acquisition; (3) providing technical assistance to prevent insolvency of institutions not now insolvent; (4) promoting and encouraging creation of new MDIs; and (5) providing for training, technical assistance, and education programs.

On April 3, 1990, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC Board and FDIC, respectively) adopted the Policy Statement on Encouragement and Preservation of Minority Ownership of Financial Institutions (1990 Policy Statement). The framework for the 1990 Policy Statement resulted from key provisions contained in Section 308 of FIRREA. The 1990 Policy Statement provided information to the public and minority banking industry regarding the

⁴⁷ The Bureau's previous concerns that it lacked authority under section 1024(b)(1)(C) were also applicable to section 1025(b)(1)(C). But for the reasons already discussed in the context of section 1024(b)(1)(C), the Bureau no longer finds those arguments persuasive.

⁴⁸ 12 U.S.C. 5512(b)(1).

⁴⁹ 5 U.S.C. 553(b).

⁵⁰ 5 U.S.C. 603(a), 604(a).

⁵¹ 44 U.S.C. 3501-3521.

⁵² 5 U.S.C. 801 *et seq.*

¹ Public Law 101-73, title III, § 308, Aug. 9, 1989, 103 Stat. 353, as amended by Public Law 111-203, title III, § 367(4), July 21, 2010, 124 Stat. 1556, codified at 12 U.S.C. 1463 note.

agency's efforts in achieving the goals of Section 308.

During the 1990s, many MDIs continued to underperform industry averages for profitability and experience failure rates that were significantly higher than those of the industry overall. In order to discuss the challenges that MDIs faced, and identify best practices and possible ways the regulatory agencies could promote and preserve MDIs, the FDIC and other banking regulatory agencies—with assistance from several minority bank trade associations—invited officers from 156 MDIs to participate in a “Bankers and Supervisors Regulatory Forum” held in March of 2001. Approximately 70 bankers attended.

The FDIC also formed an Interdivisional Working Group to consider measures to modernize the policies and procedures related to MDIs. The working group incorporated many suggestions from the March 2001 forum into a revised Policy Statement Regarding Minority Depository Institutions, issued by the FDIC, after notice and comment, in April of 2002 (2002 Policy Statement).² The FDIC issued the 2002 Policy Statement to provide additional information regarding the FDIC's initiatives related to Section 308. The 2002 Policy Statement provided a more structured framework that set forth initiatives of the FDIC to promote the preservation of, as well as to provide technical assistance, training, and educational programs for, MDIs by working with those institutions, their trade associations, and the other federal financial regulatory agencies.

Over the years, the FDIC has continued to modify and enhance its MDI program to better carry out the FDIC's efforts to meet the goals in Section 308 of FIRREA. The revisions in the proposed Statement of Policy are intended, in part, to strengthen and improve the various aspects of the MDI program and how each component of the MDI program is carried out by various responsible entities that are part of the MDI program. The proposed revisions to the 2002 Policy Statement reflected in the proposed Statement of Policy describe the FDIC's enduring and strengthened commitment to, and engagement with, MDIs in furtherance of its goal of preserving and promoting MDIs.

In 2019, the FDIC established a new MDI Subcommittee of the Advisory Committee on Community Banking (CBAC). The MDI Subcommittee held its inaugural meeting in December 2019.

There are nine executives serving as members of the MDI Subcommittee, representing African American, Native American, Hispanic American, and Asian American MDIs across the country. The MDI Subcommittee provides recommendations regarding the FDIC's MDI program to the CBAC for consideration. The MDI Subcommittee serves as a source of feedback with regard to the FDIC's efforts to fulfill its statutory goals to preserve and promote MDIs; provides a platform for MDIs to promote collaboration, partnerships, and best practices; and identifies ways to highlight the work of MDIs in their communities.

The FDIC published, also in 2019, an MDI research study, which explores changes in MDIs, their role in the financial services industry, and their impact on the communities they serve.³ The study period covered 2001 to 2018 and looked at the demographics, structural change, geography, financial performance, and social impact of MDIs.

Additionally, to discuss the challenges that MDIs face, provide information on best practices, and collaborate on possible ways the regulatory agencies can promote and preserve MDIs, in June of 2019, the FDIC hosted the Interagency MDI and Community Development Financial Institution (CDFI) Bank Conference, *Focus on the Future: Prospering in a Changing Industry*, in collaboration with the Office of the Comptroller of Currency and the Board of Governors of the Federal Reserve System. More than 80 MDI and CDFI bankers, representing 61 banks, attended the two-day conference.⁴

All of these various efforts by the FDIC to enhance its MDI program have informed the proposed revisions to the Statement of Policy. The FDIC has received suggestions from bankers at outreach and trade association meetings as well as feedback from the June 2019 conference. The MDI Subcommittee has also provided feedback to the CBAC for consideration and recommendation to the FDIC. Many of these suggestions and feedback have been incorporated into the revised Statement of Policy. The following section summarizes the significant changes from the 2002 Policy Statement.

³ See FDIC MDI research study, published June 2019, *Minority Depository Institutions: Structure, Performance, and Social Impact*, <https://www.fdic.gov/regulations/resources/minority/2019-mdi-study/full.pdf>.

⁴ See Chairman Jelena McWilliams Keynote Remarks, MDI and Community Development Financial Institution bank conference, *Focus on the Future: Prospering in a Changing Industry* (Mar. 3, 2020), <https://www.youtube.com/watch?v=o0H6Ko00qTk&feature=youtu.be>.

II. The Revised Policy Statement

A. Proposed Revisions

On September 25, 2020, the FDIC published in the **Federal Register** proposed revisions to its MDI Policy Statement.⁵ The FDIC proposed changes in the following seven areas:

Technical assistance and other engagement. The proposed Statement of Policy clarified that technical assistance is not a supervisory activity and is not intended to present additional regulatory burden. Further, the proposed Statement of Policy stated that examination teams will not view requests for, or acceptance of, technical assistance negatively when evaluating institution performance or assigning ratings.

FDIC outreach. The proposed Statement of Policy was updated to provide additional outreach opportunities, including with the Chairman's office and the National Director for Minority and Community Development Banking.

MDI Subcommittee. The proposed Statement of Policy described the newly established FDIC MDI Subcommittee of the CBAC, which serves as source of feedback on FDIC strategies to fulfill statutory goals to preserve and promote MDIs. The MDI Subcommittee may also make recommendations or offer ideas to the CBAC for consideration and presentation to the FDIC. The MDI Subcommittee provides a platform for MDIs to promote collaboration, partnerships, and best practices. The MDI Subcommittee also identifies ways to highlight the work of MDIs in their communities.

Definitions. The proposed Statement of Policy added definitions for terms used in the MDI program: Technical assistance; training and education; and outreach. Technical assistance is defined as individual assistance that a regulator will provide to a MDI in response to an institution's request for assistance in addressing specific areas of concern. The proposed Statement of Policy also noted that technical assistance is a tool to provide on-going support to institutions in an effort to facilitate timely implementation of regulatory requirements, and in some instances, the viability of the institution. Training and education programs consist of instruction designed to impart proficiency or skills related to a particular job, process, or regulatory policy. This training and education can be provided in person, through webinars or conference calls, or in a

² 67 FR 18618 (Apr. 16, 2002).

⁵ 85 FR 60466 (Sept. 25, 2020).

conference setting. Outreach consists of FDIC representatives meeting with financial institutions with a primary focus of building relationships and open communication and providing information and resources. Outreach is generally offered by the FDIC and can include meetings between financial institution management and senior FDIC management.

Reporting. The proposed Statement of Policy reflects updated reporting requirements applicable to the FDIC, including the Annual Report to Congress on the Preservation and Promotion of Minority Depository Institutions pursuant to Section 367 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and Section 308 of FIRREA. The Section 367 requirements were enacted since the Statement of Policy was last updated in 2002.

Measurement of effectiveness. The proposed Statement of Policy also established new requirements to measure the effectiveness of the MDI program. The National Director and the regional office staff will routinely solicit feedback from MDIs to assess the effectiveness of the FDIC's technical assistance, training and education, and outreach efforts and the MDI program in general. The FDIC will track instances of technical assistance, training and education, and outreach and solicit feedback on the effectiveness of these activities by administering periodic surveys and holding discussions with bank management.

Examinations. The proposed Statement of Policy added a description of how the FDIC applies rating systems to examinations of MDIs. Specifically, the proposed Statement of Policy described how the Uniform Financial Rating System (UFIRS) and the Uniform Interagency Consumer Compliance Rating System (UICCR) are designed to reflect an assessment of the individual institution, including its size and sophistication, the nature and complexity of its business activities, and its risk profile rather than a comparison to peer institutions

B. Comments

The FDIC sought comment generally on the proposed revisions to the Statement of Policy and asked six specific questions regarding aspects of the proposal. Seven comment letters were received.⁶ The comments came

from an insured financial institution, a financial institution trade organization, a non-profit organization, a service provider that serves minority depository institutions, and individuals.

Commenters generally supported the proposed revisions to the Statement of Policy, however, some commenters also made specific recommendations to the Statement of Policy. These comments are discussed in more detail below. The FDIC is making one change to the Statement of Policy in response to comments received.

The FDIC received several comments on the methods described in the Statement of Policy that would be used to identify and provide useful engagement opportunities. One commenter suggested that additional technical assistance could be provided to MDIs in danger of failing. After consideration of this comment, the FDIC has decided not to make any related changes to the Statement of Policy. The FDIC already seeks to preserve the minority character of failing institutions before and during the resolution process, as required by Section 308 of FIRREA. Further, the FDIC provides ongoing supervisory oversight of institutions prior to failure through regular on-site examinations, visitations, off-site monitoring, and various offers to provide technical assistance.

One commenter requested that the Statement of Policy more explicitly state that outreach will include national and state banking industry trade associations. Another commenter suggested that collaboration with state banking agencies might enhance program content, delivery, and reach. Such collaboration already is contemplated by the Statement of Policy, so no changes are necessary. However, the FDIC agrees that it would be useful to explicitly include national and state bankers associations among the various external organizations with whom the FDIC will discuss opportunities to collaborate, the challenges faced by MDIs, and other topics, and has made a change to the Statement of Policy to reflect such outreach.

One group of academics suggested that MDI resources be centralized in a single location. This commenter further recommended that the burden of requesting services should be transferred from the MDIs to FDIC staff in Regional and Field offices. The FDIC suggests that the current structure of the MDI program, with a National Director and staff in the FDIC's Washington Office, Regional Coordinators in each of the FDIC's six Regional Offices, and additional staff in 82 Field Offices

spread across the country, all available to respond to questions and to provide technical assistance, works well to provide resources to MDIs. The FDIC also assigns to every FDIC-supervised institution, of any size or ownership form, a case manager and a review examiner who are available for all supervisory activities or inquiries. The FDIC believes it is better to meet the needs of MDIs where they are, rather than in a central location, and has not made a change in response to these comments.

The same commenter suggested more could be done to reach out to MDIs and those in the process of organizing *de novo* MDIs, specifically recommending an annual informational conference for entrepreneurs seeking to enter the industry. The FDIC has in place a number of initiatives to assist existing and potential future MDIs. Regional Directors and their staff work with MDI organizers to help them understand application requirements and processes, and provide technical assistance throughout the process. This work includes the National Director's office and senior Regional management in the MDI organizer's respective region, hosting conference calls with the organizer addressing questions regarding MDI designation and other topics. The FDIC currently is developing videos targeted at entrepreneurs and others seeking to establish an MDI. The Statement of Policy is intended to provide general principles and commitments from the FDIC regarding the MDI program. In order for the Statement of Policy to be a living document that allows the FDIC to prioritize different initiatives and to move away from unsuccessful efforts, the Statement of Policy does not include many details about specific initiatives. The FDIC takes notice of the commenter's suggestion, but has not revised the Statement of Policy.

The FDIC received several comments on the definitions included within the Statement of Policy. Two commenters suggested that the FDIC should broaden MDI eligibility in the Statement of Policy to include women-led institutions. One of these commenters specifically recommended that the FDIC should consider implementing a requirement that in order for an institution to obtain MDI status, they must have at least a minimum of two women on their executive leadership boards. The FDIC, in response, notes that the Statement of Policy closely follows the statutory definitions of "minority depository institution" and "minority" set forth in Section 308 of FIRREA, which does not include

⁶ See Comments received for proposed revisions to Statement of Policy Regarding Minority Depository Institutions, available at <https://www.fdic.gov/regulations/laws/federal/2020/2020-statement-of-policy-minority-depository-institutions-3064-za19.html>.

women-owned or women-led institutions. Minority depository institutions have very unique challenges and serve distinct communities. The primary purpose of the FDIC's MDI program is to promote and preserve these institutions and develop resources specific to the needs of these institutions.

Another commenter recommended that the FDIC define the term "predominantly minority" in the context of a community the institution serves. The FDIC has established MDI Designation Assessment Procedures, which will be published and included in the publicly available Application Procedures Manual. These procedures provide the criteria that must be met by institutions seeking the MDI designation. The procedures also describe the FDIC's process for assessing an institution's eligibility for the designation. These procedures include steps for performing an assessment of the community served by the institution, consisting partly of a review of the minority population in the institution's target area.

The FDIC also received comments specifically relating to the definitions assigned to technical assistance, education, and outreach. One commenter recommended that the FDIC interpret as broadly as possible the specific instances within each category (technical assistance, training and education, outreach) which will likely benefit MDIs. In measuring the effectiveness of the MDI program, the FDIC regularly solicits comments from MDIs regarding the usefulness and quality of technical assistance, outreach, and education and training efforts of the FDIC. The FDIC thus has developed an understanding of, and will continue to assess, the most beneficial resources made available to institutions. The definitions in the Statement of Policy provide the FDIC with the flexibility to meet the evolving needs of the MDI program and will not be changed.

Regarding the term "technical assistance," the FDIC received a comment suggesting that the FDIC use the term "professional consultation" in place of "technical assistance" to encourage working relationships with MDI executives. The FDIC responds that the term "technical assistance" is widely used throughout the banking industry and specifically set forth in Section 308 of FIRREA. The FDIC has not received any comments from institutions indicating they have any concerns with the term itself. Many

institutions use the technical assistance and other resources, such as outreach, made available by the FDIC and have found the resources beneficial as they address challenges or require clarification on supervisory recommendations and processes as well as laws and regulations.

The same commenter noted that the proposed Statement of Policy provides a statement regarding the supervisory impact of requests for, or acceptance of, technical assistance. The commenter noted that, while its member institutions did not perceive a negative impact that served as a barrier to seeking technical assistance, the proposed clarification is laudable.

One commenter recommended that the FDIC consider whether MDIs might benefit from a clearly stated supervisory impact from participating in outreach activities similar to the statement included in the technical assistance definition, noting that technical assistance is not a supervisory activity. The FDIC has not received any feedback from MDI management indicating any perceived reluctance to communicate freely during outreach activities. Further, the FDIC understands the importance of developing strong working relationships with institution management, the development of which requires open communication. The FDIC encourages participants of all outreach activities to communicate any recommendations, questions, or concerns without worry of repercussion.

The FDIC received several comments on the types of information regarding the MDI program that would be useful to include in annual reports or the MDI program website. One commenter suggested, to encourage MDIs to use resources offered by the FDIC more fully, that the FDIC's annual report should highlight the FDIC's efforts in establishing new MDIs, success stories with growing MDIs, how the FDIC has assisted struggling MDIs, and, in the event of a failure, how the minority focus of the failed MDI has been retained by the acquiring institution. The FDIC does, and will continue to, highlight achievements made by MDIs within the Annual Report to Congress and other publications featuring the activities of MDIs. These publications will also capture supervisory activities promoting the creation of new MDIs, including the support provided during the *de novo* application process.

One commenter suggested the FDIC research the potential impact of MDIs on rural areas and how to successfully

scale MDIs in rural areas. While not described in the proposed Statement of Policy, the FDIC considers the most pertinent studies for MDIs and the banking industry as a whole, as well as the timing of such research. The commenter also suggested the FDIC's website organization should be designed for users such as entrepreneurs, new managers of MDIs, growing MDIs, and faltering MDIs. The FDIC is updating the MDI program website to expand the scope of information contained therein. The FDIC will develop informational videos promoting the creation of MDIs and providing education on applying for deposit insurance and obtaining the MDI designation. As noted above, the FDIC is developing videos specifically for entrepreneurs and other parties interested in establishing a *de novo* MDI.

One commenter recommended the FDIC clarify whether the intended use of the results from periodic surveys and discussions with bank management will be shared with the MDI Subcommittee, the FDIC's Board, and the general public. The FDIC notes that the results of the effectiveness survey and comments provided by institution management informs the MDI program on key areas where the MDI program has been successful and areas where the FDIC can improve program delivery. These findings and discussions strengthen the MDI program by identifying key resources that have been or could be beneficial to institutions. The findings of the survey are shared with the MDI Subcommittee, CBAC, and the FDIC Board. The FDIC may consider including summary survey information in the Annual Report to Congress.

The FDIC received comments on methods to identify and provide technical assistance, outreach, and training education and resources that would be beneficial to minority depository institutions. One commenter suggested expanding the training and educational programs portion of the *Engagement with MDIs* section of the Statement of Policy to specifically include virtual environments and the services of private organizations in order to ensure that MDIs have a wide variety of solutions to meet their needs. The FDIC develops training material on laws, regulations, and guidance pertinent to the financial institutions it supervises. Any private companies interested in providing training to MDIs can contact trade associations or institutions directly.

One commenter suggested the FDIC facilitate training and education through written materials, such as manuals or whitepapers. The FDIC is evaluating options for additional training and education resources. The FDIC will engage the MDI Subcommittee to seek its ideas on topics and alternative methods of providing training and education material.

Finally, one commenter urged the FDIC to play a larger role in addressing the challenges facing minority communities, including racial gaps in financial and economic opportunity. The Statement of Policy focuses on strategies to facilitate the viability of MDIs to enable MDIs to serve their communities. As noted above, the FDIC recognizes the importance of the broader societal issues and, indeed, is taking steps to address them, but revisions to the rules implementing the Community Reinvestment Act, enforcing the law against predatory lenders, and bank staff diversity are beyond the scope of the Statement of Policy.

III. Final Statement of Policy Regarding Minority Depository Institutions

The text of the Statement of Policy follows:

The FDIC has long recognized the importance of minority depository institutions in the financial system and their unique role in promoting the economic viability of minority and under-served communities. The FDIC historically has implemented programs to preserve and promote these financial institutions. This Statement of Policy describes the framework the FDIC has put into place and the initiatives the FDIC will undertake to fulfill its statutory goals with respect to minority depository institutions (MDI Program).

Statutory Framework

In August 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Section 308 of FIRREA established the following goals:

- Preserve the number of minority depository institutions;
- Preserve the minority character in cases of merger or acquisition;
- Provide technical assistance to prevent insolvency of institutions not now insolvent;
- Promote and encourage creation of new minority depository institutions; and
- Provide for training, technical assistance, and educational programs.

Definitions

Section 308 of FIRREA defines “minority depository institution” as any federally insured depository institution where 51 percent or more of the voting stock is owned by one or more “socially and economically disadvantaged individuals.” “Minority,” as defined by Section 308 of FIRREA, means any “Black American, Native American, Hispanic American, or Asian American.” Therefore, for the purposes of this Statement of Policy, “minority depository institution” is defined as any federally insured depository institution where 51 percent or more of the voting stock is owned by minority individuals. This includes institutions collectively owned by a group of minority individuals, such as a Native American tribe. Ownership must be by U.S. citizens or permanent legal U.S. residents to be counted in determining minority ownership. In addition to the institutions that meet the ownership test, for the purposes of this Statement of Policy, institutions will be considered minority depository institutions if a majority of the Board of Directors consists of minority individuals and the community that the institution serves is predominantly minority.

Identification of Minority Depository Institutions

To ensure that all minority depository institutions are able to participate in the MDI program, the FDIC will maintain a list of federally insured minority depository institutions. Institutions that are not already identified as minority depository institutions can request to be designated as such by certifying that they meet the above definition. For institutions supervised directly by the FDIC, examiners will review the appropriateness of their inclusion on the list during the examination process. In addition, case managers in regional offices will note changes to the list while processing deposit insurance applications, merger applications, change of control notices, or failures of minority depository institutions. The FDIC will work closely with the other federal banking regulators to capture accurately on the list institutions not directly supervised by the FDIC. In addition, the FDIC will periodically provide the list to relevant trade associations and seek input regarding the accuracy of the list. Inclusion in the FDIC’s MDI program is voluntary. Any minority depository institution not wishing to participate in the MDI program will be removed from the official list upon request.

Organizational Structure

The FDIC has designated a national director for the FDIC’s MDI program in the Washington Office and a regional coordinator in each Regional Office. The national director will consult with officials from the following FDIC Divisions to ensure appropriate personnel are involved and resources are made available with regard to MDI program initiatives: Division of Risk Management Supervision, Division of Depositor and Consumer Protection, Division of Resolutions and Receiverships, Division of Insurance and Research, Legal Division, and the Office of Minority and Women Inclusion. The national director will also consult with other organizations within the FDIC as appropriate.

As the primary federal regulator for State nonmember banks and State savings associations, the FDIC will focus its efforts on minority depository institutions with those charters. However, the national director will meet periodically with the other federal banking regulators to discuss each agency’s outreach efforts, to share ideas, and to identify opportunities where the agencies can work together to assist minority depository institutions. Representatives of other divisions and offices may participate in these meetings.

Engagement With Minority Depository Institutions

The FDIC’s MDI program will provide for continual engagement with minority depository institutions through ongoing interaction with the Washington, Regional, and Field Office staff. This interaction includes providing technical assistance to share information and expertise on supervisory topics, outreach initiatives to provide opportunities for open dialogue with senior FDIC staff, and training initiatives to offer opportunities to gain additional knowledge about specific regulatory requirements.

Further, trade associations affiliated with minority depository institutions serve as a significant resource in identifying specific interests or concerns for those institutions. The national director will regularly contact minority depository institution trade associations to seek feedback on the FDIC’s efforts under the MDI program, discuss possible training initiatives, and explore options for promoting and preserving minority depository institutions. The national director and the regional coordinators also will solicit information from trade associations, including national and state bankers’

associations, and other organizations about groups that may be interested in establishing new minority depository institutions. FDIC representatives will be available to address such groups to discuss the application process, the requirements of becoming FDIC insured, and the various programs supporting minority depository institutions. The regional coordinators will contact all new minority state nonmember banks and state savings associations identified through insurance applications, merger applications, or change in control notices to familiarize the institutions with the resources available through the MDI program.

Technical Assistance

Technical assistance, as defined by the FDIC's MDI program, is individual assistance that a regulator will provide to a minority depository institution in response to an institution's request for assistance in understanding supervisory topics or findings. At any time, the FDIC will share information and expertise with bank management on various topics including, but not limited to, understanding bank regulations, FDIC policies, examination procedures, accounting practices, supervisory recommendations, risk management procedures, and compliance management procedures. In providing technical assistance, FDIC staff will not actually perform tasks expected of an institution's management or employees. For example, FDIC staff may explain Call Report instructions as they relate to specific accounts, but will not assist in preparing an institution's Call Report. FDIC staff may provide information on community reinvestment opportunities, but will not recommend a specific transaction.

An institution can contact its field office representatives, case manager, or review examiner to request technical assistance. In addition, the regional coordinators and the institution's assigned case manager and review examiner are knowledgeable about minority bank issues and are available to answer questions or to direct inquiries to the appropriate FDIC office or staff member with expertise on the subject for response. Case managers can explain the application process and the type of analysis and information required for different applications. Field office representatives also serve as a significant resource to minority depository institutions by readily answering examination related questions and explaining regulatory requirements. Other staff members within the FDIC with expertise in various regulatory topics will also be

available to share knowledge to assist minority depository institutions in complying with regulations or implementing supervisory recommendations.

During examinations, the FDIC expects examiners to fully explain supervisory recommendations and offer to help management understand satisfactory methods to address such recommendations. At the conclusion of each examination of a minority depository institution directly supervised by the FDIC, the FDIC will be available to return to the institution to provide technical assistance by reviewing areas of concern or topics of interest to the institution. The purpose of return visits is to assist management in understanding and implementing examination recommendations, not to identify new problems.

Technical assistance is a tool to provide on-going support to institutions in an effort to ensure timely implementation of recommendations, full understanding of regulatory requirements, and in some instances, the viability of the institution. Technical assistance is not a supervisory activity and is not intended to present additional regulatory burden. Further, examination teams will not view requests for, or acceptance of, technical assistance negatively when evaluating institution performance or assigning ratings.

Outreach

Outreach, as defined by the FDIC's MDI program, consists of FDIC representatives meeting with financial institutions with a primary focus of building relationships and open communication and providing information and resources. Outreach is generally offered by the FDIC and can include meetings between financial institution management and senior FDIC management.

The FDIC maintains an MDI Subcommittee of its Advisory Committee on Community Banking (CBAC) composed of executives of minority depository institutions. The MDI Subcommittee serves as a source of feedback on FDIC strategies to fulfill statutory goals to preserve and promote minority depository institutions. The MDI Subcommittee may also make recommendations or offer ideas to the CBAC for consideration and presentation to the FDIC. The MDI Subcommittee provides a platform for minority depository institutions to promote collaboration, partnerships, and best practices. The Subcommittee will also identify ways to highlight the

work of minority depository institutions in their communities.

Executives and staff in the FDIC's regional offices will communicate regularly with each minority depository institution to outline the FDIC's efforts to promote and preserve minority depository institutions; will offer annually to have a member of regional management meet with the institution's board of directors to discuss issues of interest, including through roundtable discussions and training sessions; and will seek input regarding any training or other technical assistance the institution may desire.

The FDIC will explore opportunities to facilitate collaboration and partnering initiatives among minority depository institutions or between minority depository institutions and non-minority depository institutions. The FDIC recognizes that by facilitating these collaborative relationships, institutions can have opportunities to better meet the needs of their communities.

Training and Educational Programs

Training and educational programs, as defined by the FDIC's MDI program, consist of instruction designed to impart proficiency or skills related to a particular job, process, or regulatory policy. The FDIC will work with other banking regulatory agencies and trade associations representing minority depository institutions to periodically assess the need for, and provide for, training and educational opportunities. The FDIC will partner with other federal banking agencies and trade associations to offer training programs. This training and education can be provided in person, through webinars or conference calls, or in a conference setting.

Reporting

The regional coordinators will report regional office activities related to the MDI program to the national director quarterly. The national director will develop a comprehensive report on all MDI program activities and submit the report quarterly to the Chairman. The FDIC's efforts to preserve and promote minority depository institutions will also be highlighted in the FDIC's Annual Report and the Annual Report to Congress on the Preservation and Promotion of Minority Depository Institutions pursuant to Section 367 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and Section 308 of FIRREA.

Measuring Program Effectiveness

The national director and the regional office staff will routinely solicit

feedback from minority depository institutions to assess the effectiveness of the FDIC's technical assistance, outreach, and training/education efforts and the MDI program in general. The FDIC will track instances of technical assistance, outreach, and training and education and solicit feedback on the effectiveness of these activities by administering periodic surveys and holding discussions with bank management.

Examinations

All insured institutions must be operated in a safe and sound manner, in accordance with FDIC's regulations. Likewise, all examinations must be conducted within the parameters of FDIC exam policies and should consistently measure the risk an institution poses to the FDIC's deposit insurance fund. Notwithstanding, and consistent with the Uniform Financial Institutions Rating System (UFIRS) and the Uniform Interagency Consumer Compliance Rating System (UICCR), examiners are expected to recognize the distinctive characteristics and differences in core objectives of each financial institution and to consider those unique factors when evaluating an institution's financial condition and risk management practices.

Under the UFIRS and UICCR, each financial institution is assigned a composite rating based on an evaluation of specific components, which are also rated. For UFIRS, these component ratings reflect an institution's capital adequacy, asset quality, management capabilities, earnings sufficiency, liquidity position, and sensitivity to market risk (commonly referred to as the CAMELS ratings). Likewise, the UICCR is organized under broad components that assess the institution's board and management oversight, compliance program, violations of law, and consumer harm. The uniform rating systems and evaluation and rating criteria are specific to the examination types performed. Further, the assignment of the rating is based solely on the subject institution's individual performance under the specific components.

Management practices, particularly as they relate to risk management, vary considerably among financial institutions depending on size and sophistication, the nature and complexity of business activities, and risk profile. Each institution must properly manage risks and have appropriate policies, processes, or practices in place that management follows and uses. Activities undertaken in a less complex institution engaging in

less sophisticated risk-taking activities may need only basic management and control systems compared to the detailed and formalized systems and controls used for the broader and more complex range of activities undertaken at a larger and more complex institution.

Peer comparison data are not included in the rating systems. The principal reason is to avoid over reliance on statistical comparisons to justify the component rating being assigned. Avoiding such overreliance is very important when evaluating minority depository institutions due to their unique characteristics. For example, many minority depository institutions were established to serve an otherwise under-served market. High profitability may not be as essential to the organizers and shareholders of the institution. Instead, community development, improving consumer services, and promoting banking services to the unbanked or under-banked segment of its community may drive many of the organization's decisions. The UFIRS allows for consideration of the characteristics by considering not only the level of an institution's earnings, but also the trend and stability of earnings, the ability to provide for adequate capital, the quality and sources of earnings, and the adequacy of budgeting systems.

Examiners are instructed to consider all relevant factors when assigning a component rating. The rating systems are designed to reflect an assessment of the individual institution, including its size and sophistication, the nature and complexity of its business activities, and risk profile.

Failing Institutions

The FDIC will attempt to preserve the minority character of failing institutions during the resolution process. In the event of a potential failure of a minority depository institution, the Division of Resolutions and Receiverships will contact all minority depository institutions nationwide that qualify to bid on failing institutions. The Division of Resolutions and Receiverships will solicit qualified minority depository institutions' interest in the failing institution, discuss the bidding process, and offer to provide technical assistance regarding completion of the bid forms. In addition, the Division of Resolutions and Receiverships, with assistance from the Office of Minority and Women Inclusion, will maintain a list of minority individuals and nonbank entities that have expressed an interest in acquiring failing minority depository institutions and have been pre-approved

by the Division of Risk Management Supervision and the chartering authority for access to the FDIC's virtual data room for online due diligence.

Internet Site

The FDIC will maintain a website to promote the MDI program. Among other things, the website will describe the tools and resources available under the program. The website will include the name, phone number, and email address of the national director, each regional coordinator, and additional staff. The website will also contain links to the list of minority depository institutions, pertinent trade associations, and other federal agency programs. The FDIC will also explore the feasibility and usefulness of posting other items to the page, such as statistical information and comparative data for minority depository institutions. Visitors will have the opportunity to provide feedback regarding the FDIC's program and the usefulness of the website.

IV. Administrative Law Matters

The Paperwork Reduction Act of 1995 (PRA)⁷ states that no agency may conduct or sponsor, and no respondent is required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The Statement of Policy Regarding Minority Depository Institutions does not create any new or revise any existing information collections pursuant to the PRA. Rather, any reporting, recordkeeping, or disclosure activities mentioned in the Statement of Policy Regarding Minority Depository Institutions are usual and customary and should occur in the normal course of business as defined in the PRA.⁸ Consequently, no submissions will be made to the OMB for review. No comments were received regarding PRA or other burdens.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on June 15, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021-12972 Filed 6-22-21; 8:45 am]

BILLING CODE 6714-01-P

⁷ 44 U.S.C. 3501, *et seq.*

⁸ 5 CFR 1320.3(b)(2).

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

[Docket No. FAA-2021-0013; Project Identifier AD-2021-00087-T; Amendment 39-21540; AD 2021-10-07]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737-8 and 737-9 (737 MAX) airplanes. This AD was prompted by the determination that additional Certification Maintenance Requirements (CMRs) are necessary. This AD requires a revision of the existing maintenance or inspection program to incorporate three additional CMRs. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective July 8, 2021.

The FAA must receive comments on this AD by August 9, 2021.

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

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

Examining the AD Docket

You may examine the AD docket at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2021-0013; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Ken Fairhurst, Manager, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206-

231-3500; email: 9-FAA-SACO-AD-Inquiry@faa.gov.

SUPPLEMENTARY INFORMATION:**Background**

Modern transport category airplanes can remain in service for decades. To ensure that an airplane's critical systems and back-up systems continue to meet FAA requirements, such as those in 14 CFR 25.1309, manufacturers may develop and rely on required actions that include CMRs. CMRs are limitations documented in the airplane's instructions for continued airworthiness (ICA) that require operators to periodically check systems or replace certain equipment in order to ensure the continued availability and functionality of those systems over time.¹ Air carriers have existing programs to schedule CMRs and comply with their requirements.

The FAA's recent review of the 737 MAX flight control system resulted in the determination that three additional CMR items are necessary to ensure the continued functioning of certain systems throughout the life of the airplane. The manufacturer proposed, and the FAA reviewed and approved, these three new CMRs (*i.e.*, 22-CMR-01, 22-CMR-02, and 27-CMR-09), which are described in Boeing Certification Maintenance Requirements Document D626A011-9-03, dated July 2020, and available in the docket for this AD.

Prior to return to service, initial inspections of these systems were completed when necessary on affected airplanes; this ensured the safety of the 737 MAX return to service. Due to most of the fleet being well below flight-hour thresholds that would require inspection, and Boeing's coordination with operators of affected airplanes to do initial inspections prior to return to service, the FAA determined this AD to incorporate the new CMR items could be issued subsequent to return to service. Consistent with that approach, Boeing released a Multi-Operator Message. This approach protects both the safety of the return to service and the long term safety of the fleet.

For newly produced airplanes, Boeing has incorporated the three additional CMRs into the ICA for every airplane delivered on or after November 20, 2020 (the effective date of AD 2020-24-02 (85 FR 74560, November 20, 2020) (AD 2020-24-02)). These CMRs have also already been incorporated into the maintenance programs for all U.S.-

¹ More detailed information on CMRs can be found in FAA Advisory Circular (AC) 25-19A, "Certification Maintenance Requirements," available at rgl.faa.gov.

registered 737 MAX airplanes that had been delivered before the effective date of AD 2020-24-02 and are included in the applicability of AD 2020-24-02.

The manufacturer has also communicated guidance to incorporate these CMRs into the maintenance programs of all affected 737 MAX operators, via Boeing Multi Operator Message MOM-MOM-20-0891-01B, dated December 22, 2020.

Since these CMRs are part of the ICA for all 737 MAX airplanes delivered on or after November 20, 2020 (the effective date of AD 2020-24-02), this AD is applicable only to airplanes with an original airworthiness certificate or original export certificate of airworthiness issued prior to that date.

These CMRs are necessary because a potential latent failure of a flight control system function, as tested by one of these three CMRs, if combined with unusual flight maneuvers or with another flight control system failure, could result in reduced controllability of the airplane.

After these CMRs have been incorporated into the operator's maintenance and inspection program, they may be treated as other CMRs on the airplane (*i.e.*, operators may propose any change, escalation, or cancellation of these CMRs by following the processes described in AC 25-19A, and no AMOC would be required).

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires a revision of the existing maintenance or inspection program, as applicable, to incorporate additional CMR item information.

Justification for Immediate Adoption and Determination of the Effective Date

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

As discussed previously, all U.S.-registered airplanes are already in compliance with the requirements of this AD. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3). In addition, for the foregoing reason, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include Docket No. FAA-2021-0013 and Project Identifier AD-2021-00087-T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Ken Fairhurst, Manager, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206-231-3500; email: 9-FAA-SACO-AD-Inquiry@faa.gov. Any commentary that the FAA receives that is not specifically designated as CBI will

be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

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

Costs of Compliance

Although the FAA estimates that 72 airplanes of U.S. registry are included in the applicability of this AD, all of these airplanes are already in compliance with the requirements of this AD. Nevertheless, the FAA provides the following cost estimate.

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleets, the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the average total cost per operator to be \$7,650 (90 work-hours × \$85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a "significant regulatory action" under Executive Order 12866, and
- (2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021-10-07 The Boeing Company:

Amendment 39-21540; Docket No. FAA-2021-0013; Project Identifier AD-2021-00407-T.

(a) Effective Date

This airworthiness directive (AD) is effective July 8, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737-8 and 737-9 airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued before November 20, 2020.

(d) Subject

Air Transport Association (ATA) of America Code Codes 22, Autoflight; and 27, Flight controls.

(e) Unsafe Condition

This AD was prompted by a determination that additional Certification Maintenance Requirements (CMRs) are necessary. The FAA is issuing this AD to ensure the availability of certain flight control system functions through maintenance tests to verify that the functions have not failed; a potential latent failure of a flight control system function, as tested by these three CMR items, if combined with unusual flight maneuvers or with another flight control system failure, could result in reduced controllability of the airplane.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 30 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the CMR item information

identified in figure 1 to paragraph (g) of this AD. For airplanes that have exceeded the CMR interval, in total flight hours (FHs), for a required CMR item, the associated task must be done before further flight after revision of the maintenance or inspection program.

Figure 1 to paragraph (g) – CMR items

CMR item number	Related MRBR item number	Task	CMR interval	Applicability		Task description
				APL	ENG	
22-CMR-01	22-020-00 (MPD number)	OPC	6,000 FH	ALL	ALL	Operationally check (BITE check) the digital flight control system (DFCS) speed trim/stab trim discretes and aileron/elevator actuator availability.
22-CMR-02	22-030-00 (MPD number)	OPC	41,000 FH	ALL	ALL	Operationally check the stabilizer trim enable ground path and autopilot arm cutout switch - S272 Pole 2.
27-CMR-09	27-117-00 (MPD number)	OPC	12,000 FH	ALL	ALL	Operationally check the primary and secondary aisle stand stabilizer trim cutout switches.

Note 1 to paragraph (g): The CMR tasks and intervals specified in figure 1 to paragraph (g) of this AD correspond to the items identified in Boeing Certification Maintenance Requirements Document D626A011-9-03, dated July 2020. The information in both sources is identical.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in Related Information. Information may be emailed to: 9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(i) Related Information

For more information about this AD, contact Ken Fairhurst, Manager, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206-231-3500; email: 9-FAA-SACO-AD-Inquiry@faa.gov.

(j) Material Incorporated by Reference

None.

Issued on June 9, 2021.

Ross Landes,

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

[FR Doc. 2021-13458 Filed 6-21-21; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****15 CFR Part 922**

[Docket No. 210608-0125]

RIN 0648-BG01

Wisconsin Shipwreck Coast National Marine Sanctuary Designation; Final Regulations

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) issues final regulations to implement the designation of the Wisconsin Shipwreck Coast National Marine Sanctuary (WSCNMS). The approximately 962 square-mile area encompasses a portion of the waters and submerged lands of Lake Michigan adjacent to Ozaukee, Sheboygan, Manitowoc, and Kewaunee Counties. The area includes a nationally significant collection of underwater cultural resources, including 36 known shipwrecks and about 59 suspected shipwrecks. Well preserved by Lake Michigan's cold, fresh water, the shipwrecks in the WSCNMS possess exceptional historical, archaeological and recreational value. NOAA and the State of Wisconsin will co-manage WSCNMS.

DATES: *Effective Date:* Pursuant to section 304(b) of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1434(b)), the designation and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress, beginning on the date on which this federal rulemaking is published, unless the Governor of the State of Wisconsin certifies to the Secretary of Commerce during that same review period that the designation or any of its terms is unacceptable, in which case the designation or any unacceptable term shall not take effect. The public can track days on Congressional session at the following website: <https://www.congress.gov/days-in-session>. NOAA will publish an announcement of the effective date of the final regulations in the **Federal Register**.

NOAA is staying the effective date of § 922.213(a)(2), which prohibits grappling into or anchoring on shipwreck sites, until October 1, 2023. The purpose of this stay is detailed in Section II of this final rule.

ADDRESSES: Copies of the final environmental impact statement and final management plan (FEIS/FMP) described in this rule and the record of decision (ROD) are available upon request to Wisconsin Shipwreck Coast National Marine Sanctuary, One University Drive, Sheboygan, WI 53081, Attn: Russ Green, Regional Coordinator. The FEIS/FMP and Record of Decision may be viewed and downloaded at <https://sanctuaries.noaa.gov/wisconsin/>. **FOR FURTHER INFORMATION CONTACT:** Russ Green, Regional Coordinator, Office of

National Marine Sanctuaries at 920–459–4425, russ.green@noaa.gov, or Wisconsin Shipwreck Coast National Marine Sanctuary, One University Drive, Sheboygan, WI 53081, Attn: Russ Green, Regional Coordinator.

SUPPLEMENTARY INFORMATION:

I. Background

The National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1431 *et seq.*) authorizes the Secretary of Commerce (Secretary) to designate and protect as national marine sanctuaries areas of the marine or Great Lakes environment that are of special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or aesthetic qualities. Day-to-day management of national marine sanctuaries has been delegated by the Secretary to the Office of National Marine Sanctuaries (ONMS) within the National Oceanic and Atmospheric Administration (NOAA). The primary objective of the NMSA is to protect the sanctuary system's biological and cultural resources, such as marine ecosystem, marine animals, historic shipwrecks, and archaeological sites.

A. Wisconsin Shipwreck Coast National Marine Sanctuary

The approximately 962 square-mile area designated as the Wisconsin Shipwreck Coast National Marine Sanctuary (WSCNMS) encompasses a portion of the waters and submerged lands of Lake Michigan adjacent to Ozaukee, Sheboygan, Manitowoc, and Kewaunee Counties. Principal cities in this area include Port Washington, Sheboygan, Manitowoc, and Two Rivers. The boundary includes approximately 82 miles of shoreline and extends approximately 7 to 16 miles from the shoreline, and is entirely located within Wisconsin state waters.

The area includes a nationally significant collection of underwater cultural resources, including 36 known shipwrecks and approximately 59 suspected shipwrecks. The historic shipwrecks in the sanctuary are representative of the vessels that sailed and steamed on Lake Michigan during the nineteenth and twentieth centuries, carrying grain and raw materials east and coal, manufactured goods, and people west. During this period entrepreneurs and shipbuilders on the Great Lakes launched tens of thousands of ships of many different designs. Sailing schooners, grand palace steamers, revolutionary propeller-driven passenger ships, and industrial bulk carriers transported materials that were essential to America's business and

industry. In the process they brought hundreds of thousands of people to the Midwest and made possible the dramatic growth of the region's farms, cities, and industries. The Midwest, and indeed the American Nation, could not have developed with such speed and with such vast economic and social consequences without the Great Lakes. Twenty-one of the 36 shipwreck sites in the sanctuary are listed on the National Register of Historic Places. Many of the shipwrecks retain an unusual degree of archeological and architectural integrity, with several vessels nearly intact. Well preserved by Lake Michigan's cold, fresh water, the shipwrecks in the WSCNMS possess exceptional historical, archaeological and recreational value. Additional underwater cultural resources, such as submerged aircraft, docks, piers, and isolated artifacts also exist, as does the potential for prehistoric (pre-contact) sites and artifacts.

B. Need for Action

Establishing a national marine sanctuary in Wisconsin waters will complement and supplement existing state-led preservation efforts, research programs, and public outreach initiatives. Threats to the nationally significant underwater cultural resources in the area include both natural processes and human activities. In some cases human activities can threaten the long term sustainability of historic shipwrecks and other underwater cultural resources, and negatively impact their recreational and archaeological value. These negative impacts include anchor damage from visiting dive boats, damage from poorly attached mooring lines, looting of artifacts, movement of artifacts within a shipwreck site, entanglements of remotely-operated vehicle tethers, and entanglements of fishing gear. Additional threats to the national marine sanctuary's resources include human-introduced invasive mussels and the human disturbance and natural deterioration also threaten known and undiscovered sanctuary resources. Future discoveries may include newly uncovered shipwrecks in shallow, sandy lake bottom, as well as yet-to-be-discovered intact shipwrecks the lie in deeper areas.

Consistent with the community-based sanctuary nomination (described below), the national marine sanctuary will also: (a) Build on the 30-year investment the citizens of Wisconsin have made in the identification, interpretation, and preservation of shipwrecks and other maritime resources; (b) build on state and local

tourism initiatives within the many communities that have embraced their centuries-long maritime relationship with Lake Michigan, the Great Lakes region, and the nation; (c) enhance the existing state management program; and (d) provide access to NOAA's extended network of scientific expertise and technological resources, increase research efforts, and provide an umbrella for the coordination of these activities. The national marine sanctuary will also enhance existing educational initiatives and provide additional programming and technology for K–12, post-graduate, and the general public across the state.

C. Procedural History

1. Sanctuary Nomination and Public Scoping

On December 2, 2014, pursuant to section 304 of the NMSA and the Sanctuary Nomination Process (SNP; 79 FR 33851), Wisconsin Governor Scott Walker, on behalf of the State of Wisconsin; the cities of Two Rivers, Manitowoc, Sheboygan, and Port Washington; and the counties of Ozaukee, Sheboygan, and Manitowoc, submitted a nomination asking NOAA to consider designating this area of Wisconsin's Lake Michigan waters as a national marine sanctuary. The State of Wisconsin's selection of this geographic area for the nomination drew heavily from a 2008 report conducted by the Wisconsin History Society and funded by the Wisconsin Coastal Management Program (Wisconsin's Historic Shipwrecks: An Overview and Analysis of Locations for a State/Federal Partnership with the National Marine Sanctuary Program, 2008, <https://www.wisconsinshipwrecks.org/Files/Wisconsins%20Historic%20Shipwrecks.pdf>).

The nomination also identified opportunities for NOAA to strengthen and expand on resource protection, education, and research programs by State of Wisconsin agencies and in the four communities along the Lake Michigan coast. NOAA completed its review of the nomination, and on February 5, 2015, added the area to the inventory of nominations that are eligible for designation. All nominations submitted to NOAA can be found at <http://www.nominat.noaa.gov/nominations/>.

On October 7, 2015, NOAA initiated the public scoping process with the publication of the Notice of Intent (NOI) in the **Federal Register** (80 FR 60631), soliciting public input on the proposed designation and informing the public of the Agency's intention to prepare a draft

environmental impact statement (DEIS) to evaluate alternatives related to the proposed designation of WSCNMS under the NMSA. That announcement initiated a 90-day public comment period during which NOAA solicited additional input related to the scale and scope of the proposed sanctuary, including ideas presented in the community nomination. The NOI also announced NOAA's intent to fulfill its responsibilities under the requirements of the National Historic Preservation Act (NHPA).

In November 2015, NOAA hosted three public meetings and provided additional opportunities for public comments through the www.regulations.gov web portal and by traditional mail. The comment period closed January 15, 2016. All comments received, through any of these formats, were publicly posted on the www.regulations.gov web portal (see: <https://www.regulations.gov/docket?D=NOAA-NOS-2015-0112>). The public comments submitted during the scoping process were used by NOAA in preparing the proposed sanctuary regulations and the draft environmental impact statement and draft management plan (DEIS/DMP) associated with the proposed sanctuary designation.

2. Designation Process

On January 9, 2017, NOAA published a notice in the **Federal Register** announcing the proposed designation of approximately 1,075 square miles of waters and submerged lands of Lake Michigan adjacent to Manitowoc, Sheboygan, and Ozaukee counties in the State of Wisconsin. (82 FR 2269). NOAA also provided public notice of the availability of the related DEIS/DMP (82 FR 2269; 82 FR 1733). All three documents (proposed rule, DEIS, and DMP) were prepared in close consultation with the State of Wisconsin. NOAA opened an 81-day comment period on the proposed rule and the DEIS/DMP, which closed on March 31, 2017. During the public comment period, NOAA held four public meetings in the Wisconsin cities of Algoma, Manitowoc, Sheboygan, and Port Washington.

All public comments on the proposed designation are available at <https://www.regulations.gov/docket?D=NOAA-NOS-2016-0150>. NOAA's response to the public comments are included in Appendix B of the FEIS, which was made available on June 5, 2020 (85 FR 34625) and in this document (Section IV).

II. Changes From Proposed to Final Regulations

Based on public comments received between January and March 2017, internal deliberations, interagency consultations, meetings with constituent groups, and evaluation of this input with the State of Wisconsin, NOAA has made the following changes to the proposed rule. NOAA has also made conforming changes to the FEIS/FMP.

A. Sanctuary Boundary

In response to public comments and discussions with the state, NOAA chose to modify the sanctuary boundary area from 1,075 square miles, as originally proposed, to 962 square miles. This new boundary includes 36 known shipwrecks and the potential for approximately 59 new sites to be discovered. Specific changes include: (1) In response to comments raised by the commercial shipping industry, excluding all federally authorized areas (navigation channels) from the sanctuary; (2) in response to comments raised by shoreline property owners and certain industry groups and in consultation with the State of Wisconsin, using the Low Water Datum rather than the Ordinary High Water Mark as the sanctuary's western/shoreline boundary; (3) in consultation with the State of Wisconsin, moving the southern sanctuary boundary northward to approximately 650 feet south of the shipwreck *Northerner*, putting the boundary closer to the nominating community of Port Washington and using a known shipwreck site to demarcate the sanctuary boundary, rather than a political boundary (*i.e.*, a county or city line); and (4) in response to public comments, moving the northern boundary approximately 1.7 miles northward to include the shipwreck *America* (in Kewaunee County). A detailed description of these boundary modifications can be found in Chapter 3 of the FEIS. NOAA's response to these and other public comments can be found in Appendix B of the FEIS and in this document (Section IV).

B. Sanctuary Name

In the proposed rule, NOAA referred to the proposed sanctuary as the "Wisconsin-Lake Michigan National Marine Sanctuary (WLMNMS)." However, based on comments received from the public and community partners, NOAA changes the sanctuary name with this final rule to Wisconsin Shipwreck Coast National Marine Sanctuary (WSCNMS), which better describes the purpose of the sanctuary, and, as indicated by local communities,

provides stronger opportunities for marketing and branding.

C. Definition of "Sanctuary Resource" and "Shipwreck Site"

In response to public comments, NOAA revises the definitions of "sanctuary resource" and "shipwreck site" for clarity. In the proposed rule, NOAA defined "sanctuary resource" as "prehistoric, historic, archaeological, and cultural sites and artifacts within the sanctuary boundary, including but not limited to, all shipwrecks and related components." With this final rule, NOAA deletes "including but not limited to, all shipwrecks and related components" and replaces it with "including all shipwreck sites," thus revising the site-specific definition of "sanctuary resources," located in section 922.211(a)(1), to now mean "all prehistoric, historic, archaeological, and cultural sites and artifacts within the sanctuary boundary, including all shipwreck sites." NOAA made this revision to clarify this sanctuary's emphasis on the protection of shipwrecks and shipwreck sites, and to better align with state definitions.

Additionally, the proposed rule broadly defined "shipwreck site" to mean any sunken watercraft, its components, cargo, contents, and associated debris field (section 922.211(a)(2)). However, with this final rule, NOAA revises the definition in section 922.211(a)(2) for "shipwreck site" by adding "historic" to clarify that NOAA is focused on historic shipwrecks (*i.e.*, not all shipwrecks, but those that demonstrate an important role in or relationship with maritime history). This addition is specifically added to respond to concerns about defining recent or contemporary sunken craft or objects as sanctuary resources. For the purposes of this rule, "historic" takes its definition from "historical resource" located in section 922.3 of the National Marine Sanctuary Program regulations.

D. Effective Date of the Regulations on Grappling Into or Anchoring on Shipwreck Sites

As explained above in the **DATES** section of this document, NOAA postpones the effective date for the regulation that prohibits grappling into or anchoring on shipwreck sites until October 1, 2023. The purpose of this postponement is to provide NOAA with adequate time to develop a shipwreck mooring program and plan, begin installing mooring buoys, seek input from the dive community about the mooring buoy plan, and develop best practices for accessing shipwrecks when

mooring buoys are not present. During this period, NOAA will also work with stakeholders to explore the concept of permitting certain prohibited activities (e.g., allowing divers to attach mooring lines directly to some shipwreck sites).

All other regulations will become effective as described in the **DATES** section above.

III. Summary of All Final Regulations for WSCNMS

With this final rule, NOAA is implementing the following site-specific regulations for WSCNMS.

A. Add New Subpart T to Existing National Marine Sanctuary Program Regulations

NOAA amends the National Marine Sanctuary Program regulations at 15 CFR part 922 by adding a new subpart (subpart T) that contains site-specific regulations for the WSCNMS. This subpart includes the boundary description, contains definitions of common terms used in the new subpart, provides a framework for co-management of the sanctuary, identifies prohibited activities and exceptions, and establishes procedures for certification of existing uses, permitting otherwise prohibited activities, and emergency regulation procedures. Several conforming changes are also made to the national sanctuary regulations as described below.

B. Sanctuary Name

The sanctuary name is “Wisconsin Shipwreck Coast National Marine Sanctuary (WSCNMS).”

C. Sanctuary Boundary

NOAA designates a 726 square nautical mile (962 square mile) area of Lake Michigan waters off Ozaukee, Sheboygan, Manitowoc, and Kewaunee counties of Wisconsin as WSCNMS. The sanctuary’s western/shoreward boundary is defined by the Low Water Datum as defined by the International Great Lakes Datum, 1985 (IGLD 1985) as an elevation of 577.5 ft above sea level, while the lakeward boundary is drawn to include all known shipwrecks between the shipwreck *America* to the north and shipwreck *Northerner* to the south. The sanctuary extends approximately 16 miles offshore at its greatest extent. Within this boundary are 36 known shipwrecks, including 21 on the National Register of Historic Places. The harbors and marinas of Two Rivers, Manitowoc, Sheboygan, and Port Washington are not included in the sanctuary boundary, nor are federally authorized areas (channels). These are channels that have been dredged by U.S.

Army Corps of Engineers adjacent to the ports and harbors. The detailed legal sanctuary boundary description is included in section 922.210 and the coordinates are located in 15 CFR part 922, subpart T, appendix A.

A map of the area is shown in the FEIS on page 4, and can also be found at <https://sanctuaries.noaa.gov/wisconsin/>.

D. Definitions

NOAA is including a site-specific definition of “sanctuary resources” for the WSCNMS to include only the underwater cultural resources found in this area in accordance with the purpose of this designation. The definition does not include biological and ecological resources of the area. Creating this narrow, site-specific definition requires NOAA to modify the national definition of “sanctuary resource” in the national regulations at section 922.3 to add an additional sentence that defines the site-specific definition for WSCNMS at section 922.211(a). This is similar to the approach taken for other national marine sanctuaries, such as Thunder Bay National Marine Sanctuary, that do not make use of the full national “sanctuary resource” definition. The WSCNMS definition of “sanctuary resources,” located in section 922.211(a)(1), means all prehistoric, historic, archaeological, and cultural sites and artifacts within the sanctuary boundary, including all shipwreck sites. The term “shipwreck site” is further defined as any historic sunken watercraft, its components, cargo, contents, and associated debris field. This rule also incorporates and adopts other common terms defined in the existing national regulations at section 922.3. One of the common terms adopted (without modification) is “National Marine Sanctuary” or “Sanctuary,” which means an area of the marine environment of special national significance due to its resource or human-use values, which is designated as such to ensure its conservation and management.

E. Co-Management of the Sanctuary

To enhance opportunities and build on existing protections, NOAA and the State of Wisconsin will collaboratively manage the sanctuary. NOAA establishes the framework for co-management at section 922.212 and will develop a Memorandum of Agreement (MOA) with the state to provide greater details of co-management. NOAA and the state may develop additional agreements as necessary that would provide details on the execution of sanctuary management, such as

activities, programs, and permitting programs that can also be updated to adapt to changing conditions or threats to the sanctuary resources. Any proposed changes to sanctuary regulations or boundaries will be jointly coordinated with the state and will be subject to public review as mandated by the NMSA and other Federal statutes.

F. Prohibited and Regulated Activities

1. Injuring Sanctuary Resources

The regulations for WSCNMS prohibit any person from moving, removing, recovering, altering, destroying, possessing or otherwise injuring, or attempting to move, remove, recover, alter, destroy, possess or otherwise injure a sanctuary resource. This prohibition supplements existing Wisconsin laws that prohibit damaging shipwrecks. Wisconsin State statute (Wis. Stat. § 44.47), which has been in effect since 1991 and is related to removing or damaging shipwrecks, currently applies to the area and will continue to apply to these resources after sanctuary designation.

2. Grappling Into or Anchoring on a Shipwreck Site

The regulations for WSCNMS prohibit the use of grappling into or anchoring on shipwreck sites to protect fragile shipwrecks within the sanctuary from damage. To provide the public adequate notice of shipwreck locations, NOAA will prepare and make available sanctuary maps with known and suspected shipwreck sites. Shipwreck sites not listed on maps (*i.e.*, new discoveries as they occur) are considered sanctuary resources and the prohibition on anchoring and grappling still apply. The final management plan includes activities related to surveying the sanctuary area and locating additional shipwreck sites. As appropriate, NOAA will update the maps as new shipwreck sites are found.

Because NOAA seeks to promote public access, while also ensuring sound resource protection, an initial focus of the sanctuary management plan will be the installation of permanent mooring systems at priority sanctuary shipwreck sites. The moorings will provide a secure, visible, and convenient anchoring point for users, and eliminate the need for grappling. NOAA intends to publish guidelines on best practices for accessing shipwrecks when mooring buoys are not present. An example of a best practice could include instructions on using a weighted line and surface float to mark a wreck for divers to descend and ascend. This weighted line would not be

used as an anchoring line; it would need to be continuously tended and removed before the dive boat left the area.

NOAA is postponing the effective date for this prohibition for October 1, 2023. The purpose of this postponement is to provide NOAA with adequate time to develop a shipwreck mooring program and plan, begin installing mooring buoys, seek input from the dive community about the mooring buoy plan, and develop best practices for accessing shipwrecks when mooring buoys are not present. During this period, NOAA will also work with stakeholders to explore the concept of permitting certain prohibited activities (e.g., allowing divers to attach mooring lines directly to some shipwreck sites). All other regulations would remain in effect during this postponement.

3. Interfering With Investigations

The regulations for WSCNMS prohibit interfering with sanctuary enforcement activities. This regulation will assist in NOAA's enforcement of the sanctuary regulations and strengthen sanctuary management.

4. Exemption for Emergencies and Law Enforcement

The regulations for WSCNMS exempt from the three prohibitions described above activities that respond to emergencies that threaten lives, property, or the environment, or are necessary for law enforcement purposes.

G. Emergency Regulations

As part of the designation, NOAA will have the authority to issue emergency regulations for this sanctuary. Emergency regulations will be used in limited cases and under specific conditions when there is an imminent risk to sanctuary resources and a temporary prohibition would prevent the destruction or loss of those resources. NOAA will only issue emergency regulations that address an imminent risk for a fixed amount of time for a maximum of 6 months, which can be extended a single time for not more than an additional six months. Emergency regulations will only be exempted from notice and comment requirements under Administrative Procedures Act when the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." A full rulemaking process must be undertaken, including a public comment period, to consider making an emergency regulation permanent. NOAA modifies

the national regulations at § 922.44 to include WSCNMS in the list of sanctuaries that have site-specific regulations related to emergency regulations, and adds detailed site-specific emergency regulations to the WSCNMS regulations at § 922.214.

H. General Permits, Certifications, Authorizations, and Special Use Permits

1. General Permits

The regulations for WSCNMS include the authority for NOAA to issue permits to allow certain activities that would otherwise violate the prohibitions listed and described above. Similar to other national marine sanctuaries, NOAA considers these permits for the purposes of education, research, or management. To address the above additions to the ONMS general permit authority for WSCNMS, NOAA is amending regulatory text in the program-wide regulations in part 922, subpart E, to add references to subpart T, as appropriate. NOAA would also add a new § 922.215 in subpart T titled "Permit procedures and review criteria" that would address site-specific permit procedures for WSCNMS.

2. Certifications

The regulations for WSCNMS include language at section 922.216 describing the process by which NOAA may certify pre-existing authorizations or rights within the WSCNMS area. Here the term pre-existing authorizations or rights refers to any leases, permits, licenses, or rights of subsistence use or access in existence on the date of sanctuary designation (see 16 U.S.C. 1434(c); 15 CFR 922.47). Consistent with this definition, WSCNMS regulations at section 922.216 states that certification is the process by which these pre-existing authorizations that violate sanctuary prohibitions may be allowed to continue, and the sanctuary may regulate the exercise of the pre-existing authorizations consistent with the purposes for which the sanctuary was designated. Applications for certifying pre-existing authorizations must be received by NOAA within 180 days of the **Federal Register** notice announcing the effective date of the designation.

3. Authorizations

NOAA may also allow an otherwise prohibited activity to occur in the sanctuary, if such activity is specifically authorized by any valid Federal, state, or local lease, permit, license, approval, or other authorization issued after sanctuary designation. Authorization authority is intended to streamline regulatory requirements by reducing the

need for multiple permits and would apply to all proposed prohibitions at § 922.213. As such, NOAA is amending the regulatory text at § 922.49 to add reference to subpart T.

4. Special Use Permits

NOAA has the authority under the NMSA to issue special use permits (SUPs) at national marine sanctuaries as established by section 310 of the NMSA. SUPs can be used to authorize specific activities in a sanctuary if such authorization is necessary to: (1) Establish conditions of access to and use of any sanctuary resource; or (2) promote public use and understanding of a sanctuary resource. The activities that qualify for a SUP are set forth in the **Federal Register** (82 FR 42298; September 7, 2017). Categories of SUPs may be changed or added to through public notice and comment. NOAA would not apply the SUP to activities in place at the time of the WSCNMS designation.

SUP applications are reviewed to ensure that the activity is compatible with the purposes for which the sanctuary is designated and that the activities carried out under the SUP be conducted in a manner that do not destroy, cause the loss of, or injure sanctuary resources. NOAA also requires SUP permittees to purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit. The NMSA allows NOAA to assess and collect fees for the conduct of any activity under a SUP. On November 19, 2015, NOAA published public notice (80 FR 72415) of the methods, formulas and rationale for the calculations it will use in order to assess fees associated with SUPs. The fees collected could be used to recover the administrative costs of issuing the permit, the cost of implementing the permit, monitoring costs associated with the conduct of the activity, and the fair market value of the use of sanctuary resources.

I. Other Conforming Amendments

The general regulations in part 922, subpart A, and part 922, subpart E, for regulations of general applicability are amended by this action so that the regulations are accurate and up-to-date. The following 10 sections are updated to reflect the increased number of sanctuaries or to add subpart T to the list of sanctuaries:

- Section 922.1 Applicability of regulations
- Section 922.40 Purpose
- Section 922.41 Boundaries
- Section 922.42 Allowed activities

- Section 922.43 Prohibited or otherwise regulated activities
- Section 922.44 Emergency regulations
- Section 922.47 Pre-existing authorizations or rights and certifications of pre-existing authorizations or rights
- Section 922.48 National Marine Sanctuary permits—application procedures and issuance criteria
- Section 922.49 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity
- Section 922.50 Appeals of administrative action

J. Terms of Designation

Section 304(a)(4) of the NMSA requires that the terms of designation include the geographic area included within the sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or aesthetic value; and the types of activities that will be subject to regulation by the Secretary of Commerce to protect these characteristics. Section 304(a)(4) also specifies that the terms of designation may be modified only by the same procedures by which the original designation was made.

NOAA is establishing terms of designation that describe the geographic area, resources, and activities as described above. NOAA is adding the terms of designation language as appendix B to the WSCNMS regulations at 15 CFR part 922, subpart T.

Upon further examination, NOAA has decided to remove Article V., Section 2 from the proposed Terms of Designation. NOAA proposed this provision to incorporate the generally prevailing judicial precedent and regulatory practice that, to the extent two laws appear to conflict (*e.g.*, two laws apply to the same activity), the courts or the agencies will attempt to harmonize them to give effect to both laws if possible. See, *e.g.*, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020). NOAA has, however, determined that this proposed provision is not a fundamental component of the Terms of Designation (*e.g.*, the establishment of the sanctuary) or the regulatory scheme finalized herein. In the face of any potential conflicts of federal laws in the waters of the sanctuary, such as where a sanctuary prohibition may interfere with Federal safety laws, NOAA would work with that agency to ensure that the purpose of each law is given fullest effect. The remaining language in that

section referencing pre-existing authorizations such as a lease, license or permit is found in section 304(c) of the NMSA, so the removal of the language in the Terms of Designation does not change NOAA's authorities. NOAA will coordinate with the State of Wisconsin regarding any such authorization as specified in § 922.212 of these regulations regarding co-management of the site.

IV. Response to Comments

During the January 2017 through March 31, 2017, public review comment period, NOAA received 566 written comments on the DEIS/DMP and proposed rule. Approximately 400 people attended four public meetings during the week of March 13, 2017, in the Wisconsin towns of Algoma, Manitowoc, Sheboygan, and Port Washington, with 75 people providing verbal comments. Four petitions were submitted with public comments: One with 163 signatures of individuals supporting the Wisconsin sanctuary proposal exclusively; one with 128 businesses supporting both the Wisconsin and Maryland (Mallows Bay National Marine Sanctuary) sanctuary proposals; and two petitions with 51 total signatures in opposition to the Wisconsin sanctuary.

For the purposes of managing responses to public comments, NOAA grouped similar comments by theme. These themes align with the content of the draft proposed rule that identified the purposes and needs for a national marine sanctuary, and the draft management plan that identified the proposed non-regulatory programs and sanctuary operations. The themes are identified below, followed by NOAA's response.

Positive Impact on Communities Through Tourism, Economic Development, Education, and Research

1. *Comment:* NOAA received many comments supporting the opportunity for a new sanctuary to promote tourism to coastal communities. Commenters believe that national exposure and increased cooperation among the communities will result in increased numbers of visitors to the region.

Response: NOAA agrees that Wisconsin Shipwreck Coast National Marine Sanctuary (WSCNMS) would create positive impacts to tourism. The partnerships developed between NOAA, the State of Wisconsin, and the communities during the nomination and designation processes will help in achieving this goal. The WSCNMS final management plan includes a strategy and action plan that supports this goal.

2. *Comment:* NOAA received many comments supporting educational opportunities for a sanctuary to work with local museums and school districts to engage people in Wisconsin's maritime history and the Great Lakes.

Response: National marine sanctuaries across the system have robust education programs. It is a priority for NOAA to educate and engage people in national marine sanctuaries. The final management plan includes strategies and action plans to develop education programs with state and community partners that will provide a variety of educational experiences. The WSCNMS final management plan includes actions that support this goal.

3. *Comment:* NOAA received many comments highlighting the opportunity for a new sanctuary to promote Wisconsin's maritime heritage.

Response: The sanctuary designation is an opportunity to partner with the State of Wisconsin and communities to tell the many stories of centuries of exploration, travel, and commerce on the Great Lakes. The sanctuary provides a platform to share Wisconsin's stories with local, regional, and national audiences. The WSCNMS final management plan includes actions that support this goal.

4. *Comment:* NOAA received several comments by researchers expressing interest in partnering with the sanctuary on both archaeological and multidisciplinary projects.

Response: Across the nation, national marine sanctuaries partner with researchers to explore, document, and better understand sanctuary resources. NOAA expects to attract and partner with a variety of researchers in the sanctuary, and the final management plan includes actions that support this goal.

Proposed Sanctuary Boundary

5. *Comment:* NOAA received many comments from lakeshore landowners expressing concern about the proposal to use the ordinary high water mark (OHWM) as the sanctuary's western/shoreline boundary. The key concerns were: (1) That this boundary choice would negatively impact riparian rights of lakeshore property owners; (2) that the proposal would allow public access to areas below the OHWM where riparian owners currently have exclusive access; (3) that using the OHWM as the sanctuary's western boundary would impact property values because the land would change from state to federal ownership; and (4) that, more generally, using the OHWM was seen as federal overreach and would

result in more “red tape” and permitting.

Response: NOAA’s proposal to designate a national marine sanctuary recognizes the state’s sovereignty over its waters and submerged lands and does not change state ownership of public bottomlands; that is, no federal ownership of Wisconsin public lands is created by the sanctuary designation. Likewise, NOAA’s proposal to designate a national marine sanctuary would not change existing riparian rights of the property owners of Wisconsin, nor would it change state law regarding public access to the area in which shoreline property owners have exclusive access. NOAA proposed the OHWM in the draft designation because it would be consistent with the state’s regulatory boundary. Furthermore, after considering public comments about using the OHWM as the western/shoreline sanctuary boundary, NOAA is now proposing adopting the low water datum (LWD) as that boundary. NOAA is doing so because the LWD is more lakeward than the OHWM, and would move the sanctuary boundary “lower down the beach” than the OHWM, thereby removing much of the beach from NOAA jurisdiction and related riparian rights concerns.

Notably, the LWD is set at an elevation of 577.5 feet. The lowest recorded water level on Lake Michigan is 576.02 feet. This effectively places the sanctuary boundary nearly at the all-time low water level mark for Lake Michigan. Since riparian owners have exclusive use of the beach between the OHWM and the water’s edge, using the LWD effectively places the sanctuary boundary at the most lakeward extent of this area as practicable. See Section 3.3.2 in the final environmental impact statement for a detailed discussion of the difference between OHWM and LWD.

NOAA realizes that proposing using the LWD rather than the OHWM differs from its original proposal in that it leaves a portion of the shoreline (the area between the OHWM and LWD) outside of sanctuary management; any cultural resources found in this area would not benefit from sanctuary resource protection. NOAA and the State of Wisconsin are not currently aware of shipwrecks in the sanctuary that come up to the OHWM, but depending on lake levels, it is possible that shipwrecks or parts of shipwrecks that are currently buried can become unburied. The Wisconsin Historical Society has determined that several undiscovered shipwrecks may lie in the surf zone. If a cultural resource was discovered between the OHWM and the

LWD that resource would still be under state jurisdiction because all land from the OHWM lakeward are state bottomlands.

6. Comment: Certain industry stakeholders commented that NOAA should use the low water datum as the shoreward boundary of the sanctuary to ensure that the current beneficial practice of beach nourishment using dredged materials is continued.

Response: NOAA agrees and proposes that the LWD should be used as the sanctuary’s landward boundary. In addition, NOAA recognizes in the FEIS several activities important to commercial shipping, including beach nourishment, and has not proposed regulations specifically prohibiting use of dredge spoil within the sanctuary. Beach nourishment using dredge spoil is already regulated by the USACE and the State of Wisconsin. NOAA, through its co-management arrangement with the state and relationship with USACE, intends to coordinate a response if a particular renourishment project has the potential to injure known or suspected cultural resources within the sanctuary.

7. Comment: NOAA received comments from industry stakeholders stating that certain areas important to commercial shipping should be excluded from the sanctuary. NOAA also received suggested clarifying language to be included in the FEIS on the topic of dredging, and questions about the impact of the designation on dredging.

Response: To ensure compatible use with commercial shipping and other activities (such as dredging for commercial ship traffic), NOAA in the DEIS excluded the ports, harbors, and marinas of Two Rivers, Manitowoc, Sheboygan, and Port Washington from the sanctuary boundary. In the FEIS, NOAA has also excluded federally authorized areas (channels) from the sanctuary.

NOAA also included in Section 3.4.3.3 of the FEIS additional language, as suggested by the USACE, that specifies the types of activities important to commercial shipping. Specifically, “. . . routine operations and maintenance activities such as dredging, dredge material placement (nearshore/beach nourishment), and breakwater maintenance.” Although NOAA would not regulate these activities per se, the sanctuary prohibition on injuring a sanctuary resource would ensure that these activities would not negatively impact underwater cultural resources.

8. Comment: NOAA received several comments noting that the water’s edge

should be used as the sanctuary’s western/shoreline boundary.

Response: NOAA did not consider using the water’s edge for a boundary, because it would create a dynamic “moving” sanctuary boundary where cultural resources were variously within or beyond the sanctuary boundary, depending on lake levels at a given time. NOAA proposes using the LWD as the sanctuary’s western/shoreline boundary. See Comment 5 for more information.

9. Comment: NOAA received several comments stating that the sanctuary’s western/shoreline boundary should be consistent with state law.

Response: As indicated in the DEIS, NOAA selected the OHWM as the landward boundary as its preferred alternative because it was consistent with the state’s jurisdiction for managing underwater cultural resources. However, as indicated above in response to Comment 5, NOAA proposes to use the LWD as the sanctuary’s landward boundary. Addressing the public’s concern about riparian interests outweighs the benefit of an identical shoreline boundary.

10. Comment: NOAA received several comments asking how the establishment of the sanctuary would impact the findings of the Wisconsin Supreme Court case regarding property owner rights (*Doemel v. Jantz*, 1923).

Response: Sanctuary designation would not change the interpretation or application of the Wisconsin Supreme Court case (*Doemel v. Jantz*, 1923).

11. Comment: NOAA received a few comments urging use of a different boundary, because no shipwrecks come up to the OHWM.

Response: Refer to Comment 5 above. This comment is addressed by NOAA use of the LWD as the sanctuary’s western/shoreline boundary.

12. Comment: NOAA received many comments supporting Boundary Alternative B (1,260 square miles, includes additional waters off Kewaunee County), which was larger than NOAA’s preferred alternative in the DEIS.

Response: NOAA’s preferred boundary alternative includes one shipwreck in Kewaunee County (schooner *America*), but does not include additional waters off Kewaunee County. *America* is listed on the National Register of Historic Places, supporting its inclusion in the sanctuary and the aim of protecting nationally significant resources.

13. Comment: NOAA received one comment stating that Kewaunee County should not be included because a diverse group of stakeholders has not

been involved to ensure there is no negative impact to the county. The commenter noted it would be better to see first how the sanctuary impacts the counties in NOAA's preferred boundary alternative.

Response: Overall, public comments from Kewaunee County were in favor of including Kewaunee County. Additionally, NOAA held one of its public comment meetings in Algoma (located in Kewaunee County), and any member of the public could comment via online or mail. Based on an evaluation of public comments and discussions with the State of Wisconsin, NOAA's preferred boundary includes a small portion of Kewaunee County waters which contains the county's only known shipwreck (schooner *America*).

14. Comment: NOAA received one comment stating that no formal comprehensive remote sensing surveys have been conducted within the proposed boundary, which suggests more shipwrecks will be found in Kewaunee County. Consequently, NOAA should consider adding the entire county to the sanctuary boundary.

Response: Based on historical research by the Wisconsin Historical Society, NOAA agrees that there is high potential for new historic sites to be discovered in the entirety of waters off Kewaunee County. Refer also to Comment 12.

NOAA's draft environmental impact statement published on January 9, 2017, includes a clarification that places the shipwreck *Daniel Lyons* in Door County rather than Kewaunee County, leaving only one known shipwreck in Kewaunee County (schooner *America*). This clarification was made by the Wisconsin Historical Society when more accurate GPS coordinates of the shipwreck became available.

15. Comment: NOAA received several comments supporting the addition of the waters of Door County to the sanctuary, now or in the future.

Response: Because the addition of Door County would have been well beyond the geographic scope of the originally nominated area, NOAA chose not to include it in the final boundary.

16. Comment: NOAA received several comments asking for clarification on why a large geographic area was required for the protection of 37 shipwreck sites. In particular, one commenter asked why NOAA did not propose creating a regulatory area around each individual shipwreck.

Response: Research by the Wisconsin Historical Society suggests that as many as 59 shipwrecks are yet to be discovered in the sanctuary. Consequently, NOAA, in consultation

with the State of Wisconsin, chose to propose a management area that would include these potential historic sites and facilitate resource management as these new sites are discovered. This would ensure that newly discovered sites are protected and managed under sanctuary regulations at the time of discovery. Thunder Bay National Marine Sanctuary has used this management approach successfully. The sanctuary area also reflects what the State of Wisconsin put forth in its nomination to NOAA.

17. Comment: NOAA received a few comments expressing concern that it would expand the boundaries at a later time without public input. One comment suggested that the boundary could be expanded inland via Lake Michigan watershed tributaries.

Response: If NOAA expanded the sanctuary's boundary in the future, including via Lake Michigan watershed tributaries, that would constitute a change in the sanctuary's terms of designation. Under the National Marine Sanctuaries Act, a change in the terms of designation, including a boundary change, would require the same process that was undertaken for designation, including public notice and comment, public hearings, preparation of an environmental impact statement, and review periods for the governor and Congress. These statutory requirements also include Section 304(b)(1), which provides the governor of Wisconsin authority to certify that a term of a designation, including a proposed boundary expansion, is unacceptable, and the expansion of the boundary will not take effect in state waters. The State of Wisconsin, as a co-manager, would be involved in all discussions about proposed changes. Additionally, NOAA would follow the procedures of the Administrative Procedure Act, requiring that adequate public notice and opportunity for public comment be given for new regulations, including boundary changes.

18. Comment: NOAA received a few comments stating that the agency did not explain why the preferred boundary alternative was selected. One comment asked if cost was a factor in choosing the smaller of the two boundary alternatives.

Response: Chapter 3 of the DEIS and FEIS provide details regarding NOAA's analysis of boundary alternatives. Cost is not a primary factor in NOAA's selection of a boundary alternative.

Commercial Shipping (Non-Boundary) and Fishing

19. Comment: NOAA received several comments that the prohibition on anchoring could be problematic for

commercial vessels, and that NOAA should publish both the known and potential locations of shipwreck sites. A related comment noted that if the no-anchoring prohibition extends to undiscovered shipwrecks, shippers might not be able to avoid anchoring on a shipwreck if they do not know where it is, and as such, all locations, known or approximated, should be published by NOAA in a format accessible and useful to all mariners.

Response: Under the proposed regulations, anchoring within the sanctuary is not prohibited. However, grappling into or anchoring on a shipwreck site (sanctuary resource) is prohibited. This regulation is narrowly worded to protect historic shipwreck sites from anchor damage, while still allowing anchoring inside the sanctuary outside of these discrete areas. The prohibition does not apply to any activity necessary to respond to an emergency threatening life or the environment.

Existing state regulations already prohibit damaging historic shipwrecks sites within the area proposed as a sanctuary. To help vessels avoid inadvertently anchoring on known shipwrecks sites, NOAA will publish maps with coordinates of known and estimated shipwreck locations. It should be noted that historical research on shipwrecks yet to be found (potential/estimated shipwrecks) only approximates a potential shipwreck location. This information is currently available via the UW Sea Grant and Wisconsin Historical Society maintained website www.wisconsinshipwrecks.org. NOAA will work with the state to update and publish this information and share directly with stakeholders such as the Lake Carriers' Association. Additionally, NOAA will prioritize its sonar-based cultural resource surveys in areas where commercial shipping vessels are likely to anchor, such as off Manitowoc. This will help locate cultural resources and provide information useful to both the sanctuary and commercial shippers.

20. Comment: NOAA received a comment requesting that language be added to Section 922.213(b) that not only considers emergency situations but adds: ". . . or anchoring to prevent unsafe conditions, as determined by the vessel's master and recorded in the vessel's official log book."

Response: The proposed regulations provide for an exemption from the prohibitions in unsafe conditions. The proposed regulations specify, at 15 CFR 922.213(b): "The prohibitions in paragraphs (a)(1) through (3) of this

section do not apply to any activity necessary to respond to an emergency threatening life, property or the environment . . .” As such, NOAA believes that anchoring to prevent unsafe conditions is covered under current sanctuary regulations.

21. Comment: NOAA received one comment expressing concern that if NOAA broadens the scope of the Wisconsin sanctuary beyond maritime heritage resources, this would negatively impact the ability of shippers to conduct ballast water exchange.

Response: NOAA is committed to ensuring that the creation of the sanctuary would support businesses and organizations that use the lake and surrounding ports. NOAA has not proposed any regulations prohibiting ballast water exchange in the sanctuary. Also, the Coast Guard Authorization Act of 2015 (Pub. L. 114–120) prevents the Coast Guard and U.S. Environmental Protection Agency from prohibiting ballast water exchange in national marine sanctuaries in the Great Lakes that protect maritime heritage resources. Ballast water operations would continue as currently conducted. In terms of future changes to the sanctuary’s scope beyond underwater cultural resources, such a change would require a public process similar to the original designation, thereby affording commercial interests and the public an opportunity to comment on how any change in the scope might affect ballast water exchange.

22. Comment: NOAA received several comments stating that the sanctuary would have a negative impact on shipping and could result in businesses being closed. The comments indicated that the proposed sanctuary, as a cultural asset, should not encumber critical commercial activity related to maritime transportation into Wisconsin ports and through Wisconsin waters. Current legal navigational practices should continue to be allowed.

Response: NOAA’s proposal does not include restrictions to shipping. The proposal excludes the ports, marinas, and harbors of Two Rivers, Manitowoc, Sheboygan, and Port Washington from the sanctuary boundaries to avoid any unintended consequences of sanctuary designation on those operations. In addition, NOAA is proposing to eliminate the federally authorized areas (channels) from the sanctuary.

23. Comment: Several commenters asked if the sanctuary designation gives NOAA the right to regulate commercial and recreational fishing. One comment indicated that federal regulations as a result of sanctuary designation should not affect the ability of commercial

fishermen to conduct their fishing operations (particularly in “Zone 3”).

Response: Sanctuary regulations and terms of designation are narrowly defined to protect underwater cultural resources, and under the current terms of designation for WSCNMS, NOAA does not regulate commercial or recreational fishing activities. There are no restrictions on where fishing activities can occur or what gear fishermen can use, as long as the fishing activities do not injure underwater cultural resources. NOAA would need to amend the terms of designation through a public process in order to regulate commercial and recreational fishing. Through its ongoing lakebed mapping surveys, the sanctuary will work with commercial fishermen to identify and share shipwreck locations to help avoid net entanglements.

Definitions, Fines, Enforcement, and Scope of Regulations

24. Comment: NOAA received a comment indicating that the definition of sanctuary resource is too broad and could mean any “debris” (e.g., beach glass, etc.) along the beach and below the ordinary high water mark. This could lead to people being fined for gathering such items along the beach.

Response: NOAA is proposing the LWD as the sanctuary’s landward boundary. Consequently, the area between the OHWM and the LWD (i.e., most of the beach area) is not included in the preferred alternative for the sanctuary. Under the preferred alternative, cultural resources found along the beach between the OHWM and the LWD are not subject to the sanctuary regulations, but will remain subject to state regulation.

25. Comment: One commenter asked whether NOAA could impose legally enforceable restrictions on lake activities that are currently permissible by state authorities.

Response: No current state laws would be superseded by the proposed national marine sanctuary. The NMSA gives NOAA the authority to manage national marine sanctuaries in a manner that complements existing regulatory authority (16 U.S.C. 1431(b)(2)). Prior to designation, Section 304(6)(1) of the NMSA provides the governor with authority to certify that the designation or terms thereof are unacceptable, and preclude the designation or terms thereof from taking effect in state waters (16 U.S.C. 1434(6)(1)). This feature of the NMSA ensures the harmony of federal and state regulations, as well as provides the states with final approval of the designation and its regulations.

For example, one of the proposed Wisconsin sanctuary regulations, developed in consultation with the State of Wisconsin, is to prohibit anchoring at shipwreck sites. While there is no state prohibition on this activity, it is a violation of state law to damage shipwrecks, including damage from anchoring. To facilitate public access to shipwrecks and to eliminate the need for anchoring at these often fragile sites, NOAA would install moorings at these sites. In this way, the sanctuary strengthens and complements state regulations and facilitates public access through a combination of regulation and proactive resource protection measures.

26. Comment: NOAA received questions on who enforces sanctuary regulations, fines associated with violations of sanctuary regulations (including how the fines are calculated), examples of fines, and what happens to the funds NOAA receives from violations.

Response: NOAA views law enforcement as just one aspect of a sanctuary’s comprehensive resource management strategy. Developing a plan to facilitate voluntary compliance with sanctuary regulations is another element of proactive enforcement included in the proposed sanctuary’s draft management plan.

NOAA’s Office of Law Enforcement enforces all of NOAA’s natural and cultural resource laws, while also working with the U.S. Coast Guard (USCG) to enforce sanctuary regulations in the Great Lakes.

Violations of federal sanctuary regulations are violations of the NMSA, a federal statute. Civil violations are governed under NOAA’s civil procedure regulations found at 15 CFR part 904. NOAA’s Office of General Counsel assesses civil penalties in accordance with the nature, gravity, and circumstances of a violation. NOAA assesses civil penalties through the issuance of a notice of violation and assessment of civil penalty (NOVA). NOAA General Counsel publishes its penalty policy online to provide notice to the public about how it calculates penalties in any given case and to provide information about a typical penalty for a given type of violation. That information can be found at <https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf>.

Persons charged with civil violations are entitled to an opportunity for an administrative hearing before an administrative law judge (ALJ), and may seek reconsideration of the ALJ’s ruling and appeal of the ALJ decision to the NOAA administrator. Persons may seek judicial review of the administrator’s

decision before a federal district court. Criminal violations are referred to the U.S. Department of Justice for prosecution.

NOAA's Office of General Counsel does not produce an annual report detailing violations and fines levied. However, administrative decisions regarding NOAA violations that are decided by an ALJ and/or decided on appeal to the NOAA administrator are published at <http://www.gc.noaa.gov/enforce-office6.html>.

Under the NMSA (16 U.S.C. 1437(f)), amounts received from civil penalties must be used by NOAA in the following priority order: First, to manage and improve the sanctuary with respect to which the violation occurred that resulted in the penalty (e.g., used to restore any damage to a vessel caused by violating the anchoring restrictions); second, to pay a reward to a person who furnishes information leading to the civil penalty; or, third, to manage and improve any other national marine sanctuary.

27. Comment: NOAA received a comment asking about the definition of "interfering with" federal investigations and how NOAA would determine if an action constitutes interference.

Response: The NOAA Office of Law Enforcement, along with state officers where authorized under cooperative enforcement agreements, monitor compliance and investigates potential violations of the NMSA and its regulations. The NMSA specifies the authorities of those officers and agents, which includes general authorities to investigate violations of the statute, regulations, or a permit issued pursuant to the NMSA; seize evidence of violations or sanctuary resources taken in violation of the NMSA; and exercise other lawful authorities as sworn federal law enforcement authorities. Sanctuary regulations would prohibit interfering with these investigations.

Violations of the NMSA are primarily handled as civil administrative matters, pursuant to the Administrative Procedure Act. NOAA assesses civil penalties through the issuance of a NOVA. NOAA's Office of General Counsel assesses civil penalties in accordance with the nature, gravity, and circumstances of a violation. NOAA General Counsel publishes its penalty policy on its website to provide notice to the public as to how it calculates penalties in any given case and to provide information as to a typical penalty for a given type of violation. That information can be found at <https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf>.

28. Comment: Several comments indicated that because NOAA has the authority to regulate a wide variety of resources through the National Marine Sanctuaries Act, there is concern that in the future NOAA will expand its authority beyond protecting maritime heritage resources.

Response: Refer to comment 21 above.

29. Comment: NOAA received a comment asking what happens if a modern vessel sinks or wrecks in the sanctuary boundaries. Does the owner of the sunken property get to salvage his/her vessel or does this become a sanctuary resource?

Response: Current salvage rules and regulations would continue to apply within WSCNMS. A recently sunken vessel would not be included in the definition of "sanctuary resources" which means "all prehistoric, historic, archaeological, and cultural sites and artifacts within the sanctuary boundary, including all shipwreck sites." Additionally, "shipwreck site" means "any historic sunken watercraft, its components, cargo, contents, and associated debris field."

NOAA revised the definition in § 922.211(a)(2) for "shipwreck site" by adding "historic" to clarify its focus on historic shipwrecks (i.e., not all shipwrecks, but those that demonstrate an important role in or relationship with maritime history). This addition specifically responded to concerns about defining recent or contemporary sunken craft or objects as sanctuary resources. For the purposes of the final rule, "historic" takes its definition from "historical resource" located in § 922.3 of the generally applicable sanctuaries regulations.

30. Comment: Several commenters indicated that shipwrecks are not mentioned in the 1972 Marine Protection, Research, and Sanctuaries Act, so NOAA does not have the authority to designate a "shipwreck" sanctuary.

Response: The NMSA expressly provides that "the Secretary may designate any discrete area of the marine environment as a national marine sanctuary . . . (if) the area is of special national significance due to its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities" (16 U.S.C. 1431(a)(2)).

31. Comment: One commenter requested to know what NOAA means by the term "lakebottom associated with underwater cultural resources."

Response: NOAA did not propose any regulation containing the language cited by the commenter.

32. Comment: A few commenters suggested that NOAA should not take away the public's right to use metal detectors.

Response: NOAA is not proposing to prohibit metal detecting in the sanctuary. In addition, the area between the OHWM and the LWD (where metal detecting on the beach would likely take place) is not included in the sanctuary boundary.

33. Comment: One commenter raised concerns that NOAA would prohibit exploration for and development of minerals or other natural resources in the proposed sanctuary.

Response: NOAA is not proposing to prohibit natural resources exploration and development in the sanctuary. The regulations are narrowly defined to protect underwater cultural resources. There are no restrictions to natural resources exploration and development as long as these activities do not injure underwater cultural resources or otherwise conflict with regulations specific to WSCNMS.

34. Comment: One commenter asked if the proposed sanctuary could ever be abandoned or decommissioned.

Response: Although the NMSA does not contemplate de-designation of a national marine sanctuary, NOAA engages closely with the state and public to review and revise its sanctuary management plan every five years. The management plan prioritizes resource management goals and describes actions by NOAA and its partners to accomplish them. The plan encompasses all non-regulatory programming—research, resource protection, education, outreach, volunteers, operations—that protects the cultural resources of the sanctuary while supporting responsible uses and enjoyment. A full management review process may take two to three years and involve several opportunities for public participation through scoping and review and comment on a draft and final plan. The Sanctuary Advisory Council would have a key role in the management plan review process.

35. Comment: A few commenters requested that sanctuary regulations protect natural and biological resources in the Great Lakes ecosystem. Comments suggested regulations to prevent wastewater discharges, discharge of mercury and other toxic materials, risks from aging infrastructure, spread of invasive species, and other risks to wildlife and habitat.

Response: This is beyond the scope of NOAA's stated need for action, which focused on the protection and interpretation of nationally significant underwater cultural resources.

36. *Comment:* NOAA received comments asking whether the sanctuary would create any additional restrictions or regulatory requirements related to dredging, pier structure maintenance, or extension of pier structures, and if local entities would require NOAA permission to install a new water intake line into Lake Michigan or to continue grooming beaches, including areas below the OHWM. A related comment requested that all necessary maintenance activities regarding Lake Michigan water intakes should be allowed to proceed uninhibited within the sanctuary boundaries.

Response: WSCNMS regulations are narrowly focused on protecting underwater cultural resources. If an activity does not injure these sanctuary resources, it is not restricted or prohibited, and does not require a sanctuary permit. Dredging, pier construction and maintenance, and other construction activities are not expressly prohibited activities under the proposed regulations. However, should these types of activities violate the sanctuary prohibition on “moving, removing, recovering, altering, destroying, possessing, or otherwise injuring” a resource, they would be prohibited.

Activities mentioned in this comment are already regulated by state and other federal entities. Section 106 of the National Historic Preservation Act requires the State of Wisconsin to identify known and potential historic resources that may be impacted by dredging and other activities that affect the lakebed. NOAA, through its co-management arrangement with the state and through the consultation requirement for federal agencies under the NMSA Section 304(d), would coordinate its response, including potential permitting and Section 106 consultation, when historic/cultural resources may be impacted.

As for grooming beaches, NOAA proposes to adopt a boundary of the LWD, which will effectively exclude beaches from the boundaries of the sanctuary.

37. *Comment:* NOAA received a comment requesting that it refrain from depicting the national marine sanctuary on Federal Aviation Administration’s aeronautical charts to avoid confusion and misinterpretation of the area by general aviation pilots.

Response: NOAA is not proposing including overflight restrictions as part of the sanctuary prohibitions, and not proposing that the sanctuary be depicted on aeronautical charts.

38. *Comment:* NOAA received one comment that the proposed sanctuary

overlaps the boundaries of a restricted area (R-6903) used by the Volk Field Combat Readiness Training Center. In the unlikely event that the Wisconsin Air National Guard or users of R-6903 would need to conduct some sort of unconventional and/or kinetic operation in R-6903, close coordination with NOAA and the Federal Aviation Administration would be a necessity.

Response: NOAA agrees and will coordinate with the Air National Guard to ensure compatible use of the sanctuary.

39. *Comment:* NOAA received a comment asking if the sanctuary would impact municipal lakebed grants.

Response: No. The sanctuary proposal recognizes the state’s sovereignty over its waters and submerged lands, including any state lakebed leases.

Public Review Process, State Legislature Involvement, State Role/Authority

40. *Comment:* NOAA received a comment stating that it did not provide enough time for the public to comment and did not provide the public with enough information about the proposed sanctuary. NOAA also received one comment asking NOAA to hold a public session to help the public understand the sanctuary proposal.

Response: NOAA held an 81-day public comment period, which exceeds the comment period generally recommended under Executive Order 12866 and the 45-day required comment period for a DEIS under NEPA, to allow the public time to review the proposal and provide comments. NOAA also held four public meetings to discuss the proposal and gather public comments. These meetings were held in four cities along the coastal area to ensure public access. NOAA also published a **Federal Register** notice and a website (<http://sanctuaries.noaa.gov/wisconsin/>) with the proposed sanctuary information for the public, meeting NMSA notification requirements. Additionally, NOAA issued a press release and received coverage in the local, regional, and national press. NOAA staff presented at city council meetings in Two Rivers, Sheboygan, Port Washington, and Mequon, and at county council meetings in Sheboygan and Ozaukee counties. A timeline of the sanctuary designation process can be found in the FAQ section at <https://sanctuaries.noaa.gov/wisconsin/>.

41. *Comment:* NOAA received several comments asking how the state government is involved in the sanctuary designation and how a sanctuary designation can be done without the state legislature’s involvement.

Response: Throughout the sanctuary designation process, NOAA worked closely with the Wisconsin Historical Society, Wisconsin Department of Natural Resources, Wisconsin Coastal Management Program, Wisconsin Department of Transportation, Wisconsin Department of Tourism, Wisconsin Public Service Commission, and the Wisconsin Public Lands Commission. Should NOAA and the Wisconsin governor ultimately concur on the designation, both NOAA and the state would co-manage WSCNMS.

Furthermore, in national marine sanctuaries that include state waters, the NMSA provides the governor of the state with the opportunity to certify to the Secretary of Commerce that the designation or any of its terms is unacceptable (*i.e.*, objects), in which case the designation or the unacceptable term shall not take effect.

42. *Comment:* Many commenters suggested that a federal government program or involvement in Wisconsin is an intrusion into sovereign state waters. Designation of the sanctuary will result in the loss of state control of Lake Michigan, and a takeover of both management and regulation of the Wisconsin waters by the federal government.

Response: Wisconsin Shipwreck Coast National Marine Sanctuary will not change the ownership or control of state lands or waters; that is, no loss of state sovereignty will occur as a result of designation of a national marine sanctuary. The state’s jurisdiction and rights will be maintained and NOAA will not intrude upon or change existing state or local authorities. All existing state laws, regulations, and authorities will remain in effect. The state will maintain ownership of the shipwrecks within the sanctuary.

43. *Comment:* NOAA received several comments stating that while the proposal highlights co-management with the State of Wisconsin, the governor only gains power through Section 922.214, Emergency Regulations. NOAA should consider allowing the governor to hold form of a veto, or check and balanced action, or at least part of the leasing or licenses action.

Response: The co-management of the sanctuary provides a number of opportunities for the State of Wisconsin, either through the governor or by state agencies, to participate in the management of the sanctuary. For sanctuaries in state waters, pursuant to the National Marine Sanctuaries Act 304(b)(1), whenever a sanctuary is proposed to be designated, or the terms of designation changed, the governor

has the opportunity to certify to the Secretary of Commerce that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect.

The memorandum of agreement between NOAA and the State of Wisconsin will describe the details of co-management. The governor and state agencies will have considerable latitude in shaping the future of the state's co-management framework with NOAA, including the type of regulations that would apply to WSCNMS.

44. Comment: NOAA received a comment asking if NOAA does not ultimately establish a sanctuary, where the factors affecting this decision will be published. Will these factors be made a part of public record for future awareness and decision-making?

Response: Should NOAA decide not to designate a sanctuary, it would publish a notice in the **Federal Register** to withdraw the proposed rule. The **Federal Register** notice would describe the reasons for NOAA's decision.

45. Comment: NOAA received a comment asking if it would ever have any accountability to existing state government lake regulations or laws, specifically those of the Wisconsin Department of Natural Resources.

Response: The NMSA gives NOAA the authority to manage national marine sanctuaries in a manner that complements existing regulatory authority (16 U.S.C. 1431(b)(2)). In a co-management framework with a respective state government, NOAA and the state would work collaboratively on the proposed sanctuary. A memorandum of agreement between NOAA and the state would ensure that state and federal authorities are harmonized and coordinated. In addition, during the designation process and any future changes to the terms of designation, the governor has the authority to certify as unacceptable all or parts of the designation, which prevents the unacceptable terms from taking effect in state waters (16 U.S.C. 1434(b)(1)).

Diver Access, Recreational Anchoring, Mooring Buoys, and Resource Management

46. Comment: NOAA received one comment about the importance of NOAA defining what it means to not be able to anchor in areas "associated with a shipwreck."

Response: The definition of "shipwreck site" in the WSCNMS regulations at 15 CFR 922.211(a)(2) means "any historic sunken watercraft, its components, cargo, contents, and

associated debris field." Debris fields associated with shipwrecks sites can have significant archaeological value, including the existence of fragile ship structure and artifacts. By "associated debris field," NOAA means all cultural material adjacent to a shipwreck site, but not necessarily contiguous with it. Each shipwreck site is unique, and the resultant debris field forms through a variety of site-specific factors including depth, circumstances of sinking, and other factors. As more data are gathered (e.g., through sonar surveys) on individual shipwrecks sites and associated debris fields, NOAA will publish information that helps visitors anchor outside of areas that could be damaged.

47. Comment: NOAA received several comments indicating that divers are a small percentage of the population, and questioned why a sanctuary should be established to serve such a small group.

Response: As demonstrated in many sanctuaries, much of the public often benefits from the sanctuary through diving, kayaking, and snorkeling, as well as through museums, interpretive displays, websites, formal and informal educational programs, enhanced tourism opportunities, multidisciplinary research opportunities, and other unique sanctuary-related partnerships and activities. The sanctuary's final management plan outlines priorities in these areas for the first five years of the sanctuary's operation. These priorities substantially expand the public benefit of the sanctuary beyond that of divers.

48. Comment: NOAA received one comment that if NOAA does not install mooring buoys on all shipwrecks, the prohibition on anchoring will be detrimental to public access.

Response: NOAA promotes public access to shipwrecks, and believes this is a fundamental way to increase their cultural and recreational value. Permanent moorings are an important resource protection measure that eliminates the need to grapple or anchor into the often fragile sites. This priority is described in the final management plan as Strategy RP-3.

NOAA recognizes that it will take time to install moorings at all shipwrecks sites, and that some sites (particularly deep sites) create challenges for ideal mooring systems. Consequently, NOAA is proposing a two-year delay in the implementation of the no-anchoring prohibition. During this period, the sanctuary will work with the state, Sanctuary Advisory Council, a diver working group, and other relevant stakeholders to develop a moorings implementation plan and best practices document. During the two-

year delay, NOAA will also consider guidelines for allowing divers to tie moorings directly on certain shipwrecks sites via a no-fee sanctuary permit.

49. Comment: NOAA received one comment that anchoring outside the shipwreck with the "shot line" method is not practical and it increases the dangers of diving.

Response: NOAA recognizes that anchoring outside the wreck and using a shot line (a weighted line with surface buoy dropped onto a shipwreck site to mark its location and provide reference for divers) may be a new practice for some users and not possible for all users. NOAA recognizes, too, that it will take time to install sanctuary-maintained moorings (see previous comment). Consequently, NOAA is considering allowing users to apply for a sanctuary permit to tie a suitable long-term mooring line directly into some shipwreck sites, which is a common and more familiar practice. Among other resource protection benefits, a no-fee permit would allow the sanctuary to work directly with users to determine which shipwrecks are most popular, and thereby prioritize future sanctuary-maintained permanent moorings located adjacent to the shipwreck.

50. Comment: NOAA received a few comments about who would be in charge of placing mooring buoys, how early in the season buoys would be placed, if there would be online resources outlining the status of shipwrecks as marked or unmarked, and how members of a local community could be involved in buoy management.

Response: As indicated in the final management plan at Strategy RP-3 (Activity 3.1), NOAA will develop a five-year plan to develop and begin implementation of a plan for design, implementation, and maintenance of mooring buoy system, including priorities for which shipwrecks to buoy. Activity 3.1 includes an item to "work with local dive charters to monitor moorings throughout the dive season." Overall, while NOAA will have the lead responsibility for the mooring buoys in the sanctuary, it will work in close cooperation with the state and with local partners. With regard to online status, in time WSCNMS will have a GIS-based map similar to that of Thunder Bay National Marine Sanctuary (https://thunderbay.noaa.gov/shipwrecks/mooring_program.html). The online tool shows the seasonal status of mooring buoys at shipwreck sites. As indicated in Comment 47, the sanctuary will convene a working group to explore how best to implement the mooring buoy plan, which includes the potential use of volunteers.

51. *Comment:* NOAA received several comments about the importance of NOAA providing additional protection to shipwrecks.

Response: Protecting shipwrecks and other underwater cultural resources will be a priority of Wisconsin Shipwreck Coast National Marine Sanctuary. As described in the final management plan, there are several ways to accomplish the resource protection goal, including enhanced regulations, installing mooring buoys, engaging with divers about best practices for diving, providing general education regarding the significance of these resources, and enforcing federal and state regulations to address protecting shipwrecks.

52. *Comment:* NOAA received a few comments that people should not be restricted from searching for shipwrecks.

Response: NOAA is not restricting the ability of the public to search for shipwrecks, or proposing requiring a sanctuary permit for this activity.

53. *Comment:* NOAA received several comments stating that there should not be any restrictions on access to shipwrecks.

Response: NOAA is not proposing regulation of, or restrictions on, recreational diving activities within the sanctuary, as long as the activities do not injure sanctuary resources or result in anchoring on or grappling onto a shipwreck site. NOAA is not proposing requiring a permit to dive in the sanctuary.

54. *Comment:* NOAA received a few comments asking how locations of newly discovered shipwrecks would be made public.

Response: While it is the intention of the sanctuary to release coordinates of known shipwrecks, NOAA may decide to withhold the release of coordinates of a newly discovered, historically significant shipwreck for a period of time so that NOAA and the state can document the site and its artifacts. Under this scenario, NOAA will use agency and partner resources (and possibly volunteers) to document the site. A newly discovered site may be particularly fragile or possess a large number of artifacts, and specific management or monitoring measures would need to be put into place before site coordinates are published on the sanctuary's website.

55. *Comment:* NOAA received several comments asking how the sanctuary would actually protect shipwrecks, including whether there is sufficient enforcement to protect shipwrecks.

Response: The goal of WSCNMS is to comprehensively manage the underwater cultural resources of Lake

Michigan. Enforcement is one aspect of the resource protection strategy as indicated in Strategy RP-5 of the final management plan, which states "Develop a plan to increase awareness of sanctuary regulations and state law and to enhance law enforcement efforts." Since NOAA does not currently have enforcement officers in the Great Lakes, NOAA works with the U.S. Coast Guard to enforce sanctuary regulations. NOAA would also work with state partners to explore options for assistance in the enforcement of sanctuary regulations. Developing a plan to facilitate voluntary compliance with sanctuary regulations is another element of proactive enforcement included in the sanctuary's management plan.

56. *Comment:* NOAA received one comment asking if future maritime archaeological research in the sanctuary would be restricted.

Response: NOAA encourages research and documentation of underwater cultural resources, and in many cases can facilitate and act as a partner in these activities. NOAA is not restricting archaeological research, including Phase 1 (searching for shipwrecks) and Phase 2 (documenting shipwrecks) archaeology. However, given the sanctuary's proposed prohibition on injuring/damaging shipwreck sites, NOAA encourages researchers to obtain a Phase I archaeology permit from the State of Wisconsin, and consult with the sanctuary superintendent ahead of conducting research. For archaeological projects that will alter a site, or seek to remove artifacts, both a state and sanctuary permit would be required. Through a programmatic agreement, NOAA and the state will seek to simplify this process.

57. *Comment:* NOAA received several comments stating that the threat to shipwrecks will increase with increased tourism. The commenters asked who would monitor the shipwrecks, how the shipwrecks would be protected, and who would pay for these costs.

Response: NOAA believes that increasing public access and tourism to shipwrecks sites is an important way to foster awareness, appreciation, and ultimately protection of these special places. While NOAA encourages public access to shipwrecks, we are aware that increased use can result in additional pressure to these resources. The final management plan takes a broad approach to ensuring that the shipwrecks are protected to the greatest extent possible through the resource protection, education, and research. Monitoring is captured Strategy RP-2 of the final management plan.

Other elements of the final management plan that address increased use of sanctuary resources are the installation of additional mooring buoys, and public outreach programs on the value and fragility of shipwrecks. Appendix 1 of the final management plan addresses potential sanctuary operating budgets and partner contributions.

58. *Comment:* NOAA received many comments stating that the State of Wisconsin already protects shipwrecks, and that this effort should not be duplicated by the federal government.

Response: NOAA and the state will be co-managers of the sanctuary and work together to ensure that their efforts are complementary and not duplicative. Importantly, this co-management arrangement affords opportunities that neither NOAA nor the state could realize on its own. As detailed in the FEIS (see Chapter 2), designation as a national marine sanctuary would provide increased resources to carry out the research, education, and law enforcement activities necessary to more comprehensively manage, protect, and increase the public benefit of these resources. For example, the sanctuary would bring national attention, interest, resources, and partners to the area. The sanctuary nomination put forth in 2014 by the State of Wisconsin on behalf of several lakeshore communities states the reasons the state wanted to partner with NOAA to protect the shipwrecks. The sanctuary nomination can be found at https://nominate.noaa.gov/media/documents/nomination_lake_michigan_wisconsin.pdf. An example of the types of research programs and activities that a national marine sanctuary could provide in Wisconsin can be found in Thunder Bay National Marine Sanctuary's 2013 condition report (<https://sanctuaries.noaa.gov/science/condition/tbnms/>).

59. *Comment:* NOAA received a few comments suggesting that shipwrecks are not threatened to the degree that necessitates NOAA involvement, and that shipwrecks are already preserved by the fresh water of the Great Lakes.

Response: While it is true that the cold, fresh water of the Great Lakes preserves shipwrecks better than a saltwater environment, this alone does not negate negative impacts to Wisconsin's shipwrecks. These threats, as described in the FEIS (see Chapter 2), include both natural processes and human activities. Human threats to underwater cultural resources include looting and altering shipwreck sites and damaging shipwreck sites by anchoring. The proposed final rule for WSCNMS includes a prohibition on the use of

grappling hooks and anchors at shipwreck sites. This prohibition will more directly address damage to shipwrecks than the state is able to address. Additionally, as steward of these nationally significant cultural resources, NOAA believes that creating public awareness and engagement in the sanctuary through research, education, and community engagement is an essential means of resource protection and increasing public benefit.

60. Comment: NOAA received a comment asking whether NOAA could charge new fees (for a permit or otherwise) on citizens for lake activities that are currently free.

Response: NOAA is not proposing to charge any fees on any activity within the proposed Wisconsin sanctuary.

Funding

61. Comment: NOAA received several comments related to the cost of designating a national marine sanctuary. The comments included a concern about higher taxes as a result of the designation; a concern that the federal government does not have sufficient funds to manage the area; a statement that federal funds would be better used to protect natural resources; a concern that NOAA has not provided a cost or budget analysis; a comment about financial accountability; and two questions asking about the sources of funding for the sanctuary.

Response: The National Marine Sanctuaries Act (16 U.S.C. Chapter 32) directs NOAA to protect these nationally significant ecological and historical resources. As a federal agency, appropriations for NOAA programs are enacted by Congress, and signed into law by the president. An annual allocation for the management of all the national marine sanctuaries is included in each annual appropriation. NOAA makes funding decisions for each sanctuary based on the funding level, program priorities, and site needs. As a result, funding for a given site can vary with fluctuations in annual appropriations, which may impact the level of activities completed in the management plan each year. As part of the final management plan for this sanctuary, NOAA included a summary of the sanctuary activities that are possible at several funding levels. NOAA also anticipates that a varying level of in-kind contributions from co-managers and partners, as well as grants and other outside funding, will contribute to the overall sanctuary goals. Additionally, ONMS has received roughly \$2 million in donations and in-kind contributions and 120,000

volunteer hours per year at its sites nationwide.

62. Comment: One commenter asked what would happen if Congress chose to not appropriate sufficient funds for the proposed sanctuary's operations in any given fiscal year?

Response: The NMSA (16 U.S.C. 1431 *et seq.*) directs NOAA to protect these nationally significant areas and their ecological and historical resources. A program allocation in NOAA's annual appropriations typically provides funding for the management of all of the national marine sanctuaries. While NOAA makes funding decisions for each sanctuary based on the ONMS funding level, program priorities, and site needs, it executes the ONMS budget to ensure basic operating costs at all national marine sanctuaries are met.

Economic Impact

63. Comment: NOAA received several comments that the economic impact of the sanctuary would be limited because not many people dive, and local museums already do the outreach that NOAA is proposing. Similarly, NOAA received several comments stating that the socioeconomic impact study on Thunder Bay National Marine Sanctuary by the University of Michigan does not demonstrate positive impacts. The commenters asked why NOAA expects positive economic impacts in Wisconsin.

Response: As demonstrated at other national marine sanctuaries, NOAA believes that broader public outreach and education are also important resource protection activities, because they increase awareness, appreciation, and value of our nation's maritime heritage and nationally significant historic sites. That sanctuary activities aimed at the non-diving public could benefit the region was recognized in the 2014 sanctuary nomination, which indicated that a chief goal for the state and communities was to leverage the sanctuary to "Build and expand on state and local tourism initiatives and enhance opportunities for job creation." Letters of support from many area museums accompanied the sanctuary nomination (https://nominate.noaa.gov/media/documents/nomination_lake_michigan_wisconsin.pdf). Consequently, education and outreach activities constitute a significant part of the sanctuary's final management plan.

Initiatives at NOAA's Thunder Bay National Marine Sanctuary in Alpena, Michigan, provide an example of a wide range of education, outreach, interpretation, tourism, and partnerships aimed at the benefitting the general public. NOAA disagrees with

the comment on the 2013 economic study for Thunder Bay National Marine Sanctuary.

Draft Management Plan, Sanctuary Name, Operations

64. Comment: NOAA received one comment that NOAA should consider modifying the goal statement in the education and outreach plan to include education and dissemination of the maritime cultural landscape perspective as well as the shipwrecks to be protected by the proposed sanctuary, and that all of the strategies should address the maritime cultural landscape.

Response: NOAA believes the maritime cultural landscape is an essential component of interpreting, understanding, and appreciating historic shipwrecks. The final management plan contains a strategy and two activities aimed at characterizing the sanctuary's maritime cultural landscape. NOAA added a reference to maritime cultural landscapes in the "Objectives" section of the education management plan. As described by the National Park Service, a cultural landscape is a geographic area including cultural and natural resources, coastal environments, human communities, and related scenery that is associated with historic events, activities, or persons, or exhibits other cultural or aesthetic value.

65. Comment: NOAA received one comment stating that NOAA should fund the sanctuary at the \$700,000 level (as indicated in a summary of potential funding scenarios in Appendix 1 of the final management plan), as this would include enough resources to hire an education coordinator and implement an education program.

Response: NOAA agrees it is important to implement elements of the Education and Outreach Action Plan. NOAA makes funding decisions based on annual appropriations to the program, which drive decisions for each sanctuary based on the funding level, program priorities, and site needs. As a result, site level funding can vary from year to year, which may impact the level of activities completed in the management plan each year.

66. Comment: NOAA received one comment stating that NOAA needs to have a presence in each community working on this designation process. Rather than having a new visitor center created post-designation, NOAA should capitalize on the existing informal learning institutions and allied organizations already working to educate and inspire public appreciation

of—and involvement in—the Great Lakes.

Response: One of the strengths of the WSCNMS designation is the many opportunities to partner with, leverage, and complement assets in each of the sanctuary communities. Per final management plan Strategy SO–1, the sanctuary will “Develop a ‘NOAA presence’ within sanctuary communities that supports the sanctuary’s mission and infrastructure needs, and that recognizes, leverages, and complements individual assets in sanctuary communities.” NOAA will develop the strategic plan supporting Strategy SO–1 after designation in cooperation with local communities, other appropriate partners, and the Sanctuary Advisory Council to ensure that NOAA is capitalizing on existing efforts and institutions in the region.

67. *Comment:* NOAA received one comment stating that the proposal should provide more specificity about educational programming and technology for K–12.

Response: NOAA’s final management plan is the initial management plan for this site, and as such describes general objectives for education and outreach activities. As sanctuary staff are hired and as NOAA engages with its education partners after designation, more specificity will emerge for the sanctuary’s education and outreach activities.

68. *Comment:* NOAA received one comment suggesting that the sanctuary should be named “Wisconsin Marine Protection Area” as the name is shorter and easier to say, it would result in less clutter on a map, and people could identify the name easier.

Response: Community and partner discussions during a sanctuary branding workshop sponsored by the Wisconsin Department of Tourism produced the name Wisconsin Shipwreck Coast National Marine Sanctuary, which NOAA proposes as the sanctuary’s official name. The new name reflects the sanctuary’s cultural heritage focus, is responsive to community input, and is conducive to marketing and branding efforts.

69. *Comment:* NOAA received one comment stating that Sheboygan would be the ideal location for a sanctuary office because it is centrally located, has the most developed riverfront, has Blue Harbor Resort and charter fishing fleets, and is the largest of the cities in the proposed sanctuary. NOAA also received other comments identifying specific communities in a similar way, such as Port Washington.

Response: One of the strengths of the WSCNMS designation is the many

opportunities to partner with, leverage, and complement assets in each of the sanctuary communities. Per final management plan Strategy SO–1, the sanctuary will “Develop a ‘NOAA presence’ within sanctuary communities that supports the sanctuary’s mission and infrastructure needs, and that recognizes, leverages, and complements individual assets in sanctuary communities.” NOAA has not made any decisions about sanctuary office locations.

70. *Comment:* NOAA received one comment from the U.S. Environmental Protection Agency stating that NOAA should address green building practices and climate change and greenhouse gases in the FEIS. EPA recommended that the FEIS explain the geographic and policy definitions of the term “coastline” as it applies to this proposed designation.

Response: The FEIS does not include a plan for facility construction or operation as part of the proposed action. However, should NOAA propose any of these activities in the future, it will consider environmentally responsible practices suggested in EPA’s recommendations. In using the term “coastline,” NOAA does not define it as a legal term; instead it is used generally to refer to the land-water interface. The shore side boundary is defined as the LWD.

V. Classification

1. National Marine Sanctuaries Act

NOAA has determined that the designation of the Wisconsin Shipwreck Coast National Marine Sanctuary will not have a negative impact on the National Marine Sanctuary System and that sufficient resources exist to effectively implement sanctuary management plans. The final finding for NMSA section 304(f) is published on the ONMS website for Wisconsin Shipwreck Coast designation at <http://sanctuaries.noaa.gov/wisconsin/>.

2. National Environmental Policy Act

NOAA has prepared a final environmental impact statement to evaluate the environmental effects of the rulemaking and alternatives as required by NEPA (42 U.S.C. 4321 *et seq.*) and the NMSA. The Notice of Availability is available at 85 FR 34625. NOAA has also prepared a Record of Decision (ROD). Copies of the ROD and the FEIS are available at the address and website listed in the **ADDRESSES** section of this rule.

3. Coastal Zone Management Act

Section 307 of the Coastal Zone Management Act (CZMA; 16 U.S.C.

1456) requires Federal agencies to consult with a state’s coastal program on potential Federal activities that have reasonably foreseeable effects on any coastal use or resource. Such activities must be consistent with approved state coastal policies to the maximum extent possible. Because WSCNMS encompasses a portion of the Wisconsin state waters, NOAA submitted a copy of the proposed rule and supporting documents to the State of Wisconsin Coastal Zone Management Program for evaluation of Federal consistency under the CZMA. NOAA has presumed the state’s concurrence pursuant to 15 CFR 930.41(a), whereby a federal agency may presume concurrence if a response is not received within 60 days.

4. Executive Order 12866: Regulatory Impact

This rule has been determined to be significant for purposes of Executive Order 12866.

5. Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132. These sanctuary regulations are intended only to supplement and complement existing state and local laws under the NMSA.

6. National Historic Preservation Act

The National Historic Preservation Act (NHPA; 16 U.S.C. 470 *et seq.*) is intended to preserve historical and archaeological sites in the United States of America. The act created the National Register of Historic Places, the list of National Historic Landmarks, and State Historic Preservation Offices. Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by ACHP (36 CFR part 800 *et seq.*). In fulfilling its responsibilities under the NHPA, NOAA identified interested parties in addition to the State Historic Preservation Officer (SHPO), and has completed the identification of historic properties and the assessment of the effects of the undertaking on such properties in scheduled consultations with those identified parties and the SHPO. NOAA received a response from the SHPO, dated May 5, 2017, agreeing that the proposed undertaking will have

no adverse effect to one or more historic properties located within the project Area of Potential Effect.

7. Regulatory Flexibility Act

This analysis seeks to fulfill the requirements of Executive Order 12866 and the Regulatory Flexibility Act. Small businesses that could potentially be impacted from the proposed prohibition on damaging a sanctuary resource include commercial fishing, recreational fishing and diving, scenic and sightseeing industries. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) at the proposed rule stage that this rule would not have a significant impact on a substantial number of small entities. Although NOAA has made a few changes to the regulations from the proposed rule to the final rule, none of the changes alter the initial determination that this rule will not have an impact on small businesses included in the original analysis. NOAA also did not receive any comments on the certification or conclusions. Therefore, the determination that this rule will not have a significant economic impact on a substantial number of small entities remains unchanged. As a result, a final regulatory flexibility analysis is not required and has not been prepared.

8. Paperwork Reduction Act

ONMS has a valid Office of Management and Budget (OMB) control number (0648–0141) for the collection of public information related to the processing of ONMS permits across the National Marine Sanctuary System. NOAA's designation of WSCNMS would likely result in an increase in the number of requests for ONMS general permits, special use permits, certifications, and authorizations because this action proposes to add general permits and special use permits, certifications, appeals, and the authority to authorize other valid federal, state, or local leases, permits, licenses, approvals, or other authorizations. An increase in the number of ONMS permit requests would require a change to the reporting burden certified for OMB control number 0648–0141. An update to this control number for the processing of ONMS permits will be requested as part of the renewal package for 0648–0141.

Nationwide, NOAA issues approximately 500 national marine sanctuary permits each year. WSCNMS is expected to issue an additional 4 to 5 permit requests per year. The public

reporting burden for national marine sanctuaries permits is estimated to average 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Comments on this determination were solicited in the proposed rule but no public comments were received. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

9. Sunken Military Craft Act

The Sunken Military Craft Act of 2004 (SMCA; Pub. L. 108–375, Title XIV, sections 1401 to 1408; 10 U.S.C. 113 note) preserves and protects from unauthorized disturbance all sunken military craft that are owned by the United States government, as well as foreign sunken military craft that lie within United States waters, as defined in the SMCA, and other vessels owned or operated by a government on military non-commercial service when it sank. Thousands of U.S. sunken military craft lie in waters around the world, many accessible to looters, treasure hunters, and others who may cause damage to them. These craft, and their associated contents, represent a collection of non-renewable and significant historical resources that often serve as war graves, carry unexploded ordnance, and contain oil and other hazardous materials. By protecting sunken military craft, the SMCA helps reduce the potential for irreversible harm to these nationally important historical and cultural resources. Regulations regarding permits for activities directed at sunken military craft under the jurisdiction of the Department of Navy can be found at 32 CFR part 767.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Historic preservation, Intergovernmental relations, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife.

Nicole LeBoeuf,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons discussed in the preamble, the National Oceanic and Atmospheric

Administration amends 15 CFR part 922 as follows:

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

■ 1. The authority citation for 15 CFR part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

■ 2. Revise § 922.1 to read as follows:

§ 922.1 Applicability of regulations.

Unless noted otherwise, the regulations in subparts A, D, and E of this part apply to all National Marine Sanctuaries and related site-specific regulations set forth in this part. Subparts B and C of this part apply to the sanctuary nomination process and to the designation of future Sanctuaries.

■ 3. Amend § 922.3 by revising the definition of “Sanctuary resource” to read as follows:

§ 922.3 Definitions.

* * * * *

Sanctuary resource means any living or non-living resource of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary, including, but not limited to, the substratum of the area of the Sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources. For Thunder Bay National Marine Sanctuary and Underwater Preserve, Sanctuary resource means an underwater cultural resource as defined at § 922.191. For Mallows Bay-Potomac River National Marine Sanctuary, Sanctuary resource is defined at § 922.201(a). For Wisconsin Shipwreck Coast National Marine Sanctuary, sanctuary resource is defined at § 922.211.

* * * * *

■ 4. Revise § 922.44 to read as follows:

§ 922.44 Emergency regulations.

(a) Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all such activities are subject to immediate temporary regulation, including prohibition.

(b) The provisions of this section do not apply to the following national

marine sanctuaries with site-specific regulations that establish procedures for issuing emergency regulations:

(1) Cordell Bank National Marine Sanctuary, § 922.112(e).

(2) Florida Keys National Marine Sanctuary, § 922.165.

(3) Hawaiian Islands Humpback Whale National Marine Sanctuary, § 922.185.

(4) Thunder Bay National Marine Sanctuary, § 922.196.

(5) Malloes Bay-Potomac River National Marine Sanctuary, § 922.204.

(6) Wisconsin Shipwreck Coast National Marine Sanctuary, § 922.214.

■ 5. Amend § 922.47 by revising paragraph (b) to read as follows:

§ 922.47 Pre-existing authorizations or rights and certifications of pre-existing authorizations or rights.

* * * * *

(b) The prohibitions listed in subparts F through P and R through T of this part do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation, or in the case of Florida Keys National Marine Sanctuary the effective date of the regulations in subpart P, and issued by any Federal, State or local authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, or in the case of Florida Keys National Marine Sanctuary the effective date of the regulations in subpart P, and with any terms and conditions on the exercise of such authorization or right imposed by the Director as a condition of certification as the Director deems necessary to achieve the purposes for which the Sanctuary was designated.

■ 6. Revise § 922.48 to read as follows:

§ 922.48 National Marine Sanctuary permits—application procedures and issuance criteria.

(a) A person may conduct an activity prohibited by subparts F through O and S and T of this part, if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under this section and subparts F through O and S and T, as appropriate. For Florida Keys National Marine Sanctuary, a person may conduct an activity prohibited by subpart P of this

part if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under § 922.166. For Thunder Bay National Marine Sanctuary and Underwater Preserve, a person may conduct an activity prohibited by subpart R of this part in accordance with the scope, purpose, terms and conditions of a permit issued under § 922.195.

(b) Applications for permits to conduct activities otherwise prohibited by subparts F through O and S and T of this part, should be addressed to the Director and sent to the address specified in subparts F through O of this part, or subparts R through T of this part, as appropriate. An application must include:

(1) A detailed description of the proposed activity including a timetable for completion;

(2) The equipment, personnel and methodology to be employed;

(3) The qualifications and experience of all personnel;

(4) The potential effects of the activity, if any, on Sanctuary resources and qualities; and

(5) Copies of all other required licenses, permits, approvals or other authorizations.

(c) Upon receipt of an application, the Director may request such additional information from the applicant as he or she deems necessary to act on the application and may seek the views of any persons or entity, within or outside the Federal government, and may hold a public hearing, as deemed appropriate.

(d) The Director, at his or her discretion, may issue a permit, subject to such terms and conditions as he or she deems appropriate, to conduct a prohibited activity, in accordance with the criteria found in subparts F through O of this part, or subparts R through T of this part, as appropriate. The Director shall further impose, at a minimum, the conditions set forth in the relevant subpart.

(e) A permit granted pursuant to this section is nontransferable.

(f) The Director may amend, suspend, or revoke a permit issued pursuant to this section for good cause. The Director may deny a permit application pursuant to this section, in whole or in part, if it is determined that the permittee or applicant has acted in violation of the terms and conditions of a permit or of the regulations set forth in this section or subparts F through O of this part, or subparts R through T of this part or for other good cause. Any such action shall be communicated in writing to the permittee or applicant by certified mail and shall set forth the reason(s) for the

action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in subpart D of 15 CFR part 904.

■ 7. Revise § 922.49 to read as follows:

§ 922.49 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity.

(a) A person may conduct an activity prohibited by subparts L through P of this part, or subparts R through T of this part, if such activity is specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary designation, or in the case of Florida Keys National Marine Sanctuary after the effective date of the regulations in subpart P, provided that:

(1) The applicant notifies the Director, in writing, of the application for such authorization (and of any application for an amendment, renewal, or extension of such authorization) within fifteen (15) days of the date of filing of the application or the effective date of Sanctuary designation, or in the case of Florida Keys National Marine Sanctuary the effective date of the regulations in subpart P, whichever is later;

(2) The applicant complies with the other provisions of this section;

(3) The Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization (or amendment, renewal, or extension); and

(4) The applicant complies with any terms and conditions the Director deems reasonably necessary to protect Sanctuary resources and qualities.

(b) Any potential applicant for an authorization described in paragraph (a) of this section may request the Director to issue a finding as to whether the activity for which an application is intended to be made is prohibited by subparts L through P of this part, or subparts R through T of this part, as appropriate.

(c) Notification of filings of applications should be sent to the Director, Office of National Marine Sanctuaries at the address specified in subparts L through P of this part, or subparts R through T of this part, as appropriate. A copy of the application must accompany the notification.

(d) The Director may request additional information from the applicant as he or she deems reasonably necessary to determine whether to object to issuance of an authorization described in paragraph (a) of this section, or what terms and conditions are reasonably necessary to protect

Sanctuary resources and qualities. The information requested must be received by the Director within 45 days of the postmark date of the request. The Director may seek the views of any persons on the application.

(e) The Director shall notify, in writing, the agency to which application has been made of his or her pending review of the application and possible objection to issuance. Upon completion of review of the application and information received with respect thereto, the Director shall notify both the agency and applicant, in writing, whether he or she has an objection to issuance and what terms and conditions he or she deems reasonably necessary to protect Sanctuary resources and qualities, and reasons therefor.

(f) The Director may amend the terms and conditions deemed reasonably necessary to protect Sanctuary resources and qualities whenever additional information becomes available justifying such an amendment.

(g) Any time limit prescribed in or established under this section may be extended by the Director for good cause.

(h) The applicant may appeal any objection by, or terms or conditions imposed by the Director to the Assistant Administrator or designee in accordance with the provisions of § 922.50.

■ 8. Revise § 922.50 to read as follows:

§ 922.50 Appeals of administrative action.

(a)(1) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a National Marine Sanctuary permit; an applicant for, or a holder of, a Special Use permit issued pursuant to section 310 of the Act; a person requesting certification of an existing lease, permit, license or right of subsistence use or access under § 922.47; or, for those Sanctuaries described in subparts L through P and R through T of this part, an applicant for a lease, permit, license or other authorization issued by any Federal, State, or local authority of competent jurisdiction (hereinafter appellant) may appeal to the Assistant Administrator:

(i) The granting, denial, conditioning, amendment, suspension or revocation by the Director of a National Marine Sanctuary or Special Use permit;

(ii) The conditioning, amendment, suspension or revocation of a certification under § 922.47; or

(iii) For those Sanctuaries described in subparts L through P and subpart R through T, the objection to issuance of or the imposition of terms and conditions on a lease, permit, license or other authorization issued by any

Federal, State, or local authority of competent jurisdiction.

(2) For those National Marine Sanctuaries described in subparts F through K and S and T of this part, any interested person may also appeal the same actions described in paragraphs (a)(1)(i) and (ii) of this section. For appeals arising from actions taken with respect to these National Marine Sanctuaries, the term “appellant” includes any such interested persons.

(b) An appeal under paragraph (a) of this section must be in writing, state the action(s) by the Director appealed and the reason(s) for the appeal, and be received within 30 days of receipt of notice of the action by the Director. Appeals should be addressed to the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA 1305 East-West Highway, 13th Floor, Silver Spring, MD 20910.

(c)(1) The Assistant Administrator may request the appellant to submit such information as the Assistant Administrator deems necessary in order for him or her to decide the appeal. The information requested must be received by the Assistant Administrator within 45 days of the postmark date of the request. The Assistant Administrator may seek the views of any other persons. For Monitor National Marine Sanctuary, if the appellant has requested a hearing, the Assistant Administrator shall grant an informal hearing. For all other National Marine Sanctuaries, the Assistant Administrator may determine whether to hold an informal hearing on the appeal. If the Assistant Administrator determines that an informal hearing should be held, the Assistant Administrator may designate an officer before whom the hearing shall be held.

(2) The hearing officer shall give notice in the **Federal Register** of the time, place and subject matter of the hearing. The appellant and the Director may appear personally or by counsel at the hearing and submit such material and present such arguments as deemed appropriate by the hearing officer. Within 60 days after the record for the hearing closes, the hearing officer shall recommend a decision in writing to the Assistant Administrator.

(d) The Assistant Administrator shall decide the appeal using the same regulatory criteria as for the initial decision and shall base the appeal decision on the record before the Director and any information submitted regarding the appeal, and, if a hearing has been held, on the record before the hearing officer and the hearing officer's recommended decision. The Assistant Administrator shall notify the appellant

of the final decision and the reason(s) therefore in writing. The Assistant Administrator's decision shall constitute final agency action for the purpose of the Administrative Procedure Act.

(e) Any time limit prescribed in or established under this section other than the 30-day limit for filing an appeal may be extended by the Assistant Administrator or hearing office for good cause.

■ 9. Add subpart T to read as follows:

Subpart T—Wisconsin Shipwreck Coast National Marine Sanctuary

Sec.

922.210 Boundary.

922.211 Definitions.

922.212 Co-management.

922.213 Prohibited or otherwise regulated activities.

922.214 Emergency regulations.

922.215 Permit procedures and review criteria.

922.216 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

Appendix A to Subpart T of Part 922—Wisconsin Shipwreck Coast National Marine Sanctuary Boundary Description and Coordinates of the Lateral Boundary Closures and Excluded Areas

Appendix B to Subpart T of Part 922—Wisconsin Shipwreck Coast Marine Sanctuary Terms of Designation

§ 922.210 Boundary.

Wisconsin Shipwreck Coast National Marine Sanctuary consists of an area of approximately 726 square nautical miles (962 square miles) of Lake Michigan waters within the State of Wisconsin and the submerged lands thereunder, over, around, and under the submerged underwater cultural resources in Lake Michigan. The precise boundary coordinates are listed in Appendix A to this subpart. The eastern boundary of the sanctuary begins approximately 9.3 miles east of the Wisconsin shoreline (as defined by the low water datum) in Lake Michigan at Point 1 north of the border between Manitowoc and Kewaunee County. From Point 1 the boundary continues SSW in a straight line to Point 2 and then SW to Point 3 which is located in Lake Michigan approximately 16.3 miles east of a point on the shoreline roughly equidistant between the borders of northern Mequon, WI and southern Port Washington, WI. From Point 3 the boundary continues west towards Point 4 until it intersects the shoreline at the low water datum approximately 2.5 miles north of the northern border of Mequon, WI. From this intersection the boundary continues north following the shoreline at the low

water datum, cutting across the mouths of creeks and streams until it intersects the line segment formed between Point 5 and Point 6 at the end of the southern breakwater at the mouth of Sauk Creek at Port Washington. From this intersection the boundary continues to Point 6 through Point 9 in numerical order. From Point 9 the boundary continues towards Point 10 until it intersects the shoreline at the low water datum at the end of the northern breakwater at the mouth of Sauk Creek. From this intersection the boundary continues north following the shoreline at the low water datum cutting across the mouths of creeks and streams until it intersects the line segment formed between Point 11 and Point 12 at the end of the southern breakwater at the mouth of the Sheboygan River. From this intersection the boundary continues to Point 12 through Point 17 in numerical order.

From Point 17 the boundary continues towards Point 18 until it intersects the shoreline at the low water datum at the end of the northern breakwater at the mouth of the Sheboygan River. From this intersection the boundary continues north along the shoreline at the low water datum cutting across the mouths of creeks and streams until it intersects the line segment formed between Point 19 and Point 20 at the end of the southern breakwater at the mouth of Manitowoc Harbor. From this intersection the boundary continues to Point 20 through Point 23 in numerical order. From Point 23 the boundary continues towards Point 24 until it intersects the shoreline at the low water datum at the end of the northern breakwater at the mouth of the Sheboygan River. From this intersection the boundary continues north following the shoreline at the low water datum cutting across the mouths of creeks and streams until it intersects the line segment formed between Point 25 and Point 26 at the end of the western breakwater at the mouth of East Twin River. From this intersection the boundary continues to Point 27 through Point 31 in numerical order.

From Point 31 the boundary continues towards Point 32 until it intersects the shoreline at the low water datum at the end of the eastern breakwater at the mouth of East Twin River. From this intersection the boundary continues NE following the shoreline at the low water datum cutting across the mouths of creeks and streams around Rawley Point and then continues NNW past the county border between Manitowoc and Kewaunee County until it intersects the line segment formed between Point 33 and

Point 34 along the shoreline at the low water datum just south of the mouth of the unnamed stream near the intersection of Sandy Bar Road and Lakeview Road near Carlton, WI. Finally, from this intersection at the shoreline at the low water datum the boundary moves east across Lake Michigan to Point 34.

§ 922.211 Definitions.

(a) The following terms are defined for purposes of this subpart:

(1) *Sanctuary resource* means all prehistoric, historic, archaeological, and cultural sites and artifacts within the sanctuary boundary, including all shipwreck sites.

(2) *Shipwreck site* means any historic sunken watercraft, its components, cargo, contents, and associated debris field.

(b) All other terms appearing in the regulations in this subpart are defined at § 922.3, and/or in the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. 1401 *et seq.*, and 16 U.S.C. 1431 *et seq.*

§ 922.212 Co-management.

NOAA has primary responsibility for the management of the Sanctuary pursuant to the Act. However, as the Sanctuary is in state waters, NOAA will co-manage the Sanctuary in collaboration with the State of Wisconsin. The Director may enter into a Memorandum of Agreement regarding this collaboration that may address, but not be limited to, such aspects as areas of mutual concern, including Sanctuary resource protection, programs, permitting, activities, development, and threats to Sanctuary resources.

§ 922.213 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraph (b) of this section, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:

(1) Moving, removing, recovering, altering, destroying, possessing, or otherwise injuring, or attempting to move, remove, recover, alter, destroy, possess or otherwise injure a sanctuary resource.

(2) Grappling into or anchoring on shipwreck sites.

(3) Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of the Act or any regulation or any permit issued under the Act.

(b) The prohibitions in paragraphs (a)(1) through (3) of this section do not apply to any activity necessary to

respond to an emergency threatening life, property, or the environment; or to activities necessary for valid law enforcement purposes.

§ 922.214 Emergency regulations.

(a) Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities are subject to immediate temporary regulation, including prohibition. An emergency regulation shall not take effect without the approval of the Governor of Wisconsin or her/his designee or designated agency.

(b) Emergency regulations remain in effect until a date fixed in the rule or six months after the effective date, whichever is earlier. The rule may be extended once for not more than six months.

§ 922.215 Permit procedures and review criteria.

(a) *Authority to issue general permits.* The Director may allow a person to conduct an activity that would otherwise be prohibited by this subpart, through issuance of a general permit, provided the applicant complies with:

(1) The provisions of subpart E of this part; and

(2) The relevant site specific regulations appearing in this subpart.

(b) *Sanctuary general permit categories.* The Director may issue a sanctuary general permit under this subpart, subject to such terms and conditions as he or she deems appropriate, if the Director finds that the proposed activity falls within one of the following categories:

(1) Research—activities that constitute scientific research on or scientific monitoring of national marine sanctuary resources or qualities;

(2) Education—activities that enhance public awareness, understanding, or appreciation of a national marine sanctuary or national marine sanctuary resources or qualities; or

(3) Management—activities that assist in managing a national marine sanctuary.

(c) *Review criteria.* The Director shall not issue a permit under this subpart, unless he or she also finds that:

(1) The proposed activity will be conducted in a manner compatible with the primary objective of protection of national marine sanctuary resources and qualities, taking into account the following factors:

(i) The extent to which the conduct of the activity may diminish or enhance national marine sanctuary resources and qualities; and

(ii) Any indirect, secondary or cumulative effects of the activity.

(2) It is necessary to conduct the proposed activity within the national marine sanctuary to achieve its stated purpose.

(3) The methods and procedures proposed by the applicant are appropriate to achieve the proposed activity's stated purpose and eliminate, minimize, or mitigate adverse effects on sanctuary resources and qualities as much as possible.

(4) The duration of the proposed activity and its effects are no longer than necessary to achieve the activity's stated purpose.

(5) The expected end value of the activity to the furtherance of national marine sanctuary goals and purposes outweighs any potential adverse impacts on sanctuary resources and qualities from the conduct of the activity.

(6) The applicant is professionally qualified to conduct and complete the proposed activity.

(7) The applicant has adequate financial resources available to conduct and complete the proposed activity and terms and conditions of the permit.

(8) There are no other factors that would make the issuance of a permit for the activity inappropriate.

§ 922.216 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

(a) A person may conduct an activity prohibited by § 922.213(a)(1) through (3) if such activity is specifically authorized by a valid Federal, state, or local lease, permit, license, approval, or other authorization, or tribal right of subsistence use or access in existence prior to the effective date of sanctuary designation and within the sanctuary designated area and complies with § 922.47 and provided that the holder of the lease, permit, license, approval, or other authorization complies with the requirements of paragraph (e) of this section.

(b) In considering whether to make the certifications called for in this section, the Director may seek and consider the views of any other person or entity, within or outside the Federal government, and may hold a public hearing as deemed appropriate.

(c) The Director may amend, suspend, or revoke any certification made under this section whenever continued operation would otherwise be inconsistent with any terms or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit,

license, or other authorization and the issuing agency and shall set forth reason(s) for the action taken.

(d) Requests for findings or certifications should be addressed to the Director, Office of National Marine Sanctuaries; ATTN: Sanctuary Superintendent, Wisconsin Shipwreck Coast National Marine Sanctuary, 1305 East-West Hwy., 11th Floor, Silver Spring, MD 20910. A copy of the lease, permit, license, approval, or other authorization must accompany the request.

(e) For an activity described in paragraph (a) of this section, the holder of the authorization or right may conduct the activity prohibited by § 922.213(a)(1) through (3) provided that:

(1) The holder of such authorization or right notifies the Director, in writing, 180 days of the **Federal Register** document announcing of effective date of the Sanctuary designation, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of this section; and

(3) The holder complies with any terms and conditions on the exercise of such authorization or right imposed as a condition of certification, by the Director, to achieve the purposes for which the Sanctuary was designated.

(f) The holder of an authorization or right described in paragraph (a) of this section authorizing an activity prohibited by § 922.213 may conduct the activity without being in violation of applicable provisions of § 922.213, pending final agency action on his or her certification request, provided the holder is otherwise in compliance with this section.

(g) The Director may request additional information from the certification requester as he or she deems reasonably necessary to condition appropriately the exercise of the certified authorization or right to achieve the purposes for which the Sanctuary was designated. The Director must receive the information requested within 45 days of the postmark date of the request. The Director may seek the views of any persons on the certification request.

(h) The Director may amend any certification made under this section whenever additional information becomes available that he/she determines justifies such an amendment.

(i) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing,

any decision on a certification request or any action taken with respect to any certification made under this section, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(j) The holder may appeal any action conditioning, amending, suspending, or revoking any certification in accordance with the procedures set forth in § 922.50.

(k) Any time limit prescribed in or established under this section may be extended by the Director for good cause.

Appendix A to Subpart T of Part 922—Wisconsin Shipwreck Coast Sanctuary Boundary Description and Coordinates of the Lateral Boundary Closures and Excluded Areas

Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983.

TABLE A1—COORDINATES FOR SANCTUARY BOUNDARY

Point_ID	Latitude	Longitude
1	44.35279	–87.34387
2	43.45716	–87.48817
3	43.31519	–87.56312
4 *	43.31519	–87.88828
5 *	43.38447	–87.86079
6	43.38455	–87.86062
7	43.38353	–87.85936
8	43.38588	–87.85801
9	43.38510	–87.85950
10 *	43.38523	–87.85963
11 *	43.74858	–87.69479
12	43.74858	–87.69457
13	43.74840	–87.69457
14	43.74778	–87.69191
15	43.74949	–87.69161
16	43.74977	–87.69196
17	43.74935	–87.69251
18 *	43.74946	–87.69265
19 *	44.09135	–87.64377
20	44.09147	–87.64366
21	44.09081	–87.64206
22	44.09319	–87.64202
23	44.09254	–87.64365
24 *	44.09262	–87.64373
25 *	44.14226	–87.56161
26	44.14214	–87.56151
27	44.14199	–87.56181
28	44.13946	–87.55955
29	44.14021	–87.55795
30	44.14274	–87.56023
31	44.14256	–87.56059
32 *	44.14267	–87.56069
33 *	44.35279	–87.53255
34	44.35279	–87.34387

Note: The coordinates in the table above marked with an asterisk (*) are not a part of the sanctuary boundary. These coordinates are landward reference points used to draw a line segment that intersects with the shoreline at the low water datum.

Appendix B to Subpart T of Part 922— Wisconsin Shipwreck Coast National Marine Sanctuary Terms of Designation

Terms of Designation for Wisconsin Shipwreck Coast National Marine Sanctuary Under the authority of the National Marine Sanctuaries Act, as amended (the “Act” or “NMSA”), 16 U.S.C. 1431 *et seq.*, 962 square miles of Lake Michigan off the coast of Wisconsin’s coastal counties of Ozaukee, Sheboygan, Manitowoc, and Kewaunee are hereby designated as a National Marine Sanctuary for the purpose of providing long-term protection and management of the historical resources and recreational, research, educational, and aesthetic qualities of the area.

Article I: Effect of Designation

The NMSA authorizes the issuance of such regulations as are necessary and reasonable to implement the designation, including managing and protecting the historical resources and recreational, research, and educational qualities of Wisconsin Shipwreck Coast National Marine Sanctuary (the “Sanctuary”). Section 1 of Article IV of this Designation Document lists those activities that may have to be regulated on the effective date of designation, or at some later date, in order to protect Sanctuary resources and qualities. Listing an activity does not necessarily mean that it will be regulated; however, if an activity is not listed it may not be regulated, except on an emergency basis, unless Section 1 of Article IV is amended by the same procedures by which the original Sanctuary designation was made.

Article II: Description of the Area

Wisconsin Shipwreck Coast National Marine Sanctuary consists of an area of approximately 726 square nautical miles (962 square miles) of Lake Michigan waters within the State of Wisconsin and the submerged lands thereunder, over, around, and under the underwater cultural resources in Lake Michigan. The eastern boundary of the sanctuary begins approximately 9.3 miles east of the Wisconsin shoreline in Lake Michigan north of the border between Manitowoc and Kewaunee County. From this point the boundary continues in Lake Michigan roughly to the SSW until it intersects a point in Lake Michigan approximately 16.3 miles east of a point along the shoreline that is approximately equidistant between the borders of Mequon, WI and Port Washington, WI. The southern boundary continues west until it intersects the shoreline at the Low Water Datum at this point between Mequon, WI and Port Washington, WI. The western boundary continues north following the shoreline at the Low Water Datum for approximately 82 miles cutting across the mouths of rivers, creeks, and streams and excluding federally authorized shipping channels; specifically those of Sauk Creek at Port Washington, Sheboygan River at Sheboygan, Manitowoc Harbor at Manitowoc, and East Twin River at Two Rivers. The western boundary ends just north of the border between Manitowoc and Kewaunee County along the shoreline near Carlton, WI. The northern boundary

continues from the shoreline at the Low Water Datum at this point east across Lake Michigan just north of the border between these same two counties back to its point of origin approximately 9.3 miles offshore.

Article III: Special Characteristics of the Area

The area includes a nationally significant collection of maritime heritage resources, including 36 known shipwrecks, about 59 suspected shipwrecks, and other underwater cultural sites. The historic shipwrecks are representative of the vessels that sailed and steamed on Lake Michigan during the nineteenth and twentieth centuries, carrying grain and raw materials east and carrying coal, manufactured goods, and people west. During this period entrepreneurs and shipbuilders on the Great Lakes launched tens of thousands of ships of many different designs. Sailing schooners, grand palace steamers, revolutionary propeller-driven passenger ships, and industrial bulk carriers transported America’s business and industry. In the process they brought hundreds of thousands of people to the Midwest and made possible the dramatic growth of the region’s farms, cities, and industries. The Midwest, and indeed the American nation, could not have developed with such speed and with such vast economic and social consequences without the Great Lakes. Twenty-one of the 36 shipwreck sites in the sanctuary are listed on the National Register of Historic Places. Many of the shipwrecks retain an unusual degree of architectural integrity, with several vessels nearly intact. Well preserved by Lake Michigan’s cold, fresh water, the shipwrecks and related maritime heritage sites in Wisconsin Shipwreck Coast National Marine Sanctuary possess exceptional historical, archaeological and recreational value. Additional underwater cultural resources, such as submerged aircraft, docks, piers, and isolated artifacts also exist, as do the potential for prehistoric sites and artifacts.

Article IV: Scope of Regulations

Section 1. Activities Subject to Regulation. The following activities are subject to regulation, including prohibition, to the extent necessary and reasonable to ensure the protection and management of the historical resources and recreational, research and educational qualities of the area:

- a. Injuring sanctuary resources.
- b. Grappling into or anchoring on a shipwreck sites.
- c. Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of the Act or any regulation issued under the Act.

Section 2. Emergencies. Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality; or minimize the imminent risk of such destruction, loss, or injury, any activity, including those not listed in Section 1, is subject to immediate temporary regulation. An emergency regulation shall not take effect without the approval of the Governor of Wisconsin or her/his designee or designated agency.

Article V: Relation to Other Regulatory Programs

Fishing Regulations, Licenses, and Permits. Fishing in the Sanctuary shall not be regulated as part of the Sanctuary management regime authorized by the Act. However, fishing in the Sanctuary may be regulated by other Federal, State, Tribal and local authorities of competent jurisdiction, and designation of the Sanctuary shall have no effect on any regulation, permit, or license issued thereunder.

Article VI. Alteration of This Designation

The terms of designation may be modified only by the same procedures by which the original designation is made, including public meetings, consultation according to the NMSA.

§ 922.213 [Amended]

- 10. Stay § 922.213(a)(2) until October 1, 2023.

[FR Doc. 2021–12846 Filed 6–22–21; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

15 CFR Chapter VII

[Docket Number: 210617–0132]

RIN 0605–XD009

Rescission of Identification of Prohibited Transactions With Respect to TikTok and WeChat

AGENCY: Office of the Secretary, U.S. Department of Commerce.

ACTION: Identification of Prohibited Transactions; notification of rescission.

SUMMARY: Pursuant to Executive Order 14034 of June 9, 2021 (Protecting Americans’ Sensitive Data from Foreign Adversaries), this document confirms that the Secretary of Commerce has rescinded two actions issued under now-revoked Executive Orders: The September 18, 2020 Identification of Prohibited Transactions related to TikTok, published on September 24, 2020, and the September 18, 2020 Identification of Prohibited Transactions related to WeChat filed for public inspection on September 18, 2020 and withdrawn before publication.

DATES: This rescission was effective June 16, 2021. Effective June 23, 2021, the Department withdraws the Identification of Prohibited Transactions published at 85 FR 60061 on September 24, 2020.

FOR FURTHER INFORMATION CONTACT:

John Giff, U.S. Department of Commerce; email: supplychainrules@doc.gov; telephone: (202) 482–2617.

For media inquiries: Brittany Caplin, Deputy Director of Public Affairs and Press Secretary, U.S. Department of

Commerce; telephone: (202) 482-4883; email: PublicAffairs@doc.gov.

SUPPLEMENTARY INFORMATION: Executive Order 13942 of August 6, 2020, “Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain”, (85 FR 48637) found that the mobile application TikTok posed a threat to the United States and prohibited certain transactions with respect to ByteDance Ltd. or its subsidiaries, and directed the Secretary of Commerce (Secretary) to identify transactions subject to the prohibitions. Similarly, Executive Order 13943 of August 6, 2020, “Addressing the Threat Posed by WeChat, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain”, (85 FR 48641) found that the mobile app WeChat posed a threat to the United States and prohibited certain transactions with respect to Tencent Holdings Ltd. or its subsidiaries, and directed the Secretary to identify transactions subject to the prohibitions.

On September 18, 2020, the Department issued an Identification of Prohibited Transactions To Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain. A version of this Identification (with revised dates of effectiveness) was published in the **Federal Register** on September 24, 2020 (85 FR 60061). Also on September 18, 2020, the Department issued an Identification of Prohibited Transactions To Implement Executive Order 13943 and Address the Threat Posed by WeChat and the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain. This Identification was not published in the **Federal Register**, but it has remained available for public inspection on the Department’s website. All prohibitions were enjoined by federal courts prior to taking effect.

On June 9, 2021, Executive Order 14034 (Protecting Americans’ Sensitive Data from Foreign Adversaries) revoked Executive Orders 13942 and 3943 and required executive departments and agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing those Executive Orders (86 FR 31423). Accordingly, the Secretary of Commerce

has rescinded the Identification of Prohibited Transactions with respect to TikTok and the Identification of Prohibited Transactions with respect to WeChat.

Authority

International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.*; National Emergencies Act, 50 U.S.C. 1601 *et seq.*; Executive Order 14034, 86 FR 31423.

Dated: June 17, 2021.

Wynn W. Coggins,

Acting Chief Financial Officer and Assistant Secretary for Administration.

[FR Doc. 2021-13156 Filed 6-21-21; 8:45 am]

BILLING CODE 3510-20-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1632

[Docket No. CPSC-2020-0024]

Standard for the Flammability of Mattresses and Mattress Pads; Amendment

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (Commission, or CPSC) is issuing this final rule to amend its Standard for the Flammability of Mattresses and Mattress Pads. The ignition source cigarette specified in the standard for use in the mattress standard’s performance tests, Standard Reference Material cigarette SRM 1196, is no longer available for purchase. This final rule amends the mattress standard to require a revised Standard Reference Material cigarette, SRM 1196a, which was developed by the National Institute of Standards and Technology, as the ignition source for testing to the mattress standard.

DATES: This rule is effective July 23, 2021.

FOR FURTHER INFORMATION CONTACT: Lisa Scott, Directorate for Laboratory Sciences, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: 301-987-2064; email: lscott@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

1. The Standard

The Standard for the Flammability of Mattresses and Mattress Pads (Standard), 16 CFR part 1632, issued

pursuant to the Flammable Fabrics Act (FFA), 15 U.S.C. 1191 *et seq.*, sets forth a test to determine the ignition resistance of a mattress or mattress pad when exposed to a lighted cigarette. Lighted cigarettes are placed at specified locations on the mattress or mattress pad. The Standard establishes pass/fail criteria for the tests. The Standard currently specifies the ignition source for these tests as Standard Reference Material cigarette SRM 1196, available for purchase from the National Institute of Standards and Technology (NIST). See 16 CFR 1632.4(a)(2).

2. Development of the Original Standard Reference Material Cigarette

The original specification for the Standard’s ignition source included physical characteristics of a conventional, commercially available, non-filtered, king-sized cigarette. Although no specific brand was identified in the standard, a Pall Mall Red cigarette, manufactured by R.J. Reynolds Tobacco Company (RJR), was commonly known to meet the specifications. In early 2008, RJR notified CPSC that the company intended to convert its production of Pall Mall Red cigarettes to be Fire Standard Compliant (FSC).

In 2008, CPSC sought to find an alternate ignition source and contracted with NIST to develop an ignition source with an ignition strength equivalent to the Pall Mall Red cigarette. The ignition strength value is on a scale from 0 to 100 and is analogous to the percentage of full-length burns on a laboratory substrate. Lower values indicate a cigarette is more likely to self-extinguish when not actively being smoked, while higher values indicate a cigarette is more likely to remain lit while unattended. The non-FSC Pall Mall Red ignition strength varied by vintage from a low of 35 to a high of 95, most often falling at the higher end of the range. FSC cigarettes are required to have an ignition strength lower than 25, and in practice, they are often much weaker, to ensure uniform compliance.

In 2010, NIST developed SRM 1196, Standard Cigarette for Ignition Resistance Testing. SRM 1196 was available for purchase starting in September 2010. On November 1, 2010, CPSC proposed the use of SRM 1196 as the standard ignition source. 75 FR 67047. On September 23, 2011, CPSC issued a final rule amending the Standard to specify SRM 1196 as the standard ignition source, which became effective on September 23, 2012. 76 FR 59014.

3. Development of a New Standard Reference Material Cigarette

All of the SRM 1196 cigarettes were produced in one production run in 2010, with a supply estimated to last approximately 10 years. NIST staff made several attempts to procure a new batch of SRM 1196 cigarettes as the supply dwindled; but in late 2018, the supply of SRM 1196 was depleted before NIST was able to complete a new procurement. NIST was unable to find a manufacturer to produce additional SRM 1196 cigarettes. However, NIST successfully procured SRM 1196a as a replacement for SRM 1196.

NIST conducted tests to determine whether the SRM 1196 properties were replicated in the new SRM 1196a. NIST evaluated the suitability of SRM 1196a by examining the cigarette's ignition strength, tobacco column length and mass, use of unbanded paper, and absence of a filter. Tobacco column length is the length of the cigarette that contains tobacco. Banded paper contains bands that slow the cigarette's combustion when not actively being smoked, while unbanded paper does not contain these bands. NIST affirmed that these SRM 1196 properties were replicated in the new SRM 1196a, because the latter has a similar ignition strength, tobacco column length and mass, it uses unbanded paper, and it has no filter. NIST began selling SRM 1196a in February 2020.

4. CPSC Staff Evaluation of SRM 1196a¹

CPSC staff evaluated SRM 1196a in a pilot study and then a full-scale study to determine whether it is a comparable, safety-neutral replacement for SRM 1196.

CPSC staff conducted an initial pilot study in late 2019 to evaluate the suitability of SRM 1196a as a substitute for SRM 1196. The goal of the pilot study was to ensure the full-scale study met statistically robust and scientifically meaningful criteria. Staff evaluated the confidence interval and margin of error to use in the full-scale study, based on an examination of the 2010 transition from the original ignition source to SRM 1196, CPSC compliance data, and the number of test replicates required by the Standard. Based on this analysis and testing during the pilot study, staff subject matter experts determined that a

90 percent confidence interval and equivalence margin of 35 percent were appropriate.

CPSC staff then conducted a full-scale study in early 2020, to determine whether there is statistical equivalence between SRM 1196 and SRM 1196a. In the full-scale study, staff evaluated SRM 1196 and SRM 1196a and found statistically equivalent char length pass/fail patterns for all tested mattress substrates. Test results were within a 90 percent confidence interval and equivalence margin of 35 percent. Staff noted that NIST certified the ignition strengths of both SRMs to be comparable, based on a 95 percent confidence interval with a 5 percent margin in laboratory testing. Although the bounds found by CPSC staff are larger than the NIST confidence interval, staff determined that the NIST tests only examined the cigarette characteristics on substrates that have little variability. The CPSC testing included representative mattress materials that are inherently more variable than the benchmark substrates in the NIST cigarette tests. Furthermore, staff analysis of both SRM cigarettes found that the physical dimensions of SRM 1196 and SRM 1196a are nearly identical. Based on the evidence provided by the full-scale study, pilot study, and NIST certification, as well as examination of CPSC compliance data and data from the 2010 transition from the original ignition source to SRM 1196, CPSC staff's review showed that SRM 1196a cigarettes are statistically equivalent to SRM 1196. On these bases, the Commission finds that SRM 1196a is a comparable, safety-neutral replacement for SRM 1196.

B. Statutory Provisions

The FFA sets forth the process by which the Commission can issue or amend a flammability standard. 15 U.S.C. 1193. In accordance with those provisions, the Commission is amending the Standard to specify SRM 1196a as the ignition source for testing under the Standard. As required by the FFA, the Commission published a proposed rule containing the text of the ignition source revision, alternatives considered, and a preliminary regulatory analysis. 15 U.S.C. 1193(i); 85 FR 68803 (Oct. 30, 2020).

Before issuing a final rule, the Commission must prepare a final regulatory analysis and make findings concerning any relevant voluntary standard, the relationship of costs and benefits of the rule (in this case, the ignition source revision), and the burden imposed by the rule. 15 U.S.C. 1193(j). In addition, the Commission

must find that the rule: (1) Is needed to adequately protect the public against the risk of the occurrence of fire leading to death, injury, or significant property damage; (2) is reasonable, technologically practicable, and appropriate; (3) is limited to fabrics, related materials, or products which present unreasonable risks; and (4) is stated in objective terms. *Id.* 1193(b).

The Commission also must provide an opportunity for interested persons to make an oral presentation concerning the rulemaking before the Commission may issue a final rule. *Id.* 1193(d). In the preamble to the proposed rule, the Commission requested that anyone who wanted to make an oral presentation concerning this rulemaking contact the Commission's Division of the Secretariat within 45 days of publication of the proposed rule. The Commission did not receive any requests to make an oral presentation.

C. Description of the Revised Ignition Source

Currently, the Standard requires that the ignition source for testing mattresses "shall be a Standard Reference Material cigarette (SRM 1196), available for purchase from the National Institute of Standards and Technology. . . ." 16 CFR 1632.4(a)(2). CPSC is amending the Standard to require the use of SRM 1196a instead of SRM 1196 cigarettes.

D. Response to Comments on the Proposed Rule

The Commission received four public comments. One commenter supported amending the standard to update the SRM ignition source, citing the need for consistency in flammability performance and test methods. Three other commenters opposed the amendment. The issues raised in the comments are summarized and addressed below.

Comment: The cost of implementing SRM 1196a would negatively impact mattress manufacturers, due to the higher price charged for SRM 1196a over SRM 1196, and the cost increase associated with SRM 1196a over SRM 1196 should be considered substantial.

Response: The economic analysis of SRM 1196a shows that it will not have a significant economic impact on small domestic firms that supply the U.S. mattress market. The most expensive testing scenario a firm might encounter would fall well below the threshold to be considered significant. Furthermore, because SRM 1196a is a safety-neutral replacement for SRM 1196, firms are not required to retest existing prototypes with SRM 1196a. So, for existing prototypes that firms intend to continue

¹ This final rule is based on information and analysis provided in the Staff Briefing Package, Final Rule: Amendment to 16 CFR part 1632 Standard for the Flammability of Mattresses and Mattress Pads, available at <https://www.cpsc.gov/s3fs-public/Standard-for-the-Flammability-of-Mattresses-and-Mattress-Pads-SRM-1196a-Cigarette.pdf?bHVseQI3Ak24UimMONqrsDwtavQYGg4E>.

to offer for sale, there is no additional cost associated with this amendment. Additionally, although the price of SRM 1196a is more than the price of SRM 1196, the cost of SRM 1196a is determined by NIST using the actual costs incurred in the production of SRM 1196a and applicable overhead and surcharge rates. The Commission has determined that the cost increase of adopting SRM 1196a is not considered significant to even the smallest domestic suppliers in the United States.

Comment: The additional cost of SRM 1196a would be passed along to consumers, increasing the cost of mattresses nationwide.

Response: The increase in cost associated with adopting SRM 1196a could potentially be passed on to the consumer. Under the Standard's testing requirements, however, the cost of testing is born over the size of the production run for a given prototype. For a regular production run, the cost per mattress product that could be passed on to the consumer associated with adopting SRM 1196a as the ignition source is negligible. Furthermore, because SRM 1196a is a safety-neutral replacement for SRM 1196, firms are not required to retest existing prototypes. So, for existing prototypes that firms intend to continue to offer for sale, there is no additional cost associated with this amendment and no associated cost passed on to the consumer.

Comment: The U.S. market for mattress products faces challenges stemming from supply chain shortages and disruptions related to the COVID-19 pandemic and tariffs on trade.

Response: Preliminary data published by the U.S. Bureau of Labor Statistics (BLS) for the Mattress Manufacturing Industry (NAICS 337910) show that prices charged to producers to manufacture mattresses have increased by 2.2 percent since the start of the pandemic. The Producer Price Index data published by the BLS does not provide details on what causes industry production price changes. Nor does it attribute price increases to supply chain shortages or disruptions; but it does provide a reliable indication that production prices have increased. Although cost increases currently may be impacting industry, the cost associated with adopting SRM 1196a is small. The marginal cost increase associated with amending the Standard will not have a significant impact on suppliers. Delaying the rule, or electing not to adopt SRM 1196a as the standard ignition source, would not result in any significant cost savings.

Comment: The SRM ignition source is not representative of FSC cigarettes consumers can purchase. It is too strong to be a standardized ignition source for testing. The Commission should use FSC cigarettes as the ignition source for testing to the Standard.

Response: The SRM 1196a cigarette is a more appropriate test ignition source than FSC cigarettes for the following reasons:

- The SRM cigarette is a test instrument with calibration and traceability to NIST. Its ignition characteristics are more important than whether it looks like a consumer cigarette.
- Cigarette ignition of mattresses and bedding remains a substantial cause of residential fire deaths and injuries each year. Weakening the standard ignition strength would lower the threshold for smoldering ignition of these products, potentially increasing the incidence of these events. The SRM 1196a cigarette maintains the current level of safety because it is a safety-neutral replacement for SRM 1196.
- FSC cigarettes are intended to self-extinguish when not actively being smoked. The Standard states: "If a cigarette extinguishes before burning its full length on any mattress surface location . . . the test must be repeated with a freshly lit cigarette." Because FSC cigarettes are designed to reduce the amount of time a cigarette burns while unattended, testing with FSC cigarettes could lead to many test locations with an incomplete initial data point. In addition, it also could lead to substantially more repeated tests. This would require firms to use more cigarettes to complete a test and increase the time required to complete the test.

Comment: The Commission should consider SRM 1082, NIST's FSC Cigarette Ignition Strength Standard material.

Response: SRM 1082 is not a suitable replacement for SRM 1196 because it is an FSC cigarette. SRM 1082 would not provide the same level of safety, given its ignition strength of 15.8, compared to the ignition strength of SRM 1196a of 95.6 (on a scale of 0–100). SRM 1082 is also more expensive than SRM 1196a, with a cost of \$405 for one carton, which is 85 percent costlier per cigarette than SRM 1196a (\$437 for two cartons). Additionally, because SRM 1082 is an FSC cigarette, it could self-extinguish, requiring substantially more individual cigarettes to complete the testing.

Comment: It is not fair to obligate industry to procure SRM cigarettes from NIST, and NIST has a vested financial interest in revising the Standard.

Response: SRM cigarettes are available for purchase from NIST, and no other source. According to NIST's pricing policy published online, it establishes the prices of its measurement services in accordance with federal statutes. The prices of SRMs are determined by production costs, overhead, and surcharge rates incurred by NIST. Twice each calendar year, SRMs may be re-priced taking into account updates for overhead and surcharge rates, as determined by NIST and the Department of Commerce.

Other Comments

We also received other comments that are out of scope in this rulemaking proceeding. Commenters stated that 16 CFR part 1632 should be revoked because 16 CFR part 1633 is a more robust standard. Another commenter raised an issue regarding flame retardants in health care products. The scope of this rulemaking is limited to revising the ignition source in the Standard. The Commission is not making any other changes to the Standard. Because the comments do not address the replacement of SRM 1196 with SRM 1196a, these comments fall outside the scope of this rulemaking. We note that CPSC separately published an advance notice of proposed rulemaking to consider the revocation or amendment of 16 CFR part 1632, and those issues are appropriately addressed in that proceeding. 70 FR 36357.

E. Final Regulatory Analysis

Section 4(j) of the FFA requires that the Commission prepare a final regulatory analysis when it issues a regulation under section 4 of the FFA and that the analysis be published with the rule. 15 U.S.C. 1193(j). The following discussion fulfills this requirement.

1. Market/Industry Information

The size of the U.S. mattress market increased from \$17.4 billion in 2018, to \$18.1 billion in 2019. Roughly 23.6 million mattress units shipped in 2018. Approximately 29 percent (6.8 million) of units shipped were imported products. Three industry sectors supply mattresses and mattress pads to the U.S. market, categorized under the North American Industry Classification System (NAICS): NAICS Sector 337910—Mattress Manufacturing, NAICS Sector 314120—Curtain and Linen Mills, and NAICS Sector 423210—Furniture and Merchant Wholesalers.

The Mattress Manufacturing Sector (337910) includes establishments primarily engaged in manufacturing

innerspring, box spring, and non-innerspring mattresses. The Curtain and Linen Mills Sector (314120) comprises establishments primarily engaged in manufacturing household linens, bedspreads, sheets, tablecloths, towels, and shower curtains, from purchased materials. This sector includes mattress pad and mattress protector manufacturing. The Furniture and Merchant Wholesalers Sector (423210) is primarily engaged in the merchant wholesale distribution of furniture, except hospital beds and medical furniture. Importers of mattresses are typically categorized under NAICS code 423210.

According to the Small Business Administration (SBA), a firm in the Mattress Manufacturing sector (NAICS sector 337910) can be defined as "small" if the firm employs fewer than 1,000 workers. Under this definition, among the 250 firms identified by staff in the sector, 240 are small businesses that supply mattress products. The SBA defines a firm within the Curtain and Linen Mills Sector (NAICS sector 314120) as small if the firm employs fewer than 750 workers. Under this definition, among the 20 firms identified by staff, 19 firms are small and currently supply mattress products to the U.S. mattress market. Finally, a firm in the Furniture and Merchant Wholesale Sector (NAICS sector 423210) is defined as small if the firm employs fewer than 100 workers. All of the 88 firms identified in this sector meet this definition of small. Under SBA-provided definitions, the majority of firms supplying the U.S. market for mattresses and mattress pads are small businesses.

2. The Mattress Standard

The mattress standard at 16 CFR part 1632 requires premarket, full-scale prototype testing for each new mattress design. Prototype testing also must be performed for each change in materials of an existing design that may affect cigarette ignition resistance.

Under the Standard, four defined test procedures require the use of an SRM ignition source: The mattress test procedure, the mattress pad test procedure, the ticking classification test procedure, and the tape edge substitution test procedure. The number of test cigarettes required by these test procedures range from 18 SRM test cigarettes consumed during the ticking classification test, to 108 SRM test cigarettes consumed during the mattress or mattress pad test procedures. Furthermore, under the Standard only SRM test cigarettes from unopened packages can be selected for a series of

tests, and if a cigarette extinguishes before burning its full length on any mattress surface location, the test must be repeated with a freshly lit cigarette. Therefore, mattress and mattress pad test procedures require, in practice, six packs of SRM cigarettes, the ticking classification test procedure requires in practice one pack of SRM cigarettes, and the tape edge substitution test requires, at a minimum, two packs of SRM cigarettes.

SRM 1196a is available for purchase from NIST at a minimum order of 2 cartons. A carton contains 10 packs, and each pack contains 20 cigarettes; therefore, two cartons from NIST will contain 400 SRM cigarettes. Based on information collected by staff from a selection of domestic third-party testing facilities, a third-party testing facility uses an average of 10 to 40 packs of SRM cigarettes (or between 200–800 test cigarettes) per month. These data provide insight into the number of test cigarettes used by third party testing facilities located in the United States, as an order of magnitude. A testing facility that uses 400 test cigarettes per month would need to purchase two cartons of SRM cigarettes from NIST every month.

3. Potential Benefits and Costs

The SRM 1196a cigarette would have approximately the same ignition strength characteristics as originally intended by the Standard. The use of SRM 1196a cigarettes would not change the flammability performance tests or test method required under the Standard.

a. Potential Benefits

Cigarette ignition of mattresses and mattress pads is a substantial cause of residential fire deaths and injuries each year. This rule will allow firms to comply with the Standard, with consistent and reliable results, preventing injury and death due to mattress fires. This rule is "safety-neutral," so mattresses that passed or failed under the existing Standard would be expected to generate similar results when SRM 1196a is used. The level of protection provided by the Standard would neither increase nor decrease as a result of the change from SRM 1196 to SRM 1196a. Thus, there would be no impact on the level or value of fire safety benefits derived from the Standard.

Because NIST has exhausted its supply of SRM 1196, adopting this rule to require the use of SRM 1196a will allow firms access to an ignition source that would permit them to continue testing mattresses and mattress pads to the Standard. This rule would thus

provide significant benefits to firms, since failing to adopt this amendment would mean that the Standard would require firms to test using an ignition source that is no longer available for purchase.

As an interim measure in 2018, when NIST's stock of SRM 1196 cigarettes was depleted, CPSC's Office of Compliance issued guidance stating that testing to the Standard could be completed with commercial king-size, non-filtered FSC cigarettes. CPSC's Office of Compliance amended its Interim Enforcement Policy guidance, effective September 2020, to allow testing with either reserved stock of SRM 1196 or new stock of SRM 1196a. Accordingly, testing with FSC cigarettes to the Standard is no longer permitted.

SRM cigarettes provide a common ignition source for all laboratories, while commercially available FSC cigarettes do not offer that consistency. The ignition strength of FSC cigarettes vary from one brand to another. Because FSC cigarettes are required to have an ignition strength lower than 25 and are often much weaker, FSC cigarettes would have an ignition strength substantially lower than SRM 1196a. As a result, test results would vary between a test conducted with one brand of FSC cigarette and another, making testing, reporting, and enforcement inconsistent and unreliable.

Furthermore, FSC cigarettes are intended to self-extinguish when left unattended. Under the Standard, results from a cigarette that does not burn its full length are not accepted. Any cigarette which extinguishes before burning its full length on any mattress surface location must be retested with a freshly lit cigarette. As a result, use of the FSC cigarette as the ignition source would likely lead to an increase in the average number of cigarettes used for each complete test. FSC cigarettes would likely self-extinguish, requiring multiple freshly lit cigarettes to complete a test, thereby increasing the costs of testing and time burdens associated with testing.

In contrast to the inconsistency and unreliability of FSC cigarettes, SRM 1196a is a statistically equivalent replacement for SRM 1196, and will reduce the need for retesting and lighting fresh FSC cigarettes. Furthermore, SRM 1196a allows for consistency in reporting and testing between laboratories. This rule specifying SRM 1196a as a replacement cigarette will achieve consistency and prevent uncertainty for industry, testing laboratories, and CPSC.

b. Potential Costs

The cost increase associated with this rule is related to the SRM test cigarettes used as the ignition source for testing. A carton of SRM cigarettes contains 10 packs, and each pack contains 20 cigarettes; therefore, two cartons from NIST will contain 400 SRM cigarettes. Prices for SRM 1196a are set by NIST. At the time the Commission published the proposed rule, NIST charged \$400 to purchase a "unit" of two cartons of SRM 1196a. Since then, NIST increased the price for two cartons to \$437. The current price of SRM 1196a reflects a number of increases in surcharges accrued over the last calendar year, which includes NIST personnel costs and NIST overhead. The price increase from the previous NIST listed price of \$400 per unit of two cartons is a price increase of 9.25 percent. At the new per-unit price, the cost of a pack of SRM 1196a cigarettes increased from \$20 per pack to \$21.85.

Manufacturers and importers of mattresses will be responsible for ensuring that their mattress products are tested using SRM 1196a. If a supplier's mattress product does not comply with the requirements, they will need to either modify the product, or cease their manufacture or importation. Additionally, as required by the CPSIA and its implementing regulations, manufacturers and importers of youth mattresses would be required to certify that their mattresses intended for children comply with the requirements of the Standard. Many domestic manufacturers of youth mattresses are small entities as defined by SBA. The following analysis reviews possible impacts of using SRM 1196a in the Standard.

The annual cost of adopting the SRM 1196a test cigarette will vary among small firms. Different firms offer a variety of mattress products and have different operational procedures for mattress product development and testing. Among other considerations, the number of mattresses produced annually by small firms is not uniform. Furthermore, some firms perform testing procedures in-house, while others elect or are required to have testing performed by a CPSC-approved conformity assessment body. The number of new prototypes that a firm will bring to market, and the size of a production run by a small firm, is up to the firm to decide; but the cost per firm of the amendment would be impacted by these individual decisions.

Commission staff reviewed a variety of likely cost increases that may be faced by small firms in adopting SRM

1196a, in three separate testing scenarios. To determine the likely costs faced by small firms from use of SRM 1196a cigarettes, staff analyzed testing costs related to the Standard in a manner that is consistent with past economic analysis of the industry. The analysis uses commercial data published online for mattress manufacturing, bedding manufacturing, and wholesale mattress product importers acquired from Dun and Bradstreet. Staff also reviewed current mattress products available on the market from a variety of small domestic suppliers and received input from industry on the type and frequency of testing performed under the Standard.

The number of new prototypes that a small firm will bring to market is up to the individual firm to decide, but the cost per firm due to this rule would be impacted by these individual business decisions. A small firm may choose to make new prototypes every year and bring them to market, or it may elect to substitute ticking and modify existing models of mattress products that are selling well or are customer favorites.

The Commission previously published cost estimates for three testing scenarios. 85 FR 68806. To supplement that analysis, the following discusses the effect of the SRM 1196a price increase from \$20 per pack to \$21.85 per pack since publication of the proposed rule. The most expensive of the three testing scenarios was Scenario 1, which used 46 packs of SRM 1196a to test mattresses and mattress products annually. At \$11.50 per pack, a firm's cost of using SRM 1196 would be \$529 (46 packs $\times$ \$11.50 per pack = \$529). At \$21.85 per pack for SRM 1196a, the same testing scenario would cost a firm \$1,005.10 (46 packs $\times$ \$21.85 per pack = \$1,005.10). As a result of adopting SRM 1196a as the replacement SRM, at a price of \$21.85 per pack, the firm would incur a cost increase of \$476.10 (\$1,005.10 – \$529 = \$476.10). This example of a cost impact is for the most expensive testing scenario a firm might reasonably choose. The lowest reported annual revenue for any small domestic firm in the mattress manufacturing sector is \$128,000. One percent of annual revenue for the firm is \$1,280 (\$128,000 $\times$ 1 percent). For this small domestic supplier, any impact smaller than \$1,280 should be considered insignificant. Therefore, the cost increase of \$476.10 of using SRM 1196a at the price of \$437, as charged by NIST, would not be significant for even the smallest firm currently supplying the sector.

In summary, this rule is not expected to have a significant impact on expected

benefits or costs of the Standard in 16 CFR part 1632. Both the expected benefits and costs of the amendment are small, and the likely effect on testing costs per new prototype mattress or ticking substitution would be minor, especially when the projected cost is allocated over a production run of complying mattresses.

4. Regulatory Alternatives

The Commission considered two basic alternatives: (1) Allow for the use of FSC cigarettes as the ignition source; or (2) take no action on the smoldering ignition source issue.

Neither SRM 1196a nor FSC cigarettes (alternative one) would likely have a substantial economic impact. There would, however, be some relative differences in terms of resource costs and potential effects on the level of benefits the Standard affords. Alternative two would impose a significant economic impact, as it would require firms to use an ignition source that is no longer available, effectively making it impossible for firms to comply with the Standard. The advantages and disadvantages of these two basic alternatives are discussed below.

a. Allow for the Use of FSC Cigarettes

Under the first alternative, manufacturers and testers could conduct tests with any available FSC cigarettes.

A possible advantage of the Commission taking this alternative action is that some of the projected minor increase in resource costs of testing would not be incurred, since FSC cigarettes are less expensive than SRM 1196a. As noted, however, firms would likely have to use many more FSC cigarettes than SRM 1196a cigarettes due to the likelihood that FSC cigarettes would extinguish before testing is complete.

Disadvantages of the Commission taking this action include an increase in test result variability due to differences in cigarettes. Tests would be less reliable and results would vary depending on which cigarette was used. This would create uncertainty and confusion surrounding the reliability of tests for compliance with 16 CFR part 1632. Manufacturers and testing firms would have to conduct tests that are either wasteful (in terms of extra cigarettes required to complete a test due to cigarettes prematurely extinguishing) or have irreproducible and unreliable results.

b. No Action

If the Commission took no action, firms would be required to use an ignition source that is no longer available for purchase. Firms would be unable to comply with the Standard.

In summary, there are no readily available or technically feasible alternatives to SRM 1196a that would have lower estimated costs and still address the need for a consistent ignition source that retains the “safety-neutral” approach of this rule.

F. Regulatory Flexibility Act Certification

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, an agency that engages in rulemaking generally must prepare initial and final regulatory flexibility analyses describing the impact of the rule on small businesses and other small entities. Section 605 of the RFA provides that an agency is not required to prepare a regulatory flexibility analysis if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule retains the current mattress test procedure, but requires that entities performing cigarette ignition tests (including the CPSC, other state agencies, and industry testing organizations) purchase and use SRM 1196a cigarettes at a higher cost than the price at which SRM 1196 cigarettes had been sold. No additional actions will be required of small entities. The costs associated with the rule will essentially be borne by mattress manufacturers and importers that perform (or pay fees for) compliance testing.

The Commission has determined that this rule will have little or no effect on small producers. The design and construction of existing, compliant mattress products will remain unchanged, and the resource cost increase of using SRM 1196a cigarettes will represent a minimal increase in total testing costs. We have addressed comments concerning the impact of this rule on small entities, and we are not aware of any other information that would change the conclusion that the rule will not have a significant impact on a substantial number of small businesses or other small entities.

Based on the information presented here, in the proposed rule, and in the staff briefing package, the Commission concludes that the rule will have little or no effect on small producers. Thus, the Commission certifies that the rule will not have a significant impact on a substantial number of small businesses or other small entities.

G. Environmental Considerations

Pursuant to the National Environmental Policy Act, and in accordance with Council on Environmental Quality regulations and CPSC procedures for environmental review, the Commission has assessed the possible environmental effects associated with the rule. The Commission’s regulations state that amendments to rules providing performance requirements for consumer products normally have little or no potential for affecting the human environment. 16 CFR 1021.5(c)(1). Nothing in this rule alters that expectation. Therefore, because this rule would have no adverse effect on the environment, neither an environmental assessment nor an environmental impact statement is required.

H. Preemption

The rule will modify a flammability standard issued under the FFA. With certain exceptions that are not applicable in this instance, “no state or political subdivision of a state may establish or continue in effect a flammability standard or other regulation” applicable to the same fabric or product covered by an FFA standard if the state or local flammability standard or other regulations is “designed to protect against the same risk of the occurrence of fire” unless the state or local flammability standard or regulation “is identical” to the FFA standard. 15 U.S.C. 1203(a). The rule will not alter the preemptive effect of the existing mattress standard. Thus, the rule will preempt nonidentical state or local flammability standards for mattresses or mattress pads designed to protect against the same risk of the occurrence of fire.

I. Effective Date

Section 4(b) of the FFA (15 U.S.C. 1193(b)) provides that an amendment of a flammability standard shall become effective one year from the date it is promulgated, unless the Commission finds for good cause that an earlier or later effective date is in the public interest, and the Commission publishes the reason for that finding. The Commission believes that an effective date of thirty days will give adequate notice to all interested persons for firms to obtain SRM 1196a cigarettes from NIST. Section 4(b) of the FFA requires that an amendment of a flammability standard shall exempt products “in inventory or with the trade” on the date the amendment becomes effective, unless the Commission limits or withdraws that exemption because

those products are so highly flammable that they are dangerous when used by consumers for the purpose for which they are intended. This rule merely changes the ignition source, however, without any change to the test requirements of the Standard, so there is no relevant exemption for products in inventory or with the trade. The purpose of this rule is to allow manufacturers to replace SRM 1196 cigarettes which are no longer available. Accordingly, manufacturers are already purchasing SRM 1196a cigarettes as the SRM 1196 stock is depleted. Therefore, the Commission finds for good cause that the rule will become effective 30 days after publication in the **Federal Register**.

J. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a “major rule.” Pursuant to the CRA, OIRA designated this rule as not a “major rule,” as defined in 5 U.S.C. 804(2).

K. Findings

Sections 4(a), (b), and (j) of the FFA require the Commission to make certain findings when it issues or amends a flammability standard. The Commission must find that the standard or amendment: (1) Is needed to adequately protect the public against the risk of the occurrence of fire leading to death, injury, or significant property damage; (2) is reasonable, technologically practicable, and appropriate; (3) is limited to fabrics, related materials, or products which present unreasonable risks; and (4) is stated in objective terms. 15 U.S.C. 1193(b). In addition, the Commission must find that: (1) If an applicable voluntary standard has been adopted and implemented, that compliance with the voluntary standard is not likely to adequately reduce the risk of injury, or compliance with the voluntary standard is not likely to be substantial; (2) that benefits expected from the regulation bear a reasonable relationship to its costs; and (3) that the regulation imposes the least burdensome alternative that would adequately reduce the risk of injury. These findings are discussed below.

The amendment to the Standard is needed to adequately protect the public

against unreasonable risk of the occurrence of fire. The current Standard specifies as the ignition source cigarettes that are no longer being produced. In order for the Standard to continue to be effective (and for labs to test mattresses and mattress pads to determine whether they comply with the Standard), it is necessary to change the ignition source specification. Changing the ignition source to SRM 1196a, rather than FSC cigarettes, will ensure that testing is reliable and that results will not vary from one lab or manufacturer to another. Such variation would be likely if labs or manufacturers were able to use different ignition sources that have similar physical properties but different burning characteristics. The Commission finds that the amendment is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, personal injury or significant property damage.

The amendment to the Standard is reasonable, technologically practicable, and appropriate. The amendment is based on technical research conducted by NIST and CPSC staff, which established that the SRM 1196a cigarette is capable of providing reliable and reproducible results in flammability testing of mattresses and mattress pads. The SRM 1196a ignition source represents an equivalent, safety-neutral ignition source for use in testing to establish compliance with the Standard. The Commission finds that the amendment is reasonable, technologically practicable and appropriate.

The amendment to the Standard is limited to fabrics, related materials, and products that present an unreasonable risk. The amendment will continue to apply to the same products as the existing Standard, so the Commission finds that it is limited to fabrics, related materials, and products that present an unreasonable risk, and it is stated in objective terms.

Voluntary standards. There is no applicable voluntary standard for mattresses. The rule amends an existing federal mandatory standard.

Relationship of benefits to costs. Amending the Standard to specify SRM 1196a cigarettes as the ignition source allows testing to the Standard to continue without interruption, maintains the effectiveness of the Standard, and will not significantly increase testing costs to manufacturers and importers of mattresses and mattress pads. Both expected benefits and costs of the amendment are small. The effect on testing costs will be minor. Thus, the Commission finds that there

is a reasonable relationship between benefits and costs of the amendment.

Least burdensome requirement. No other alternative would allow the Standard's level of safety and effectiveness to continue. Thus, the Commission finds that the amendment imposes the least burdensome requirement that would adequately address the risk of injury.

L. Conclusion

For the reasons discussed above, the Commission finds that amending the mattress flammability standard (16 CFR part 1632) to specify SRM 1196a cigarettes as the ignition source is needed to adequately protect the public against the unreasonable risk of the occurrence of fire leading to death, injury, and significant property damage. The Commission also finds that the amendment to the Standard is reasonable, technologically practicable, and appropriate. The Commission further finds that the amendment is limited to the fabrics, related materials, and products that present such unreasonable risks.

List of Subjects in 16 CFR Part 1632

Consumer protection, Flammable materials, Labeling, Mattresses and mattress pads, Records, Textiles, Warranties.

For the reasons given above, the Commission amends 16 CFR part 1632 as follows:

PART 1632—STANDARD FOR THE FLAMMABILITY OF MATTRESSES AND MATTRESS PADS (FF 4-72, AMENDED)

- 1. The authority citation for part 1632 continues to read as follows:

Authority: 15 U.S.C. 1193, 1194; 15 U.S.C. 2079(b).

- 2. Revise § 1632.4(a)(2) to read as follows:

§ 1632.4 Mattress test procedure.

(a) * * *

(2) *Ignition source.* The ignition source shall be a Standard Reference Material cigarette (SRM 1196a), available for purchase from the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, MD 20899.

* * * * *

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2021-13070 Filed 6-22-21; 8:45 am]

BILLING CODE 6355-01-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada

AGENCY: Office of the Secretary, Department of Homeland Security; U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on June 22, 2021 and will remain in effect until 11:59 p.m. EDT on July 21, 2021, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID-19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on June 21, 2021.²

DHS continues to monitor and respond to the COVID-19 pandemic. As of the week of June 14, 2021, there have been over 172 million confirmed cases globally, with over 3.7 million confirmed deaths.³ There have been over 33 million confirmed and probable cases within the United States,⁴ over 1.3 million confirmed cases in Canada,⁵ and over 2.4 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of June 14, over 310 million vaccine doses have been administered in the United States and almost 55% of adults in the United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID-19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

² See 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID-19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed June 14, 2021).

⁴ CDC, COVID Data Tracker (accessed June 14, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

⁵ WHO, COVID-19 Weekly Epidemiological Update (June 8, 2021).

⁶ *Id.*

⁷ See CDC, COVID Data Tracker: COVID-19 Vaccinations in the United States (June 14, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed June 15, 2021).

⁸ See CDC, Travel Notice: COVID-19 in Canada (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID-19 in Mexico (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/>

Notice of Action

Given the outbreak and continued transmission and spread of COVID-19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada currently poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential

travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (accessed June 10, 2021).

⁹ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (e.g., individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (e.g., government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on July 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an

integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counterparts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2021–13238 Filed 6–21–21; 12:30 pm]

BILLING CODE 9112–FP–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico

AGENCY: Office of the Secretary, Department of Homeland Security; U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on June 22, 2021 and will remain in effect until 11:59 p.m. EDT on July 21, 2021, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on June 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of June 14, 2021, there have been over 172 million confirmed cases globally, with over 3.7 million confirmed deaths.³ There have been over 33 million confirmed and probable cases within the United States,⁴ over 1.3

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

² See 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4967 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed June 14, 2021).

⁴ CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing

million confirmed cases in Canada,⁵ and over 2.4 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of June 14, over 310 million vaccine doses have been administered in the United States and almost 55% of adults in the United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID–19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico currently poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with

(NAATs) by State, Territory, and Jurisdiction (June 13, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (accessed June 14, 2021).

⁵ WHO, COVID–19 Weekly Epidemiological Update (June 8, 2021).

⁶ *Id.*

⁷ See CDC, COVID Data Tracker: COVID–19 Vaccinations in the United States (June 14, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed June 15, 2021).

⁸ See CDC, Travel Notice: COVID–19 in Canada (June 7, 2021), <https://wwwncc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID–19 in Mexico (June 7, 2021), <https://wwwncc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed June 10, 2021).

COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (e.g., individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes

⁹ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

(e.g., government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);

- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on July 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counterparts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2021-13235 Filed 6-21-21; 12:30 pm]

BILLING CODE 9112-FF-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 92

[Docket No. FR-6249-C-02]

RIN 2529-AB01

Restoring Affirmatively Furthering Fair Housing Definitions and Certifications

AGENCY: Office of General Counsel, HUD.

ACTION: Interim final rule; correction.

SUMMARY: On July 10, 2021, HUD published its Restoring Affirmatively Furthering Fair Housing Definitions and Certifications interim final rule. Shortly thereafter, the Office of the Federal Register alerted HUD to a scrivener’s error in the amendatory instructions of the interim final rule. In this document, HUD corrects this error.

DATES: Effective date: July 31, 2021.

FOR FURTHER INFORMATION CONTACT:

Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW, Room 10238, Washington, DC 20410; telephone number 202-708-1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay at 800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: On July 10, 2021 (86 FR 30779), HUD published its Restoring Affirmatively Furthering Fair Housing Definitions and Certifications interim final rule. Following publication, the **Federal Register** alerted HUD to an error in the amendatory instruction for revisions to 24 CFR 92.508. Specifically, the amendatory instruction directed that paragraph (a)(7)(i)(C) be revised, however, the revision being made by the interim final rule is to paragraph (a)(7)(i)(B). This document corrects the amendatory instructions for 24 CFR 92.508 to reflect the correct paragraph being revised.

Correction

In FR Doc. 2021-12114 appearing on page 30779 in the **Federal Register** on July 10, 2021, the following correction is made:

§ 92.508 [Corrected]

On page 30792, in the second column, after the title for Part 92, in amendment 11, the instruction “Amend § 92.508 by revising paragraph (a)(7)(i)(C) to read as follows:” is corrected to read “Amend

§ 92.508 by revising paragraph (a)(7)(i)(B) to read as follows:"

Aaron Santa Anna,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2021–13173 Filed 6–22–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2021–0340]

RIN 1625–AA08

Special Local Regulation; Ohio River, New Martinsville, WV

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for all navigable waters of the Ohio River between mile markers 127.5 and 128.5. The special local regulation is needed to protect regatta participants, the public, and the marine environment from potential hazards created by the regatta. This special local regulation establishes a Patrol Commander and restricts movement and anchoring of spectator and non-participant vessels during the time of the event.

DATES: This rule is effective from 9 a.m. on July 10, 2021, until 6 p.m. on July 11, 2021.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2021–0340 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST1 Joseph McCollum, Marine Safety Unit Huntington, U.S. Coast Guard; (304) 733–0198, Joseph.P.Mccollum@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because we must establish the special local regulation by July 10, 2021, and lack sufficient time to request public comments and respond to those comments before the special local regulation must be established.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the New Martinsville Vintage Regatta taking place on the Ohio River between mile marker 127.5 and mile marker 128.5.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Ohio Valley (COTP) has determined that potential hazards associated with New Martinsville Vintage Regatta starting July 10, 2021, will be a safety concern for anyone on the Ohio River from mile marker 127.5 to mile marker 128.5. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the special local regulation for the duration of the regatta.

IV. Discussion of the Rule

This rule establishes a special local regulation from 9 a.m. through 6 p.m. daily on July 10, 2021, and July 11, 2021. The special local regulation will cover all navigable waters between mile markers 127.5 and 128.5 on the Ohio River. The duration of the regulated area is intended to protect personnel, vessels, and the marine environment in these navigable waters for the duration of the regatta. No vessel or person will be permitted to enter the regulated area

without obtaining permission from the designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size and location of the special local regulation. This rule involves a special local regulation lasting less than a week and covering a limited area of one mile. In addition, vessel traffic will be able to reach out to the safety boat to coordinate safe passage through the special local regulation which will impact a mile stretch on the Ohio River. The Coast Guard will publish a Local Notice to Mariners (LNMs), and issue a Broadcast Notice to Mariners (BNMs) via VHF–FM marine channel 16 about the regulated area.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the regulated area may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule

would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or

more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023-01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a special local regulations lasting from 9 a.m. through 6 p.m. on July 10, 2021 and 9 a.m. through 6 p.m. July 11, 2021 that will limit access of the Ohio River from mile marker 127.5 to mile marker 128.5. It is categorically excluded from further review under paragraph L[61] of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 1. A Memorandum for the Record supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05-1.

■ 2. Add § 100.T08-0340 to read as follows:

§ 100.T08-0340 New Martinsville Vintage Regatta, Ohio River, New Martinsville, WV.

(a) *Regulated area.* The regulations in this section apply to the following area:

All navigable waters of the Ohio River from mile marker 127.5 to mile marker 128.5 near New Martinsville, WV.

(b) *Definitions.* The following definitions apply to this section:

Designated representative means a Coast Guard Patrol Commander (PATCOM), including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Ohio Valley (COTP) in the enforcement of the regulations in this section.

Participant means all persons and vessels registered with the event sponsor as a participants in the race.

(c) *Regulations.* (1) The Coast Guard may patrol the event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF-FM (156.8 MHz) by the call sign "PATCOM."

(2) All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators. The "official patrol vessels" consist of any Coast Guard, state, or local law enforcement and sponsor provided vessels assigned or approved by the Commander, Eighth Coast Guard District, to patrol the event.

(3) Spectator vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer and will be operated at a no wake speed in a manner which will not endanger participants in the event or any other craft.

(4) No spectator shall anchor, block, loiter, or impede the through transit of participants or official patrol vessels in the regulated area during the effective dates and times, unless cleared for entry by or through an official patrol vessel.

(5) The Patrol Commander may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(6) Any spectator vessel may anchor outside the regulated area specified above, but may not anchor in, block, or loiter in a navigable channel.

(7) The Patrol Commander may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(8) To seek permission to enter, contact the COTP or the COTP's representative by VHF-FM marine radio

channel 16 or phone at 1-800-253-7465. Those in the regulated area must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(9) The COTP will provide notice of the regulated area through advanced notice via local notice to mariners and broadcast notice to mariners and by on-scene designated representatives.

(d) *Enforcement periods.* The special local regulation in this section will be enforced from 9 p.m. to 6 p.m. daily on July 10, 2021, and July 11, 2021.

Dated: June 16, 2021.

A.M. Beach,

Captain, U.S. Coast Guard, Captain of the Port Ohio Valley.

[FR Doc. 2021-13064 Filed 6-22-21; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[Docket ID ED-2020-OSERS-0192]

Final Priority—Rehabilitation Short-Term Training: Client Assistance Program

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Final priority.

SUMMARY: The Department of Education (Department) announces a priority under the Rehabilitation Short-Term Training program, Assistance Listing Number 84.246K. We take this action to improve the capacity of Client Assistance Program (CAP) professionals to inform, assist, and advocate for clients and client applicants about expanded education, training, and competitive integrated employment opportunities available through the State Vocational Rehabilitation Services program, and about the benefits and services available through other programs authorized by the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by the Workforce Innovation and Opportunity Act (WIOA). We may use this priority for competitions in Federal fiscal year (FFY) 2021 and later years. The priority will provide enhanced training and technical assistance on CAP duties and responsibilities under section 112 of the Rehabilitation Act, State Vocational Rehabilitation (VR) service provision requirements and other benefits and services under the Rehabilitation Act, expanded opportunities under WIOA, individual and systems advocacy competencies, and leadership,

relationship-building, and outreach skills as well as CAP strategic planning and resources management capacity-building. Also, the priority will promote the use of flexible training delivery methods, including in-person and virtual activities, and state-of-the-art communication tools and platforms, including the latest distance learning and convening technologies.

DATES: This priority is effective July 23, 2021.

FOR FURTHER INFORMATION CONTACT:

Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW, Room 5101, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7425. Email: 84.246K@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:

Purpose of Program: The Rehabilitation Short-Term Training program is designed to provide short-term training and technical instruction in areas of special significance to the vocational, medical, social, and psychological rehabilitation programs, supported employment program, independent living services programs, and Client Assistance Program, including special seminars, institutes, workshops, and other short-term courses. Short-term training projects may be of regional or national scope.

Program Authority: 29 U.S.C. 772(a)(1).

Applicable Program Regulations: 34 CFR parts 385 and 390.

We published a notice of proposed priority (NPP) for this competition in the **Federal Register** on February 19, 2021 (86 FR 10213). The NPP contained background information and our reasons for proposing the priority.

Editorial and technical revisions are explained in the discussion of comments that follow.

Public Comment: In response to our invitation in the NPP, 23 parties submitted comments on the proposed priority.

We group major issues according to subject. Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make. In addition, we do not address general comments that raise concerns not directly related to the proposed priority.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priority since publication of the NPP follows.

State VR/CAP Coordination and Communication

Comment: Several commenters addressed the priority's requirement that, in providing training and technical assistance, the grantee considers the challenges that State VR agencies face in implementing WIOA's expanded VR services provisions. These commenters expressed the concern that the priority's emphasis on VR agency challenges would have the effect of "shielding" the agency from its statutory responsibility to provide quality and timely VR services in accordance with the Rehabilitation Act. These commenters indicated that CAPs also face similar challenges and argue that any consideration of WIOA implementation challenges should encompass both perspectives.

Conversely, some commenters cited several VR agency challenges and limitations—financial and non-financial—beyond those referenced in the NPP and about which, these commenters believe, CAPs may not be sufficiently aware. These commenters cited, as examples, issues related to the Rehabilitation Act-Individuals with Disabilities Education Act coordination in the delivery of pre-employment transition services; the Rehabilitation Act's maintenance of effort requirements; and parameters set by the States' written policies governing the nature and scope of VR services and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements (2 CFR part 200), among others. The commenters recommended greater emphasis on improving communication between the CAPs and the State VR agencies to promote mutual understanding about their distinct roles, approaches, and perspectives; more training about the impact of Federal and State statutes, regulations, and policies on the delivery of VR services in the States; and closer coordination between the CAPs and the State VR agencies on both individual cases and statewide initiatives to improve competitive integrated employment outcomes for VR clients and applicants. Additionally, one commenter recommended that the comprehensive needs assessment questionnaires, surveys, or focus group include broader input from VR agencies and the State Rehabilitation Councils (SRCs).

Discussion: The Department agrees that the priority's references to VR agency challenges should not be interpreted as a dispensation from the VR program requirements in the Rehabilitation Act, as amended by WIOA. The Department also agrees that

VR clients and applicants would be well served by increased coordination, communication, and cross-training between CAPs and VR agencies. The priority includes several provisions that promote such coordination, communication, and training. Required training topics include the obstacles faced by individuals represented by the CAPs and the challenges faced by VR agencies; the roles of SRCs, workforce development partners, and other key VR stakeholders; leadership, relationship-building, and outreach skills for CAP professionals; strategic assessments of VR program challenges, needs, and opportunities based on the CAPs; and strategic engagement with State VR agencies, SRCs, and other stakeholders in response to such assessments. In addition, the NPP requires that CAP training and technical assistance be based on a comprehensive needs assessment that considers the needs of CAP professionals and individuals with disabilities in the context of VR program challenges, needs, and opportunities.

We are revising the priority to further emphasize CAP coordination and communication with the stated purpose of improving VR service delivery and, thus, competitive integrated employment outcomes for VR clients and applicants.

Changes: The Department added language encouraging greater communication, coordination, cross-training, and feedback between the CAP and the State VR agencies, SRCs, workforce partners, and other programs and services available under the Rehabilitation Act in the priority's introductory paragraphs; in required topic areas (a)(1)(iv) and (vi) and (a)(3)(i) and (iii); and in the comprehensive needs assessment section. Also, we added a reference to the CAP's participation in the SRC under the CAP duties and responsibilities required topic area.

Policy Analysis

Comment: One commenter suggested that policy analysis is an additional area that needs to be addressed in the CAP Training priority. The commenter points out that, under section 101(a)(16)(A) and (B) of the Rehabilitation Act, the designated State agency is required to actively consult with the CAP prior to the adoption of any policies or procedures governing the provision of VR services under the State plan, or amendments thereof, and to consider the views of the CAP director in matters of general policy arising in the administration of the plan.

Discussion: The Department agrees that CAP professionals must develop the

expertise necessary to advise State designated agencies on proposed policies and procedures governing the provision of VR services, consistent with section 101(a)(16)(A) and (B)(iv) of the Rehabilitation Act. The NPP supports the development of such expertise by requiring CAP training on the service provision requirements in the Rehabilitation Act and its regulations, policy guidance, and legal decisions, including those related to section 113 on pre-employment transition services and section 511 regarding limitations on use of subminimum wage. We are revising the priority to further foster and facilitate meaningful CAP input on policies or procedures governing the provision of VR services before they are adopted by the State designated agency, consistent with the Rehabilitation Act. The final priority's new provisions on coordination and communication discussed above should also foster favorable conditions for the CAPs to provide input on proposed VR service provision policies and procedures.

Changes: The Department added a reference to section 101(a)(16) under the final priority's required topic area on CAP duties and responsibilities.

Dispute Resolution Between CAPs and State VR Agencies

Comment: One commenter stated that the priority should encourage CAPs and State VR agencies to resolve disputes at the lowest level of intervention possible to minimize the need for litigation and maximize the amount of Federal funds available for the provision of VR services that individuals need to obtain their employment goals under the Rehabilitation Act.

Discussion: The Department agrees that the priority should encourage CAPs to resolve disputes at the lowest level possible. Accordingly, alternate dispute resolution is one of the required training topic areas under this priority. Also, the notice inviting applications published elsewhere in this issue of the **Federal Register** includes two pertinent Government Performance and Results Act (GPRA) performance measures: Number and percentage of individual cases resolved through alternative dispute resolution and number of non-litigation systemic activities not involving individual representation that resulted in the change of one or more policies or practices of an agency. Moreover, we expect that the priority's provisions regarding coordination and communication between CAPs, State VR agencies, and other programs within the scope of CAP will help create an environment favorable to non-litigation

dispute resolution activities and outcomes.

Changes: None.

CAP Training Nature and Scope

Comment: One commenter raised the question of whether the CAP Training priority's purview extends beyond the VR services outlined in Title I of the Rehabilitation Act, as amended by WIOA. The commenter notes that section 112(a) extends the CAP program's role to all the projects, programs, and services provided under the Rehabilitation Act, including independent living.

Discussion: The Department agrees that, under section 112(a) of the Rehabilitation Act, CAPs are responsible for informing, assisting, advising, and advocating for projects, programs, and services under the Rehabilitation Act beyond VR, including the independent living programs. In response, the priority has been revised to ensure consistency with Section 112(a) of the Rehabilitation Act.

Changes: The Department incorporated throughout the priority references to other projects, programs, and services provided by the Rehabilitation Act, in addition to the priority's original references to the VR program.

Comment: One commenter expressed support for the priority's provisions regarding CAP Training coordination with the Rehabilitation Services Administration (RSA) VR technical assistance centers. Also, the commenter recommended further integration with the technical assistance centers through the CAP Training grantee's participation in the Intensive Technical Assistance (ITA) agreements established between the technical assistance centers and participating State VR agencies. The commenter also recommended that the CAP Training grantee join the Technical Assistance Center Collaborative that convenes monthly to coordinate delivery of the centers' technical assistance to the VR agencies.

Discussion: The Department agrees with the importance of coordination between the CAP Training program and the RSA VR technical assistance centers. Accordingly, the priority requires the coordination and leveraging of resources between the CAP Training grantee and the technical assistance centers. Towards that end, we will encourage the CAP Training grantee to attend the Technical Assistance Center Collaborative meetings. However, it is not feasible or appropriate for the CAP Training grantee to participate directly in the ITA agreements. CAP Training activities do not constitute ITA, as

defined in the technical assistance centers' final priority. Under the priority, CAP training is available primarily to individual CAP professionals nationwide, whereas technical assistance to CAPs in individual States are available on a short-term, issue-specific basis only. The CAP Training grantee will be able to learn about the ITA agreements through its participation in the Technical Assistance Center Collaborative. Participation in the collaborative may also offer opportunities for short-term collaborative opportunities between CAP Training and the technical assistance centers in individual States.

Changes: None.

Funding Needs

Comment: Several commenters noted that the priority's increased focus on strategic planning and resource management would require increased funding relative to that under the prior priority.

Discussion: The funding level established in the notice inviting applications published elsewhere in this issue of the **Federal Register** for the FFY 2021 competition reflects the Department's recognition of the funding needs associated with the increased focus on strategic planning and resource management capacity-building and other aspects of this priority.

Changes: None.

Access to State Plans and Program Reports

Comment: Several commenters questioned whether the grantee would have the necessary access to Unified or Combined State Plans, State monitoring reports, Annual Client Assistance Program Reports (RSA-227), and input from VR clients.

Discussion: The approved Unified and Combined State plans can be found at <https://wioaplans.ed.gov/>. The State monitoring reports, RSA-227, State VR annual reports, and other pertinent information resources are currently available on the RSA's upgraded information management system, at rsa.ed.gov. The Department expects that these information resources will be used for two broad purposes under this priority: A comprehensive needs assessment that the grantee will conduct at the national level and the strategic planning activities that individual CAPs will conduct at the State level. RSA will provide the CAP Training grantee with technical assistance to access State Plans, RSA-227s, State monitoring reports, and other pertinent resources for its comprehensive needs assessment.

In turn, the CAP Training grantee is expected to help individual CAPs to access and analyze these resources and to gather and assess input from VR clients and other key stakeholders as part of their strategic planning activities.

Changes: None.

FINAL PRIORITY:

Rehabilitation Short-Term Training—Client Assistance Program (CAP Training).

This CAP Training priority is designed to provide CAP professionals the necessary knowledge, competencies, and skills to inform, assist, and advocate for clients and client-applicants regarding expanded education, training, and competitive integrated employment opportunities and other services and benefits available under the Rehabilitation Act of 1973, as amended by WIOA.

Under this priority, the grantee must provide comprehensive and in-depth training and technical assistance activities that provide updated information about CAP duties and responsibilities under the Rehabilitation Act; expanded VR service provisions in the Rehabilitation Act, including section 113 on pre-employment transition services and section 511 regarding limitations on use of subminimum wage; and on other education, training, and employment opportunities under WIOA, including career pathways, apprenticeships, and customized employment. The training and technical assistance must enhance CAP professionals' individual and systems advocacy competencies and their leadership, relationship-building, and outreach skills. In addition, the training and technical assistance must strengthen the institutional effectiveness of the CAPs in the individual States through strategic planning and resource management capacity-building activities. In providing the training and technical assistance, the grantee must consider the challenges and opportunities experienced by the VR program and other programs authorized under the Rehabilitation Act, as amended by WIOA, and encourage greater communication and coordination between the CAPs and those programs.

Under this priority, the Secretary funds only applications that meet the project requirements outlined below. Applicants must describe major implementation activities, timelines, and milestones for each of the following project requirements:

(a) Training and technical assistance to increase CAP professionals' knowledge, skills, and competencies in

the four broad subject areas and related topics:

(1) The Rehabilitation Act, as amended by WIOA, including—

(i) CAP duties and responsibilities under section 112(a) of the Rehabilitation Act and other pertinent provisions including section 101(a)(16) regarding CAP consultation on draft policies and procedures governing the provision of VR services and section 105(b) regarding CAP membership on the SRC;

(ii) VR service provision requirements in the Rehabilitation Act and its regulations, policy guidance, and legal decisions, including those regarding section 113 on pre-employment transition services and section 511 regarding limitations on use of subminimum wage;

(iii) Requirements related to other projects, programs, and services under the Rehabilitation Act, as amended by WIOA, including the independent living programs authorized in Title VII;

(iv) Expanded training, education, and employment opportunities under WIOA, including but not limited to the provision of pre-employment transition services, apprenticeships, customized employment, career pathways, and the focus on postsecondary credential attainment, including advanced degrees;

(v) Challenges and opportunities in implementing the expanded VR service provisions and other benefits available under the Rehabilitation Act, as amended by WIOA, including consideration of Federal and State statutes, regulations, and policies that impact the delivery of VR services in the States, such as the transition services provisions of the Individuals with Disabilities Education Act;

(vi) Obstacles that individuals with disabilities—including individuals with the most significant disabilities, students and youth with disabilities, members of traditionally unserved or underserved groups, and individuals in economically disadvantaged communities—experience in accessing VR services and other services and benefits under the Rehabilitation Act; and

(vii) The complementary roles of CAPs, State VR agencies, SRCs, community rehabilitation programs, WIOA core partners, and key stakeholders of the VR program and other services and programs authorized by the Rehabilitation Act, as amended by WIOA.

(2) Discrete skills related to CAP duties and responsibilities, including—

(i) Individual advocacy;

(ii) Systems advocacy;

(iii) Alternate dispute resolution; and

(iv) Leadership, relationship-building, and outreach.

(3) Strategic planning, including—

(i) Assessments of the State's program priorities, challenges, needs, and opportunities in implementing the expanded VR program provisions and other benefits and services under the Rehabilitation Act, as amended by WIOA. Strategic assessments may include targeted reviews of the Unified or Combined State Plans, monitoring reports, Annual Client Assistance Program Report (RSA-227), other State Plans and reports, and input from agency leadership and staff, SRC members, clients, applicants, and other key stakeholders;

(ii) Development of the individual CAPs' strategic goals and action plans (including their particular training or technical assistance needs), based on identified program priorities, challenges, needs, and opportunities; and

(iii) Strategic outreach and engagement with State VR agencies, SRCs, and other stakeholders associated with the programs and services authorized under the Rehabilitation Act to increase collaboration in support of improved service delivery and outcomes in the State.

(4) Resource management, including—

(i) Budgeting and financial oversight practices in support of strategic goals and objectives, consistent with Generally Accepted Accounting Practices; and

(ii) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, at 2 CFR part 200, pertinent to CAP and VR program operations.

(b) Comprehensive plan for the provision of training and technical assistance on the required subject areas and topics, based on a comprehensive assessment of CAP professionals' needs. The training and technical assistance plan must describe the following:

(1) Subject areas and topics, specifically, how they will be prioritized and made available in the initial year and subsequent years of the project;

(2) Training activities, consisting of both established training modules and ad hoc training responsive to emerging circumstances or trends;

(3) Technical assistance, consisting of individualized assistance on applying principles and practices from training on the required subject areas and topics, as well as consultation on options for applying existing law, regulations, and RSA-issued guidance to specific factual circumstances that arise in the course of

CAP professionals' individual or systems advocacy efforts;

(4) Training and technical assistance curricula, materials, and tools, which may incorporate the resources developed by current and former RSA VR technical assistance centers and demonstration projects, available at the National Clearinghouse of Rehabilitation Training Materials;

(5) Information delivery methods, including in-person and virtual activities, communities of practice, social media, and searchable databases; and

(6) State-of-the-art communication tools and platforms, including an interactive project website, distance learning and convening technologies, and searchable databases.

The comprehensive needs assessment may comprise selective reviews, on a national basis, of RSA-227s, Unified or Combined State Plans, RSA State monitoring reports, other State Plans and reports, and input from CAP professionals and key stakeholders, including VR agency and SRC representatives.

(c) Quality control processes to ensure that training and technical assistance activities and materials are updated to reflect the statutory and regulatory changes in the Rehabilitation Act, as amended by WIOA, the RSA policy guidance updates, and future reauthorizations of the Rehabilitation Act.

(d) Coordination with and leveraging the resources of RSA's vocational rehabilitation technical assistance centers and other Federal or non-Federal programs, including the National Technical Assistance Center on Transition and the recently funded RSA technical assistance centers on Quality Employment and Quality Management in the development and delivery of CAP Training project activities, curriculum, materials, and tools.

(e) Coordination with the entity providing training and technical assistance to the Protection and Advocacy of Individual Rights program, consistent with section 509 of the Rehabilitation Act.

(f) Comprehensive evaluation plan based on performance measures established in the notice inviting applications, consistent with the Government Performance and Results Act.

CAP Training performance will be assessed based on the following considerations:

(a) Increased capacity to provide individual and systems advocacy, alternative dispute resolution, and outreach to unserved or underserved

populations, as reported by the CAP professionals.

(b) Trends in pertinent CAP services, including individual and systems advocacy.

(c) Relationship between the observed CAP services trends and the training and technical assistance provided under this priority.

The performance evaluation will be based on a variety of quantitative and qualitative data sources, including, but not limited to:

(a) RSA-227;

(b) Pre- and post-training assessments;

(c) Questionnaires, surveys, and focus groups;

(d) Success stories; and

(e) Peer reviews.

The evaluation plan must include a logic model that outlines the proposed project activities, outputs, outcomes, baselines, and targets. The plan also must describe how the evaluation results will be used to promote continuous program improvement throughout the grant's period of performance.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866 and 13563 Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by 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 final regulatory action is not a significant regulatory action subject to review by OMB under section 3 (f) of Executive Order 12866.

We have also reviewed this regulatory action 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 this final priority only on a reasoned determination that the benefits will justify the 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 this regulatory action is consistent with the principles in Executive Order 13563.

We have also determined that this regulatory action will not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with these Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department’s programs and activities. The costs will include the time and effort in responding to the priority for entities that choose to respond. Potential benefits include increased access to the educational, training, and competitive integrated employment opportunities under the Rehabilitation Act, as amended by WIOA, for individuals with disabilities, through improved CAP professional development and institutional capacity nationwide.

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 Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Regulatory Flexibility Act

Certification: The Secretary certifies that this final regulatory action will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define “small entities” as for-profit or nonprofit institutions with total annual revenue below \$7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000.

The small entities that this final regulatory action will affect are States and public or private nonprofit agencies and organizations, including Indian Tribes and institutions of higher education, which are the eligible applicants for this program. We believe that the costs imposed on an applicant by the final priority are limited to the paperwork burden related to preparing an application and that the benefits of the final priority will outweigh any costs incurred by the applicant. There are very few entities that could provide the type of technical assistance required under the final priority. For these reasons, the final priority will not impose a burden on a significant number of small entities.

Paperwork Reduction Act of 1995:

The priority contains information collection requirements that are approved by OMB under OMB control number 1820–0018; the priority does not affect the currently approved data collection.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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Register by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs, delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021-13191 Filed 6-17-21; 4:15 pm]

BILLING CODE 4000-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 27

[AU Docket No. 21-62; DA 21-655; FR ID 32766]

Auction of Flexible-Use Service Licenses in the 3.45–3.55 GHz Band for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 110; Bidding in Auction 110 Scheduled To Begin October 5, 2021

AGENCY: Federal Communications Commission.

ACTION: Final action; requirements and procedures.

SUMMARY: This document establishes the procedures to be used for Auction 110, the Auction of new flexible-use licenses in the 3.45–3.55 GHz band (the 3.45 GHz Service).

DATES: Applications to participate in Auction 110 must be submitted before 6 p.m. Eastern Time (ET) on July 21, 2021. Upfront payments for Auction 110 must be received by 6 p.m. ET on September 9, 2021. Bidding in Auction 110 is scheduled to start on October 5, 2021.

FOR FURTHER INFORMATION CONTACT:

General Auction 110 Information: FCC Auctions Hotline at 888-225-5322, option two; or 717-338-2868.

Auction 110 Legal Information: Mary Lovejoy or Andrew McArdell at 202-418-0660.

3.45 GHz Service Information: Joyce Jones at 202-418-1327.

3.45 GHz Service Technical Information: Ira Keltz, (202) 418-0616.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 110 Procedures Public Notice*, released on June 9, 2021. The complete text of the *Auction 110 Procedures Public Notice*, including attachments and any related document, are available on the Commission's website at www.fcc.gov/auction/110 or

by using the search function for AU Docket No. 21-62, DA 21-655, on the Commission's Electronic Comment Filing System (ECFS) web page at www.fcc.gov/ecfs. Alternative formats are available to persons with disabilities by sending an email to FCC504@fcc.gov or by calling the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

I. General Information

A. Introduction

1. By the *Auction 110 Procedures Public Notice*, the Office of Economics and Analytics (OEA), jointly with the Wireless Telecommunications Bureau (WTB), establishes the procedures to be used for Auction 110, the auction of new flexible-use licenses in the 3.45–3.55 GHz band (the 3.45 GHz Service). Auction 110 is the Commission's third scheduled auction of mid-band spectrum, which is intended to further the deployment of fifth-generation (5G) wireless, the Internet of Things (IoT), and other advanced spectrum-based services across the country. The *Auction 110 Procedures Public Notice* continues to implement section 905 of the Consolidated Appropriations Act, 2021, which required the Commission to start an auction to grant new initial licenses subject to flexible use in the 3450–3550 MHz (3.45 GHz) band by December 31, 2021.

2. The bidding for new licenses in Auction 110 is scheduled to commence on October 5, 2021. The *Auction 110 Procedures Public Notice* provides details regarding the procedures, terms, conditions, dates, and deadlines governing participation in Auction 110 bidding, as well as an overview of the post-auction application and payment processes.

B. Background and Relevant Authority

3. In the *3.45 GHz Second Report and Order*, 86 FR 17920, April 7, 2021, the Commission made available 100 megahertz of spectrum in the 3.45–3.55 GHz band for licensed use within the contiguous United States. In that Order, the Commission allocated the 3.45–3.55 GHz band for new non-federal fixed and mobile (except aeronautical mobile) operations in the contiguous United States. Among other things, the Commission authorized both fixed and mobile operations in the 3.45–3.55 GHz band using geographic area licensing, established licensing and operating rules for the new 3.45 GHz Service, and decided to use its competitive bidding rules to assign 3.45 GHz Service licenses.

4. On March 18, 2021, in accordance with section 309(j)(3) of the Communications Act of 1934, as amended (Communications Act), the Commission released a public notice seeking comment on certain competitive bidding procedures and various other procedures to be used in Auction 110. The Commission received comments from eight parties in response to the *Auction 110 Comment Public Notice*, 86 FR 18000, April 07, 2021, and eight reply comments. In the *Auction 110 Procedures Public Notice*, OEA and WTB resolve all open issues raised in the *Auction 110 Comment Public Notice* and address the comments received.

5. Other Commission rules and decisions provide the underlying authority for the procedures OEA and WTB adopt today for Auction 110. Among other things, prospective applicants should familiarize themselves with the Commission's general competitive bidding rules, including recent amendments and clarifications thereto, as well as Commission decisions regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. Prospective applicants also should familiarize themselves with the Commission's rules regarding the 3.45 GHz Service, as well as the licensing and operating rules that are applicable to all part 27 services. In addition, applicants must be thoroughly familiar with the procedures, terms, and conditions contained in the *Auction 110 Procedures Public Notice* and any future public notices that may be released in this proceeding.

6. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in its public notices at any time and will issue public notices to convey any new or supplemental generally applicable information to applicants. Pursuant to the Commission's rules, OEA and WTB also retain the authority to implement further procedures during the course of this auction. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to Auction 110.

C. Description of Licenses To Be Offered in Auction 110

7. Auction 110 will offer 4,060 new flexible-use licenses for spectrum in the 3.45–3.55 GHz band throughout the contiguous United States. The 100 megahertz of spectrum in this band will be licensed on an unpaired basis and divided into ten 10-megahertz blocks in

partial economic area (PEA)-based geographic areas located in the contiguous 48 states and the District of Columbia (PEAs 1–41, 43–211, 213–263, 265–297, 299–359, and 361–411). These 10-megahertz blocks are designated as A through J.

8. All 3.45 GHz Service licenses will be issued for 15-year, renewable license terms, and certain licenses are subject to cooperative sharing requirements, as described in the *3.45 GHz Second Report and Order* and below, as well as any other conditions that may be established in related proceedings. Interested parties will be able to find additional information about the cooperative sharing requirements, including information about the encumbrances in specific PEAs, on the National Telecommunications and Information Administration's (NTIA) 3450–3550 MHz web page at <https://www.ntia.doc.gov/category/3450-3550-mhz>. Interested parties can also find additional guidance and information on federal/non-federal coordination procedures in the public notice issued jointly by NTIA and the Commission. OEA and WTB understand that the Department of Defense (DoD) will hold one or more workshops to provide further information on transition and coordination plans, as well as guidance on anticipated received power levels from the DoD's high-powered operations, methods and means for sharing proprietary and classified information (e.g., through "Trusted Agents"), and descriptions of potential national emergency scenarios.

9. Licensees may hold up to four 10-megahertz blocks (out of a total of ten) in the 3.45–3.55 GHz band within any PEA at any given time for the first four years after the close of the auction. A licensee in the 3.45–3.55 GHz band may provide any services permitted under terrestrial fixed or mobile, except aeronautical mobile, allocations (as set forth in the non-Federal Government column of the Table of Frequency Allocations in section 2.106 of the Commission's rules, as modified by the *3.45 GHz Second Report and Order*), so long as it complies with the relevant licensing, operating, and technical rules.

D. Auction Specifics

1. Auction Title and Start Date

10. The auction of licenses in the 3.45–3.55 GHz band will be referred to as "Auction 110." Bidding in Auction 110 will begin on Tuesday, October 5, 2021. Pre-bidding dates and deadlines are listed below. The initial schedule for bidding rounds in Auction 110 will be

announced by public notice at least one week before bidding begins.

11. Unless otherwise announced, bidding on all licenses will be conducted on each business day until bidding has stopped on all licenses.

2. Auction Dates and Deadlines

12. The following dates and deadlines apply to Auction 110:

Auction Application Tutorial Available (via internet): No later than June 22, 2021

Short-Form Application (FCC Form 175) Filing Window Opens July 8, 2021, 12 p.m. Eastern Time (ET)

Short-Form Application: (FCC Form 175) Filing Window Deadline: July 21, 2021, 6 p.m. ET

Upfront Payments (via wire transfer):

September 2, 2021, 6 p.m. ET Bidding Tutorial Available (via internet): No later than September 16, 2021

Mock Auction: September 30, 2021 Bidding Begins in Auction 110: October 5, 2021

3. Requirements for Participation

13. Those wishing to participate in Auction 110 must:

- Submit a short-form application (FCC Form 175) electronically prior to 6 p.m. ET on July 21, 2021, following the electronic filing procedures set forth in the FCC Form 175 Instructions. OEA will prepare and make publicly available detailed instructions for submitting an FCC Form 175 for Auction 110 (FCC Form 175 Instructions) in the Education section of the Auction 110 website at www.fcc.gov/auction/110.

- Submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6 p.m. ET on September 2, 2021, following the procedures and instructions set forth in the FCC Form 159 Instructions.

- Comply with all provisions outlined in the *Auction 110 Procedures Public Notice* and applicable Commission rules.

II. Applying To Participate in Auction 110

A. General Information Regarding Short-Form Applications

14. An application to participate in Auction 110, referred to as a short-form application or FCC Form 175, provides information that the Commission uses to determine whether the applicant has the legal, technical, and financial qualifications to participate in a Commission auction for spectrum licenses. The short-form application is

the first part of the Commission's two-phased auction application process. In the first phase, a party seeking to participate in Auction 110 must file a short-form application in which it certifies, under penalty of perjury, that it is qualified to participate. Eligibility to participate in Auction 110 is based on an applicant's short-form application and certifications and on the applicant's submission of a sufficient upfront payment for the auction. After bidding closes, in the second phase of the process, each winning bidder must file a more comprehensive post-auction, long-form application (FCC Form 601) for the licenses it wins in the auction, and it must have a complete and accurate ownership disclosure information report (FCC Form 602) on file with the Commission. OEA and WTB remind applicants that being deemed qualified to bid in Auction 110 does not constitute a determination that a party is qualified to hold a Commission license or is eligible for a designated entity bidding credit.

15. A party seeking to participate in Auction 110 must file an FCC Form 175 electronically via the Auction Application System prior to 6 p.m. ET on July 21, 2021, following the procedures prescribed in the FCC Form 175 Instructions. If an applicant claims eligibility for a bidding credit, then the information provided in its FCC Form 175 as of the filing date will be used to determine whether the applicant may request the claimed bidding credit. Below OEA and WTB describe more fully the information disclosures and certifications required in the short-form application. An applicant that files an FCC Form 175 for Auction 110 will be subject to the Commission's rule prohibiting certain communications. An applicant is subject to the prohibition beginning at the deadline for filing short-form applications—6 p.m. ET on July 21, 2021. The prohibition will end for applicants on the post-auction down payment deadline for Auction 110.

16. An applicant bears full responsibility for submitting an accurate, complete, and timely short-form application. Pursuant to the Commission's competitive bidding rules, each applicant must make a series of certifications under penalty of perjury on its FCC Form 175 related to the information provided in its application and its participation in the auction, and it must confirm that it is legally, technically, financially, and otherwise qualified to hold a license. Additionally, each participant in Auction 110 must certify that it has read the *Auction 110 Procedures Public Notice* and has familiarized itself both with the auction

procedures and with the requirements for obtaining a license and operating facilities in the 3.45–3.55 GHz band). If an Auction 110 applicant fails to make the required certifications in its FCC Form 175 by the filing deadline, then its application will be deemed unacceptable for filing and cannot be corrected after the filing deadline.

17. An applicant should note that submitting an FCC Form 175 (and any amendments thereto) constitutes a representation by the certifying official that he or she is an authorized representative of the applicant with authority to bind the applicant, that he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. Submitting a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

18. Applicants are cautioned that, because the required information submitted in FCC Form 175 bears on each applicant's qualifications, requests for confidential treatment will not be routinely granted. The Commission generally has held that it may publicly release confidential business information where the party has put that information at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosing the information. In this regard, the Commission specifically has held that information submitted in support of receiving bidding credits in auction proceedings should be made available to the public.

19. An applicant must designate between one and three individuals as authorized bidders in its FCC Form 175. The Commission's rules prohibit an individual from serving as an authorized bidder for more than one auction applicant.

20. No individual or entity may file more than one short-form application or have a controlling interest in more than one short-form application. If a party submits multiple short-form applications for an auction, then only one application may form the basis for that party to become qualified to bid in that auction.

21. Similarly, and consistent with the Commission's general prohibition on joint bidding agreements, a party generally is permitted to participate in a Commission auction only through a single bidding entity. Accordingly, the filing of applications in Auction 110 by multiple entities controlled by the same individual or set of individuals

generally will not be permitted. This restriction applies across all applications, without regard to the geographic areas selected. The Commission adopted a limited exception to the general prohibition on the filing of multiple applications by commonly controlled entities for qualified rural wireless partnerships and individual members of such partnerships. 47 CFR 1.2105(a)(3). Under this limited exception, each qualifying rural wireless partnership and its individual members will be permitted to participate separately in an auction. As noted by the Commission in adopting the prohibition on applications by commonly controlled entities, this rule, in conjunction with the prohibition against joint bidding agreements, protects the competitiveness of the Commission's auctions.

22. After the initial short-form application filing deadline, Commission staff will review all timely submitted applications for Auction 110 to determine whether each application complies with the application requirements and whether the applicant has provided all required information concerning its qualifications for bidding. After this review is completed, a public notice will be released announcing the status of applications and identifying the applications that are complete and those that are incomplete because of minor defects that may be corrected. That public notice also will establish an application resubmission filing window, during which an applicant may make permissible minor modifications to its application to address identified deficiencies. The public notice will include the deadline for resubmitting modified applications. To become a qualified bidder, an applicant must have a complete application (*i.e.*, have timely filed an application that is deemed complete after the deadline for correcting any identified deficiencies), and must make a timely and sufficient upfront payment. Qualified bidders will be identified by public notice at least 10 days prior to the mock auction.

23. The *Auction 110 Procedures Public Notice* outlines below additional details regarding certain information required to be submitted in the FCC Form 175. An applicant should consult the Commission's rules to ensure that, in addition to the materials described below, all required information is included in its short-form application. To the extent the information in the *Auction 110 Procedures Public Notice* does not address a potential applicant's specific operating structure, or if the

applicant needs additional information or guidance concerning the described disclosure requirements, the applicant should review the educational materials for Auction 110 (see the Education section of the Auction 110 website at www.fcc.gov/auction/110) and/or use the contact information provided in the *Auction 110 Procedures Public Notice* to consult with Commission staff to better understand the information it must submit in its short-form application.

B. License Area Selection

24. An applicant must select all of the license areas on which it may want to bid from the list of available PEAs on its FCC Form 175. An applicant must carefully review and verify its PEA selections before the FCC Form 175 filing deadline because those selections cannot be changed after the auction application filing deadline. An applicant is not required to place bids on any or all of the license areas selected, but the FCC Auction Bidding System (bidding system) will not accept bids for blocks located in PEAs that the applicant did not select in its FCC Form 175. The auction application system, however, will provide an applicant the option to select all 406 available PEAs at one time using an "all PEAs" feature.

C. Disclosure of Agreements and Bidding Arrangements

25. An applicant must provide in its FCC Form 175 a brief description of, and identify each party to, any partnerships, joint ventures, consortia or agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls or is controlled by the applicant, is a party. In connection with the agreement disclosure requirement, the applicant must certify under penalty of perjury in its FCC Form 175 that it has described, and identified each party to, any such agreements, arrangements, or understandings to which it (or any party that controls it or that controls) is a party. As discussed below, an applicant may continue negotiating, discussing, or communicating with respect to a new agreement after the FCC Form 175 filing deadline, provided that the communications involved do not relate both to the licenses being auctioned and to bids or bidding strategies or post-auction market structure. If, after the FCC Form 175

filing deadline, an auction applicant enters into any agreement relating to the licenses being auctioned, then it is subject to these same disclosure obligations. Each applicant must maintain the accuracy and completeness of the information in its pending auction application.

26. For purposes of making the required agreement disclosures on the FCC Form 175, if parties agree in principle on all material terms prior to the application filing deadline, then each party to the agreement that is submitting an auction application must provide a brief description of, and identify the other party or parties to, the agreement on its respective FCC Form 175, even if the agreement has not been reduced to writing. Parties that have not agreed in principle by the FCC Form 175 filing deadline should not describe, or include the names of parties to, the discussions on their applications.

27. The Commission's rules generally prohibit joint bidding and other arrangements involving auction applicants (including any party that controls or is controlled by such applicants). For purposes of the prohibition, a joint bidding arrangement includes any arrangement relating to the licenses being auctioned that addresses or communicates, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific licenses on which to bid, and any such arrangement relating to the post-auction market structure.

28. This prohibition applies to joint bidding arrangements involving two or more nationwide providers, as well as joint bidding arrangements involving a nationwide provider and one or more non-nationwide providers, where at least one party to the arrangement is an applicant for the auction. In the *Updating Part 1 Report and Order*, 80 FR 56763, Sep. 18, 2015, the Commission stated that entities that qualify as nationwide providers generally would be identified in procedures public notices released before each auction. To that end, and consistent with the Commission's decisions in recent spectrum auctions, the Commission considers AT&T, T-Mobile, and Verizon to be "nationwide providers" for the purpose of implementing the competitive bidding rules in Auction 110.

29. Under certain circumstances, a non-nationwide provider may enter into an agreement to form a consortium or a joint venture (as applicable) that results in a single party applying to participate in an auction. Specifically, a designated entity (DE) can participate in one

consortium or joint venture in an auction, and non-nationwide providers that are not designated entities may participate in an auction through only one joint venture. While two or more non-nationwide providers may participate in an auction through a joint venture, a nationwide and a non-nationwide provider may not do so. A non-nationwide provider may enter into only one agreement to form a consortium or joint venture (as applicable), and such consortium or joint venture shall be the exclusive bidding vehicle for its members in the auction. The general prohibition on joint bidding arrangements excludes certain agreements, including those that are solely operational in nature, as defined in section 1.2105(a)(2)(ix)(A)–(C) of the Commission's rules.

30. To implement the prohibition on joint bidding arrangements, the Commission's rules require each applicant to certify in its short-form application that it has disclosed any arrangements or understandings of any kind relating to the licenses being auctioned to which it (or any party that controls or is controlled by it) is a party. The applicant must also certify that it (or any party that controls or is controlled by it) has not entered and will not enter into any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with, among others, any other applicant or a nationwide provider.

31. Although the Commission's rules do not prohibit auction applicants from communicating about matters that are within the scope of an excepted agreement that has been disclosed in an FCC Form 175, the Commission reminds applicants that certain discussions or exchanges could nonetheless touch upon impermissible subject matters, and that compliance with the Commission's rules will not insulate a party from enforcement of the antitrust laws.

32. Applicants should bear in mind that a winning bidder will be required to disclose in its FCC Form 601 post-auction application the specific terms, conditions, and parties involved in any agreement relating to the licenses being auctioned into which it had entered prior to the time bidding was completed. This applies to any bidding consortium, joint venture, partnership, or other agreement, arrangement, or understanding of any kind entered into relating to the competitive bidding process, including any agreements relating to the licenses being auctioned that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not

to bid), or the post-auction market structure, to which the applicant, or any party that controls or is controlled by the applicant, is a party.

D. Ownership Disclosure Requirements

33. Each applicant must comply with the applicable part 1 ownership disclosure requirements and provide information required by sections 1.2105 and 1.2112, and, where applicable, section 1.2110, of the Commission's rules. Specifically, in completing FCC Form 175, an applicant must fully disclose information regarding the real party- or parties-in-interest in the applicant or application and the ownership structure of the applicant, including both direct and indirect ownership interests of 10% or more, as prescribed in sections 1.2105 and 1.2112 and, where applicable, section 1.2110 of the Commission's rules. Each applicant is responsible for ensuring that information submitted in its short-form application is complete and accurate.

34. In certain circumstances, an applicant may have previously filed an FCC Form 602 ownership disclosure information report or filed an auction application for a previous auction in which ownership information was disclosed. The most current ownership information contained in any FCC Form 602 or previous auction application on file with the Commission that used the same FCC Registration Number (FRN) the applicant is using to submit its FCC Form 175 will automatically be pre-filled into certain ownership sections on the applicant's FCC Form 175, if such information is in an electronic format compatible with FCC Form 175. Applicants are encouraged to submit an FCC Form 602 ownership report or update any ownership information on file with the Commission in an FCC Form 602 ownership report prior to starting a short-form application for Auction 110 to ensure that their most recent ownership information is pre-filled into their short-form application. Each applicant must carefully review any ownership information automatically entered into its FCC Form 175, including any ownership attachments, to confirm that all information supplied on FCC Form 175 is complete and accurate as of the application filing deadline. Any information that needs to be corrected or updated must be changed directly in FCC Form 175.

E. Foreign Ownership Disclosure Requirements

35. Section 310 of the Communications Act requires the

Commission to review foreign investment in radio station licenses and imposes specific restrictions on who may hold certain types of radio licenses. Section 310 applies to applications for initial radio licenses, applications for assignments and transfers of control of radio licenses, and spectrum leasing arrangements under the Commission's secondary market rules. In completing FCC Form 175, an applicant is required to disclose information concerning foreign ownership of the applicant. If an applicant has foreign ownership interests in excess of the applicable limit or benchmark set forth in section 310(b), then it may seek to participate in Auction 110 as long as it has filed a petition for declaratory ruling with the Commission prior to the FCC Form 175 filing deadline. An applicant must certify in its FCC Form 175 that, as of the deadline for filing its application to participate in the auction, the applicant either is in compliance with the foreign ownership provisions of section 310 or has filed a petition for declaratory ruling requesting Commission approval to exceed the applicable foreign ownership limit or benchmark in section 310(b) that is pending before, or has been granted by, the Commission. Additional information concerning foreign ownership disclosure requirements is provided in the FCC Form 175 Instructions.

F. Information Procedures During the Auction Process

36. Consistent with past practice in many prior spectrum license auctions, OEA and WTB adopt the Commission's proposal to limit information available in Auction 110 in order to prevent the identification of bidders placing particular bids until after the bidding has closed. More specifically, OEA will not make public until after bidding has closed: (1) The PEAs that an applicant selects for bidding in its short-form application, (2) the amount of any upfront payment made by or on behalf of an applicant for Auction 110, (3) any applicant's bidding eligibility, and (4) any other bidding-related information that might reveal the identity of the bidder placing a bid.

37. The limited information procedures used in past auctions have helped safeguard against potential anticompetitive behavior such as retaliatory bidding and collusion. No commenters objected to this proposal, and OEA and WTB find nothing in the record to suggest departure from the Commission's now-established practice of implementing these procedures in wireless spectrum auctions. OEA and WTB find that the competitive benefits

associated with limiting information disclosure support adoption of such procedures and outweigh the potential benefits of full disclosure.

38. Once the bidding begins in Auction 110, under the limited information procedures (sometimes also referred to as anonymous bidding), information to be made public after each round of bidding will include, for licenses in each geographic area, the supply, the aggregate demand, the price at the end of the last completed round, and the price for the next round. The identities of bidders placing specific bids and the net bid amounts (reflecting bidding credits) will *not* be disclosed until after the close of bidding.

39. Throughout the auction, bidders will have access to additional information related to their own bidding and bidding eligibility through the Commission's bidding system. For example, bidders will be able to view their own level of eligibility, both before and during the auction.

40. After the close of bidding, bidders' PEA selections, upfront payment amounts, bidding eligibility, bids, and other bidding-related actions will be made publicly available.

41. OEA and WTB warn applicants that direct or indirect communication to other applicants or the public disclosure of non-public information (e.g., reductions in eligibility, identities of bidders) could violate the Commission's rule prohibiting certain communications. Therefore, to the extent an applicant believes that such a disclosure is required by law or regulation, including regulations issued by the U.S. Securities and Exchange Commission (SEC), OEA and WTB strongly urge that the applicant consult with the Commission staff in the Auctions Division before making such disclosure.

G. Prohibited Communications and Compliance With Antitrust Laws

42. The rules prohibiting certain communications set forth in section 1.2105(c) apply to each applicant that files a short-form application (FCC Form 175) in Auction 110. Section 1.2105(c)(1) of the Commission's rules provides that, subject to specified exceptions, "[a]fter the short-form application filing deadline, all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider [of communications services] that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an

applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline. . . ."

1. Entities Subject to Section 1.2105(c)

43. An "applicant" for purposes of this rule includes all "controlling interests" in the entity submitting the FCC Form 175 auction application, as well as all holders of interests amounting to 10% or more of the entity (including institutional investors and asset management companies), and all officers and directors of that entity. Under section 1.2105(c), a party that submits an application becomes an "applicant" under the rule at the application deadline, and that status does not change based on later developments. Thus, an auction applicant that does not correct deficiencies in its application, fails to submit a timely and sufficient upfront payment, or does not otherwise become qualified, remains an "applicant" for purposes of the rule and remains subject to the prohibition on certain communications until the Auction 110 down payment deadline.

44. As the Commission proposed in the *Auction 110 Comment Public Notice*, OEA and WTB consider AT&T, T-Mobile, and Verizon to be "nationwide providers" for the purposes of the prohibited communications rule for Auction 110.

2. Prohibition Applies Until Down Payment Deadline

45. The prohibition in section 1.2105(c) on certain communications begins at an auction's short-form application filing deadline and ends at the auction's down payment deadline after the auction closes, which will be announced in a future public notice.

3. Scope of Prohibition on Certain Communications; Prohibition on Joint Bidding Agreements

46. Section 1.2105(c) of the Commission's rules prohibits certain communications between applicants for an auction, regardless of whether the applicants seek permits or licenses in the same geographic area or market. The rule also applies to communications by applicants with non-applicant nationwide providers of communications services and by nationwide applicants with non-applicant non-nationwide providers. The rule further prohibits "joint bidding arrangements," including arrangements relating to the permits or licenses being

auctioned that address or communicate, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific permits or licenses on which to bid, and any such arrangements relating to the post-auction market structure. The rule allows for limited exceptions for communications within the scope of any arrangement consistent with the exclusion from the Commission's rule prohibiting joint bidding, provided such arrangement is disclosed on the applicant's auction application. Applicants may communicate pursuant to any pre-existing agreements, arrangements, or understandings relating to the licenses being auctioned that are solely operational or that provide for the transfer or assignment of licenses, provided that such agreements, arrangements, or understandings are disclosed on their applications and do not both relate to the licenses at auction and address or communicate bids (including amounts), bidding strategies, or the particular permits or licenses on which to bid or the post-auction market structure.

47. In addition to express statements of bids and bidding strategies, the prohibition against communicating in any manner includes public disclosures as well as private communications and indirect or implicit communications. Consequently, an applicant must take care to determine whether its auction-related communications may reach another applicant. OEA and WTB remind applicants that they must determine whether their communications with other parties are permissible under the rule once the prohibition begins at the deadline for submitting applications, even before the public notice identifying applicants is released.

48. Parties subject to section 1.2105(c) should take special care in circumstances where their officers, directors, and employees may receive information directly or indirectly relating to any applicant's bids or bidding strategies. Such information may be deemed to have been received by the applicant under certain circumstances. For example, Commission staff have found that, where an individual serves as an officer and director for two or more applicants, the bids and bidding strategies of one applicant are presumed to be conveyed to the other applicant through the shared officer, which creates an apparent violation of the rule.

49. Subject to the limited exceptions for communications within the scope of any arrangement consistent with the exclusion from the Commission's rule

prohibiting joint bidding, section 1.2105(c)(1) prohibits applicants from communicating with specified other parties only with respect to "their own, or each other's, or any other applicant's bids or bidding strategies" The *Prohibited Communications Guidance Public Notice*, 80 FR 63215, Oct. 19, 2015, released in advance of the broadcast incentive auction (Auction 1000) reviewed the scope of the prohibition generally, as well as in that specific auction's forward auction of spectrum licenses and reverse auction to relinquish broadcast licenses. As the Commission explained therein, a communication conveying "bids or bidding strategies (including post-auction market structure)" must also relate to the "licenses being auctioned" in order to be covered by the prohibition. Thus, the prohibition is limited in scope and does not apply to all communications between or among the specified parties. The Commission consistently has made clear that application of the rule prohibiting communications has never required total suspension of essential ongoing business. Entities subject to the prohibition may negotiate agreements during the prohibition period, provided that the communications involved do not relate to both: (1) The licenses being auctioned and (2) bids or bidding strategies or post-auction market structure.

50. Accordingly, business discussions and negotiations that are unrelated to bidding in Auction 110 and that do not convey information about the bids or bidding strategies, including the post-auction market structure, of an applicant are not prohibited by the rule. Moreover, not all auction-related information is covered by the prohibition. For example, communicating merely whether a party has or has not applied to participate in Auction 110 will not violate the rule. In contrast, communicating, among other things, how a party will participate, including specific geographic areas selected, specific bid amounts, and/or whether or not the party is placing bids, would convey bids or bidding strategies and would be prohibited.

51. While section 1.2105(c) does not prohibit business discussions and negotiations among auction applicants that are unrelated to the auction, each applicant must remain vigilant not to communicate, directly or indirectly, information that affects, or could affect, bids or bidding strategies. Certain discussions might touch upon subject matters that could convey price or geographic information related to bidding strategies. Such subject areas

include, but are not limited to, management, sales, local marketing agreements, and other transactional agreements.

52. OEA and WTB caution applicants that bids or bidding strategies may be communicated outside of situations that involve one party subject to the prohibition communicating privately and directly with another such party. For example, the Commission has warned that prohibited communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly. Moreover, the Commission found a violation of the rule against prohibited communications when an applicant used the Commission's bidding system to disclose its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate in specific markets, and it has placed auction participants on notice that the use of its bidding system to disclose market information to competitors will not be tolerated and will subject bidders to sanctions.

53. Likewise, when completing a short-form application, each applicant should avoid any statements or disclosures that may violate section 1.2105(c), particularly in light of the limited information procedures in effect for Auction 110. Specifically, an applicant should avoid including any information in its short-form application that might convey information regarding its PEA selections, such as referring to certain markets in describing agreements, including any information in application attachments that will be publicly available that may otherwise disclose the applicant's PEA selections, or using applicant names that refer to licenses being offered.

54. Applicants also should be mindful that communicating non-public application or bidding information publicly or privately to another applicant may violate section 1.2105(c) even though that information subsequently may be made public during later periods of the application or bidding processes.

4. Communicating With Third Parties

55. Section 1.2105(c) does not prohibit an applicant from communicating bids or bidding strategies to a third party, such as a consultant or consulting firm, counsel, or lender. The applicant should take appropriate steps, however, to ensure

that any third party it employs for advice pertaining to its bids or bidding strategies does not become a conduit for prohibited communications to other specified parties, as that would violate the rule. For example, an applicant might require a third party, such as a lender, to sign a non-disclosure agreement before the applicant communicates any information regarding bids or bidding strategy to the third party. Within third-party firms, separate individual employees, such as attorneys or auction consultants, may advise individual applicants on bids or bidding strategies, as long as such firms implement firewalls and other compliance procedures that prevent such individuals from communicating the bids or bidding strategies of one applicant to other individuals representing separate applicants. Although firewalls and/or other procedures should be used, their existence is not an absolute defense to liability if a violation of the rule has occurred.

56. As the Commission has noted in other spectrum auctions, in the case of an individual, the objective precautionary measure of a firewall is not available. As a result, an individual that is privy to bids or bidding information of more than one applicant presents a greater risk of becoming a conduit for a prohibited communication. OEA and WTB will take the same approach to interpreting the prohibited communications rule in Auction 110. OEA and WTB emphasize that whether a prohibited communication has taken place in a given case will depend on all the facts pertaining to the case, including who possessed what information, what information was conveyed to whom, and the course of bidding in the auction.

57. OEA and WTB remind potential applicants that they may discuss the short-form application or bids for specific licenses or license areas with the counsel, consultant, or expert of their choice *before* the short-form application deadline. Furthermore, the same third-party individual could continue to give advice after the short-form deadline regarding the application, provided that no information pertaining to bids or bidding strategies, including PEAs selected on the short-form application, is conveyed to that individual.

58. Applicants also should use caution in their dealings with other parties, such as members of the press, financial analysts, or others who might become conduits for the communication of prohibited bidding information. For example, even though communicating

that it has applied to participate in the auction will not violate the rule, an applicant's statement to the press that it intends to stop bidding in an auction could give rise to a finding of a section 1.2105 violation. Similarly, an applicant's public statement of intent not to place bids during bidding in Auction 110 could also violate the rule.

5. Section 1.2105(c) Certifications

59. By electronically submitting its FCC Form 175 auction application, each applicant for Auction 110 certifies its compliance with section 1.2105(c) of the rules. The mere filing of a certifying statement as part of an application, however, will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted. Any applicant found to have violated these communication prohibitions may be subject to sanctions.

6. Duty To Report Prohibited Communications

60. Section 1.2105(c)(4) requires that any applicant that makes or receives a communication that appears to violate section 1.2105(c) must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. Each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five-day period.

7. Procedures for Reporting Prohibited Communications

61. A party reporting any information or communication pursuant to sections 1.65, 1.2105(a)(2), or 1.2105(c)(4) must take care to ensure that any report of a prohibited communication does not itself give rise to a violation of section 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other parties specified under the rule through the use of Commission filing procedures that allow such materials to be made available for public inspection.

62. Parties must file only a single report concerning a prohibited communication and must file that report with the Commission personnel expressly charged with administering the Commission's auctions. This process differs from filing procedures used in connection with other Commission rules and processes, which may call for submission of filings to the Commission's Office of the Secretary or

ECFS. Filing through the Office of Secretary or ECFS could allow the report to become publicly available and might result in the communication of prohibited information to other auction applicants. This rule is designed to minimize the risk of inadvertent dissemination of information in such reports. Any reports required by section 1.2105(c) must be filed consistent with the instructions set forth in the *Auction 110 Procedures Public Notice*. For Auction 110, such reports must be filed with the Chief of the Auctions Division, Office of Economics and Analytics, by the most expeditious means available. Any such report should be submitted by email to the Auctions Division Chief and sent to auction110@fcc.gov. If you choose instead to submit a report in hard copy, contact Auctions Division staff at auction110@fcc.gov or (202) 418-0660 for guidance.

63. Given the potential competitive sensitivity of public disclosure of information in such a report, a party seeking to report such a prohibited communication should consider submitting its report with a request that the report or portions of the submission be withheld from public inspection by following the procedures specified in section 0.459 of the Commission's rules. OEA and WTB encourage such parties to coordinate with the Auctions Division staff about the procedures for submitting such reports.

8. Winning Bidders Must Disclose Terms of Agreements

64. Each applicant that is a winning bidder will be required to provide as part of its long-form application any agreement or arrangement it has entered into and a summary of the specific terms, conditions, and parties involved in any agreement it has entered into. This applies to any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to the post-auction market structure. Failure to comply with the Commission's rules can result in enforcement action.

9. Additional Information Concerning Prohibition on Certain Communications in Commission Auctions

65. A summary listing of documents issued by the Commission, OEA, and WTB addressing the application of section 1.2105(c) is available on the Commission's auction web page at www.fcc.gov/summary-listing-documents-addressing-application-rule-prohibiting-certain-communications.

10. Antitrust Laws

66. Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace.

Compliance with the disclosure requirements of section 1.2105(c)(4) will not insulate a party from enforcement of the antitrust laws. For instance, a violation of the antitrust laws could arise out of actions taking place well before any party submits a short-form application. The Commission has cited a number of examples of potentially anticompetitive actions that would be prohibited under antitrust laws: For example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another market for the other.

67. To the extent that Commission staff become aware of specific allegations that suggest that violations of the federal antitrust laws may have occurred, they may refer such allegations to the United States Department of Justice for investigation. If an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, then it may be subject to a forfeiture and may be prohibited from participating further in Auction 110 and in future auctions, among other sanctions.

H. Provisions for Small Businesses and Rural Service Providers

68. A bidding credit represents an amount by which a bidder's overall payment across all the licenses won will be discounted, subject to the caps discussed below. As set forth in section 1.2110 of the Commission's rules, and as described below, these rule revisions include, but are not limited to: (1) Adopting a two-pronged standard for evaluating eligibility for small business benefits, (2) establishing a new attribution rule for certain disclosable interest holders of applicants claiming designated entity benefits, (3) updating the gross revenue amounts defining eligibility for small business benefits, (4) creating a separate bidding credit for eligible rural service providers, and (5) establishing caps on the total amount of designated entity benefits any eligible winning bidder may receive.

69. In Auction 110, designated entity bidding credits will be available to applicants demonstrating eligibility for a small business or a rural service

provider bidding credit and subsequently winning license(s). These bidding credits will not be cumulative—an applicant is permitted to claim either a small business bidding credit or a rural service provider bidding credit, but not both. Each applicant must also certify that it is eligible for the claimed bidding credit in its FCC Form 175. In addition to the information provided below, each applicant should review carefully the Commission's decisions regarding the designated entity provisions as well as the part 1 rules.

70. In particular, the Commission reminds applicants applying for designated entity bidding credits that they should take due account of the requirements of the Commission's rules and implementing orders regarding *de jure* and *de facto* control of such applicants. These rules include a prohibition, which applies to all applicants (whether they seek bidding credits or not), against changes in ownership of the applicant that would constitute an assignment or transfer of control. This may, in some circumstances, include changes in officers or directors. Applicants should not expect to receive any opportunities to revise their ownership structure after the filing of their short- and long-form applications, including making revisions to their agreements or other arrangements with interest holders, lenders, or others in order to address potential concerns relating to compliance with the designated entity bidding credit requirements. This policy will help to ensure compliance with the Commission's rules applicable to the award of bidding credits prior to the conduct of the auction, which will involve competing bids from those that do and do not seek bidding credits, and thus preserves the integrity of the auction process. OEA and WTB also believe that this will meet the Commission's objectives in awarding licenses through the competitive bidding process.

1. Small Business Bidding Credit

71. For Auction 110, bidding credits will be available to eligible small businesses and consortia thereof, subject to the caps discussed below. Under the service rules applicable to the 3.45 GHz Service licenses to be offered in Auction 110, the level of bidding credit available is determined as follows:

- A bidder that qualifies as a “small business”—*i.e.*, one with attributed average annual gross revenues that do not exceed \$55 million for the preceding five years—is eligible to receive a 15% discount on its overall payment.

- A bidder that qualifies as a “very small business”—*i.e.*, one with attributed average annual gross revenues that do not exceed \$20 million for the preceding five years—is eligible to receive a 25% discount on its overall payment.

72. In adopting this two-tiered approach in the 3.45 GHz *Second Report and Order*, the Commission observed that this approach would provide consistency and predictability for small businesses.

73. Small business bidding credits are not cumulative; an eligible applicant may receive either the 15% or the 25% bidding credit on its overall payment, but not both. The Commission's unjust enrichment provisions also apply to a winning bidder that uses a bidding credit and subsequently seeks to assign or transfer control of its license within a certain period to an entity not qualifying for at least the same level of small business bidding credit.

74. Each applicant claiming a small business bidding credit must disclose the gross revenues for the preceding five years for each of the following: (1) The applicant, (2) its affiliates, (3) its controlling interests, and (4) the affiliates of its controlling interests. The applicant must also submit an attachment that lists all parties with which the applicant has entered into any spectrum use agreements or arrangements for any licenses that may be won by the applicant in Auction 110. In addition, to the extent that an applicant has an agreement with any disclosable interest holder for the use of more than 25% of the spectrum capacity of any license that may be won in Auction 110, the applicant must disclose the identity and the attributable gross revenues of any such disclosable interest holder. This attribution rule will be applied on a license-by-license basis. As a result, an applicant may be eligible for a bidding credit on some, but not all, of the licenses for which it is bidding in Auction 110. If an applicant is applying as a consortium of small businesses, then the disclosures described in this paragraph must be provided for each consortium member.

2. Rural Service Provider Bidding Credit

75. An eligible applicant may request a 15% discount on its overall payment using a rural service provider bidding credit, subject to the cap discussed below. To be eligible for a rural service provider bidding credit, an applicant must: (1) Be a service provider that is in the business of providing commercial communications services and, together with its controlling interests, affiliates, and the affiliates of its controlling

interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers; and (2) serve predominantly rural areas. Rural areas are defined as counties with a population density of 100 or fewer persons per square mile. An applicant seeking a rural service provider bidding credit must provide the number of subscribers served as of the short-form application deadline. An applicant may count any subscriber as a single subscriber even if that subscriber receives more than one service.

76. Each applicant seeking a rural service provider bidding credit must disclose the number of its subscribers, along with the number of subscribers of its affiliates, controlling interests, and the affiliates of its controlling interests. The applicant must also submit an attachment that lists all parties with which the applicant has entered into any spectrum use agreements or arrangements for any licenses that may be won by the applicant in Auction 110. In addition, to the extent that an applicant has an agreement with any disclosable interest holder for the use of more than 25% of the spectrum capacity of any license that may be won in Auction 110, the identity and the attributable subscribers of any such disclosable interest holder must be disclosed. Like applicants seeking eligibility for small business bidding credits, eligible rural service providers may also form a consortium. If an applicant is applying as a consortium of rural service providers, then the disclosures described in this paragraph, including the certification, must be provided for each consortium member.

3. Caps on Bidding Credits

77. Eligible applicants claiming either a small business or rural service provider bidding credit will be subject to specified caps on the total amount of bidding credit discounts that they may receive. OEA and WTB adopt the bidding credit caps for Auction 110 at the amounts proposed by the Commission in the *Auction 110 Comment Public Notice*. Specifically, OEA and WTB adopt a \$25 million cap on the total amount of bidding credit discounts that may be awarded to an eligible small business, and a \$10 million cap on the total amount of bidding credit discounts that may be awarded to an eligible rural service provider. Additionally, to create parity among eligible small businesses and rural service providers competing against each other in smaller markets, no winning designated entity bidder may receive more than \$10 million in bidding credit discounts in total for

licenses won in PEAs with populations of 500,000 or less.

4. Attributable Interests

a. Controlling Interests and Affiliates

78. Pursuant to section 1.2110 of the Commission's rules, an applicant's eligibility for designated entity benefits is determined by attributing the gross revenues (for those seeking small business benefits) or subscribers (for those seeking rural service provider benefits) of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests. Controlling interests of an applicant include individuals and entities with either de facto or de jure control of the applicant. Typically, ownership of greater than 50% of an entity's voting stock evidences de jure control. De facto control is determined on a case-by-case basis based on the totality of the circumstances. The following are some common indicia of de facto control:

- The entity constitutes or appoints more than 50% of the board of directors or management committee;
- the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and
- the entity plays an integral role in management decisions.

79. Additionally, for attribution purposes, officers and directors of an applicant seeking a bidding credit are considered to have a controlling interest in the applicant. Applicants should refer to section 1.2110(c)(2) of the Commission's rules and the FCC Form 175 Instructions to understand how certain interests are calculated in determining control for purposes of attributing gross revenues.

80. Affiliates of an applicant or controlling interest include an individual or entity that: (1) Directly or indirectly controls or has the power to control the applicant, (2) is directly or indirectly controlled by the applicant, (3) is directly or indirectly controlled by a third party that also controls or has the power to control the applicant, or (4) has an identity of interest with the applicant. The Commission's definition of an affiliate of the applicant encompasses both controlling interests of the applicant and affiliates of controlling interests of the applicant. For more information on the application requirements regarding controlling interests and affiliates, applicants should refer to sections 1.2110(c)(2) and (c)(5) respectively, as well as the FCC Form 175 Instructions.

81. An applicant seeking a small business bidding credit must

demonstrate its eligibility for the bidding credit by: (1) Meeting the applicable small business size standard, based on the controlling interest and affiliation rules discussed in the *Auction 110 Procedures Public Notice*; and (2) retaining control, on a license-by-license basis, over the spectrum associated with the licenses for which it seeks small business benefits. For purposes of the first prong of the standard, applicants should note that control and affiliation may arise through, among other things, ownership interests, voting interests, management and other operating agreements, or the terms of any other types of agreements—including spectrum lease agreements—that independently or together create a controlling, or potentially controlling, interest in the applicant's or licensee's business as a whole. In addition, once an applicant demonstrates eligibility as a small business under the first prong, it must also be eligible for benefits on a license-by-license basis under the second prong. As part of making the FCC Form 175 certification that it is qualified as a designated entity under section 1.2110, an applicant is certifying that it does not have any spectrum use or other agreements that would confer either de jure or de facto control of any license it seeks to acquire with bidding credits.

82. Applicants should note that, under this standard for evaluating eligibility for small business bidding credits, if an applicant executes a spectrum use agreement that does not comply with the Commission's relevant standard of de facto control, then it will be subject to unjust enrichment obligations for the benefits associated with that particular license, as well as the penalties associated with any violation of section 310(d) of the Communications Act and related regulations, which require Commission approval of transfers of control. If that spectrum use agreement (either alone or in combination with the designated entity controlling interest and attribution rules described above) goes so far as to confer control of the applicant's overall business, then the gross revenues of the additional interest holders will be attributed to the applicant, which could render the applicant ineligible for all current and future small business benefits on all licenses.

b. Limitation on Spectrum Use

83. Under section 1.2110(c)(2)(ii)(f) of the Commission's rules, the gross revenues (or the subscribers, in the case of a rural service provider) of an applicant's disclosable interest holder

are attributable to the applicant, on a license-by-license basis, if the disclosable interest holder has an agreement with the applicant to use, in any manner, more than 25% of the spectrum capacity of any license won by the applicant and acquired with a bidding credit during the five-year unjust enrichment period for the applicable license. For purposes of this requirement, a disclosable interest holder of an applicant seeking designated entity benefits is defined as any individual or entity holding a 10% or greater interest of any kind in the applicant, including but not limited to, a 10% or greater interest in any class of stock, warrants, options, or debt securities in the applicant or licensee. Any applicant seeking a bidding credit for licenses won in Auction 110 will be subject to this attribution rule and must make the requisite disclosures.

84. Certain disclosable interest holders may be excluded from this attribution rule. Specifically, an applicant claiming the rural service provider bidding credit may have spectrum license use agreements with a disclosable interest holder, without having to attribute the disclosable interest holder's subscribers, so long as the disclosable interest holder is independently eligible for a rural service provider credit and the use agreement is otherwise permissible under the Commission's existing rules. If applicable, the applicant must attach to its FCC Form 175 any additional information as may be required to indicate any license (or license area) that may be subject to this attribution rule or to demonstrate its eligibility for the exception from this attribution rule. Consistent with the Commission's limited information procedures, the Commission intends to withhold from public disclosure all information contained in any such attachments until after the close of Auction 110.

c. Exceptions From Attribution Rules for Small Businesses and Rural Service Providers

85. Applicants claiming designated entity benefits may be eligible for certain exceptions from the Commission's attribution rules. For example, in calculating an applicant's gross revenues under the controlling interest standard, the Commission will not attribute to the applicant the personal net worth, including personal income, of its officers and directors. However, to the extent that the officers and directors of the applicant are controlling interest holders of other entities, the gross revenues of those entities will be attributed to the

applicant. Moreover, if an officer or director operates a separate business, then the gross revenues derived from that business would be attributed to the applicant.

86. The Commission has also exempted from attribution to the applicant the gross revenues of the affiliates of a rural telephone cooperative's officers and directors, if certain conditions specified in section 1.2110(b)(4)(iii) of the Commission's rules are met. An applicant claiming this exemption must provide, in an attachment, an affirmative statement that the applicant, affiliate and/or controlling interest is an eligible rural telephone cooperative within the meaning of section 1.2110(b)(4)(iii), and the applicant must supply any additional information as may be required to demonstrate eligibility for the exemption from the attribution rule.

87. An applicant claiming a rural service provider bidding credit may be eligible for an exception from the Commission's attribution rules as an existing rural partnership. To qualify for this exception, an applicant must be a rural partnership providing service as of July 16, 2015, and each member of the rural partnership must individually have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers. Because each member of the rural partnership must individually qualify for the bidding credit, by definition, a partnership that includes a nationwide provider as a member will not be eligible for the benefit.

88. Finally, a consortium of small businesses or rural service providers may seek an exception from the Commission's attribution rules. Under the Commission's rules, a consortium of small businesses or rural service providers is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of small business or rural service provider. A consortium must provide additional information for each member demonstrating each member's eligibility for the claimed bidding credit in order to show that the applicant satisfies the eligibility criteria for the bidding credit. The gross revenue or subscriber information of each consortium member will not be aggregated for purposes of determining the consortium's eligibility for the claimed bidding credit. This information must be provided, however, to ensure that each consortium member qualifies for the bidding credit sought by the consortium.

I. Provisions Regarding Former and Current Defaulters

89. Pursuant to the rules governing competitive bidding, each applicant must make certifications regarding whether it is a current or former defaulter or delinquent. A current defaulter or delinquent is not eligible to participate in Auction 110, but a former defaulter or delinquent may participate so long as it is otherwise qualified and makes an upfront payment that is 50% more than would otherwise be necessary. Accordingly, each applicant must certify under penalty of perjury on its FCC Form 175 that it, its affiliates, its controlling interests, and the affiliates of its controlling interests are not in default on any payment for a Commission construction permit or license (including down payments) and that it is not delinquent on any non-tax debt owed to any Federal agency. Additionally, an applicant must certify under penalty of perjury whether it (along with its controlling interests) has ever been in default on any payment for a Commission construction permit or license (including down payments) or has ever been delinquent on any non-tax debt owed to any Federal agency, subject to the exclusions described below. For purposes of making these certifications, the term "controlling interest" is defined in section 1.2105(a)(4)(i) of the Commission rules.

90. Under the Commission's rule regarding applications by former defaulters, an applicant is considered a "former defaulter" or a "former delinquent" when, as of the FCC Form 175 deadline, the applicant or any of its controlling interests has defaulted on any Commission construction permit or license or has been delinquent on any non-tax debt owed to any Federal agency, but has since remedied all such defaults and cured all of the outstanding non-tax delinquencies. For purposes of the certification under section 1.2105(a)(2)(xii), the applicant may exclude from consideration any cured default on a Commission construction permit or license or cured delinquency on a non-tax debt owed to a Federal agency for which any of the following criteria are met: (1) The notice of the final payment deadline or delinquency was received more than seven years before the FCC Form 175 filing deadline, (2) the default or delinquency amounted to less than \$100,000, (3) the default or delinquency was paid within two quarters (*i.e.*, six months) after receiving the notice of the final payment deadline or delinquency, or (4) the default or delinquency was the subject of a legal or arbitration proceeding and

was cured upon resolution of the proceeding. With respect to the first exclusion, notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied depending on the origin of any Federal non-tax debt giving rise to a default or delinquency. Additionally, for the third exclusion, the date of receipt of the notice of a final default deadline or delinquency by the intended party or debtor will be used for purposes of verifying receipt of notice.

91. In addition to the *Auction 110 Procedures Public Notice*, applicants are encouraged to review previous guidance on default and delinquency disclosure requirements in the context of the auction short-form application process. Parties are also encouraged to consult with Auctions Division staff if they have any questions about default and delinquency disclosure requirements.

92. The Commission considers outstanding debts owed to the United States Government, in any amount, to be a serious matter. The Commission has previously adopted rules, including a provision referred to as the “red light rule,” that implement its obligations under the Debt Collection Improvement Act of 1996, which governs the collection of debts owed to the United States. Under the red light rule, applications and other requests for benefits filed by parties that have outstanding debts owed to the Commission will not be processed. When adopting that rule, the Commission explicitly declared, however, that its competitive bidding rules are not affected by the red-light rule. As a consequence, the Commission’s adoption of the red light rule does not alter the applicability of any of its competitive bidding rules, including the provisions and certifications of sections 1.2105 and 1.2106, with regard to current and former defaults or delinquencies.

93. OEA and WTB remind each applicant, however, that any indication in the Commission’s Red Light Display System, which provides information regarding debts currently owed to the Commission, may not be determinative of an auction applicant’s ability to comply with the default and delinquency disclosure requirements of section 1.2105. Thus, while the red light rule ultimately may prevent the processing of long-form applications by auction winners, an auction applicant’s lack of current “red light” status is not necessarily determinative of its eligibility to participate in an auction (or whether it may be subject to an increased upfront payment obligation).

Moreover, a prospective applicant in Auction 110 should note that any long-form applications filed after the close of bidding will be reviewed for compliance with the Commission’s red light rule, and such review may result in the dismissal of a winning bidder’s long-form application. OEA and WTB encourage each applicant to carefully review all records and other available Federal agency databases and information sources to determine whether the applicant, or any of its affiliates, or any of its controlling interests, or any of the affiliates of its controlling interests, owes or was ever delinquent in the payment of non-tax debt owed to any Federal agency.

J. Optional Applicant Status Identification

94. Applicants owned by members of minority groups and/or women, as defined in section 1.2110(c)(3), and rural telephone companies, as defined in section 1.2110(c)(4), may identify themselves regarding this status in filling out their FCC Form 175 applications. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of various groups in its auctions.

K. Modifications to FCC Form 175

1. Only Minor Modifications Allowed

95. After the initial FCC Form 175 filing deadline, an Auction 110 applicant will be permitted to make only minor changes to its application consistent with the Commission’s rules. Examples of minor changes include the deletion or addition of authorized bidders (to a maximum of three) and the revision of addresses and telephone numbers of the applicant, its responsible party, and its contact person. Major modification to an FCC Form 175 (e.g., change of PEA selection, certain changes in ownership that would constitute an assignment or transfer of control of the applicant, change in the required certifications, change in applicant’s legal classification that results in a change in control, or change in claimed eligibility for a higher percentage of bidding credit) will not be permitted after the initial FCC Form 175 filing deadline. If an amendment reporting changes is a “major amendment,” as described in section 1.2105(b)(2), the major amendment will not be accepted and may result in the dismissal of the application.

2. Duty To Maintain Accuracy and Completeness of FCC Form 175

96. Pursuant to section 1.65 of the Commission’s rules, each applicant has a continuing obligation to maintain the accuracy and completeness of information furnished in a pending application, including a pending application to participate in Auction 110. Consistent with the requirements for spectrum auctions, an applicant for Auction 110 must furnish additional or corrected information to the Commission within five business days after a significant occurrence, or amend its FCC Form 175 no more than five business days after the applicant becomes aware of the need for the amendment. An applicant is obligated to amend its pending application even if a reported change may result in the dismissal of the application because it is subsequently determined to be a major modification.

3. Modifying an FCC Form 175

97. As noted above, a party seeking to participate in Auction 110 must file an FCC Form 175 electronically via the FCC’s Auction Application System. During the initial filing window, an applicant will be able to make any necessary modifications to its FCC Form 175 in the Auction Application System. An applicant that has certified and submitted its FCC Form 175 before the close of the initial filing window may continue to make modifications as often as necessary until the close of that window; however, the applicant must re-certify and re-submit its FCC Form 175 before the close of the initial filing window to confirm and effect its latest application changes. After each submission, a confirmation page will be displayed stating the submission time and submission date.

98. An applicant will also be allowed to modify its FCC Form 175 in the Auction Application System, except for certain fields, during the resubmission filing window and after the release of the public notice announcing the qualified bidders for an auction. During these times, if an applicant needs to make permissible minor changes to its FCC Form 175 or must make changes in order to maintain the accuracy and completeness of its application pursuant to sections 1.65 and 1.2105(b)(4), then it must make the change(s) in the Auction Application System and re-certify and re-submit its application to confirm and effect the change(s).

99. An applicant’s ability to modify its FCC Form 175 in the Auction Application System will be limited between the closing of the initial filing

window and the opening of the application resubmission filing window, and between the closing of the resubmission filing window and the release of the public notice announcing the qualified bidders for an auction. During these periods, an applicant will be able to view its submitted application, but will be permitted to modify only the applicant's address, responsible party address, and contact information (e.g., name, address, telephone number, etc.) in the Auction Application System. An applicant will not be able to modify any other pages of the FCC Form 175 in the Auction Application System during these periods. If, during these periods, an applicant needs to make other permissible minor changes to its FCC Form 175, or changes to maintain the accuracy and completeness of its application pursuant to sections 1.65 and 1.2105(b)(4), then the applicant must submit a letter briefly summarizing the changes to its FCC Form 175 via email to auction110@fcc.gov. The email summarizing the changes must include a subject line referring to Auction 110 and the name of the applicant, for example, "Re: Changes to Auction 110 Auction Application of XYZ Corp." Any attachments to the email must be formatted as Adobe® Acrobat® (PDF) or Microsoft® Word documents. An applicant that submits its changes in this manner must subsequently modify, certify, and submit its FCC Form 175 application(s) electronically in the Auction Application System once it is again open and available to applicants.

100. Applicants should also note that even at times when the Auction Application System is open and available to applicants, the system will not allow an applicant to make certain other permissible changes itself (e.g., correcting a misstatement of the applicant's legal classification, name, or certifying official). If an applicant needs to make a permissible minor change of this nature, then it must submit a written request by email to the Auctions Division Chief, via auction110@fcc.gov requesting that the Commission manually make the change on the applicant's behalf. Once Commission staff has informed the applicant that the change has been made in the Auction Application System, the applicant must then re-certify and re-submit its FCC Form 175 in the Auction Application System to confirm and effect the change(s).

101. As with filing the FCC Form 175, any amendment(s) to the application and related statements of fact must be certified by an authorized representative

of the applicant with authority to bind the applicant. Applicants should note that submission of any such amendment or related statement of fact constitutes a representation by the person certifying that he or she is an authorized representative with such authority and that the contents of the amendment or statement of fact are true and correct.

102. Applicants must not submit application-specific material through the Commission's Electronic Comment Filing System. Further, as discussed above, parties submitting information related to their applications should use caution to ensure that their submissions do not contain confidential information or communicate information that would violate section 1.2105(c) or the limited information procedures adopted for Auction 110. An applicant seeking to submit, outside of the Auction Application System, information that might reflect non-public information, such as an applicant's PEA selection(s), upfront payment amount, or bidding eligibility, should consider including in its email a request that the filing or portions of the filing be withheld from public inspection until the end of the prohibition on certain communications pursuant to section 1.2105(c).

103. Questions about FCC Form 175 amendments should be directed to the Auctions Division at (202) 418-0660.

III. Preparing for Bidding in Auction 110

A. Due Diligence

104. OEA and WTB remind each potential bidder that it is solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the licenses that it is seeking in Auction 110 and that it is required to certify, under penalty of perjury, that it has read the *Auction 110 Procedures Public Notice* and has familiarized itself with the auction procedures and the service rules for the 3.45–3.55 GHz band. The Commission makes no representations or warranties about the use of this spectrum or these licenses for particular services. Each applicant should be aware that a Commission auction represents an opportunity to become a Commission licensee, subject to certain conditions and regulations. This includes the established authority of the Commission to alter the terms of existing licenses by rulemaking, which is equally applicable to licenses awarded by auction. A Commission auction does not constitute an endorsement by the Commission of any particular service, technology, or product, nor does a Commission license

constitute a guarantee of business success.

105. An applicant should perform its due diligence research and analysis before proceeding, as it would with any new business venture. In particular, OEA and WTB encourage each potential bidder to perform technical analyses and/or refresh its previous analyses to assure itself that, should it become a winning bidder for any Auction 110 license, it will be able to build and operate facilities that will fully comply with all applicable technical and legal requirements. OEA and WTB urge each applicant to inspect any prospective sites for communications facilities located in, or near, the geographic area for which it plans to bid, confirm the availability of such sites, and to familiarize itself with the Commission's rules regarding the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and other environmental statutes.

106. OEA and WTB also encourage each applicant in Auction 110 to continue to conduct its own research throughout the auction in order to determine the existence of pending or future administrative or judicial proceedings that might affect its decision on continued participation in the auction. Lockheed Martin Corporation has filed a request for waiver of certain Commission rules that is currently pending before the Commission. Additionally, three Petitions for Reconsideration of the *3.45 GHz Second Report and Order* are currently pending before the Commission. If the Commission acts on any of these pending matters prior to the auction, we will provide updated information for potential bidders as necessary. Each applicant is responsible for assessing the likelihood of the various possible outcomes and for considering the potential impact on licenses available in an auction. The due diligence considerations mentioned in the *Auction 110 Procedures Public Notice* do not constitute an exhaustive list of steps that should be undertaken prior to participating in Auction 110. As always, the burden is on the potential bidder to determine how much research to undertake, depending upon the specific facts and circumstances related to its interests. For example, applicants should pay particular attention to the framework adopted in the *3.45 GHz Second Report and Order* that requires new flexible-use licensees to reimburse secondary, non-federal radiolocator operators for the relocation costs associated with their transitions into the 2.9–3.0 GHz band and cooperative

sharing requirements for certain licenses.

107. Applicants in Auction 110 should carefully consider the impact of the aggregation limit in the 3.45 GHz Service, discussed further in Section III.B.4, below. In particular, applicants should consider whether any of their own attributable interest holders have permissible overlapping interests in another applicant that could further limit the number of licenses that each applicant may hold in a given PEA. For example, a single individual or entity may be permitted to hold a non-controlling interest of 10% or more in multiple applicants, but the combined holdings of those applicants in any PEA may not exceed the four-license aggregation limit.

108. Applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of the licenses available in Auction 110. Each potential bidder is responsible for undertaking research to ensure that any licenses won in the auction will be suitable for its business plans and needs. Each potential bidder must undertake its own assessment of the relevance and importance of information gathered as part of its due diligence efforts.

109. The Commission makes no representations or guarantees regarding the accuracy or completeness of information in its databases or any third-party databases, including, for example, court docketing systems. To the extent the Commission's databases may not include all information deemed necessary or desirable by an applicant, it must obtain or verify such information from independent sources or assume the risk of any incompleteness or inaccuracy in said databases. Furthermore, the Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into its databases.

B. Licensing Considerations

1. Transition of Incumbent Operations

110. Potential applicants in Auction 110 should consider carefully the process for transitioning incumbent Federal and non-Federal radiolocation and amateur operations out of the 3.45–3.55 GHz band and to the cooperative sharing requirements within the band when developing business plans, assessing market conditions, and evaluating the availability of equipment for 3.45 GHz Service operations. Each

applicant should follow closely releases from the Commission concerning these issues and consider carefully the technical and economic implications for commercial use of the 3.45–3.55 GHz band.

a. Cooperative Sharing in the 3.45–3.55 GHz Band

111. The 3.45–3.55 GHz band will operate using a cooperative sharing framework under which existing federal users are prohibited from causing harmful interference to non-federal operations, except in limited circumstances and in locations where current incumbent federal systems will remain indefinitely in the band. Under the following circumstances, non-federal systems are not entitled to protection against harmful interference from federal operations (and limited restrictions may be placed on non-federal operations); (1) in “Cooperative Planning Areas” identified by the DoD in which it anticipates that federal operations will continue after the assignment of flexible use licenses in the band; and (2) in “Periodic Use Areas” that overlap with certain Cooperative Planning Areas, in which the DoD will need episodic access to all or a portion of the band in specific, limited geographic areas. Cooperative Planning Areas and Periodic Use Areas are coordination areas, rather than exclusion areas, meaning that commercial operations within their boundaries are not precluded. Under this framework, incumbent federal operations and new flexible use operations must coordinate with each other to facilitate shared use of the band in these specified areas and during specified time periods as described in the *3.45 GHz Second Report and Order*.

b. AIA's Petition for Reconsideration and Lockheed Martin Corporation's Waiver Request

112. We note that one of the pending petitions for reconsideration, filed by the Aerospace Industries Association, seeks adoption of a coordination framework for certain existing federal contractor facilities and that Lockheed Martin Corporation has filed a request for waiver of certain Commission rules across the lower 75 megahertz of the 3.45–3.55 GHz Band related to its Experimental Radio Service licenses and operations between midnight and 8:00 a.m. ET. Potential bidders should be aware that if relief substantially similar to that sought by Lockheed were granted, it would affect coordination requirements and spectrum use in blocks A through H in PEAs 41, 44, and

227 for the duration of time of any such grant.

c. Relocation of Secondary Non-Federal Radiolocation Operations

113. In addition to the federal users operating in the 3.45–3.55 GHz band, the 3.3–3.55 GHz band is currently used by secondary non-federal radiolocation licensees that will be relocated to the 2.9–3.0 GHz band no later than 180 days after the flexible-use licenses won in Auction 110 are granted. In order to facilitate the expeditious clearing of the 3.3–3.55 GHz band, in the *3.45 GHz Second Report and Order*, the Commission adopted a requirement that licensees in the new 3.45 GHz Service reimburse the current 3.3–3.55 licensees for their reasonable costs related to the relocation of their operations to the 2.9–3.0 GHz band. Auction 110 winning bidders will be required to pay these reimbursement costs in addition to their winning bid amounts. For additional information about cost-sharing and reimbursement procedures related to the licenses offered in Auction 110, potential bidders should review carefully the *3.45 GHz Second Report and Order*.

d. Commercial Spectrum Enhancement Act/Spectrum Act Requirements and Aggregate Reserve Price

114. The spectrum in the 3.45–3.55 GHz band is covered by a Congressional mandate that requires auction proceeds to be used to fund the estimated relocation or sharing costs of incumbent federal entities. In 2004, the Commercial Spectrum Enhancement Act (CSEA) established a Spectrum Relocation Fund (SRF) to reimburse eligible federal agencies operating on certain frequencies that have been reallocated from federal to non-federal use for the cost of relocating their operations. The CSEA, as amended by the Spectrum Act, requires that the total cash proceeds from any auction of eligible frequencies must equal at least 110% of the estimated relocation or sharing costs provided to the Commission by NTIA, and it prohibits the Commission from concluding any auction of eligible frequencies that falls short of this amount. The Commission's rules therefore require that the establishment of a reserve price in order to meet the CSEA's requirement that Auction 110's total cash proceeds amount to at least 110% of the NTIA's estimate of the relevant relocation or sharing costs.

115. NTIA provides the Commission with an estimate of eligible federal entities' relocation or sharing costs and the timelines for such relocation or sharing pursuant to the requirements of

the CSEA. On January 14, 2021, NTIA provided to the Commission an estimate of \$13,432,140,300 for the relocation or sharing costs of the incumbent Federal entities currently operating in the 3.45–3.55 GHz band. Accordingly, for Auction 110, OEA and WTB establish a single aggregate reserve price to ensure that total cash proceeds from the auction equal at least \$14,775,354,330, or 110% of NTIA's estimate.

116. OEA and WTB adopt procedures that have been used in past Commission auctions to determine whether the reserve price is met in Auction 110. Although total cash proceeds from Auction 110 will not be known precisely before the conclusion of the auction, these procedures will provide a careful, conservative estimate of whether total cash proceeds meet the reserve price after each bidding round in the clock phase.

117. As in many services, the Commission has established for this auction bidding credits for small business and rural service providers. Winning bidders claiming such credits may pay less than the amount of their winning bids for any licenses won. In the CSEA/Part 1 Declaratory Ruling, the Commission determined that "total cash proceeds" for purposes of meeting the CSEA's requirement means winning bids net of any applicable bidding credit discounts at the end of bidding. Thus, whether the CSEA's total cash proceeds requirement has been met depends on whether winning bids, net of any applicable bidding credit discounts, equal, in aggregate, at least 110% of estimated relocation costs.

118. As in prior Commission auctions, OEA will assess whether the reserve price is met—whether the auction will generate sufficient total cash proceeds—based on bids in the clock phase of the auction and not the assignment phase. Total cash proceeds from assignment phase payments are expected to be small relative to those from the clock phase and therefore less likely to contribute significantly to meeting the reserve price. Given that assignment phase payments will be determined using a second-price rule, an individual bidder will have little ability to boost net winning bids in the assignment phase in order to meet the reserve price. OEA and WTB do not wish to require bidders or Commission staff to invest the additional time in the assignment phase if ultimately no licenses will be assigned.

119. Whether winning bidders in the clock phase claim any bidding credits that may reduce total cash proceeds to less than gross winning bids only can be determined with certainty at the close of

the clock phase of bidding. However, OEA will estimate whether the reserve is met during the clock phase by assuming conservatively that for a category in a PEA with excess demand, blocks will be won by the bidders with the highest bidding credit percentages, to the extent that such bidders still demand blocks in that category in that PEA. In order to make bidders aware of whether the reserve is likely to be met while they are still bidding in the clock phase, OEA will indicate on the Public Reporting System (PRS) whether estimated total cash proceeds based on the bids in the most recently completed round would satisfy the reserve. If the reserve has not yet been met, OEA will make available only to bidders information on the shortfall between the reserve and the estimated total cash proceeds, rounded up to the nearest million.

These procedures are designed to avoid a potential situation where the reserve price is assumed to be met, but, when bidding credits are considered, final net winning bids later prove insufficient. For a category in a PEA without excess demand, the requirement will be evaluated based on a true calculation of net revenue after bid processing, rather than on the estimate, since information on how to apply bidding credits precisely will be available in that case.

120. These procedures are designed to avoid a potential situation where the reserve price is assumed to be met, but, when bidding credits are considered, final net winning bids later prove insufficient. For a category in a PEA without excess demand, the requirement will be evaluated based on a true calculation of net revenue after bid processing, rather than on the estimate, since information on how to apply bidding credits precisely will be available in that case.

2. International Coordination

121. Potential bidders seeking licenses for geographic areas adjacent to the Canadian and Mexican borders should be aware that the use of the 3.45 GHz Service frequencies they acquire in Auction 110 are subject to current and future agreements with the governments of Canada and Mexico.

122. The Commission routinely works with the United States Department of State and Canadian and Mexican government officials to ensure the efficient use of the spectrum as well as interference-free operations in the border areas near Canada and Mexico. Until such time as any adjusted agreements, as needed, between the United States, Mexico, and/or Canada

can be agreed to, operations in the 3.45–3.55 GHz band must not cause harmful interference across the border, consistent with the terms of the agreements currently in force.

3. Environmental Review Requirements

123. Licensees must comply with the Commission's rules for environmental review under the NEPA, the NHPA, and other environmental statutes. Licensees and other applicants that propose to build certain types of communications facilities for licensed service must follow Commission procedures implementing obligations under NEPA and NHPA prior to constructing the facilities. Under NEPA, a licensee or applicant must assess if certain environmentally sensitive conditions specified in the Commission's rules are relevant to the proposed facilities, and prepare an environmental assessment when applicable. If an environmental assessment is required, then facilities may not be constructed until environmental processing is completed. Under NHPA, a licensee or applicant must follow the procedures in section 1.1320 of the Commission's rules, the *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* and the *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*. Compliance with section 106 of the NHPA requires tribal consultation, and if construction of the communications facilities would have adverse effects on historic or tribally significant properties, an environmental assessment must be prepared.

4. Spectrum Aggregation Limit

124. In the *3.45 GHz Second Report and Order*, the Commission adopted a spectrum aggregation limit for flexible-use licenses in the 3.45 GHz Service that allows any entity to hold a maximum of 40 megahertz (*i.e.*, four blocks out of ten) in any PEA at any point in time for four years post-auction. For purposes of spectrum attribution to a particular entity, all controlling interests and non-controlling interests of 10% or more, including institutional investors and asset management companies, are attributable. In addition, interests of less than 10% are attributable if the interest confers de facto control, including but not limited to partnership and other ownership interests and any stock interest in a licensee.

125. Consistent with this limit on the number of blocks that a single entity can hold in any single PEA, the bidding system will limit to four the number of blocks that a bidder can demand in any given PEA at any point in the auction.

Therefore, in each bidding round, a bidder will have the opportunity to bid for a total of up to four blocks of spectrum per PEA. This spectrum aggregation limit will apply across both categories in PEAs that contain Cat1 and Cat2 blocks. As a result, no single entity will be permitted to bid on, for example, two Cat1 blocks and three Cat2 blocks within a single PEA. An aggregation limit of four blocks furthers the Commission's interest in promoting greater diversity in participation in the 3.45 GHz Service by ensuring that, if licenses for all blocks in a PEA are awarded, there will be at least three winning bidders in the PEA.

126. The bidding system will not, however, prevent an entity from bidding on more licenses than it may otherwise be permitted to hold under the relevant attribution rules. Applicants should therefore be encouraged to conduct the necessary due diligence prior to the short-form application deadline to determine whether any of its attributable interest holders have attributable interests in other potential auction participants, which may limit each applicant's ability to hold up to four licenses in a single PEA. Bidders are reminded, however, that section 1.2105(c) of the competitive bidding rules, 47 CFR 1.2105(c), prohibits certain communications between auction participants beginning at the short-form application deadline and continuing until the deadline for winning bidders to make down payments.

C. Bidder Education

127. Before the opening of the short-form filing window for Auction 110, detailed educational information will be provided in various formats to would-be participants on the Auction 110 web page. Specifically, OEA will provide various materials on the pre-bidding processes in advance of the opening of the short-form application window, beginning with the release of step-by-step instructions for completing the FCC Form 175, which OEA will make available in the Education section of the Auction 110 website at www.fcc.gov/auction/110. In addition, OEA will provide an online application procedures tutorial for the auction, covering information on pre-bidding preparation, completing short-form applications, and the application review process.

128. In advance of the start of the mock auction, OEA will provide educational materials on the bidding procedures for Auction 110, beginning with the release of a user guide for the bidding system and bidding system file

formats, followed by an online bidding procedures tutorial. OEA and WTB recognize the importance of these materials to applicants' and bidders' comprehension of the bidding procedures adopted herein. Accordingly, the educational materials shall be released as soon as reasonably possible to provide potential applicants and bidders with time to understand them and ask questions before bidding begins.

129. OEA and WTB believe that parties interested in participating in Auction 110 will find the interactive, online tutorials an efficient and effective way to further their understanding of the application and bidding processes. The online tutorials will allow viewers to navigate the presentation outline, review written notes, and listen to audio of the notes. Additional features of this web-based tool include links to auction-specific Commission releases, email links for contacting Commission staff, and screen shots of the online application and bidding systems. The online tutorials will be accessible in the Education section of the Auction 110 website at www.fcc.gov/auction/110. Once posted, the tutorials will remain continuously accessible.

D. Short-Form Applications: Due Before 6 p.m. ET on July 21, 2021

130. In order to be eligible to bid in Auction 110, an applicant must first follow the procedures to submit a short-form application (FCC Form 175) electronically via the Auction Application System, following the instructions set forth in the FCC Form 175 Instructions. The short-form application will become available with the opening of the initial filing window and must be submitted prior to 6 p.m. ET on July 21, 2021. Late applications will not be accepted. No application fee is required for short-form applications.

131. Applications may be filed at any time beginning at noon ET on July 8, 2021, until the filing window closes at 6 p.m. ET on July 21, 2021. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. There are no limits or restrictions on the number of times an application can be updated or amended until the initial filing deadline on July 21, 2021.

132. An applicant must always click on the CERTIFY & SUBMIT button on the "Certify & Submit" screen to successfully submit its FCC Form 175 and any modifications; otherwise the application or changes to the application will not be received or reviewed by Commission staff. Additional information about accessing,

completing, and viewing the FCC Form 175 is provided in the FCC Form 175 Instructions. Applicants requiring technical assistance should contact FCC Auctions Technical Support at (877) 480-3201, option nine; (202) 414-1250; or (202) 414-1255 (text telephone (TTY)); hours of service are Monday through Friday, from 8 a.m. to 6 p.m. ET. In order to provide better service to the public, all calls to Technical Support are recorded.

E. Application Processing and Minor Modifications

1. Public Notice of Applicants' Initial Application Status and Opportunity for Minor Modifications

133. After the deadline for filing auction applications, the Commission will process all timely submitted applications to determine whether each applicant has complied with the application requirements and provided all information concerning its qualifications for bidding. OEA will issue a public notice with applicants' initial application status, identifying: (1) Those that are complete; and (2) those that are incomplete or deficient because of defects that may be corrected. The public notice will include the deadline for resubmitting corrected applications and an electronic copy of the public notice will be sent by email to the contact address listed in the FCC Form 175 for each applicant. In addition, each applicant with an incomplete application will be sent information on the nature of the deficiencies in its application, along with the name and contact information of a Commission staff member who can answer questions specific to the application.

134. After the initial application filing deadline on July 21, 2021, applicants can make only minor modifications to their applications. Major modifications (e.g., change of PEA selection, certain changes in ownership that would constitute an assignment or transfer of control of the applicant, change in the required certifications, change in applicant's legal classification that results in a change in control, or change in claimed eligibility for a higher percentage of bidding credit) will not be permitted. After the deadline for resubmitting corrected applications, an applicant will have no further opportunity to cure any deficiencies in its application or provide any additional information that may affect Commission staff's ultimate determination of whether and to what extent the applicant is qualified to participate in Auction 110.

135. Commission staff will communicate only with an applicant's contact person or certifying official, as designated on the applicant's FCC Form 175, unless the applicant's certifying official or contact person notifies Commission staff in writing that another representative is authorized to speak on the applicant's behalf. Authorizations may be sent by email to auction110@fcc.gov.

2. Public Notice of Applicants' Final Application Status After Upfront Payment Deadline

136. After Commission staff reviews resubmitted applications and upfront payments, OEA will release a public notice identifying applicants that have become qualified bidders for the auction. A *Qualified Bidders Public Notice* will be issued before bidding in the auction begins. Qualified bidders are those applicants with submitted FCC Form 175 applications that are deemed timely filed and complete and that have made a sufficient upfront payment.

F. Upfront Payments

137. In order to be eligible to bid in Auction 110, a sufficient upfront payment and a complete and accurate FCC Remittance Advice Form (FCC Form 159, Revised 2/03) must be submitted before 6 p.m. ET on September 2, 2021. After completing its short-form application, an applicant will have access to an electronic pre-filled version of the FCC Form 159. An accurate and complete FCC Form 159 must accompany each payment. Proper completion of this form is critical to ensuring correct crediting of upfront payments. Payers using the pre-filled FCC Form 159 are responsible for ensuring that all the information on the form, including payment amounts, is accurate. Instructions for completing FCC Form 159 for Auction 110 are provided below.

1. Making Upfront Payments by Wire Transfer for Auction 110

138. Upfront payments for Auction 110 must be wired to, and will be deposited in, the U.S. Treasury.

139. Wire transfer payments for Auction 110 must be received before 6 p.m. ET on September 22, 2021. An applicant must initiate the wire transfer through its bank, authorizing the bank to wire funds from the applicants account to the proper account in the U.S. Treasury. No other payment method is acceptable. The Commission will not accept checks, credit cards, or automated clearing house (ACH) payments. To avoid untimely payments,

applicants should discuss arrangements (including bank closing schedules and other specific bank wire transfer requirements, such as an in-person written request before a specified time of day) with their bankers several days before they plan to make the wire transfer, and must allow sufficient time for the transfer to be initiated and completed before the deadline. The following information will be needed:

ABA Routing Number: 021030004.

Receiving Bank: TREAS NYC, 33 Liberty Street, New York, NY 10045.

Beneficiary: FCC, 45 L Street NE, 3rd Floor, Washington, DC 20554.

Account Number: 827000001001.

Originating Bank Information (OBI Field): (Skip one space between each information item).

“AUCTIONPAY”

Applicant FCC Registration Number (FRN): (Use the same FRN as used on the applicant's FCC Form 159, block 21).

Payment Type Code: (Same as FCC Form 159, block 24A: “U110”).

Note: The beneficiary account number (BNF Account Number) is specific to the upfront payments for Auction 110. Do not use a BNF Account Number from a previous auction.

140. At least one hour before placing the order for the wire transfer (but on the same business day), applicants must print and fax a completed FCC Form 159 (Revised 2/03) to the FCC at (202) 418-2843. Alternatively, the completed form can be scanned and sent as an attachment to an email to RROGWireFaxes@fcc.gov. On the fax cover sheet or in the email subject header, write “Wire Transfer—Auction Payment for Auction 110”. To meet the upfront payment deadline, an applicant's payment must be credited to the Commission's account for Auction 110 before the deadline.

141. Each applicant is responsible for ensuring timely submission of its upfront payment and for timely filing of an accurate and complete FCC Form 159. An applicant should coordinate with its financial institution well ahead of the due date regarding its wire transfer and allow sufficient time for the transfer to be initiated and completed prior to the deadline. Among other things, OEA and WTB caution each applicant to plan ahead regarding any potential delays in its or its financial institution's ability to complete wire transfers due to the COVID-19 pandemic. The Commission repeatedly has cautioned auction participants about the importance of planning ahead to prepare for unforeseen last-minute

difficulties in making payments by wire transfer. Each applicant also is responsible for obtaining confirmation from its financial institution that its wire transfer to the U.S. Treasury was successful and from Commission staff that its upfront payment was timely received and that it was deposited into the proper account. As a regulatory requirement, the U.S. Treasury screens all payments from all financial institutions before deposits are made available to specified accounts. If wires are suspended, the U.S. Treasury may direct questions regarding any transfer to the financial institution initiating the wire. Each applicant must take care to assure that any questions directed to its financial institution(s) are addressed promptly. To receive confirmation from Commission staff, contact Scott Radcliffe of the Office of Managing Director's Revenue & Receivables Operations Group/Auctions at (202) 418-7518 or Theresa Meeks at (202) 418-2945.

142. Please note the following information regarding upfront payments:

- All payments must be made in U.S. dollars.
- All payments must be made by wire transfer.
- Upfront payments for Auction 110 go to an account number different from the accounts used in previous FCC auctions.

143. Failure to deliver a sufficient upfront payment as instructed by the upfront payment deadline will result in dismissal of the short-form application and disqualification from participation in the auction.

2. Completing and Submitting FCC Form 159

144. The following information supplements the standard instructions for FCC Form 159 (Revised 2/03) and is provided to help ensure correct completion of FCC Form 159 for upfront payments for Auction 110. Applicants need to complete FCC Form 159 carefully, because:

- Mistakes may affect bidding eligibility; and
- Lack of consistency between information provided in FCC Form 159 (Revised 2/03), FCC Form 175, long-form application (FCC Form 601), and correspondence about an application may cause processing delays.

145. Therefore, appropriate cross-references between the FCC Form 159 Remittance Advice and the short-form application (FCC Form 175) are described below.

Block number	Required information
1	LOCKBOX #—Leave Blank.
2	Payer Name—Enter the name of the person or company making the payment. If the applicant itself is the payer, this entry would be the same name as in FCC Form 175.
3	Total Amount Paid—Enter the amount of the upfront payment associated with the FCC Form 159 (Revised 2/03).
4–8	Street Address, City, State, ZIP Code—Enter the street mailing address (not Post Office box number) where mail should be sent to the payer. If the applicant is the payer, these entries would be the same as FCC Form 175 from the Applicant Information section.
9	Daytime Telephone Number—Enter the telephone number of a person knowledgeable about this upfront payment.
10	Country Code—For addresses outside the United States, enter the appropriate postal country code (available from the Mailing Requirements Department of the U.S. Postal Service).
11	Payer FRN—Enter the payer's 10-digit FCC Registration Number (FRN) registered in the Commission Registration System (CORES).
21	Applicant FRN (Complete only if applicant is different than payer)—Enter the applicant's 10-digit FRN registered in CORES.
24A	Payment Type Code—Enter "U110".
25A	Quantity—Enter the number "1".
26A	Fee Due—Amount of Upfront Payment.
27A	Total Fee—Will be the same amount as 26A.
28A	FCC Code 1—Enter the number "110" (indicating Auction 110).

Notes:

- Do not use Remittance Advice (Continuation Sheet), FCC Form 159–C, for upfront payments.
- If applicant is different from the payer, complete blocks 13 through 21 for the applicant, using the same information shown on FCC Form 175. Otherwise leave them blank.
- No signature is required on FCC Form 159 for auction payments.
- Since credit card payments will not be accepted for upfront payments for an auction, leave Section E blank.

3. Upfront Payments and Bidding Eligibility

146. The Commission has delegated authority to OEA and WTB to determine appropriate upfront payments for each license being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar licenses. An upfront payment is a refundable deposit made by each applicant seeking to participate in bidding to establish its eligibility to bid on licenses. Upfront payments that are related to the inventory of licenses being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of bidding.

147. Applicants that are former defaulters must pay upfront payments 50% greater than non-former defaulters. For purposes of classification as a former defaulter or a former delinquent, defaults and delinquencies of the applicant itself and its controlling interests are included. For this purpose, the term "controlling interest" is defined in 47 CFR 1.2105(a)(4)(i).

148. An applicant must make an upfront payment sufficient to obtain bidding eligibility on the generic blocks on which it will bid. OEA and WTB adopt the Commission's proposal to set

upfront payments based on MHz-pops, and that the amount of the upfront payment submitted by an applicant will determine its initial bidding eligibility, the maximum number of bidding units on which a bidder may place bids in any single round. In order to bid for a block, qualified bidders must have a current eligibility level that meets or exceeds the number of bidding units assigned to that generic block in a PEA. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one block in one of the PEAs selected on its FCC Form 175 for Auction 110, or else the applicant will not become qualified to participate in the auction. The total upfront payment does not affect the total dollar amount the bidder may bid.

149. In the *Auction 110 Comment Public Notice*, the Commission proposed to require applicants to submit upfront payments based on \$0.03 per MHz-pop for PEAs 1–50 and \$0.01 per MHz-pop for all other PEAs, subject to a minimum of \$500. In response to concerns raised by commenters that calculating upfront payments and bidding units with a significant structural break between the top 50 markets and markets just outside of the top 50 has the potential to create distortions in bidding behavior, OEA and WTB will forgo the discrete break in calculation amounts for large and small markets for upfront payment and bidding unit amounts.

150. Accordingly, OEA and WTB adopt upfront payments for a generic block in a PEA based on \$0.01 per MHz-pop for all PEAs. The results of these calculations will be rounded using the Commission's standard rounding procedures for auctions: Results above \$10,000 are rounded to the nearest \$1,000; results below \$10,000 but above

\$1,000 are rounded to the nearest \$100; and results below \$1,000 are rounded to the nearest \$10. The upfront payment amount per block in each PEA is set forth in the "Attachment A" file on the Auction 110 website at www.fcc.gov/auction/110.

151. OEA and WTB also adopt the Commission's proposal to assign each generic block in a PEA a specific number of bidding units, equal to one bidding unit per \$100 of the upfront payment. The number of bidding units per block in each PEA is set forth in the "Attachment A" file that lists the upfront payment amounts. The number of bidding units for one block in a given PEA is fixed, since it is based on the MHz-pops in the block, and it does not change during the auction as prices change. Thus, in calculating its upfront payment amount, an applicant must determine the maximum number of bidding units on which it may wish to bid in any single round and submit an upfront payment amount for the auction covering that number of bidding units. In some cases, a qualified bidder's maximum eligibility may be less than the amount of its upfront payment because the qualified bidder has either previously been in default on a Commission construction permit or license or delinquent on non-tax debt owed to a Federal agency, or has submitted an upfront payment that exceeds the total amount of bidding units associated with the license areas it selected on its FCC Form 175. In order to make this calculation, an applicant should add together the bidding units for the number of blocks in PEAs on which it seeks to be active in any given round. Applicants should check their calculations carefully, as there is no provision for increasing a bidder's eligibility after the upfront payment deadline.

TABLE 1—UPFRONT PAYMENTS, BIDDING ELIGIBILITY, AND BIDDING FLEXIBILITY EXAMPLE

PEA	Bidding units	Upfront payment
PEA058—Bloomington, IN	1,070	\$107,000
PEA064—South Bend, IN	950	95,000

If a bidder wishes to bid on one block in both of the above PEAs in a round, it must have selected both PEAs on its FCC Form 175 and purchased at least 2,020 bidding units (1,070 + 950) of bidding eligibility. If a bidder only wishes to bid on a block in one of these PEAs, but not both, purchasing 1,070 bidding units would meet the eligibility requirement for a block in either PEA. The bidder would be able to bid on a block in either PEA, but not both at the same time. If the bidder purchased only 950 bidding units, the bidder would have enough eligibility to bid for a block in PEA064 but not for one in PEA058.

152. If an applicant is a former defaulter, it must calculate its upfront payment for the maximum amount of generic blocks in each PEA on which it plans to bid by multiplying the number of bidding units on which it wishes to be active by 1.5. In order to calculate the number of bidding units to assign to former defaulters, the Commission will calculate the number of bidding units a non-former defaulter would get for the upfront payment received, divide that number by 1.5, and round the result up to the nearest bidding unit. If a former defaulter fails to submit a sufficient upfront payment to establish eligibility to bid on at least one generic block in a PEA, the applicant will not be eligible to participate in Auction 110. The applicant, however, will retain its status as an applicant in Auction 110 and will remain subject to 47 CFR 1.2105(c).

G. Auction Registration

153. All qualified bidders for Auction 110 are automatically registered for the auction. Registration materials will be distributed prior to the auction by overnight delivery. The mailing will be sent only to the contact person at the contact address listed in the FCC Form 175 and will include the SecurID® tokens that will be required to place bids.

154. Qualified bidders that do not receive this registration mailing will not be able to submit bids. Therefore, any qualified bidder for Auction 110 that has not received this mailing by noon on September 8, 2021, should call the Auctions Hotline at (717) 338–2868. Receipt of this registration mailing is critical to participating in the auction, and each applicant is responsible for ensuring it has received all the registration materials.

155. In the event that a SecurID® token is lost or damaged, only a person who has been designated as an authorized bidder, the contact person, or the certifying official on the applicant's short-form application may request a replacement. To request a replacement, call the Auction Bidder Line at the telephone number provided

in the registration materials or the Auction Hotline at (717) 338–2868.

H. Remote Electronic Bidding via the FCC Auction Bidding System

156. Bidders will be able to participate in Auction 110 over the internet using the FCC Auction Bidding System (bidding system). During the assignment phase only, bidders will have the option of placing bids by telephone through a dedicated auction bidder line. Please note that telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round. The length of a call to place a telephonic bid may vary; please allow a minimum of 10 minutes. The toll-free telephone number for the auction bidder line will be provided to qualified bidders prior to the start of bidding in the auction.

157. Only qualified bidders are permitted to bid. Each authorized bidder must have his or her own SecurID® token, which the Commission will provide at no charge. Each applicant will be issued three SecurID® tokens. A bidder cannot bid without his or her SecurID® token. In order to access the bidding function of the bidding system, bidders must be logged in during the bidding round using the passcode generated by the SecurID® token and a personal identification number (PIN) created by the bidder. Bidders are strongly encouraged to print a *bid summary* for each round after they have completed all their activity for that round. For security purposes, the SecurID® tokens and a telephone number for bidding questions are only mailed to the contact person at the contact address listed on the FCC Form 175. Each SecurID® token is tailored to a specific auction. SecurID® tokens issued for other auctions or obtained from a source other than the FCC will not work for Auction 110. Please note that the SecurID® tokens can be recycled, and the Commission requests that bidders return the tokens to the FCC. Pre-addressed envelopes will be

provided to return the tokens once the auction has ended.

158. The Commission makes no warranties whatsoever, and shall not be deemed to have made any warranties, with respect to the bidding system, including any implied warranties of merchantability or fitness for a particular purpose. In no event shall the Commission, or any of its officers, employees, or agents, be liable for any damages whatsoever (including, but not limited to, loss of business profits, business interruption, loss of use, revenue, or business information, or any other direct, indirect, or consequential damages) arising out of or relating to the existence, furnishing, functioning, or use of the bidding system. Moreover, no obligation or liability will arise out of the Commission's technical, programming, or other advice or service provided in connection with the bidding system.

159. To the extent an issue arises with the bidding system itself, the Commission will take all appropriate measures to resolve such issues quickly and equitably. Should an issue arise that is outside the bidding system or attributable to a bidder, including, but not limited to, a bidder's hardware, software, or internet access problem that prevents the bidder from submitting a bid prior to the end of a round, the Commission shall have no obligation to resolve or remediate such an issue on behalf of the bidder. Similarly, if an issue arises due to bidder error using the bidding system, the Commission shall have no obligation to resolve or remediate such an issue on behalf of the bidder. Accordingly, after the close of a bidding round, the results of bid processing will not be altered absent evidence of any failure in the bidding system.

I. Mock Auction

160. All qualified bidders will be eligible to participate in a mock auction for the clock phase. Only those bidders that are qualified to participate in Auction 110 will be eligible to participate in the mock auction. The mock auction, which will begin on

September 30, 2021, will enable qualified bidders to become familiar with the bidding system and to practice submitting bids prior to the auction. OEA and WTB recommend that all qualified bidders, including all their authorized bidders, participate to assure that they can log in to the bidding system and gain experience with the bidding procedures. Participating in the mock auction may reduce the likelihood of a bidder making a mistake during the auction. Details regarding the mock auction will be announced in the *Qualified Bidders Public Notice* for Auction 110.

161. After the clock phase of the auction concludes, a separate mock auction for the assignment phase will be held for those qualified bidders that won generic blocks in the clock phase.

J. Auction Delay, Suspension, or Cancellation

162. At any time before or during the bidding process, OEA, in conjunction with WTB, may delay, suspend, or cancel bidding in Auction 110 in the event of a natural disaster, technical obstacle, network interruption, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. This approach has proven effective in resolving exigent circumstances in previous auctions and OEA and WTB find no reason to depart from it here. OEA will notify participants of any such delay, suspension, or cancellation by public notice and/or through the bidding system's announcement function. If the bidding is delayed or suspended, then OEA may, in its sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. OEA and WTB emphasize that they will exercise this authority at their discretion.

K. Fraud Alert

163. As is the case with many business investment opportunities, some unscrupulous entrepreneurs may attempt to use Auction 110 to deceive and defraud unsuspecting investors. Common warning signals of fraud include the following:

- The first contact is a "cold call" from a telemarketer or is made in response to an inquiry prompted by a radio or television infomercial.
- The offering materials used to invest in the venture appear to be targeted at IRA funds, for example, by including all documents and papers

needed for the transfer of funds maintained in IRA accounts.

- The amount of investment is less than \$25,000.
- The sales representative makes verbal representations that: (a) The Internal Revenue Service, Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), FCC, or other government agency has approved the investment; (b) the investment is not subject to state or federal securities laws; or (c) the investment will yield unrealistically high short-term profits. In addition, the offering materials often include copies of actual FCC releases, or quotes from FCC personnel, giving the appearance of FCC knowledge or approval of the solicitation.

164. Information about deceptive telemarketing investment schemes is available from the FCC, as well as the FTC and SEC. Additional sources of information for potential bidders and investors may be obtained from the following sources:

- The FCC's Consumer Call Center at (888) 225-5322 or by visiting www.fcc.gov/general/frauds-scams-and-alerts-guides.
- the FTC at (877) FTC-HELP ((877) 382-4357) or by visiting www.consumer.ftc.gov/articles/0238-investment-risks.
- the SEC at (202) 942-7040 or by visiting www.sec.gov/investor.

165. Complaints about specific deceptive telemarketing investment schemes should be directed to the FTC, the SEC, or the National Fraud Information Center at (202) 835-0618.

IV. Bidding Procedures

166. OEA and WTB will conduct Auction 110 using an ascending clock auction design with two phases. The first phase of the auction—the clock phase—will consist of successive clock bidding rounds in which bidders indicate their demands for a number of generic license blocks in specific categories and PEAs. In the second phase—the assignment phase—winning clock phase bidders will have the opportunity to bid for their preferred combinations of frequency-specific license assignments, consistent with their clock phase winnings, in a series of sealed-bid rounds conducted by PEA or, in some cases, PEA group.

167. In conjunction with WTB, OEA will release shortly updated technical guides that provide the mathematical details of the adopted auction design and algorithms for the clock and assignment phases of Auction 110. The information in the updated technical guides, which are available in the Education section of the Auction 110

website (www.fcc.gov/auction/110), supplements the decisions in the *Auction 110 Procedures Public Notice*. The Auction 110 Clock Phase Technical Guide details the adopted procedures for the clock phase of Auction 110. The Auction 110 Assignment Phase Technical Guide details the adopted procedures for the assignment phase.

A. Clock Phase

1. Clock Auction Design

168. Under the bidding procedures that OEA and WTB adopt, during the clock phase of Auction 110, bidders will indicate their demands for generic license blocks in a bidding category in specific geographic areas—in this case, PEAs. There may be one or two bidding categories in a given PEA. The clock auction format will proceed in a series of rounds, with bidding being conducted simultaneously for all spectrum blocks in all PEAs available in the auction. During each bidding round, the bidding system will announce a per-block clock price for each category in each PEA. Qualified bidders will submit, for each category and PEA for which they wish to bid, the number of blocks they seek at the clock price associated with the current round. Bidding rounds will be open for predetermined periods of time. Bidders will be subject to activity and eligibility rules that govern the pace at which they participate in the auction.

169. As proposed, for each product—a category in a PEA—the clock price for a generic license block will increase from round to round if bidders indicate total demand for blocks in that product that exceeds the number of blocks available. The bidding rounds will continue until, for all products, the total number of blocks that bidders demand does not exceed the supply of available blocks.

170. If the aggregate reserve price to satisfy the CSEA requirement has been met at the time that the clock phase bidding stops, those bidders indicating demand for a product at the final clock phase price will be deemed winning bidders, and the auction will proceed to the assignment phase. If the reserve price has not been met at the time bidding stops in the clock phase, the auction will end, and no licenses will be assigned.

171. Following the clock phase, if the reserve price has been met, the assignment phase will offer clock phase winners the opportunity to bid an additional amount for licenses with specific frequencies. All winning bidders, regardless of whether they bid in the assignment phase, will be

assigned licenses for contiguous blocks within a category in a PEA. In addition, if in a PEA there are one or more bidders with clock phase winnings in both categories, one of the bidders will be assigned frequency blocks that are contiguous across the two categories.

2. Generic License Blocks in Two Bidding Categories

172. As established in the *3.45 GHz Second Report and Order*, the 3.45–3.55 GHz band will be licensed in uniform 10-megahertz sub-blocks in each of the 406 PEAs in the contiguous United States. In most PEAs, new licensees generally will have unrestricted use of all ten frequency blocks. In other areas, specifically in PEAs that wholly or in part cover Cooperative Planning Areas or Periodic Use Areas, licensees must coordinate with incumbent federal operations in the band, as established in the *3.45 GHz Second Report and Order*. In some of the PEAs where coordination is required, all ten blocks will be subject to the same restrictions. In others, the restrictions may vary depending upon the frequency block—specifically, in some PEAs subject to coordination with federal incumbents, the A through D blocks may be subject to different restrictions than the E through J blocks. As set forth in the *3.45 GHz Second Report and Order*, the lower 40 megahertz of the band—between 3450–3490 MHz corresponding to the A through D blocks—are affected differently than the upper 60 megahertz in certain PEAs in the band. In the event Lockheed is granted relief substantially similar to that sought in its waiver request, the A through H blocks will be subject to different conditions than the I and J blocks in the three affected PEAs. See *Lockheed Waiver Request*.

173. *Categories*. The Commission adopts the proposal to establish categories for bidding such that all the blocks within a category in a PEA are similar in terms of any requirements or restrictions. For the reasons proposed by the Commission, OEA and WTB adopt bidding categories as follows: In the PEAs where all ten blocks are the same—*i.e.*, all ten generally are unrestricted or all ten are subject to the same restrictions—the ten generic blocks will be considered Category 1, or “Cat1,” blocks. In the PEAs subject to coordination with federal incumbents where the restrictions differ according to the frequency, the four blocks A through D will be considered Category 1, or “Cat1,” while the six blocks E through J will be considered Category 2, or “Cat2,” for bidding. In PEAs with two categories, we designate certain blocks as Cat1 and other blocks as Cat2 simply

to denote that for these licenses the coordination requirements in a PEA differ between the two categories. For all licenses, we caution potential bidders to investigate carefully the restrictions that may apply to a given PEA. In particular, we note that DoD has created a workbook that specifically describes the coordination requirements for each Cooperative Planning Area and Periodic Use Area. In 334 PEAs, there will be ten generic blocks of a single Cat1 product, and in 72 PEAs, there will be two products. OEA and WTB also note that in the three PEAs that encompass the areas subject to Lockheed’s pending waiver request, the eight blocks A through H would be considered Cat1 while the two blocks I and J would be considered Cat2 for bidding should relief substantially similar to that sought by Lockheed be granted.

174. This approach to determining bidding categories differs somewhat from the approach the Commission has taken in prior clock auctions, in that the coordination requirements on blocks in a given category in a given PEA may differ from the requirements on the same category of blocks in a different PEA. For example, the Cat1 blocks in one PEA may be unrestricted while the Cat1 blocks in another PEA may require some degree of coordination. Similarly, the restrictions on Cat2 blocks will likely vary from PEA to PEA. In previous auctions, blocks in a given bidding category generally have been subject to the same use requirements in all PEAs, but because the restrictions in this auction differ so widely from PEA to PEA, that approach is not feasible. Importantly, however, for Auction 110, within any given PEA, the blocks within a category can be considered generic, and bidding in the clock phase will determine a single price that will apply to each generic block in a category in a PEA.

175. This approach for bidding on generic blocks in two categories is based on the close similarity of the blocks within each bidding category within a PEA. To the extent a bidder has a preference for licenses for specific frequencies, the bidder may bid for its preferred blocks in the assignment phase. However, a bidder for a generic block in a category will not be assured that it will be assigned, or not be assigned, any particular frequency block.

176. *Limit on number of blocks per bidder*. In the *3.45 GHz Second Report and Order*, the Commission adopted a spectrum aggregation limit for flexible-use licenses in the 3.45 GHz band of a maximum of 40 megahertz (*i.e.*, four

blocks out of ten) in any PEA at any point in time for four years post-auction. Consistent with this limit on the number of blocks that a single entity can hold in any single PEA, the bidding system will limit to four the number of blocks that a bidder can demand in any given PEA at any point in the auction. Therefore, in each bidding round, a bidder will have the opportunity to bid for a total of up to four blocks of spectrum per PEA. This spectrum aggregation limit will apply across both categories in PEAs that contain Cat1 and Cat2 blocks. As a result, no single entity will be permitted to bid on, for example, two Cat1 blocks and three Cat2 blocks within a single PEA. More specifically, the bidding system will not permit bids to be submitted that, if fully applied, would result in the bidder demanding more than four blocks in the PEA. Further, the system will not fully apply submitted bids if doing so would result in the bidder demanding more than four blocks in the PEA. For example, a requested increase in one category may not be applied if a requested reduction in the other category cannot be applied because of insufficient aggregate demand.

177. An aggregation limit of four blocks will further the Commission’s interest in promoting greater diversity in participation in the 3.45 GHz band by ensuring that, if licenses for all blocks in a PEA are awarded, there will be at least three winning bidders in the PEA.

3. Bidding Rounds

178. As proposed, Auction 110 will consist of sequential bidding rounds, each followed by the release of round results. OEA and WTB will conduct bidding simultaneously for all spectrum blocks in both bidding categories for all PEAs available in the auction. In the first bidding round of Auction 110, a bidder will indicate, for each product, the number of generic license blocks it demands at the minimum opening bid price.

179. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of bidding. OEA will retain the discretion to adjust the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders’ need to study round results and adjust their bidding strategies. Such adjustments may include changes in the amount of time for bidding rounds, the amount of time between rounds, or the number of rounds per day, and will depend upon bidding activity and other factors.

180. Auction 110 will be conducted over the internet. A bidder will be able

to submit its bids using the bidding system's *upload* function, which allows bid files in a comma-separated values (CSV) text format to be uploaded. The bidding system will not allow bids to be submitted unless the bidder selected the PEAs on its FCC Form 175, the bidder has sufficient bidding eligibility, and the bids, if applied, are consistent with the aggregation limit of 40 megahertz in a PEA.

181. During each round of the bidding, a bidder will also be able to remove bids placed in the current bidding round. If a bidder modifies its bids for blocks in a PEA in a round, the system will take the last bid submission as that bidder's bid for the round. No bids may be withdrawn after the close of a round. Unlike an auction conducted using the Commission's simultaneous multiple-round auction format, there are no provisionally winning bids in a clock auction. As a result, the concept of bid withdrawals as used in simultaneous multiple-round auctions does not apply to a clock auction.

4. Stopping Rule

182. OEA and WTB adopt a simultaneous stopping rule for Auction 110, under which all blocks in all PEAs will remain available for bidding until the bidding stops in every PEA. Specifically, bidding will close for all blocks after the first round in which there is no excess demand in any product. Excess demand is calculated as the difference between the number of blocks of aggregate demand and supply. Under this approach, it is not possible to determine in advance how long Auction 110 will last.

5. Availability of Bidding Information

183. OEA and WTB adopt the proposal to make public after each clock phase bidding round, for each category in each PEA: The supply, the aggregate demand, the posted price of the last completed round, and the clock price for the next round. The posted price of the previous round is, generally, the start-of-round price if supply exceeds demand; the clock price of the previous round if demand exceeds supply; or the price at which a reduction caused demand to equal supply. The identities of bidders demanding blocks in a specific category or PEA will not be disclosed until after Auction 110 concludes (*i.e.*, after the close of bidding).

184. OEA will also make public after each clock phase bidding round whether the reserve price has been met, that is, whether the estimated total cash proceeds based on the bids in the most recently completed round would satisfy

the CSEA requirement. If the reserve has not yet been met, each bidder will be informed about the shortfall between the reserve and the estimated total cash proceeds, rounded up to the nearest million. This shortfall information will not be publicly available during the auction.

185. Each bidder will have access to additional information related to its own bidding and bid eligibility. Specifically, after the bids of a round have been processed, the bidding system will inform each bidder of the number of blocks it holds after the round (its processed demand) for every product and its eligibility for the next round.

186. Limiting the availability of bidding information during the auction balances the Commission's interest in providing bidders with sufficient information about the status of their own bids and the general level of bidding in all areas and license categories to allow them to bid confidently and effectively, while restricting the availability of information that may facilitate identification of bidders placing particular bids, which could potentially lead to undesirable strategic bidding.

6. Activity Requirement, Contingent Bidding Limit, and Missing Bids

187. *Activity requirement.* To ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. For this clock auction, a bidder's activity in a round for purposes of the activity rule will be the sum of the bidding units associated with the bidder's demands as applied by the auction system during bid processing. Bidders are required to be active on a specific percentage (the *activity requirement percentage*) of their current bidding eligibility during each round of the auction. Failure to maintain the requisite activity level will result in a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place bids in subsequent rounds of the auction.

188. OEA and WTB adopt the proposal to require that bidders maintain a fixed, high level of activity in each round of Auction 110 in order to maintain bidding eligibility. Specifically, bidders must be active on between 90% and 100% of their bidding eligibility in all clock rounds, with the specific percentage within this range to be set for each round. Thus, the activity rule will be satisfied when a bidder has bidding activity on blocks with bidding

units that total 90% to 100% of its current eligibility in the round. OEA will set the activity requirement percentage initially at 95%. If the activity rule is met, then the bidder's eligibility will not change for the next round. If the activity rule is not met in a round, the bidder's eligibility will be reduced. Bidding activity will be based on the bids that are applied by the FCC auction bidding system. That is, if a bidder requests a reduction in the quantity of blocks it demands in a product, but the bidding system cannot apply the request because demand would fall below the available supply, then the bidder's activity will reflect its unreduced demand. Under the ascending clock auction format, the FCC auction bidding system will not allow a bidder to reduce the quantity of blocks it demands in an individual product if the reduction would result in aggregate demand falling below (or further below) the available supply of blocks in the product.

189. OEA will retain the discretion to change the activity requirement percentage during the auction. The bidding system would announce any such change in advance of the round in which it would take effect, giving bidders adequate notice to adjust their bidding strategies.

190. *Contingent bidding limit.* Because a bidder's eligibility for the next round is calculated based on the bidder's demands as applied by the auction system during bid processing, a bidder's eligibility may be reduced even if the bidder submitted bids with activity that exceeds the required activity for the round. This may occur, for example, if the bidder bids to reduce its demand in PEA X by two blocks (with 10 bidding units each) and bids to increase its demand by one block (with 20 bidding units) in PEA Y. If the bidder's demand can only be reduced by one block in PEA X (because there is only one block of excess demand), the increase in PEA Y cannot be applied, and absent other bidding activity the bidder's eligibility would be reduced. To help a bidder avoid potentially having its eligibility reduced as a result of submitted bids that could not be applied during bid processing, as proposed, OEA and WTB adopt procedures to allow a bidder to submit bids with associated bidding activity greater than its current bidding eligibility. For example, depending upon the bidder's overall bidding eligibility and the contingent bidding percentage, a bidder could submit an "additional" bid or bids that would be considered (in price point order with its other bids) and applied as available

eligibility permits during the bid processing. However, OEA and WTB emphasize that even under these additional procedures, the bidder's activity as applied by the auction system during bid processing will not exceed the bidder's current bidding eligibility. That is, if a bidder submits bids with associated bidding units exceeding 100% of its current bidding eligibility, its processed activity cannot exceed its eligibility.

191. Under these procedures, after Round 1 a bidder may submit bids with bidding units totaling up to a *contingent bidding limit* equal to the bidder's current bidding eligibility for the round times a percentage (the *contingent bidding percentage*) equal to or greater than 100%. The Commission has previously referred to the *contingent bidding limit* as the *activity upper limit*, and similarly, to the *contingent bidding percentage* as the *activity limit percentage*. OEA and WTB modify those terms to remind bidders that bids submitted using the contingent bidding limit will be applied only under certain circumstances. For Round 1, the contingent bidding limit would be 100% of the bidder's initial bidding eligibility. OEA and WTB adopt an initial contingent bidding percentage of 120% to apply beginning in Round 2. This limit will be subject to change in subsequent rounds within a range of 100% to 140%. In any bidding round, the auction bidding system will advise the bidder of its current bidding eligibility, its required bidding activity, and its contingent bidding limit. The Auction 110 Clock Phase Technical Guide provides examples of use of the contingent bidding limit, and bidders are encouraged to review them.

192. As with the activity requirement percentage, OEA will retain the discretion to change the contingent bidding percentage during the auction and will announce any such changes in advance of the round in which they would take effect.

193. *Missing bids*. Under the clock auction format, bidders are required to indicate their demands in every round, even if their demands at the new round's prices are unchanged from the previous round. Missing bids—bids that are not reconfirmed—are treated by the auction bidding system as requests to reduce to a quantity of zero blocks for the product. If these requests are applied, or applied partially, then a bidder's bidding activity, and its bidding eligibility for the next round, may be reduced, in which they would take effect.

194. For Auction 110, OEA and WTB will not provide for activity rule waivers

to preserve a bidder's eligibility. OEA and WTB note that the procedures to permit a bidder to submit bids with bidding activity greater than its eligibility, within the precise limits set forth above, will address some of the circumstances under which a bidder risks losing bidding eligibility and otherwise could wish to use a bidding activity waiver, while minimizing any potential adverse impacts on bidder incentives to bid sincerely and on the price setting mechanism of the clock auction. This approach not to allow waivers is consistent with the ascending clock auction procedures used in other FCC clock auctions. The clock auction relies on precisely identifying the point at which demand decreases to equal supply to determine winning bidders and final prices. Allowing waivers would create uncertainty with respect to the exact level of bidder demand and would interfere with the basic clock price-setting and winner determination mechanism. Moreover, uncertainty about the level of demand would affect the way bidders' requests to reduce demand are processed by the bidding system, as addressed below.

7. Acceptable Bids

a. Minimum Opening Bids

195. As is typical for each auction, the Commission sought comment on the use of a minimum opening bid amount and/or reserve price, as mandated by section 309(j) of the Communications Act. OEA and WTB will establish minimum opening bid amounts for Auction 110. The bidding system will not accept bids lower than the minimum opening bids for each product. Based on the Commission's experience in past auctions, setting minimum opening bid amounts judiciously is an effective tool for accelerating the competitive bidding process.

196. For Auction 110, the Commission proposed to calculate minimum opening bid amounts based on bandwidth and license area population using a tiered approach under which the calculation would vary by market population. The Commission proposed minimum opening bid amounts for a block in a PEA based on \$0.06 per MHz-pop for PEAs 1–50 and \$0.02 per MHz-pop for all other PEAs, subject to a minimum of \$1000.

197. Based on comments in the record, however, OEA and WTB adopt revised, lower minimum opening bid amounts for Auction 110. Specifically, OEA and WTB adopt minimum opening bid amounts for a block in a PEA based on \$0.03 per MHz-pop for PEAs 1–50, \$0.006 per MHz-pop for PEAs 51–100,

and \$0.003 per MHz-pop for all other PEAs, subject to a minimum of \$1000. These minimum opening bid amounts are set forth in the “Attachment A” file on the Auction 110 website at www.fcc.gov/auction/110.

b. Clock Price Increments

198. OEA and WTB adopt the proposed procedures regarding clock price increments for Auction 110. Accordingly, after bidding in the first round and before each subsequent round, the bidding system will announce the start-of-round price (also referred to as the posted price of the previous round) and the clock price for the upcoming round—that is, the lowest price and the highest price at which bidders can specify the number of blocks they demand during the round. As long as aggregate demand for blocks in the product exceeds the supply of blocks, the start-of-round price will be equal to the clock price from the prior round. If demand equaled supply at a price in a previous round, then the start-of-round price for the next round will be equal to the price at which demand equaled supply. If demand was less than supply in the previous round, then the start-of-round price for the next round will not increase.

199. OEA will set the clock price for blocks in a specific product for a round by adding a percentage increment to the start-of-round price. For example, if the start-of-round price for a block of a given product is \$10,000, and the percentage increment is 20%, then the clock price for the round will be \$12,000. The result of the clock price calculation will be rounded as follows: results above \$10,000 will be rounded up to the nearest \$1,000, and results below \$10,000 will be rounded up to the nearest \$100. OEA will set the initial increment percentage at 10%, and may adjust the increment within a range of 5% to 20% inclusive, as rounds continue. The total dollar amount of the increment (the difference between the clock price and the start-of-round price) will be capped at a certain amount. OEA will set this cap on the increment initially at \$50 million and may adjust the cap as rounds continue. The proposed 5% to 20% increment range and cap will allow OEA to set a percentage that manages the auction pace and takes into account bidders' needs to evaluate their bidding strategies while moving the auction along quickly.

c. Intra-Round Bids

200. As proposed, OEA and WTB will permit a bidder to make intra-round bids by indicating a point between the

start-of-round price and the clock price at which its demand for blocks changes. In placing an intra-round bid, a bidder will indicate a specific price and a (different) quantity of blocks it demands if, after bids for the round are processed, the price for blocks should increase beyond that intra-round amount.

201. An intra-round bid gives the bidder the flexibility to indicate that it wants to change its demand at a price lower than the clock price. However, intra-round bids will be optional; a bidder may choose to express its demands only at the clock prices. Permitting intra-round bids allows the auction system to use relatively large increments, thereby speeding the auction, without running the risk that a jump in the clock price will overshoot the market clearing price—the point at which demand for blocks equals the available supply.

8. Bids To Change Demand, Bid Types, and Bid Processing

202. Under the ascending clock auction format the Commission proposed for Auction 110, and which OEA and WTB adopt, a bidder will indicate in each round the number of blocks in each product that it demands at a given price, subject to the in-band limit of four discussed above.

203. A bidder that is willing to maintain the same demand for a product (relative to its demands from the previous round as processed by the bidding system) at the new clock price would bid for that quantity at the clock price, indicating that it is willing to pay up to that price, if need be, for the specified quantity. Bids to maintain demand will always be applied by the auction bidding system. A bidder that wishes to change the quantity it demands would bid at the clock price or at an intra-round price, depending upon the point at which its demands change.

204. For example, if a bidder has processed demand for two blocks entering a round in which the start-of-round price is \$2,000 and the clock price is \$2,500, but it is only willing to buy one block if the price should increase above \$2,100, the bidder can submit an intra-round bid indicating a bid quantity of one at a price of \$2,100. Or, if the bidder is not willing to pay more than the start-of-round price of \$2,000 for any blocks, it can submit an intra-round bid requesting a quantity of zero at the start-of-round price of \$2,000.

205. To facilitate bidding for multiple blocks in a PEA, bidders will be permitted to make two types of bids: Simple bids and switch bids. A “simple” bid indicates a desired

quantity of blocks in a product at a price (either the clock price or an intra-round price). A “switch” bid allows the bidder to request to move its demand for a quantity of blocks from Cat1 to Cat2, or vice versa, within the same PEA at a price for the “from” category (either the clock price or an intra-round price). “Switch” bids are allowed only in PEAs with two categories.

206. OEA and WTB will not incorporate any form of package bidding procedures into the clock phase of Auction 110. Package bidding would add complexity to the bidding process, and OEA and WTB do not see significant benefit from such procedures, given the clock auction and assignment phase format OEA and WTB adopt. A bidder may bid on multiple blocks in a PEA (up to the limit of four) and in multiple PEAs. As set forth below, the assignment phase will assign contiguous blocks to winners of multiple blocks in a category in a PEA and give bidders an opportunity to express their preferences for specific frequency blocks, thereby facilitating aggregations of licenses. Also as set forth below, if there are one or more bidders that win blocks in both categories, the assignment phase bidding system will assign blocks that are contiguous across the categories to one such bidder.

207. OEA and WTB adopt bid processing procedures that the auction bidding system will use, after each bidding round, to process bids to change demand to determine the *processed demand* of each bidder for each product and a *posted price* for each product that will serve as the start-of-round price for the next round.

a. No Excess Supply Rule for Bids To Reduce Demand

208. Under the ascending clock auction format, the FCC auction bidding system will not allow a bidder to reduce the quantity of blocks it demands in a product if the reduction would result in aggregate demand falling below (or further below) the available supply of blocks in the product. Therefore, if a bidder submits a simple bid to reduce the number of blocks for which it has processed demand as of the previous round, the bidding system will treat the bid as a request to reduce demand that will be applied only if the “no excess supply” rule would be satisfied. Similarly, if a bidder submits a switch bid to move its demand for a quantity of blocks from Cat1 to Cat2 within the same PEA, the FCC auction bidding system will treat the bid as a request that will be applied only if the “no

excess supply” rule would be satisfied for Cat1 in the PEA.

b. Eligibility Rule and Aggregation Limit for Bids To Increase Demand

209. The bidding system will not allow a bidder to increase the quantity of blocks it demands in a product if the total number of bidding units associated with the bidder’s demand exceeds the bidder’s bidding eligibility for the round. Therefore, if a bidder submits a simple bid to increase the number of blocks for which it has processed demand as of the previous round, the bidding system will treat the bid as a request to increase demand that will be applied only if it would not cause the bidder’s activity to exceed its eligibility. The eligibility rule for bids to increase demand does not apply to switch bids because the bidder’s processed activity does not change when a switch bid is applied.

210. In addition, in light of the in-band aggregation limit of 40 megahertz in a PEA established by the *3.45 GHz Second Report and Order*, the bidding system will not permit a bidder to increase the number of blocks it demands in a PEA if its total demand in the PEA would exceed four blocks.

c. Partial Application of Bids

211. Under the bid processing procedures OEA and WTB adopt, as in all previous FCC spectrum auctions using the clock auction format, a bid (simple bid or switch bid) that involves a reduction from the bidder’s previous demands can be applied partially—that is, reduced by fewer blocks than requested in the bid—if excess demand is insufficient to support the entire reduction. Accordingly, the bidding system will apply a bidder’s request to reduce demand as much as possible consistent with the no excess supply rule. A switch bid may be applied partially, but the increase in demand in the “to” category will always match in quantity the reduction in the “from” category. A simple bid to increase a bidder’s demand may be applied partially if the total number of bidding units associated with the bidder’s demand exceeds the bidder’s bidding eligibility for the round, or if fully applying the bid would violate the aggregation limit. Therefore, the bidding system will accommodate a bidder’s request to increase demand as much as possible consistent with the aggregation limit and as long as the bidder’s activity does not exceed its eligibility.

d. Processed Demand

212. As proposed, OEA and WTB adopt procedures to determine the order

in which the bidding system will process bids after a round ends. Bids to maintain demand are considered first and always applied. The bidding system will then process bids to change demand in order of price point, where the price point represents the percentage of the bidding interval for the round. For example, if the start-of-round price is \$5,000 and the clock price is \$6,000, a price of \$5,100 will correspond to the 10% price point, since it is 10% of the bidding interval between \$5,000 and \$6,000. The bidding system will first consider intra-round bids in ascending order of price point and then bids at the clock price. The system will consider bids at the lowest price point across all PEAs, then look at bids at the next price point in all areas, and so on. If there are multiple bids at a single price point, the system will process those bids in order of a bid-specific pseudo-random number. As it considers each submitted bid during bid processing, the bidding system will determine the extent to which there is excess demand in each PEA at that point in the processing in order to determine whether a bidder's request to reduce demand can be applied. Likewise, the auction bidding system will evaluate the activity associated with the bidder's most recently determined demands at that point in the processing to determine whether a request to increase demand can be applied.

213. Because in any given round some bidders may request to increase demands for licenses while others may request reductions, the price point at which a bid is considered by the bidding system can affect whether it is applied. Bids not applied because of insufficient aggregate demand or insufficient eligibility will be held in a queue and considered, again in order, if there should be excess demand or sufficient eligibility later in the processing after other bids are processed.

214. Therefore, once a round closes, the bidding system will process bids to change demand by first considering the bid submitted at the lowest price point and determining the maximum extent to which that bid can be applied given bidders' demands as determined at that point in the bid processing. If the bid can be applied (either in full or partially), the number of blocks the bidder holds at that point in the processing will be adjusted, and aggregate demand will be recalculated accordingly. If the bid cannot be applied in full, the unfulfilled bid, or portion thereof, will be held in a queue to be considered later during bid processing

for that round. The bidding system will then consider the bid submitted at the next highest price point, applying it in full, in part, or not at all, given the most recently determined demands of bidders. Any unfulfilled requests will again be held in the queue, and aggregate demand will again be recalculated. Every time a bid or part of a bid is applied, the unfulfilled bids held in the queue will be reconsidered, in the order of the original price points of the bids (and by pseudo-random number, in the case of tied price points). The auction bidding system will not carry over unfulfilled bid requests to the next round, however. The bidding system will advise bidders of the status of their bids when round results are released.

e. Price Determination

215. OEA and WTB further adopt bid processing procedures that will determine, based on aggregate demand, the posted price for each product for the round, which will serve as the start-of-round price for the next round. The uniform price for all of the blocks in a product will increase from round to round as long as there is excess demand for blocks in the product but will not increase if aggregate demand does not exceed the available supply of blocks.

216. Under these procedures, if at the end of a round the aggregate demand for blocks in the product exceeds the supply of blocks, the posted price will equal the clock price for the round. If a reduction in demand was applied during the round and caused demand in the product to equal supply, the posted price will be the price at which the reduction was applied. If aggregate demand is less than or equal to supply and no bid to reduce demand was applied for the product, then the posted price will equal the start-of-round price for the round. The range of acceptable bid amounts for the next round will be set by adding the percentage increment to the posted price.

217. When a bid to reduce demand can be applied only partially, the uniform price for the product will stop increasing at that point, since the partial application of the bid will result in demand falling to equal supply. Hence, a bidder that makes a bid to reduce demand that cannot be fully applied will not face a price for the remaining demand that is higher than its bid price.

218. After the bids of the round have been processed, if the stopping rule has not been met, the FCC auction bidding system will announce clock prices to indicate a range of acceptable bids for the next round. Each bidder will be informed of its processed demand and

the extent of excess demand for blocks in each product.

9. Winning Bids in the Clock Phase

219. Under the clock auction format for Auction 110, if the reserve price to meet the CSEA requirement is met in the clock phase, bidders with processed demand for a product at the time the stopping rule is met will become the winning bidders of licenses corresponding to that number of blocks and will be assigned specific frequencies in the assignment phase. The final clock phase price for a generic block in a product will be the posted price for the final round. This and other Auction 110 bid processing details are addressed in the Auction 110 Clock Phase Technical Guide.

B. Assignment Phase

220. Following the conclusion of the clock phase, if the reserve price to satisfy the CSEA requirement has been met, the assignment phase will follow. As proposed, in the assignment phase, in a series of bidding rounds, each clock phase winning bidder will have the opportunity to indicate its preferences for specific frequency licenses corresponding to the generic blocks it won in each category in the clock phase. As proposed, a bidder will be assigned contiguous frequencies for blocks it wins within each category and PEA regardless of whether it chooses to bid in the assignment phase. As set forth below, OEA and WTB adopt an additional assignment procedure to address commenter concerns that the procedures, as proposed, did not take contiguity across categories into account.

1. Sequencing and Grouping of PEAs

221. As proposed, OEA will sequence assignment rounds to make it easier for bidders to incorporate frequency assignments from previously assigned areas into their bid preferences for other areas, recognizing that bidders winning multiple blocks of licenses generally will prefer contiguous blocks across adjacent PEAs. To that end, OEA will conduct rounds for the largest markets first to enable bidders to establish a "footprint" from which to work.

222. Specifically, OEA will conduct a separate assignment round for each of the top 20 PEAs and to conduct these assignment rounds sequentially, beginning with the largest PEA. Once the top 20 PEAs have been assigned, OEA will conduct, for each Regional Economic Area Grouping (REAG), a series of assignment rounds for the remaining PEAs within that region.

223. Further, the bidding system will group into a single market for assignment any non-top 20 PEAs within a REAG in which the same winning bidders will be assigned the same number of blocks in each category, and all are subject to the small markets bidding cap or all are not subject to the cap. Grouping in this way may also help maximize contiguity across PEAs.

224. OEA will sequence the assignment rounds within a REAG in descending order of population for a PEA group or individual PEA. The bidding for the different REAGs will be conducted in parallel in order to reduce the total amount of time required to complete the assignment phase.

2. Acceptable Bids and Bid Processing

225. Under the bidding procedures OEA and WTB adopt, in each assignment round a bidder will be asked to assign a price to one or more possible frequency assignments for which it wishes to express a preference, consistent with its winnings for generic blocks in the clock phase. The price will represent a maximum payment that the bidder is willing to pay, in addition to the price established in the clock phase for the generic blocks, for the frequency-specific license or licenses in its bid. In PEAs where there are two categories and a bidder won generic blocks in both categories, a bidder will submit its preferences for blocks won in Cat1 and Cat2 separately, rather than submitting bids for preferences that include blocks in both categories. That is, if a bidder won one block in Cat1 and two blocks in Cat2, it will not be able to submit a single bid amount for an assignment that includes both categories. Instead, it will submit its bid or bids for assignments in Cat1 separately from its bid or bids for assignments in Cat2.

226. In response to numerous comments requesting that the Commission implement procedures that would prioritize contiguous assignments across categories, OEA and WTB modify the procedures proposed in the *Auction 110 Comment Public Notice* to ensure that, in PEAs with both Cat1 and Cat2 blocks, if one or more bidders win blocks in both categories in the clock phase, one of those bidders will be assigned licenses that are contiguous across the categories. Specifically, in each assignment round, prior to implementing the proposed optimization procedures separately for each category in the PEA or PEA group, the bidding system will first determine if there are one or more bidders with winnings in both categories. If there are, the bidding system will assign blocks that are contiguous across the categories

to one such bidder. To do so, the bidding system will consider the sum of each such bidder's bid for its Cat1 option that includes the highest-frequency block (D) and its bid for the Cat2 option that includes the lowest-frequency block (E). The bidder with the highest bid total will be assigned licenses that are contiguous across the categories (*i.e.*, that include blocks D and E and any other blocks contiguous to D and/or E that the bidder won. The bidder's assignment payment will be the price of the bidder with the second-highest total bid for options that include blocks that are contiguous across categories.

227. Once the bidding system has determined whether there is at least one bidder with cross-category winnings and if so, has assigned licenses to one of those bidders, the system will, as proposed, use an optimization approach to determine the winning frequency assignment for the remaining blocks in each category in each PEA or PEA group. The auction system will select the assignment that maximizes the sum of bid amounts among all assignments that satisfy the contiguity requirements within categories. Furthermore, if multiple blocks in a category in a PEA remain unsold, the unsold licenses will be contiguous.

228. The additional price a bidder will pay for a specific frequency assignment (above the clock phase price) in a given category will be calculated consistent with a generalized "second price" approach—that is, the winner will pay a price that would be just sufficient to result in the bidder receiving that same winning frequency assignment while ensuring that no group of bidders is willing to pay more for an alternative assignment where each bidder is assigned contiguous spectrum within that category. This price will be less than or equal to the price the bidder indicated it was willing to pay for the assignment. OEA will determine prices in this way because it facilitates bidding strategy for the bidders, encouraging them to bid their full value for the assignment, knowing that if the assignment is selected, they will pay no more than would be necessary to ensure that the outcome is competitive.

3. Information Available to Bidders During the Assignment Phase

229. After the clock phase concludes but before bidding begins in the assignment phase, the bidding system will provide to each assignment phase bidder a menu of bidding options consisting of possible configurations of frequency-specific licenses on which it

can bid. These bidding options will be consistent with the bidder's clock-phase winnings but will not take into account the winnings of other bidders. The bidding system will also announce the order in which assignment rounds will take place and indicate which PEAs will be grouped together for bidding. The bidding system will provide clock phase winning bidders with this information as soon as possible and will announce a schedule of assignment phase rounds that will commence no sooner than five business days later.

230. After each assignment round, the bidding system will inform each bidder of its own assignment and assignment payment for each assignment category for each PEA or PEA group assigned in the round. The bidding system will also provide each bidder with its current total payment, which is calculated as the sum of the bidder's total clock payment across all PEAs and the bidder's assignment payments for the PEAs for which an assignment round has already completed. During the assignment rounds this information will provide the bidder a running estimate of the dollar amount it will owe at the end of the auction. A bidder that is claiming a bidding credit will also be informed about its current bidding credit discount and whether the discount has been capped.

C. Final Auction Payment Calculations

231. When all assignment rounds have been completed, a bidder's final auction payment takes into account the sum of final clock phase prices across all licenses that it won, the sum of all of the bidder's assignment payments, and any claimed bidding credits. Specifically, if a bidder is not claiming a bidding credit, its final payment is determined by summing the final clock phase prices across all licenses that it won and its assignment payments across all PEAs or PEA groups.

232. If a bidder claims a bidding credit, a bidding credit discount is calculated by applying the bidder's bidding credit percentage to the sum of the bidder's clock payments and assignment payments, capping the bidding credit discount if it exceeds the applicable caps for small businesses, rural service providers, and small markets. The resulting bidding credit discount is subtracted from the sum of the bidder's clock payments and assignment payments to determine the final payment for a bidder with a bidding credit.

D. Calculating Individual “Per-License” Prices

233. While final auction payments for winning bidders will be calculated with bidding credit caps and assignment payments applied on an aggregate basis, rather than to individual licenses, the bidding system will also calculate a “per-license” price for each license. Such individual prices may be needed if a licensee later incurs license-specific obligations, such as unjust enrichment payments.

234. After the assignment phase, the auction bidding system will determine a net and gross post-auction price for each license that a bidder won by apportioning assignment payments and bidding credit discounts (only applicable for the net price) across all the bidder’s licenses. To calculate the gross per-license price, the auction bidding system will apportion the assignment payment to licenses in proportion to the final clock phase price of the blocks that the bidder is assigned in that assignment category and PEA (or PEA group). Mathematical details of these procedures, including how the system apportions the assignment payment for an assignment that is contiguous across the two categories, are given in the Auction 110 Assignment Phase Technical Guide. To calculate the net price, the auction bidding system will first apportion any applicable bidding credit discounts to each PEA or PEA group in proportion to the gross payment for that market. Then, for each PEA or PEA group, the auction bidding system will apportion the assignment payment and the discount to licenses in proportion to the final clock phase price of the blocks that the bidder is assigned in that assignment category for that PEA (or PEA group).

E. Auction Results

235. The bidding system will determine winning bidders as described in Section IV.A.9 (Winning Bids in the Clock Phase), above. After release of the public notice announcing auction results, the public will be able to view and download bidding and results data through the FCC Public Reporting System (PRS).

F. Auction Announcements

236. Commission staff will use auction announcements to report necessary information, such as schedule changes, to bidders. All auction announcements will be available by clicking a link in the bidding system.

V. Post-Auction Procedures

237. The public notice announcing the close of the bidding and auction

results will be released shortly after bidding has ended in Auction 110. This public notice will also establish the deadlines for submitting down payments, final payments, and the long-form applications (FCC Form 601) for the auction.

A. Down Payments

238. The Commission’s rules provide that, unless otherwise specified by public notice, within ten business days after the release of the auction closing public notice for Auction 110, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission to 20% of the net amount of its winning bids (less any bidding credits, if applicable). Because it is not possible to know when bidding in Auction 110 will end, and thus whether post-auction payments will be due in late 2021 or early 2022, some commenters request that OEA and WTB announce before the bidding begins that down payments will be due in early 2022. Commission staff have previously recognized that uncertainties regarding the year in which down payments will be due could affect potential applicants from a capital planning perspective, and that this could in turn affect auction participation. Acknowledging that such uncertainties may be presented under the current schedule for Auction 110, OEA and WTB exercise their discretion under the Commission’s rules to set the down payment deadline for Auction 110 to be the later of January 7, 2022, or ten business days after release of the auction closing public notice.

B. Final Payments

239. Each winning bidder will be required to submit the balance of the net amount for each of its winning bids within 10 business days after the deadline for submitting down payments.

C. Long-Form Application (FCC Form 601)

240. The Commission’s rules provide that, within 10 business days after release of the auction closing public notice, winning bidders must electronically submit a properly completed post-auction application (FCC Form 601), including the necessary filing fee of \$3,175, for the license(s) they won through the auction. The filing fee will be required only if the recently amended section 1.1102 of the Commission’s rules is in effect by the post-auction application deadline.

241. A winning bidder claiming eligibility for a small business bidding credit or a rural service provider

bidding credit must demonstrate its eligibility for the bidding credit sought in its FCC Form 601 post-auction application. Further instructions on these and other filing requirements will be provided to winning bidders in the auction closing public notice for Auction 110.

242. Winning bidders organized as bidding consortia must comply with the FCC Form 601 post-auction application procedures set forth in section 1.2107(g) of the Commission’s rules. Specifically, license(s) won by a consortium must be applied for as follows: (a) An individual member of the consortium or a new legal entity comprising two or more individual consortium members must file for licenses covered by the winning bids; (b) each member or group of members of a winning consortium seeking separate licenses will be required to file a separate FCC Form 601 for its/their respective license(s) in their legal business name; (c) in the case of a license to be partitioned or disaggregated, the member or group filing the applicable FCC Form 601 shall include the parties’ partitioning or disaggregation agreement with the FCC Form 601; and (d) if a DE credit is sought (either small business or rural service provider), the applicant must meet the applicable eligibility requirements in the Commission’s rules for the credit.

D. Ownership Disclosure Information Report (FCC Form 602)

243. Within 10 business days after release of the auction closing public notice for Auction 110, each winning bidder must also comply with the ownership reporting requirements in sections 1.913, 1.919, and 1.2112 of the Commission’s rules by submitting an ownership disclosure information report for wireless telecommunications services (FCC Form 602) with its FCC Form 601 post-auction application.

244. If a winning bidder already has a complete and accurate FCC Form 602 on file in the FCC’s Universal Licensing System (ULS), then it is not necessary to file a new report, but the winning bidder must certify in its FCC Form 601 application that the information on file with the Commission is complete and accurate. If the winning bidder does not have an FCC Form 602 on file, or if the form on file is not complete and accurate, then the winning bidder must submit a new one.

245. When a winning bidder submits an FCC Form 175, ULS automatically creates an ownership record. This record is not an FCC Form 602, but it may be used to pre-fill the FCC Form 602 with the ownership information

submitted on the winning bidder's FCC Form 175 application. A winning bidder must review the pre-filled information and confirm that it is complete and accurate as of the filing date of the FCC Form 601 post-auction application before certifying and submitting the FCC Form 602. Further instructions will be provided to winning bidders in the auction closing public notice.

E. Tribal Lands Bidding Credit

246. A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally recognized tribal lands that have a wireline penetration rate equal to or below 85% is eligible to receive a tribal lands bidding credit as set forth in sections 1.2107(e) and 1.2110(f)(3) of the Commission's rules. A tribal lands bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify.

247. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal lands bidding credit after the auction when it files its FCC Form 601 post-auction application. When initially filing the post-auction application, the winning bidder will be required to inform the Commission whether it intends to seek a tribal lands bidding credit, for each license won in the auction, by checking the designated box(es). After stating its intent to seek a tribal lands bidding credit, the winning bidder will have 180 days from the close of the post-auction application filing window to amend its application to select the specific tribal lands to be served and provide the required tribal government certifications. Licensees receiving a tribal lands bidding credit are subject to performance criteria as set forth in section 1.2110(f)(3)(vii). For additional information on the tribal lands bidding credit, including how the amount of the credit is calculated, applicants should review the Commission's rulemaking proceeding regarding tribal lands bidding credits and related public notices.

F. Default and Disqualification

248. Any winning bidder that defaults or is disqualified after the close of an auction (*i.e.*, fails to remit the required down payment by the specified deadline, fails to submit a timely long-form application, fails to make a full and timely final payment, or is otherwise disqualified) is liable for default payments as described in section 1.2104(g)(2). A default payment consists of a deficiency payment, equal to the difference between the amount of the bidder's winning bid and the amount of

the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

249. The percentage of the applicable bid to be assessed as an additional payment for defaults in a particular auction is established in advance of the auction. OEA and WTB adopt the Commission's proposal to set the additional default payment for Auction 110 at 15% of the applicable bid for winning bids. The bidding system will calculate individual per-license prices that are separate from final auction payments, which are calculated on an aggregate basis.

250. Finally, in the event of a default, the Commission has the discretion to re-auction the license or offer it to the next highest bidder (in descending order) at its final bid amount. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, then the Commission may declare the applicant and its principals ineligible to bid in future auctions and may take any other action that it deems necessary, including institution of proceedings to revoke any existing authorizations held by the applicant.

G. Refund of Remaining Upfront Payment Balance

251. All refunds of upfront payment balances will be returned to the payer of record as identified on the FCC Form 159 unless the payer submits written authorization instructing otherwise. Bidders are encouraged to use the Refund Information icon found on the *Auction Application Manager* page or the Refund Form link available on the *Auction Application Submit Confirmation* page in the FCC Auction Application System to access the form. After the required information is completed on the blank form, the form should be printed, signed, and submitted to the Commission by mail, fax, or email as instructed below.

252. If you have elected not to access the Refund Form through the *Auction Application Manager* page, the Commission is requesting that all information listed below be supplied in writing.

Name, address, contact and phone number of Bank, ABA Number (capable to accept ACH payments), Account Number to Credit, Name of Account Holder, FCC Registration Number (FRN).

The refund request must be submitted by fax to the Revenue & Receivables Operations Group/Auctions at (202)

418-2843, by email to RROGWIREFAXES@fcc.gov.

Note: Refund processing generally takes up to two weeks to complete. Bidders with questions about refunds should contact Scott Radcliffe at (202) 418-7518 or Theresa Meeks at (202) 418-2945.

VI. Procedural Matters

253. *Supplemental Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 603, a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) was incorporated in the *Auction 110 Comment Public Notice* released in March 2021. The Commission sought public comment on the proposals in the *Auction 110 Comment Public Notice*, including comments on the Supplemental IRFA. The Rural Wireless Association, Inc. (RWA) filed comments specifically addressing the Supplemental IRFA, and OEA and WTB address those comments in the *Supplemental FRFA* in the *Auction 110 Procedures Public Notice*. The *Auction 110 Procedures Public Notice* establishes the procedures to be used for Auction 110 and supplements the Initial and Final Regulatory Flexibility Analyses completed by the Commission in the *3.1-3.55 GHz Report and Order (R&O)* and *Further Notice of Proposed Rulemaking (FNPRM)*, 85 FR 64062, October 2, 2020, and 85 FR 66888, October 21, 2020, *3.45 GHz Second Report and Order*, 86 FR 17920, April 7, 2021, *3.45 GHz Second Report and Order*, and other Commission orders pursuant to which Auction 110 will be conducted. This present Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) conforms to the RFA.

254. *Need for, and Objectives of, the Rules.* The *Auction 110 Procedures Public Notice* implements auction procedures for those entities that seek to bid to acquire licenses in Auction 110. Auction 110 will be the Commission's third auction of mid-band spectrum in furtherance of the deployment of fifth-generation (5G) wireless, the Internet of Things (IoT), and other advanced spectrum-based services. The *Auction 110 Procedures Public Notice* adopts procedural rules and terms and conditions governing Auction 110, and the post-auction application and payment processes, as well as sets the minimum opening bid amounts for flexible-use licenses in the 3.45-3.55 GHz band (3.45 GHz Service) that will be offered in Auction 110.

255. To promote the efficient and fair administration of the competitive

bidding process for all Auction 110 participants, OEA and WTB adopt the following procedures proposed in the *Auction 110 Comment Public Notice*:

- Establishment of bidding credit caps for eligible small businesses, very small businesses, and rural service providers in Auction 110;
- designation of AT&T, T-Mobile, and Verizon Wireless as nationwide providers for purposes of the prohibition of certain communications;
- use of anonymous bidding/limited information procedures which will not make public until after bidding has closed: (1) The PEAs that an applicant selects for bidding in its short-form application (FCC Form 175), (2) the amount of any upfront payment made by or on behalf of an applicant for Auction 110, (3) an applicant's bidding eligibility, and (4) any other bidding-related information that might reveal the identity of the bidder placing a bid;
- establishment of an additional default payment of 15% under section 1.2104(g)(2) of the rules in the event that a winning bidder defaults or is disqualified after the auction;
- a specific upfront payment amount for products available in Auction 110;
- establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each generic block;
- establishment of a single aggregate reserve price for the auction to ensure that total cash proceeds from the auction equal at least \$14,775,354,330;
- use of a simultaneous stopping rule for Auction 110, under which all blocks in both categories in all PEAs would remain available for bidding until the bidding stops in every PEA;
- use of a clock auction format for Auction 110 under which each qualified bidder will indicate in successive clock bidding rounds its demands for categories of generic blocks in specific geographic areas. Categories are determined based on the framework set forth in the *3.45 GHz Second Report and Order*, in which the lower frequency bands are affected differently than the upper frequency bands in certain PEAs in the band;
- permission for bidders to make two types of bids: Simple bids and switch bids. A "simple" bid indicates a desired quantity of blocks in a product at a price (either the clock price or an intra-round price). A "switch" bid allows the bidder to request to move its demand for a quantity of blocks from Cat1 to Cat2, or vice versa, within the same PEA at a price for the "from" category (either the clock price or an intra-round price);

- use of an activity rule that would require bidders to be active on between 90% and 100% of their bidding eligibility in all regular clock rounds;
- use of an activity rule that does not include a waiver of the rule to preserve a bidder's eligibility;
- a specific minimum opening bid amount for products available in Auction 110;
- establishment of acceptable bid amounts, including clock price increments and intra-round bids, along with a proposed methodology for calculating such amounts;
- establishment of a methodology for processing bids and requests to reduce and increase demand subject to the no excess supply rule for bids to reduce demand and the eligibility rule for bids to increase demand; and
- establishment of an assignment phase that will determine which frequency-specific licenses will be won by the winning bidders of generic blocks during the clock phase.

256. The procedures for the conduct of Auction 110 constitute the more specific implementation of the competitive bidding rules contemplated by parts 1 and 27 of the Commission's rules and the underlying rulemaking orders, including the *3.45 GHz Second Report and Order*, and relevant competitive bidding orders, and are fully consistent therewith.

257. *Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA.* RWA filed comments that address issues discussed in the Supplemental IRFA. RWA argues that the Commission's analysis in the *Auction 110 Comment Public Notice's* Supplemental IRFA underestimates the costs that small and rural entities incur when participating in an FCC auction. RWA states that, contrary to the Commission's expectations, small and rural providers regularly consult attorneys, engineers, and consultants to participate in Commission auctions, incurring costs of up to \$100,000 on average per auction. However, RWA provides no support for this cost figure. Nor does RWA clarify what portion of this figure represents costs associated with applying to participate in the auction and/or whether the figure may be an aggregate amount for all of its trade association members. RWA also claims that the educational materials provided by the Commission are insufficient, as some materials are not provided until after the short-form application deadline.

258. *Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration.* Pursuant to the Small Business Jobs Act of 2010,

which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the SBA and to provide a detailed statement of any changes made to the proposed procedures as a result of those comments. The Chief Counsel did not file any comments in response to the procedures that were proposed in the *Auction 110 Comment Public Notice*.

259. *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply.* The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the rules and policies adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 5 U.S.C. 601(3). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. A "small business concern" is one which: (1) Is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA.

260. As noted above, Regulatory Flexibility Analyses were incorporated into the *3.1–3.55 GHz R&O and FNPRM* and the *3.45 GHz Second Report and Order*. These orders provide the underlying authority for the procedures proposed in the *Auction 110 Comment Public Notice* and are adopted herein for Auction 110. In those regulatory flexibility analyses, the Commission described in detail the small entities that might be significantly affected. In the *Auction 110 Procedures Public Notice*, in the Supplemental FRFA, OEA and WTB incorporate by reference the descriptions and estimates of the number of small entities from the previous Regulatory Flexibility Analyses in the *3.1–3.55 GHz R&O and FNPRM* and the *3.45 GHz Second Report and Order*.

261. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* The Commission designed the auction application process to minimize

reporting and compliance requirements for small businesses and other applicants. In the first part of the Commission's two-phased auction application process, parties desiring to participate in an auction file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on an applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the process, winning bidders file a more comprehensive long-form application. Thus, an applicant that fails to become a winning bidder does not need to file a long-form application or provide the additional showings and more detailed demonstrations required of a winning bidder.

262. OEA and WTB do not expect that the processes and procedures adopted in the *Auction 110 Procedures Public Notice* will require small entities to hire attorneys, engineers, consultants, or other professionals to participate in Auction 110 and comply with the procedures adopted in the *Auction 110 Procedures Public Notice* because of the information, resources, and guidance the Commission makes available to potential and actual participants. OEA and WTB cannot quantify the cost of compliance with the procedures, however, they do not believe that the cost of compliance will unduly burden small entities that choose to participate in the auction. OEA and WTB note that the processes and procedures are consistent with existing Commission policies and procedures used in prior auctions. Thus, some small entities may already be familiar with such procedures and have the processes and procedures in place to facilitate compliance resulting in minimal incremental costs to comply. For those small entities that may be new to the Commission's auction process, the various resources that will be made available, including, but not limited to, the mock auction, remote electronic bidding, and access to hotlines for both technical and auction assistance, should help facilitate participation without the need to hire professionals. For example, OEA intends to release an online tutorial that will help applicants understand the procedures for filing the auction short-form applications (FCC Form 175). OEA also intends to offer other educational opportunities for applicants in Auction 110 to familiarize themselves with the FCC Auction Application System and the bidding system. By providing these resources as well as the resources discussed below,

OEA and WTB expect small entities that use the available resources to experience lower participation and compliance costs.

263. RWA does not provide evidence that suggests that outside consultants are needed to comply with the auction procedures adopted here. Instead, RWA claims that small entity bidders cannot make complex decisions on the future impacts of auction bidding, participation, and winning bidder compliance requirements without outside counsel. In doing so, RWA appears to conflate compliance with auction procedures with the development of bidding strategies and compliance with the relevant service rules. As discussed below, the Commission makes every effort to educate auction participants at every stage of the auction process in order to reduce the need for outside consultants.

264. Moreover, neither the short-form application nor the bidding system for Auction 110 require applicants to provide detailed technical or financial information that would require the advice of outside experts, nor do they require technical or legal expertise to access or use. That some entities may elect to hire outside consultants as a matter of convenience and/or to develop bidding strategies is not relevant to the question of whether they are necessary for small entities to comply with auction procedures.

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

266. The Commission has taken steps to minimize any economic impact of its auction procedures on small entities through, among other things, the many free resources the Commission provides to potential auction participants. As mentioned above, consistent with the past practices in prior auctions, small entities that are potential participants will have access to detailed educational information and Commission personnel

to help guide their participation in Auction 110, which should alleviate any need to hire professionals. For example, small entities and other would-be participants will be provided with various materials on the pre-bidding process in advance of the short-form application filing window, which includes step-by-step instructions on how to complete FCC Form 175. In addition, small entities will have access to the web-based, interactive online tutorials produced by Commission staff to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to an auction.

267. The Commission has also taken steps to ensure that the application system is simple to use and that FCC Form 175 itself is easy to complete. For example, the application will pre-fill ownership information that an applicant has previously provided in FCC Form 175 for prior auctions or in an FCC Form 602.

268. After the initial application stage, auction participants whose applications have been deemed incomplete have the opportunity to correct their errors. An applicant whose application is deemed incomplete will receive a letter from the Commission identifying the specific errors in their application and providing contact information for a specific FCC staff member who has been assigned to provide additional information about the nature of the errors and the information needed to correct them. Additionally, after the application process is complete and the Commission has identified the applicants who will be qualified to bid in Auction 110, all qualified bidders for Auction 110 will automatically be registered for the auction, and registration materials will be distributed prior to the auction by overnight delivery. Applicants are not required to take any further steps until bidding commences.

269. Prior to the start of bidding, eligible bidders will be given an opportunity to become familiar with auction procedures and the bidding system by participating in a mock auction. Eligible bidders will have access to a user guide for the bidding system, bidding file formats, and an online bidding procedures tutorial in advance of the mock auction. Further, OEA and WTB will conduct Auction 110 electronically over the internet using a web-based auction system that eliminates the need for small entities and other bidders to be physically present in a specific location. These mechanisms are made available to facilitate participation in Auction 110

by all eligible bidders and may result in significant cost savings for small entities that use them. Moreover, the adoption of bidding procedures in advance of the auction, consistent with statutory directive, is designed to ensure that the auction will be administered predictably and fairly for all participants, including small businesses.

270. Small entities and other auction participants may seek clarification of, or guidance on, complying with competitive bidding rules and procedures, reporting requirements, and using the bidding system at any stage of the auction process. Additionally, an FCC Auctions Hotline will provide small entities one-on-one access to Commission staff for information about the auction process and procedures. Further, the FCC Auctions Technical Support Hotline is another resource that provides technical assistance to applicants, including small entities, on issues such as access to or navigation within the electronic FCC Form 175 and use of the bidding system.

271. The Commission also makes various databases and other sources of information, including the Auctions program websites and copies of Commission decisions, available to the public without charge, providing a low-cost mechanism for small entities to conduct research prior to and throughout the auction. Prior to the start of bidding, and at the close of Auction 110, OEA will post public notices on the Auctions website that articulate the procedures and deadlines for the auction. The Commission makes this information easily accessible and without charge to benefit all Auction 110 applicants, including small entities, thereby lowering their administrative costs to comply with the Commission's competitive bidding rules.

272. Another step taken to minimize the economic impact for small entities participating in Auction 110 is the Commission's adoption of bidding credits for small businesses and rural service providers. In accordance with the service rules applicable to the 3.45 GHz Service licenses to be offered in Auction 110, bidding credit discounts will be available to eligible small businesses and small business consortia on the following basis: (1) A bidder with attributed average annual gross revenues that do not exceed \$55 million for the preceding five years is eligible to receive a 15% discount on its overall payment or (2) a bidder with attributed average annual gross revenues that do not exceed \$20 million for the preceding five years is eligible to receive a 25% discount on its overall payment. Eligible

applicants can receive only one of the available small business bidding credits—not both.

273. An eligible rural service provider may request a 15% discount on its overall payment using a rural service provider bidding credit. To be eligible for a rural service provider bidding credit, an applicant must: (1) Be a service provider that is in the business of providing commercial communications services and, together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers; and (2) serve predominantly rural areas. Rural areas are defined as counties with a population density of 100 or fewer persons per square mile. Eligible applicants can request either a small business bidding credit or a rural service provider bidding credit, but not both.

274. The total amount of bidding credit discounts that may be awarded to an eligible small business is capped at \$25 million and there is a \$10 million cap on the total amount of bidding credit discounts that may be awarded to an eligible rural service provider. In addition, to create parity among eligible small businesses and rural service providers competing against each other in smaller markets, OEA and WTB adopt a \$10 million cap on the overall amount of bidding credits that any winning designated entity may apply to winning licenses in PEAs with a population of 500,000 or less. Based on the technical characteristics of the 3.45–3.55 GHz band and OEA and WTB's analysis of past auction data, OEA and WTB anticipate that the caps adopted in the *Auction 110 Procedures Public Notice* will allow the majority of small businesses to take full advantage of the bidding credit program, thereby lowering the relative costs of participation for small businesses.

275. These procedures for the conduct of Auction 110 constitute the more specific implementation of the competitive bidding rules contemplated by parts 1 and 27 of the Commission's rules and the underlying rulemaking orders, including the *3.45 GHz Second Report and Order* and relevant competitive bidding orders, and are fully consistent therewith.

276. *Report to Congress.* The Commission will send a copy of the *Auction 110 Procedures Public Notice*, including the Supplemental FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Auction 110 Procedures Public Notice*,

including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA.

Federal Communications Commission.

William Huber,

Associate Chief, Auctions Division, Office of Economics and Analytics.

[FR Doc. 2021–12617 Filed 6–22–21; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 210616–0131]

RIN 0648–BK25

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2021 Harvest Specifications for Pacific Whiting, and 2021 Pacific Whiting Tribal Allocation

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to establish the 2021 harvest specifications and management measures for Pacific whiting caught in the U.S. Exclusive Economic Zone off the coasts of Washington, Oregon, and California consistent with the Magnuson-Stevens Fishery Conservation and Management Act, the Pacific Whiting Act of 2006, and other applicable laws. This rule also establishes the 2021 adjusted U.S. Total Allowable Catch (TAC), tribal and non-tribal allocations, and research and bycatch set-asides. These measures are intended to help prevent overfishing, achieve optimum yield, ensure that management measures are based on the best scientific information available and ensure the long-term sustainability of Pacific whiting.

DATES: Effective June 23, 2021.

ADDRESSES: This final rule is accessible via the internet at the Office of the Federal Register website at <https://www.federalregister.gov>. Background information and documents are available at the NMFS website at <https://www.fisheries.noaa.gov> and at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

FOR FURTHER INFORMATION CONTACT: Stacey Miller, phone: 503–231–6290, and email: Stacey.Miller@noaa.gov.

SUPPLEMENTARY INFORMATION:**Background**

The transboundary stock of Pacific whiting is managed through the agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003, Nov. 21, 2003, Treaties and Other International Act Series (TIAS) 08–625 (Agreement). NMFS issued a proposed rule on February 16, 2021 (86 FR 9473) that describes the Agreement, including the establishment of F–40 percent default harvest rate, the explicit allocation of Pacific whiting coastwide total allowable catch (TAC) to the United States (73.88 percent) and Canada (26.12 percent), the bilateral bodies to implement the terms of the Agreement, including the Joint Management Committee (JMC), and the process used to determine the coastwide TAC under the Agreement. The proposed rule also proposed allocating 17.5 percent of the U.S. TAC of Pacific whiting for 2021 to Pacific Coast Indian tribes that have a treaty right to harvest groundfish, and implementing set-asides (750 metric tons (mt)) for Pacific whiting for research and incidental mortality in other fisheries.

On March 15–17, the JMC and Advisory Panel (AP) met remotely to determine the 2021 coastwide TAC for Pacific whiting, however, they did not reach a bilateral agreement on the coastwide TAC. Given this lack of bilateral agreement, NMFS issued a revised proposed rule (86 FR 23659) on May 4, 2021 that included the 2021 coastwide and U.S. TACs, as determined by NMFS under the Pacific Whiting Act of 2006 (Pacific Whiting Act), and the 2021 non-tribal sector allocation. The revised proposed rule also included the tribal allocation and set asides for research and incidental mortality in other fisheries that was included in the original proposed rule.

This final rule establishes the 2021 Pacific whiting harvest specifications, including the adjusted coastwide TAC of 500,000 mt and the adjusted U.S. TAC of 369,400 mt. The final rule also establishes the 2021 tribal allocation of 17.5 percent of the U.S. TAC (64,645 mt), allocations for the three non-tribal commercial whiting sectors, and set-asides for research and incidental mortality of Pacific whiting as recommended by the Pacific Fishery Management Council (Council). The allocations for Pacific whiting are effective until December 31, 2021.

2021 Pacific Whiting Harvest Specifications

The 2021 JMC and AP met remotely March 15–17, 2021 but did not reach a bilateral agreement on the coastwide TAC. The Agreement does not specify a procedure for when the JMC does not agree on a coastwide TAC. However, the Pacific Whiting Act (16 U.S.C. 7006(c)) identifies procedures for when the JMC does not recommend a final coastwide TAC. The Pacific Whiting Act states that NMFS (as delegated by the Secretary of Commerce) should establish the Pacific whiting TAC, taking into account recommendations from the Pacific whiting treaty bodies, and the Council. The Pacific Whiting Act requires NMFS to base the coastwide TAC decision on the best scientific information available, and use the Agreement's default harvest rate unless scientific information indicates a different rate is necessary to sustain the Pacific whiting resource. The Pacific Whiting Act also requires NMFS to establish the U.S. share of the TAC based on the U.S./Canada percentage split in the Agreement. Finally, the Pacific Whiting Act requires NMFS to make the necessary adjustments to the TAC specified in the Agreement. Paragraph 5 of Article II of the Agreement requires adjustments to the coastwide TAC to account for overages if either U.S. or Canadian catch in the previous year exceeded its individual TAC, or carryovers if U.S. or Canadian catch was less than its individual TAC in the previous year. Both the United States and Canada harvested less than their individual TACs in 2020, therefore carryover is applied to the 2021 individual TACs.

Taking into account the percentage shares for each country (26.12 percent for Canada and 73.88 percent for the United States) and the adjustments for uncaught fish, as required by the Pacific Whiting Act, this final rule announces a final adjusted coastwide TAC of 500,000 mt and a final adjusted TAC for the United States of 369,400 mt (314,320 mt + 55,080 mt carryover adjustment). Following the Act's criteria, NMFS analyzed a range of alternatives in the revised proposed rule (86 FR 23659; May 4, 2021) and determined a final adjusted coastwide TAC of 500,000 mt maintains the sustainability of the Pacific whiting stock and balances the economic needs of coastal communities. This TAC is well below the default level of F–40 percent and is supported by the recommendations from the JMC and its advisory bodies, and is consistent with the best scientific information available, provisions of the Agreement, and the Pacific Whiting Act.

Tribal Allocations

This final rule establishes the tribal allocation of Pacific whiting for 2021 as described in the revised proposed rule (86 FR 23659; May 4, 2021). Since 1996, NMFS has been allocating a portion of the U.S. TAC of Pacific whiting to the tribal fishery. Regulations for the Pacific Coast Groundfish Fishery Management Plan (FMP) specify that the tribal allocation is subtracted from the total U.S. Pacific whiting TAC. The tribal Pacific whiting fishery is managed separately from the non-tribal Pacific whiting fishery and is not governed by limited entry or open access regulations or allocations. NMFS is establishing the 2021 tribal allocation as 64,645 mt (17.5 percent of the U.S. TAC) in this final rule.

In 2009, NMFS, the states of Washington and Oregon, and the tribes with treaty rights to harvest Pacific whiting started a process to determine the long-term tribal allocation for Pacific whiting; however, no long-term allocation has been determined. While new scientific information or discussions with the relevant parties may impact that decision, the best available scientific information to date suggests that 64,645 mt is within the likely range of potential treaty right amounts. As with prior tribal Pacific whiting allocations, this final rule is not intended to establish precedent for future Pacific whiting seasons, or for the determination of the total amount of Pacific whiting to which the Tribes are entitled under their treaty right. Rather, this rule adopts an interim allocation. The long-term tribal treaty amount will be based on further development of scientific information and additional coordination and discussion with and among the coastal tribes and the states of Washington and Oregon.

Harvest Guidelines and Allocations

This final rule establishes the fishery harvest guideline (HG), also called the non-tribal allocation, as described in the revised proposed rule published on May 4, 2021 (86 FR 23659). The 2021 fishery HG for Pacific whiting is 304,005 mt. This amount was determined by deducting the 64,645 mt tribal allocation and the 750 mt allocation for scientific research catch and fishing mortality in non-groundfish fisheries from the total U.S. TAC of 369,400 mt. The Council recommends the research and bycatch set-aside on an annual basis, based on estimates of scientific research catch and estimated bycatch mortality in non-groundfish fisheries. The regulations further allocate the fishery HG among the three non-tribal

sectors of the Pacific whiting fishery: The catcher/processor (C/P) Coop Program, the Mothership (MS) Coop Program, and the Shorebased Individual Fishing Quota (IFQ) Program. The C/P Coop Program is allocated 34 percent (103,362 mt for 2021), the MS Coop Program is allocated 24 percent (72,961 mt for 2021), and the Shorebased IFQ Program is allocated 42 percent (127,682 mt for 2021). The fishery south of 42° N lat. may not take more than 6,384 mt (5 percent of the Shorebased IFQ Program allocation) prior to May 15, the start of the primary Pacific whiting season north of 42° N lat.

TABLE 1—2021 U.S. PACIFIC WHITING TOTAL ALLOWABLE CATCH AND ALLOCATIONS IN METRIC TONS

	2021 Pacific whiting harvest specifications (mt)
Adjusted U.S. TAC	369,400
Tribal	64,645
Catcher/Processor (C/P) Coop Program	103,362
Mothership (MS) Coop Program	72,961
Shorebased IFQ Program ...	127,682

Comments and Responses

NMFS issued a proposed rule on February 16, 2021 (86 FR 9473) that proposed allocating 17.5 percent of the U.S. TAC of Pacific whiting for 2021 to Pacific Coast Indian tribes that have a treaty right to harvest groundfish, and implement set-asides (750 mt) for Pacific whiting for research and incidental mortality in other fisheries. The comment period on the proposed rule closed on March 18, 2021. NMFS did not receive any public comments. On May 4, 2021, NMFS issued a revised proposed rule to include additional actions due to the lack of a bilateral agreement on the 2021 Pacific whiting coastwide TAC by the JMC under the Agreement. The revised proposed rule included the 2021 adjusted coastwide TAC and U.S. TAC for Pacific whiting as determined by NMFS under the Pacific Whiting Act, the non-tribal sector allocations, and the tribal allocation and set-asides included in the original proposed rule. We requested public comment on these proposed actions through May 19, 2021 but received no public comments during the comment period.

Changes From the Proposed Rule

NMFS has not made any changes to the proposed regulatory text and there

are no substantive changes from the revised proposed rule.

Classification

The Administrator, West Coast Region, NMFS, determined that the final rule is necessary for the conservation and management of the Pacific whiting and that it is consistent with section 304(b)(1)(A) and 305(d), and other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, the Pacific Coast Groundfish FMP, and other applicable laws.

Pursuant to 5 U.S.C. 553(d)(3), the NMFS Assistant Administrator finds good cause to waive the 30-day delay in the date of effectiveness for this final rule because such a delay would be contrary to the public interest. If this final rule were delayed by 30 days, Pacific coast whiting fishermen would not be able to fish under the final catch limits for Pacific whiting for that time period, and not be able to realize the full level of economic opportunity this rule provides. Waiving the 30-day delay in the date of effectiveness will allow this final rule to more fully benefit the fishery through increased fishing opportunities as described in the preamble of this rule.

In addition, because this rule increases catch limits for Pacific whiting compared to the interim allocation the fishery is currently operating under, it therefore also falls within the 5 U.S.C. 553(d)(1) exception to the 30-day delay in the date of effectiveness requirement. The Pacific whiting fishery season began fishing on May 15, 2021 under interim allocations based on the lowest coastwide TAC considered in the revised proposed rule. This final rule implements a higher TAC for Pacific whiting and implementing the rule upon publication provides the whiting fleet more opportunity and greater flexibility to harvest the optimal yield.

Waiving the 30-day delay in effectiveness will not have a negative impact on any entities, as there are no new compliance requirements or other burdens placed on the fishing community with this rule. Making this rule effective immediately would also serve the best interests of the public because it will allow for the longest possible fishing season for Pacific whiting and therefore the best possible economic outcome for those whose livelihoods depend on this fishery. Because the 30-day delay in effectiveness would potentially cause significant financial harm without providing any corresponding benefits, this final rule is effective upon publication in the **Federal Register**.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

A range of potential harvest levels for Pacific whiting have been considered under the Final Environmental Impact Statement for Harvest Specifications and Management Measures for 2015–2016 and Biennial Periods thereafter (2015/16 FEIS). The 2015/16 FEIS examined the harvest specifications and management measures for 2015–16 and 10 year projections for routinely adjusted harvest specifications and management measures. The 10 year projections were produced to evaluate the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. The Environmental Assessment for Amendment 29 to the Pacific Coast Groundfish Fishery Management Plan and 2021–22 Harvest Specifications and Management Measures (2021–22 EA) for the 2021–22 cycle tiers from the 2015/16 FEIS and focuses on the harvest specifications and management measures for Pacific coast groundfish stocks that were not within the scope of the 10 year projections in the 2015/16 FEIS. The 2015/16 FEIS and 2021–22 EA are available from NMFS (see **ADDRESSES**).

Final Regulatory Flexibility Analysis

NMFS published a revised proposed rule on May 4, 2021 (86 FR 23659), for the 2021 Harvest Specifications for Pacific Whiting, and 2021 tribal allocation for Pacific whiting. An Initial Regulatory Flexibility Analysis (IRFA) was prepared and summarized in the Classification section of the preamble to the revised proposed rule. The comment period on the revised proposed rule ended on May 19, 2021. NMFS did not receive any public comments on the revised proposed rule. The Chief Counsel for Advocacy of the Small Business Administration (SBA) did not file any comments on the IRFA or the revised proposed rule. The description of this action, its purpose, and its legal basis are described in the preamble to the revised proposed rule and are not repeated here. A Final Regulatory Flexibility Analysis (FRFA) was prepared and incorporates the IRFA. There were no public comments received on the IRFA. NMFS also prepared a RIR for this action. A copy of the RIR/FRFA is available from NMFS (see **ADDRESSES**). A summary of the FRFA, per the requirements of 5 U.S.C. 604 follows.

Under the Regulatory Flexibility Act (RFA), the term “small entities” includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$11 million for all its affiliated operations worldwide (see 80 FR 81194, December 29, 2015). A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A small organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. Effective February 26, 2016, a seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 81 FR 4469; January 26, 2016). For purposes of rulemaking, NMFS is also applying the seafood processor standard to catcher processors because whiting C/Ps earn the majority of the revenue from processed seafood product.

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

No public comments were received on the revised proposed rule.

Description and Estimate of the Number of Small Entities to Which the Rule Applies, and Estimate of Economic Impacts by Entity Size and Industry

This final rule establishes the adjusted coastwide and U.S. TACs and affects how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased IFQ Program Trawl Fishery, MS Coop Program Whiting At-sea Trawl Fishery, and C/P Coop Program Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the adjusted U.S. TAC.

We expect one tribal entity to fish for Pacific whiting in 2021. Tribes are not considered small entities for the

purposes of RFA. Impacts to tribes are nevertheless considered in this analysis.

As of January 2021, the Shorebased IFQ Program is composed of 166 Quota Share permits/accounts (134 of which were allocated whiting quota pounds), and 35 first receivers, one of which is designated as whiting-only receivers and 11 that may receive both whiting and non-whiting.

These regulations also directly affect participants in the MS Co-op Program, a general term to describe the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program consists of six MS processor permits, and a catcher vessel fleet currently composed of a single co-op, with 34 Mothership/Catcher Vessel (MS/CV) endorsed permits. Three MS/CV permits each have two catch history assignments, and the remaining MS/CV permits each have one catch history assignment.

These regulations also directly affect the C/P Co-op Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single coop. These co-ops are considered large entities from several perspectives; they have participants that are large entities, and have in total more than 750 employees worldwide including affiliates.

Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. As part of the permit application processes for the non-tribal fisheries, based on a review of the Small Business Administration size criteria, permit applicants are asked if they considered themselves a “small” business, and they are asked to provide detailed ownership information. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as the West Coast and may have operations in other countries as well. NMFS has limited entry permit holders self-report size status. For 2021, all 10 CP permits, 3 MS permits and 8 mothership catcher vessels reported they are not small businesses. There is substantial, but not complete overlap between permit ownership and vessel ownership so there may be a small number of additional small entity vessel owners who will be impacted by this rule. After accounting for cross participation, multiple Quota Share account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered “small” businesses.

This rule will allocate Pacific whiting between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests may be delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2020 NMFS reapportioned 40,000 mt of the original 74,342 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. The reapportionment process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2020 following the reapportionment were: Tribal 34,342 mt, C/P Co-op 132,249 mt; MS Co-op 93,352 mt; and Shorebased IFQ Program 163,367 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the United States is exported. The U.S. Pacific whiting TAC is highly variable, as have been subsequent harvests and ex-vessel revenues. For the years 2016 to 2020, the total Pacific whiting fishery (tribal and non-tribal) harvested on average 303,782 mt annually. The 2020 U.S. non-tribal fishery had a Pacific whiting catch of approximately 287,400 mt, and the tribal fishery landed less than 200 mt.

Impacts to the U.S. non-tribal fishery are measured with an estimate of ex-vessel revenue. The NMFS proposed adjusted coastwide TAC of 500,000 mt would result in an adjusted U.S. TAC of 369,400 mt and U.S. non-tribal harvest guideline of 304,005 mt. Using the 2020 weighted-average non-tribal Oregon shoreside price per metric ton (e.g. \$154 per metric ton), and assuming full utilization, the TAC of 500,000 mt is estimated to result in a projected ex-vessel revenue of \$46.9 million for the U.S. non-tribal fishing fleet. The low and high range of the coastwide TAC NMFS considered (475,000 mt and

565,191 mt, respectively) is estimated to result in a projected ex-vessel revenue range of \$44.5 million to \$53 million, respectively, assuming full utilization of the TAC.

Impacts to tribal catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2020 average non-tribal Oregon shoreside ex-vessel price of Pacific whiting, which was \$154 per metric ton. At that price, the 2020 tribal allocation of 64,645 mt would have an ex-vessel value of \$10 million.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

There are no reporting, recordkeeping or other compliance requirements in the final rule. No Federal rules have been identified that duplicate, overlap, or conflict with this action.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

This action determines the 2021 adjusted coastwide TAC of 500,000 mt, with a corresponding adjusted U.S. TAC of 369,400 mt. NMFS considered a “No Action” alternative as well as a range of alternatives for setting the Pacific whiting coastwide TAC. NMFS considered setting the coastwide TAC between 475,000 mt to 565,191 mt. A coastwide TAC at the bottom of the range (475,000 mt) may provide less economic opportunity for 2021 as compared to a coastwide TAC of 500,000 mt. A higher coastwide TAC of 565,191 mt may offer an increased economic opportunity for 2021 as compared to a coastwide TAC of 500,000 mt. However, the 2021 stock assessment projections indicate this higher catch levels may result in near-term stock biomass declines below target levels. This is contrary to the Pacific Whiting Act and Agreement, which requires sustainable management of the Pacific whiting resource. Under the no action alternative, NMFS would not set a coastwide TAC, which would not fulfill NMFS’ responsibility to manage the U.S. fishery. Therefore this alternative received no further consideration.

NMFS considered two alternatives for the Pacific whiting tribal allocation: the “No Action” and the “Proposed Action.” NMFS did not consider a broader range of alternatives to the proposed tribal allocation because the

tribal allocation is a percent of the adjusted U.S. TAC and is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting.

Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of 64,645 mt for 2021. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the Tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the no action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no action alternative would result in no allocation of Pacific whiting to the tribal sector in 2021, which would be inconsistent with NMFS’ responsibility to manage the fishery consistent with the Tribes’ treaty rights. Given that there is a tribal request for allocation in 2021, this alternative received no further consideration.

Regulatory Flexibility Act (RFA) Determination of No Significant Impact

NMFS determined this rule does not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of Pacific whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. A small entity compliance guide will be sent to stakeholders, and copies of the final rule and guides (*i.e.*, information bulletins)

are available from NMFS at the following website: <https://www.fisheries.noaa.gov/species/pacific-whiting#management>.

Consultation and Coordination With Indian Tribal Governments

Pursuant to Executive Order 13175, this final rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the Pacific Coast Groundfish FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council’s jurisdiction. In addition, regulations implementing the Pacific Coast Groundfish FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish FMP request new allocations or regulations specific to the tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.324(d) further state, the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The tribal management measures in this final rule have been developed following these procedures.

With this final rule, NMFS, acting on behalf of the Secretary, determined that the FMP is implemented in a manner consistent with treaty rights of four Treaty Tribes to fish in their “usual and accustomed grounds and stations” in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. Wash. 1974).

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: June 17, 2021.

Samuel D. Rauch III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.50, revise paragraph (f)(4) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(4) *Pacific whiting*. The tribal allocation for 2021 is 64,645 mt.

* * * * *

■ 3. Revise Table 1a to part 660, subpart C, to read as follows:

TABLE 1a TO PART 660, SUBPART C—2021, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HG (WEIGHTS IN METRIC TONS) CAPITALIZED STOCKS ARE REBUILDING

Stocks	Area	OFL	ABC	ACL ^{a/}	Fishery HG ^{b/}
Yelloweye Rockfish ^{c/}	Coastwide	97	83	50	41.2
Arrowtooth Flounder ^{d/}	Coastwide	13,551	9,933	9,933	7,837.9
Big Skate ^{e/}	Coastwide	1,690	1,477	1,477	1,419.7
Black Rockfish ^{f/}	California (S of 42° N lat)	379	348	348	345.7
Black Rockfish ^{g/}	Washington (N of 46°16' N lat)	319	293	293	274.9
Bocaccio ^{h/}	S of 40°10' N lat	1,887	1,748	1,748	1,700.2
Cabazon ^{i/}	California (S of 42° N lat)	225	210	210	208.7
California Scorpionfish ^{j/}	S of 34°27' N lat	319	291	291	287.1
Canary Rockfish ^{k/}	Coastwide	1,459	1,338	1,338	1,268.6
Chilipepper ^{l/}	S of 40°10' N lat	2,571	2,358	2,358	2,260.3
Cowcod ^{m/}	S of 40°10' N lat	114	84	84	72.8
Cowcod	(Conception)	95	72	NA	NA
Cowcod	(Monterey)	19	11	NA	NA
Darkblotched Rockfish ^{n/}	Coastwide	953	882	882	862.9
Dover Sole ^{o/}	Coastwide	93,547	84,192	50,000	48,402.8
English Sole ^{p/}	Coastwide	11,107	9,175	9,175	8,924.37
Lingcod ^{q/}	N of 40°10' N lat	5,816	5,386	5,369	5,090.6
Lingcod ^{r/}	S of 40°10' N lat	1,255	1,162	1,102	1,089
Longnose Skate ^{s/}	Coastwide	2,086	1,823	1,823	1,571.6
Longspine Thornyhead ^{t/}	N of 34°27' N lat	5,097	3,466	2,634	2,580.3
Longspine Thornyhead ^{u/}	S of 34°27' N lat			832	829.8
Pacific Cod ^{v/}	Coastwide	3,200	1,926	1,600	1,093.9
Pacific Ocean Perch ^{w/}	N of 40°10' N lat	4,497	3,854	3,854	3,829.3
Pacific Whiting ^{x/}	Coastwide	565,191	(x)	(x)	304,005
Petrale Sole ^{y/}	Coastwide	4,402	4,115	4,115	3,727.5
Sablefish ^{z/}	N of 36° N lat	9,402	8,791	6,892	See Table 1c
Sablefish ^{aa/}	S of 36° N lat			1,899	1,871.6
Shortspine Thornyhead ^{bb/}	N of 34°27' N lat	3,211	2,183	1,428	1,349.6
Shortspine Thornyhead ^{cc/}	S of 34°27' N lat			756	749.3
Spiny Dogfish ^{dd/}	Coastwide	2,479	1,621	1,621	1,277
Splitnose ^{ee/}	S of 40°10' N lat	1,868	1,666	1,666	1,647.6
Starry Flounder ^{ff/}	Coastwide	652	392	392	343.6
Widow Rockfish ^{gg/}	Coastwide	15,749	14,725	14,725	14,476.7
Yellowtail Rockfish ^{hh/}	N of 40°10' N lat	6,534	6,050	6,050	5,012.5

Stock Complexes

Blue/Deacon/Black Rockfish ^{ii/}	Oregon	676	603	603	600.7
Cabazon/Kelp Greenling ^{jj/}	Oregon	215	198	198	197.8
Cabazon/Kelp Greenling ^{kk/}	Washington	25	20	20	18.0
Nearshore Rockfish North ^{ll/}	N of 40°10' N lat	94	79	79	75.9
Nearshore Rockfish South ^{mm/}	S of 40°10' N lat	1,232	1,016	1,016	1,011.6
Other Fish ^{nn/}	Coastwide	286	223	223	201.7
Other Flatfish ^{oo/}	Coastwide	7,714	4,802	4,802	4,581.1
Shelf Rockfish North ^{pp/}	N of 40°10' N lat	1,888	1,511	1,511	1,438.7
Shelf Rockfish South ^{qq/}	S of 40°10' N lat	1,842	1,439	1,438	1,305.2
Slope Rockfish North ^{rr/}	N of 40°10' N lat	1,862	1,595	1,595	1,529.1
Slope Rockfish South ^{ss/}	S of 40°10' N lat	873	709	709	670.1

^{a/} Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

^{b/} Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

^{c/} Yelloweye rockfish. The 50 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 8.85 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP catch (0.24 mt), research (2.92 mt), and the incidental open access fishery (0.69 mt) resulting in a fishery HG of 41.2 mt. The non-trawl HG is 37.9 mt. The combined non-nearshore/nearshore HG is 7.9 mt. Recreational HGs are: 9.7 mt (Washington); 8.8 mt (Oregon); and 11.4 mt (California). In addition, the non-trawl ACT is 29.5, and the combined non-nearshore/nearshore ACT is 6.2 mt. Recreational ACTs are: 7.5 mt (Washington), 6.9 (Oregon), and 8.9 mt (California).

^{d/} Arrowtooth flounder. 2,095.08 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), EFP fishing (0.1 mt), research (12.98 mt) and incidental open access (41 mt), resulting in a fishery HG of 7,837.9 mt.

^{e/} Big skate. 57.31 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), EFP fishing (0.1 mt), and research catch (5.49 mt), and incidental open access (36.72 mt), resulting in a fishery HG of 1,419.7 mt.

^{f/} Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research (0.08 mt), and incidental open access (1.18 mt), resulting in a fishery HG of 345.7 mt.

^{g/} Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 274.9 mt.

^h_v Bocaccio south of 40°10' N lat. 47.82 mt is deducted from the ACL to accommodate EFP catch (40 mt), research (5.6 mt), and incidental open access (2.22 mt), resulting in a fishery HG of 1,700.2 mt. The combined non-nearshore and nearshore HG is 320.2 mt. The California recreational fishery HG is 716.2 mt.

ⁱ_v Cabezon (California). 1.28 mt is deducted from the ACL to accommodate EFP (1 mt), research (0.02 mt), and incidental open access fishery (0.26 mt), resulting in a fishery HG of 208.7 mt.

^j_v California scorpionfish south of 34°27' N lat. 3.89 mt is deducted from the ACL to accommodate research (0.18 mt) and the incidental open access fishery (3.71 mt), resulting in a fishery HG of 287.1 mt.

^k_v Canary rockfish. 69.39 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (8 mt), and research catch (10.08 mt), and the incidental open access fishery (1.31 mt), resulting in a fishery HG of 1,268.6 mt. The combined nearshore/non-nearshore HG is 126.6 mt. Recreational HGs are: 43.3 mt (Washington); 65.1 mt (Oregon); and 116.7 mt (California).

^l_v Chilipepper rockfish south of 40°10' N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research (14.04 mt), the incidental open access fishery (13.66 mt), resulting in a fishery HG of 2,260.3 mt.

^m_v Cowcod south of 40°10' N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research (10 mt), and incidental open access (0.17 mt), resulting in a fishery harvest guideline of 72.8 mt. A single ACT of 50 mt is being set for the Conception and Monterey areas combined.

ⁿ_v Darkblotched rockfish. 19.06 mt is deducted from the ACL to accommodate the Tribal fishery (0.2 mt), EFP catch (0.6 mt), and research catch (8.46 mt), and the incidental open access fishery (9.8 mt) resulting in a fishery HG of 862.9 mt.

^o_v Dover sole. 1,597.21 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), EFP fishing (0.1 mt), research (50.84 mt), and incidental open access (49.27 mt), resulting in a fishery HG of 48,402.8 mt.

^p_v English sole. 250.63 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (0.1 mt), research (8.01 mt), and the incidental open access fishery (42.52 mt), resulting in a fishery HG of 8,924.37 mt.

^q_v Lingcod north of 40°10' N lat. 278.38 mt is deducted from the ACL for the Tribal fishery (250 mt), EFP catch (0.1 mt), research (16.6 mt), and the incidental open access fishery (11.68 mt) resulting in a fishery HG of 5,090.6 mt.

^r_v Lingcod south of 40°10' N lat. 13 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (3.19 mt), and incidental open access fishery (8.31 mt), resulting in a fishery HG of 1,089 mt.

^s_v Longnose skate. 251.40 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), EFP catch (0.1 mt), and research catch (12.46 mt), and incidental open access fishery (18.84 mt), resulting in a fishery HG of 1,571.6 mt.

^t_v Longspine thornyhead north of 34°27' N lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and the incidental open access fishery (6.22 mt), resulting in a fishery HG of 2,580.3 mt.

^u_v Longspine thornyhead south of 34°27' N lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and the incidental open access fishery (0.8 mt), resulting in a fishery HG of 829.6 mt.

^v_v Pacific cod. 506.1 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), EFP fishing (0.1 mt), research catch (5.47 mt), and the incidental open access fishery (0.53 mt), resulting in a fishery HG of 1,093.9 mt.

^w_v Pacific ocean perch north of 40°10' N lat. 24.73 mt is deducted from the ACL to accommodate the Tribal fishery (9.2 mt), EFP fishing (0.1 mt), research catch (5.39 mt), and the incidental open access fishery (10.04 mt), resulting in a fishery HG of 3,829.3 mt.

^x_v Pacific whiting. The 2021 OFL of 565,191 mt is based on the 2021 assessment with an F40 percent of FMSY proxy. The 2021 coastwide adjusted Total Allowable Catch (TAC) is 500,000 mt. The U.S. TAC is 73.88 percent of the coastwide TAC. The 2021 adjusted U.S. TAC is 369,400 mt (314,320 mt unadjusted TAC + 55,080 mt carryover adjustment). From the adjusted U.S. TAC, 64,645 mt is deducted to accommodate the Tribal fishery, and 750 mt is deducted to accommodate research and bycatch in other fisheries, resulting in a 2021 fishery HG of 304,005 mt. The TAC for Pacific whiting is established under the provisions of the Agreement with Canada on Pacific Hake/Whiting and the Pacific Whiting Act of 2006, 16 U.S.C. 7001–7010, and the international exception applies. Therefore, no ABC or ACL values are provided for Pacific whiting.

^y_v Petrale sole. 387.54 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP catch (0.1 mt), research (24.14 mt), and the incidental open access fishery (13.3 mt), resulting in a fishery HG of 3,727.5 mt.

^z_v Sablefish north of 36° N lat. This coastwide ACL value is not specified in regulations. The coastwide ACL value is apportioned north and south of 36° N lat., using a rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 78.4 percent apportioned north of 36° N lat. and 21.6 percent apportioned south of 36° N lat. The northern ACL is 6,892 mt and is reduced by 689.2 mt for the Tribal allocation (10 percent of the ACL north of 36° N lat.). The 689.2 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

^{aa}_v Sablefish south of 36° N lat. The ACL for the area south of 36° N lat. is 1,899 mt (21.6 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 1,871.6 mt.

^{bb}_v Shortspine thornyhead north of 34°27' N lat. 78.4 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (0.1 mt), and research catch (10.48 mt), and the incidental open access fishery (17.82 mt), resulting in a fishery HG of 1,349.6 mt for the area north of 34°27' N lat.

^{cc}_v Shortspine thornyhead south of 34°27' N lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and the incidental open access fishery (6 mt), resulting in a fishery HG of 749.3 mt for the area south of 34°27' N lat.

^{dd}_v Spiny dogfish. 344 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP catch (1.1 mt), research (34.27 mt), and the incidental open access fishery (33.63 mt), resulting in a fishery HG of 1,277 mt.

^{ee}_v Splitnose rockfish south of 40°10' N lat. 18.42 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (11.17 mt), and the incidental open access fishery (5.75 mt), resulting in a fishery HG of 1,647.6 mt.

^{ff}_v Starry flounder. 48.38 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), EFP catch (0.1 mt), research (0.57 mt), and the incidental open access fishery (45.71 mt), resulting in a fishery HG of 343.6 mt.

^{gg}_v Widow rockfish. 248.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP catch (28 mt), research (17.27 mt), and the incidental open access fishery (3.05 mt), resulting in a fishery HG of 14,476.7 mt.

^{hh}_v Yellowtail rockfish north of 40°10' N lat. 1,047.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), EFP catch (10 mt), research (20.55 mt), and the incidental open access fishery (7 mt), resulting in a fishery HG of 5,012.5 mt.

ⁱⁱ_v Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 2.32 mt is deducted from the ACL to accommodate the EFP catch (0.5 mt), research (0.08 mt), and the incidental open access fishery (1.74 mt), resulting in a fishery HG of 600.7 mt.

^{jj}_v Cabezon/kelp greenling (Oregon). 0.21 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (0.05 mt), and the incidental open access fishery (0.06 mt), resulting in a fishery HG of 197.8 mt.

^{kk}_v Cabezon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, therefore the fishery HG is 18 mt.

^{ll}_v Nearshore Rockfish north of 40°10' N lat. 3.08 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), EFP catch (0.5 mt), research (0.47 mt), and the incidental open access fishery (0.61 mt), resulting in a fishery HG of 75.9 mt. State specific HGs are Washington (18.4 mt), Oregon (22.7 mt), and California (37.6 mt).

^{mm}_v Nearshore Rockfish south of 40°10' N lat. 4.42 mt is deducted from the ACL to accommodate research catch (2.68 mt) and the incidental open access fishery (2.68 mt), resulting in a fishery HG of 1,011.6 mt.

ⁿⁿ_v Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.34 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (6.29 mt), and the incidental open access fishery (14.95 mt), resulting in a fishery HG of 201.7 mt.

^{oo}_v Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: Butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.89 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), EFP catch (0.1 mt), research (23.63 mt), and the incidental open access fishery (137.16 mt), resulting in a fishery HG of 4,581.1 mt.

^{pp}/ Shelf Rockfish north of 40°10' N lat. 72.44 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), EFP catch (1.5 mt), research (15.32 mt), and the incidental open access fishery (25.62 mt), resulting in a fishery HG of 1,438.66 mt.

^{qq}/ Shelf Rockfish south of 40°10' N lat. 132.77 mt is deducted from the ACL to accommodate EFP catch (50 mt), research catch (15.1 mt), and the incidental open access fishery (67.67 mt) resulting in a fishery HG of 1,305.2 mt.

^{rr}/ Slope Rockfish north of 40°10' N lat. 65.89 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), EFP catch (0.5 mt), and research (10.51 mt), and the incidental open access fishery (18.88 mt), resulting in a fishery HG of 1,529.1 mt.

^{ss}/ Slope Rockfish south of 40°10' N lat. 38.94 mt is deducted from the ACL to accommodate EFP catch (1 mt), and research (18.21 mt), and the incidental open access fishery (19.73 mt), resulting in a fishery HG of 670.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N lat. set equal to the species' contribution to the ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10' N lat. counts against this HG of 176.5 mt.

■ 4. Revise Table 1b to part 660, subpart C, to read as follows:

TABLE 1b TO PART 660, SUBPART C—2021, ALLOCATIONS BY SPECIES OR SPECIES GROUP

[Weight in metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT ^{a/b/}	Trawl		Non-Trawl	
			%	Mt	%	Mt
Yelloweye Rockfish ^{a/}	Coastwide	41.2	8	3.3	92	37.9
Arrowtooth flounder	Coastwide	7,837.9	95	7,446	5	391.9
Big skate ^{a/}	Coastwide	1,419.7	95	1,348.7	5	71
Bocaccio ^{a/}	S of 40°10' N lat	1,700.2	39	663.8	60	1,036.4
Canary rockfish ^{a/}	Coastwide	1,268.6	72	917	28	351.6
Chilipepper rockfish	S of 40°10' N lat	2,260.3	75	1,695.2	25	565.1
Cowcod ^{a/}	S of 40°10' N lat	50	36	18	64	32
Darkblotched rockfish	Coastwide	862.9	95	819.8	5	43.1
Dover sole	Coastwide	48,402.8	95	45,982.7	5	2,420.1
English sole	Coastwide	8,924.4	95	8,478.2	5	446.2
Lingcod	N of 40°10' N lat	5,090.6	45	2,290.8	55	2,799.8
Lingcod ^{a/}	S of 40°10' N lat	1,089	40	435.6	60	653.4
Longnose skate ^{a/}	Coastwide	1,571.6	90	1,414.4	10	157.2
Longspine thornyhead	N of 34°27' N lat	2,580.3	95	2,451.3	5	129
Pacific cod	Coastwide	1,093.9	95	1,039.2	5	54.7
Pacific ocean perch	N of 40°10' N lat	3,829.3	95	3,637.8	5	191.5
Pacific whiting ^{c/}	Coastwide	304,005	100	304,005	0	0
Petrale sole ^{a/}	Coastwide	3,727.9		3,697.9		30
Sablefish	N of 36° N lat	NA	See Table 1c			
Sablefish	S of 36° N lat	1,861.6	42	782.3	58	1,080.3
Shortspine thornyhead	N of 34°27' N lat	1,349.6	95	1,282.1	5	67.5
Shortspine thornyhead	S of 34°27' N lat	749.3		50		699.3
Splitnose rockfish	S of 40°10' N lat	1,647.6	95	1,565.2	5	82.4
Starry flounder	Coastwide	343.6	50	171.8	50	171.8
Widow rockfish ^{a/}	Coastwide	14,476.7		14,076.7		400
Yellowtail rockfish	N of 40°10' N lat	5,012.5	88	4,411.0	12	601.5
Other Flatfish	Coastwide	4581.1	90	4,123	10	458.1
Shelf Rockfish ^{a/}	N of 40°10' N lat	1,438.7	60.2	866.1	39.8	572.6
Shelf Rockfish ^{a/}	S of 40°10' N lat	1,305.2	12.2	159.2	87.8	1,146
Slope Rockfish	N of 40°10' N lat	1,529.1	81	1,238.6	19	290.5
Slope Rockfish ^{a/}	S of 40°10' N lat	670.1		526.4		143.7

^{a/} Allocations decided through the biennial specification process.

^{b/} The cowcod fishery harvest guideline is further reduced to an ACT of 50 mt. The non-trawl allocation is further split 50:50 between the commercial and recreational sectors.

^{c/} Consistent with regulations at § 660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/ P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

■ 5. In § 660.140, revise paragraph (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(D) Shorebased trawl allocations. For

the trawl fishery, NMFS will issue QP

based on the following shorebased trawl allocations:

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)

IFQ species	Area	2021 Shorebased trawl allocation (mt)	2022 Shorebased trawl allocation (mt)
Yelloweye Rockfish	Coastwide	3.3	3.4
Arrowtooth flounder	Coastwide	7,376.02	5974.77
Bocaccio	South of 40°10' N lat	663.75	654.38
Canary rockfish	Coastwide	880.96	858.56
Chilipepper	South of 40°10' N lat	1,695.2	1,621
Cowcod	South of 40°10' N lat	18	18
Darkblotched rockfish	Coastwide	743.39	694.94
Dover sole	Coastwide	45,972.65	45,972.65
English sole	Coastwide	8,478.2	8,407.9
Lingcod	North of 40°10' N lat	2,275.78	2,090.83
Lingcod	South of 40°10' N lat	435.6	463.6
Longspine thornyhead	North of 34°27' N lat	2,451.28	2,278.38
Pacific cod	Coastwide	1,039.21	1,039.21
Pacific halibut (IBQ)	North of 40°10' N lat	69.6	69.6
Pacific ocean perch	North of 40°10' N lat	3,337.74	3,201.94
Pacific whiting	Coastwide	127,682	TBD
Petrale sole	Coastwide	3,692.9	3,237.5
Sablefish	North of 36° N lat	3,139.59	2,985.42
Sablefish	South of 36° N lat	786	748
Shortspine thornyhead	North of 34°27' N lat	1,212.12	1,178.87
Shortspine thornyhead	South of 34°27' N lat	50	50
Splitnose rockfish	South of 40°10' N lat	1,565.20	1,531.00
Starry flounder	Coastwide	171.8	171.8
Widow rockfish	Coastwide	13,600.68	12,663.68
Yellowtail rockfish	North of 40°10' N lat	4,091.13	3,898.4
Other Flatfish complex	Coastwide	4,088.00	4,120.40
Shelf Rockfish complex	North of 40°10' N lat	831.07	794.56
Shelf Rockfish complex	South of 40°10' N lat	159.24	158.02
Slope Rockfish complex	North of 40°10' N lat	938.58	916.71
Slope Rockfish complex	South of 40°10' N lat	526.4	523.9

* * * * *

[FR Doc. 2021-13150 Filed 6-21-21; 11:15 am]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 86, No. 118

Wednesday, June 23, 2021

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206–AO27

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

RIN 1545–BQ10

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AC07

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 149

[CMS–9905–NC]

RIN 0938–AU66

Request for Information Regarding Reporting on Pharmacy Benefits and Prescription Drug Costs

AGENCY: Office of Personnel Management; Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Request for information.

SUMMARY: This document is a request for information on issues related to certain reporting requirements under section 204 of Title II of Division BB of the Consolidated Appropriations Act, 2021 (CAA) that are applicable to group health plans and health insurance issuers offering group or individual health insurance coverage. The Departments of Health and Human Services, Labor, and the Treasury (the

Departments) are issuing this request for information to gather input from the public regarding implementation considerations for the data collection required under section 204 of Title II of Division BB of the CAA, and the associated impact on group health plans and health insurance issuers. As part of this request for information, the Office of Personnel Management (OPM) is also seeking input from the public regarding implementation considerations for the data collection required under section 204 of Title II of Division BB of the CAA as it pertains to Federal Employees Health Benefits (FEHB) carriers (whether or not they are also health insurance issuers). The Departments and OPM also seek input on specific data elements, including the level of detail that is feasible to report for entities subject to the data collection requirements and the associated burdens and potential compliance costs. Public comments will inform the Departments' and OPM's implementation of section 204 through rulemaking and the establishment of processes to receive the required information.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on July 23, 2021.

ADDRESSES: Written comments may be submitted to the addresses specified below. Any comment that is submitted will be shared among the Departments and OPM. Please do not submit duplicates.

Comments will be publicly posted on *Regulations.gov*. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Comments may be submitted anonymously.

In commenting, refer to file code CMS–9905–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <https://www.regulations.gov/>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, US Department of Labor, Attention: Request for Information Regarding Reporting on Pharmacy Benefits and Prescription Drug Costs, 200 Constitution Avenue NW, Room N–5653, Washington, DC 20210.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, US Department of Labor, Attention: Request for Information Regarding Reporting on Pharmacy Benefits and Prescription Drug Costs, 200 Constitution Avenue NW, Room N–5653, Washington, DC 20210.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Rina Shah, Office of Personnel Management, at (202) 606–0004.

Christopher J. Dellana, Internal Revenue Service, Department of the Treasury, at (202) 317–5500.

Matthew Litton, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335.

Christina Whitefield, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492–4172.

Customer Service Information:

Individuals interested in obtaining information from the Department of Labor (DOL) concerning employment-based health coverage laws may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the DOL's website (www.dol.gov/agencies/ebsa). In addition, information from the Department of Health and Human Services (HHS) on private health insurance coverage and non-Federal governmental group health plans can be found on the Centers for Medicare & Medicaid Services (CMS) website (www.cms.gov/ccio), and information on health care reform can be found at www.HealthCare.gov.

Information from OPM on Federal Employees Health Benefits (FEHB) plans can be found on the OPM website (www.opm.gov/healthcare-insurance).

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments:

Comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. Comments received before the close of the comment period are posted on the following website as soon as possible after they have been received: <https://www.regulations.gov/>. Follow the search instructions on that website to view public comments.

I. Background

A. Purpose

In recent years, there has been a broad effort toward promoting greater price transparency in health care as a means to promote competition and bring down overall costs. Section 204 of Title II of Division BB of the CAA added parallel provisions at section 2799A–10 of the Public Health Service Act (PHS Act), section 725 of the Employee Retirement Income Security Act of 1974 (ERISA), and section 9825 of the Internal Revenue Code (Code). These provisions include certain reporting requirements for group health plans (plans) and health insurance issuers offering group or individual health insurance coverage (issuers). The reporting requirements primarily relate to prescription drug expenditures, requiring that plans and issuers submit the relevant information to the Departments. The provisions also require the Departments to issue biannual public reports on prescription drug reimbursements under group health plans and individual health insurance coverage, prescription drug pricing trends, and the impact of prescription drug costs on premium rates, aggregated in such a way so that no drug or plan specific information will be made public.

Title I of Division BB also amended 5 U.S.C. 8902(p) to include specified provisions of the CAA into FEHB carrier contracts. Although section 204 is not enumerated as a specified provision in section 8902(p), FEHB carrier compliance with the Departments' collection pursuant to this section helps accomplish the CAA's intended purpose of achieving national health data transparency and lower costs. Therefore, references to "plans" for purposes of this request for information include FEHB health benefits plans.

The Departments and OPM are requesting input from the public

regarding implementation of the data collection, the data elements to be collected, and the associated impact on plans and issuers. Public input will inform the Departments' and OPM's implementation through rulemaking and establishment of processes to receive the information that must be reported. Using the information obtained through this data collection, the Departments and OPM intend to analyze trends in overall spending on prescription drugs and other health care services by plans and issuers and to publish the analysis in the required reports in a format that the Departments and OPM intend to enable plans and issuers to ultimately negotiate fairer rates and lower costs for participants, beneficiaries, and enrollees.

B. Reporting Requirements

By December 27, 2021, and not later than June 1 of each year thereafter, plans and issuers must submit to the Departments certain information with respect to the health plan or coverage for the previous plan year. This includes general information on the plan or coverage, such as the beginning and end dates of the plan year, the number of participants, beneficiaries, or enrollees, as applicable, and each state in which the plan or coverage is offered. Plans and issuers must also report the 50 most frequently dispensed brand prescription drugs, and the total number of paid claims for each such drug; the 50 most costly prescription drugs by total annual spending, and the annual amount spent by the plan or coverage for each such drug; and the 50 prescription drugs with the greatest increase in plan expenditures over the plan year preceding the plan year that is the subject of the report, and, for each such drug, the change in amounts expended by the plan or coverage in each such plan year. Additionally, plans and issuers must report total spending by the plan or coverage broken down by the type of health care services; spending on prescription drugs by the plan or coverage as well as by participants, beneficiaries, and enrollees, as applicable; and the average monthly premiums paid by participants, beneficiaries, and enrollees and paid by employers on behalf of participants, beneficiaries, and enrollees, as applicable. Plans and issuers must report rebates, fees, and any other remuneration paid by drug manufacturers to the plan or coverage or its administrators or service providers, including the amount paid with respect to each therapeutic class of drugs and for each of the 25 drugs that yielded the highest amount of rebates and other

remuneration under the plan or coverage from drug manufacturers during the plan year. Finally, plans and issuers must report any reduction in premiums and out-of-pocket costs associated with these rebates, fees, or other remuneration.

C. Public Report and Privacy Protections

Not later than 18 months after the date on which plans and issuers must first submit the information described in section B and biannually thereafter, the Departments and OPM will publish on the internet reports on prescription drug reimbursements under group health plans and group and individual health insurance coverage, prescription drug pricing trends, and the role of prescription drug costs in contributing to premium increases or decreases under such plans or coverage, aggregated so that no drug or plan specific information is made public. Furthermore, these reports will not include any confidential or trade secret information submitted pursuant to the reporting requirements of PHS Act section 2799A–10, ERISA section 725, and Code section 9825.

II. Solicitation of Comments

The Departments and OPM request comments from all interested stakeholders to gain a better understanding of the issues related to compliance with this provision, including reporting on premiums, enrollment, pharmacy drug benefits, and prescription drug costs, and to estimate the impact of any potential rules, both generally and with respect to the following specific areas:

A. General Implementation Concerns

1. What, if any, challenges do plans and issuers anticipate facing in meeting the statutory reporting obligations? For example, do plans or issuers currently have access to all the information they are required to report under PHS Act section 2799–10, ERISA section 725, and Code section 9825? If not, which statutory data elements are not readily accessible to plans and issuers, and how could plans and issuers obtain the information necessary to comply with the reporting requirements? Are there ways in which the Departments and OPM could structure the reporting requirements to facilitate compliance?

2. Are FEHB carriers (including those that are also issuers) able to report data separately for each FEHB plan?

3. After the Departments and OPM finalize rulemaking and publish the reporting format and instructions, how much time will plans and issuers need to prepare their data and submit it to the

Departments and OPM? What data sources are readily available and which data may take longer to compile? Are there operational, formatting, or technical considerations that the Departments and OPM should be aware of that may impact plans' and issuers' abilities to meet the statutory deadline for reporting?

4. Are there different considerations regarding data reporting by health insurance issuers versus group health plans that would affect their ability to comply with the statutory reporting obligations? Among group health plans, are there different considerations for reporting by fully-insured versus self-insured plans, or for insured plans with small group versus large group coverage? Are there different considerations for reporting FEHB carrier data versus other plans and issuers? Are there different considerations for reporting of premiums, spending, and other data by partially-insured group health plans, such as those that utilize minimum premium, stop-loss, or similar coverage? Are there special considerations the Departments should take into account for multiemployer plans, or that OPM should take into account for policies offered by FEHB carriers that are not issuers?

5. What data reporting tools and systems should the Departments and OPM consider when deciding on the format of the data collection? What are the operational advantages and disadvantages of various reporting formats, such as Excel spreadsheets, fillable PDF forms, or flat files? How can the Departments and OPM reduce the need for manual data entry? What are the ways in which the Departments and OPM could implement the reporting requirements to facilitate compatibility with the systems most commonly used by plans and issuers?

6. Are there state laws with similar reporting requirements that could serve as models for implementing the requirements under PHS Act section 2799A–10, ERISA section 725, and Code section 9825? If so, in what ways are these state laws directly comparable to PHS Act section 2799A–10, ERISA section 725, and Code section 9825, and what should the Departments and OPM consider when deviating from the state requirements?

B. Definitions

1. What considerations should the Departments and OPM take into account in defining “rebates, fees, and any other remuneration”? Should bona fide service fees—for example, administrative fees, data sharing fees,

formulary placement fees, credits, and market share incentives—be included in this definition? Are there additional fees that the Departments and OPM should include in this definition? How should manufacturer copay assistance programs and coupon cards be accounted for? How should copay accumulator programs be accounted for?

2. What considerations should the Departments and OPM take into account in defining the term “pharmacy”? Are there different considerations for retail pharmacies versus mail order or specialty pharmacies? Are there different considerations for prescription drugs dispensed in an inpatient, outpatient, office, home, or other setting?

3. What considerations should the Departments and OPM take into account in defining the term “prescription drug”? Should prescription drugs be identified by National Drug Codes (NDCs)? Are there other prescription drug classification systems that should be considered, such as the first nine digits of the NDC, the RxNorm Concept Unique Identifier (RxCUI), or the United States Pharmacopeia Drug Classification (USP–DC)? How does the choice of prescription drug classification influence plan and issuer operational costs?

4. Should there be different definitions of “prescription drug” for different elements of the PHS Act section 2799A–10, ERISA section 725, and Code section 9825 data collection, such as the 9-digit NDC for identifying the 25 drugs with the highest rebates and the RxCUI for identifying the 50 most costly drugs? What classification systems do plans and issuers currently use for internal needs and compliance with reporting requirements other than those under PHS Act section 2799A–10, ERISA section 725, and Code section 9825?

5. What considerations should the Departments and OPM take into account in defining the term “therapeutic class”? How do plans and issuers currently classify prescription drugs by therapeutic class? Does the classification method rely on proprietary software, and how would the choice of therapeutic classification method influence plan and issuer operational costs?

6. What considerations should the Departments and OPM take into account in defining “health care services”? It is preferable to define the term as a service or bundle of services necessary to treat an illness (for example, by Diagnosis-Related Group code)? Or would it be preferable to disaggregate by particular services (for example, by Current

Procedure Technology code)? In what ways could this definition help reduce burdens or increase the utility of data reporting?

C. Entities That Must Report

1. Are there special considerations for certain types or sizes of group health plans, such as individual coverage health reimbursement arrangements and other account-based plans, that make it challenging or not feasible for these plans to satisfy the reporting requirements? What are those specific challenges? If exemptions are provided for certain plans, how might that affect the value of the required public analysis?

2. Should the Departments expect that self-insured and partially-insured group health plans will contract with third-party administrators or other service providers to submit the required data on their behalf? Is there any relevant information or data that may be helpful in determining how widespread this approach may be?

3. Are there ways for issuers and plan service providers to submit data on behalf of multiple plans and coverage options, consistent with the statutory requirements? What benefit would there be to issuers and plan service providers having the ability to submit aggregated data as opposed to reporting information separately for each group health plan, to the extent consistent with the statutory requirements? What considerations exist with respect to issuers that participate in the FEHB Program submitting FEHB-specific data separately as opposed to including FEHB data in their general book of business?

4. What role, if any, will Pharmacy Benefits Managers (PBMs) play in furnishing necessary information to plans and issuers, or to the Departments or OPM? If permitted, would plans and issuers rely on PBMs to help satisfy their reporting obligations, such as by retaining PBMs to conduct some or all of the reporting? Could PBMs obtain all the information required to be reported, including general information on the plan or coverage, such as the number of participants, beneficiaries, and enrollees; each state in which the plan or coverage is offered; monthly premiums paid by employers and by participants, beneficiaries, and enrollees; total spending on health care services broken down by type; and the impact on premiums of prescription drug rebates, fees, and any other remuneration paid by drug manufacturers to the plan or coverage or its administrators or service providers? If not, would allowing separate

reporting forms, modules, or data collection systems for PBMs and issuers and plan administrators to report such information be administratively and operationally feasible? How would separate reporting forms change the costs or burdens associated with compliance?

D. Information Required To Be Reported

1. What considerations are important for plans and issuers in determining the 50 brand prescription drugs that are most frequently dispensed by pharmacies for claims paid by the plan or coverage, and the total number of paid claims for each drug? Should the determination be based on the number of claims, the number of days' supply, or something else? Should the unique number of participants, beneficiaries, or enrollees that received a prescription be taken into account, and, if so, how?

2. What considerations are important for plans and issuers in determining the 50 prescription drugs with the greatest increase in plan expenditures? Should the increase be measured based on the absolute increase in dollars; percentage increase in price; the increase relative to another measure, such as overall spending by the plan or issuer; or something else? What factors should the Departments and OPM consider in selecting an approach? If the Departments and OPM define the increase in proportion to the change in overall spending, should the increase be measured in comparison to total spending or only to spending on prescription drugs?

3. If the top prescription drugs are identified by RxCUI (or any classification other than NDC), is it feasible for plans and issuers to report the required information separately by NDC for each NDC associated with the given RxCUI?

4. Which data elements can be directly tied to a specific prescription drug or class of prescription drugs, and which data elements must be allocated among prescription drugs or prescription drug classes? If an amount must be allocated, what allocation method(s) are preferable, and why?

5. What considerations are important for plans and issuers in determining the 25 drugs that yielded the highest amount of rebates and other remuneration from drug manufacturers during the plan year? Should rebates and other remuneration be measured by total dollar amount? Should rebates and other remuneration be measured in comparison to another measure, such as total spending on a drug or a unit price? If a price measure is used, which price measure should be used and why?

6. PHS Act section 2799A–10, ERISA section 725, and Code section 9825 require plans and issuers to report total spending on health care services separately for hospital costs, health care provider and clinical service costs (for primary care and specialty care separately), prescription drug costs, and other medical costs, including wellness services. Which cost elements should be included in each category? Should the Departments and OPM collect prescription drug spending information separately based on the setting of care?

7. Should the Departments collect information separately by market, state, or employer size? If so, are there data elements that must be allocated among the categories? What allocation methods should be used? Are there differences in the capacities of different size entities to comply with the Departments' and OPM's reporting requirements, or in the costs and burdens of compliance?

8. What considerations are important for plans and issuers in measuring the impact of drug manufacturer rebates on premiums and out-of-pocket costs? What quantitative or qualitative analyses might plans and issuers perform? What analyses do plans and issuers currently perform?

9. Should the Departments and OPM collect information on rebates, fees, and any other remuneration at the total level or broken out by relevant subcategories? For example, in the PBM Transparency for Qualified Health Plans (QHPs) data collection,¹ PBMs will report information for retained rebates, rebates expected but not yet received, PBM incentive payments, price concessions for administrative services from manufacturers, all other price concessions from manufacturers, amounts received and paid to pharmacies, and spread amounts for retail and mail order pharmacies. Should the Departments use the same or similar subcategories for the reporting requirements under PHS Act section 2799A–10, ERISA section 725, and Code section 9825?

10. Are there types of payments that flow from plans, issuers, or PBMs directly to drug manufacturers? If so, how should these payments be treated? Should they be netted against rebates and other price concessions that are received from drug manufacturers?

11. Are there types of rebates and price concessions that are passed directly to the participant, beneficiary, or enrollee? If so, how should they be

treated? Should they be included or acknowledged in this data collection?

E. Coordination With Other Reporting Requirements

1. Are there opportunities to remove other reporting requirements applicable to plans and issuers or to leverage or combine those requirements with the reporting requirements under PHS Act section 2799A–10, ERISA section 725, and Code section 9825 to reduce administrative burdens or costs associated with complying with the new requirements? For example, the Departments are aware that there may be some overlap between the data subject to collection under PHS Act section 2799A–10, ERISA section 725, and Code section 9825 and the data subject to collection in the PBM Transparency for QHPs data collection,² which requires issuers of QHPs or their PBMs to report prescription drug information to HHS.

F. Public Report and Privacy Protections

1. In what ways can the Departments and OPM facilitate use of the reports by a variety of interested parties, such as government entities, academics, industry entities, and consumers and their advocates?

2. Should OPM issue a public report specifically for FEHB carriers?

3. Would the Departments' and OPM's reports have greater value and utility if data were collected on a calendar year basis, by plan or policy years, or by some combination, to the extent consistent with the statutory requirements? If data were to be collected by plan or policy year, are there any considerations the Departments and OPM should take into account when determining the plan or policy year effective dates for reporting periods? For example, what is the last plan or policy year end date that should be included in data submitted by June 1 of each year?

4. Are there any examples of similar reports published by state agencies? If so, what are any strengths or limitations of the reports published by the state agencies that would be relevant to the Departments and OPM? In what ways should the Departments and OPM consider adapting or differentiating the process under PHS Act section 2799A–10, ERISA section 725, and Code section 9825 from any similar state reporting processes?

5. Should the public report include a comparative analysis of prescription drug costs for plans and issuers, relative

¹ Section 1150A of the Social Security Act, and its implementing regulations at 45 CFR 156.295 and 45 CFR part 184, require issuers of QHPs or their PBMs to report certain prescription drug information to HHS.

² *Id.*

to costs under Medicare or in other countries?

G. Regulatory Impact Analysis

1. What benefits, costs, and other impacts do plans, issuers, or other stakeholders anticipate from the reporting requirements of PHS Act section 2799A-10, ERISA section 725, and Code section 9825?

2. Are there benefits to academics or other researchers? How will consumers benefit?

3. What data, research, or other information is available to help quantify the benefits, costs, and other impacts of the reporting requirements? Are there existing data, research, or reporting analogues that could be extrapolated from to predict market impacts?

4. What actions could the Departments and OPM take to minimize the compliance costs of the reporting requirements?

5. Operationally, which types of employees will be necessary to ensure compliance with the reporting requirements? Will staff specialized in medical billing coding be needed for the purpose of reporting?

6. Will new or additional technology be needed for the collection, maintenance, or storage of the data to be reported?

7. Will there be coordination costs or benefits from simultaneously complying with state regulations that require the reporting of medical services costs or prescription drug costs?

8. Would greater alignment with other Federal reporting requirements reduce associated compliance costs, and if so, how?

III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements under the Paperwork Reduction Act of 1995 (PRA). However, Section II of this document does contain a general solicitation of comments in the form of a request for information. In accordance with the implementing regulations of the PRA, specifically 5 CFR 1320.3(h)(4), this general solicitation is exempt from the PRA. Facts or opinions submitted in response to general solicitations of comments from the public, published in the **Federal Register** or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full

consideration, are not generally considered information collections and therefore not subject to the PRA. Consequently, there is no need for review by the Office of Management and Budget under the authority of the PRA.

Signed at Washington DC.

Laurie Bodenheimer,
*Associate Director, Healthcare and Insurance,
Office of Personnel Management.*

Signed at Washington DC.

Rachel D. Levy,
*Associate Chief Counsel (Employee Benefits,
Exempt Organizations, and Employment
Taxes), Internal Revenue Service, Department
of the Treasury. Signed at Washington DC.*

Carol A. Weiser,
*Benefits Tax Counsel, Department of the
Treasury.*

Signed at Washington DC.

Ali Khawar,
*Acting Assistant Secretary, Employee Benefits
Security Administration, Department of
Labor.*

Signed at Washington DC.

Xavier Becerra,
*Secretary, Department of Health and Human
Services.*

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**BILLING CODE 4510-29-P; 6523-63-P; 4120-01-P;
4830-01-P**

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC-2017-0214]

Retrospective Review of Administrative Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Availability of comment evaluation summary; public meeting and status of rulemaking activities.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC), on February 4, 2020, requested input from its licensees and members of the public on any administrative requirements that may be modified or eliminated without an adverse effect on public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. The public comment period ended on May 6, 2020, and the NRC evaluated the comments. This document announces the availability of the comment evaluation summary and provides the status of the NRC's Retrospective Review of Administrative Requirements initiative. The NRC plans to hold a public meeting to discuss the comment

evaluation process and answer stakeholder questions.

DATES: The comment evaluation summary is available on June 23, 2021. A public meeting will be held on June 30, 2021.

ADDRESSES: Please refer to Docket ID NRC-2017-0214 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- **Federal Rulemaking website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2017-0214. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407; email: Dawn.Forder@nrc.gov. For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

- **Attention:** The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at pdr.resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Andrew G. Carrera, telephone: 301-415-1078, email: Andrew.Carrera@nrc.gov; or Solomon Sahle, telephone: 301-415-3781, email: Solomon.Sahle@nrc.gov. Both are staff of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

SUPPLEMENTARY INFORMATION:

I. Background

On February 4, 2020, the NRC published a document in the **Federal Register** (85 FR 6103) requesting input from its licensees and members of the public on any administrative requirements that may be modified or eliminated without an adverse effect on

public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. The public comment period was originally scheduled to close on April 6, 2020. On April 2, 2020, the NRC published a document in the **Federal Register** (85 FR 18477) extending the deadline to May 6, 2020. During the comment period, on March 5, 2020 (ADAMS Accession No. ML20069A022), and March 24, 2020 (ADAMS Accession No. ML20085H593), the NRC held public meetings to discuss the NRC's request for public input. In addition, the NRC requested input from agency staff through various methods of internal outreach. The NRC received comment submissions from the Nuclear Energy Institute, agency staff, and a member of the public, for a total of 100 individual comments. The evaluation summary of these comments is available in ADAMS under Accession No. ML21012A439.

II. Discussion

For this Retrospective Review of Administrative Requirements (RROAR) initiative, the NRC developed criteria with which to evaluate potential regulatory changes. In addition to the following five criteria, the NRC considered programmatic experience, intent of the requirement, impact to the NRC's mission, and overall impact to resources when determining whether to pursue a change to the regulations.

1. Submittals resulting from routine and periodic recordkeeping and reporting requirements, such as directives to submit recurring reports that the NRC has not consulted or referenced in programmatic operations or policy development in the last 3 years.

2. Requirements for reports or records that contain information reasonably accessible to the agency from alternative resources that, as a result, may be candidates for elimination.

3. Requirements for reports or records that could be modified to result in reduced burden without impacting programmatic needs, regulatory efficiency, or transparency, through: (a) Less frequent reporting, (b) shortened record retention periods, (c) requiring entities to maintain a record rather than submit a report, or (d) implementing another mechanism that reduces burden for collecting or retaining information.

4. Recordkeeping and reporting requirements that result in significant burden.

5. Reports or records that contain information used by other Federal agencies, State and local governments, or Federally recognized Tribes will be

dropped from the review provided the information collected is necessary to support the NRC's mission or to fulfill a binding NRC obligation.

To be screened in for rulemaking consideration, comments had to meet at least one of Criteria 1 through 4 and not meet Criterion 5.

Once screened in for rulemaking consideration, the staff organized the comments into three categories of action: (1) To be further evaluated in a new RROAR-related rulemaking (44 comments), (2) to be incorporated in an annual administrative corrections rulemaking (5 comments), or (3) to be considered in an ongoing rulemaking activity outside the RROAR initiative (5 comments). For comments that need further evaluation within the context of a new RROAR rulemaking effort, the NRC will consider the comments, in combination with its preliminary evaluation of the comments, in the rulemaking process. However, this is not a final determination and could change as NRC proceeds through rulemaking activities.

The NRC's evaluation identified 46 comments that did not meet the criteria. The staff plans no further action on 44 of these comments, and identified two comments to be reviewed for potential non-rulemaking solutions under the agency's innovation and transformation efforts.

III. Public Meeting

The NRC will conduct a public meeting to discuss the comment evaluation process and answer stakeholder questions.

The meeting will be held on June 30, 2021, from 10:00 a.m. to 12:00 p.m. Eastern Standard Time. Interested members of the public can participate in this meeting via WebEx at: <https://usnrc.webex.com/usnrc/onstage/g.php?MTID=e01dcfc6971f79f394a24d902b4e0e9b3>, or by phone conference at (888) 390-2141, passcode 8801623.

This is an Information Public Meeting with a question and answer session. The purpose of this meeting is for the NRC staff to meet directly with individuals to discuss regulatory and technical issues. Attendees will have an opportunity to ask questions of the NRC staff or make comments about the issues discussed throughout the meeting; however, the NRC is not actively soliciting comments towards regulatory decisions at this meeting. For additional information or to request reasonable accommodations, please contact Andrew Carrera, phone: 301-415-1078, email: Andrew.Carrera@nrc.gov, or Solomon Sahle, phone: 301-415-3781, email: Solomon.Sahle@nrc.gov

nrc.gov. Stakeholders should monitor the NRC's public meeting website for information about the public meeting; <https://www.nrc.gov/public-involve/public-meetings/index.cfm>.

Dated: June 14, 2021.

For the Nuclear Regulatory Commission.

Kevin A. Coyne,

Deputy Director, Division of Rulemaking, Environmental Review and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2021-13466 Filed 6-22-21; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

29 CFR Part 531

RIN 1235-AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking (NPRM), the Department of Labor (Department) proposes to withdraw and re-propose one portion of the Tip Regulations Under the Fair Labor Standards Act (FLSA) (2020 Tip final rule) related to the determination of when a tipped employee is employed in dual jobs under the Fair Labor Standards Act of 1938 (FLSA or the Act). Specifically, the Department is proposing to amend its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation. Work that is part of the tipped occupation includes work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.

DATES: Submit written comments on or before August 23, 2021.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments. *Mail:* Address written submissions to:

Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Please submit only one copy of your comments by only one method. Commenters submitting file attachments on <https://www.regulations.gov> are advised that uploading text-recognized documents—i.e., documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. WHD posts comments gathered and submitted by a third-party organization as a group under a single document ID number on <https://www.regulations.gov>. All comments must be received by 11:59 p.m. on August 23, 2021 for consideration in this NPRM; comments received after the comment period closes will not be considered. The Department strongly recommends that commenters submit their comments electronically via <https://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this proposal may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency’s existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD’s toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD’s website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) generally requires covered employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour. *See* 29 U.S.C. 206(a)(1). Section 3(m) of the FLSA allows an employer that meets certain requirements to count a limited amount of the tips its tipped employees receive as a credit toward its federal minimum wage obligation (known as a “tip credit”). *See* 29 U.S.C. 203(m)(2)(A). Section 3(t) of the FLSA defines a “tipped employee” for whom an employer may take a tip credit under section 3(m) as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” *See* 29 U.S.C. 203(t). The FLSA regulations addressing tipped employment are codified at 29 CFR 531.50 through 531.60. *See also* 29 CFR 10.28 (establishing a tip credit for federal contractor employees covered by Executive Order 13658 who are tipped employees under section 3(t) of the FLSA).

The current version of § 531.56(e) recognizes that an employee may be employed both in a tipped occupation and in a non-tipped occupation, “as[,] for example, where a maintenance man in a hotel also serves as a waiter”, explaining that in such a “dual jobs” situation, the employee is a “tipped employee” for purposes of section 3(t) only while the employee is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. At the same time, the current regulation also recognizes that a distinguishable situation can exist where an employee in a tipped occupation may perform duties related to their tipped occupation that are not “themselves . . . directed toward producing tips,” such as, for example, a server “who spends part of her time” performing non-tipped duties, such as “cleaning and setting tables, toasting bread, making coffee and occasionally

washing dishes or glasses.” 29 CFR 531.56(e).

For three decades, the Department issued subregulatory guidance to provide further clarity to the terms “occasionally” and “part of [the] time” found in § 531.56(e). The Department’s guidance recognized that because the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, it is important to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute. The guidance explained that an employer could continue to take a tip credit for the time an employee spent performing duties that are related to the employee’s tipped occupation but that do not produce tips, but only if that time did not exceed 20 percent of the employee’s workweek (80/20 guidance). *See* WHD Field Operations Handbook (FOH) 30d00(e), Revision 563 (Dec. 9, 1988). The 80/20 guidance and its tolerance permitting the performance of a limited amount of non-tipped, related duties provided an essential backstop to prevent abuse of the tip credit, and a number of courts deferred to the guidance.¹

In 2018, the Department rescinded the 80/20 guidance. In 2018 and 2019, the Department issued new subregulatory guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. *See* WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); Field Assistance Bulletin (FAB) 2019–2 (Feb. 15, 2019); FOH 30d00(f) (2018–2019 guidance). The Department explained that, in addition to the examples listed in § 531.56(e), it would use the Occupational Information Network (O*NET) to determine whether a tipped employee’s non-tipped duties are related to their tipped occupation. On December 30, 2020, the Department published the 2020 Tip final rule updating § 531.56(e) largely incorporating the 2018–2019 guidance addressing situations where an employee performs both tipped and non-tipped duties (dual jobs portion of the 2020 Tip final rule). *See* 85 FR 86771.

¹ *See, e.g., Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 632 (9th Cir. 2018) (en banc); *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011).

On February 26, 2021, the Department published a final rule extending the effective date of the 2020 Tip final rule from March 1, 2021, until April 30, 2021, in order to allow it the opportunity to review issues of law, policy, and fact raised by the 2020 Tip final rule before it took effect. *See* 86 FR 11632. On March 25, 2021, in a second NPRM, the Department proposed to further extend the effective date of three portions of the 2020 Tip final rule. *See* 86 FR 15811. This delay provided the Department additional time to consider whether to withdraw and re-propose the dual jobs portion of the 2020 Tip final rule, and to complete a separate rulemaking addressing the two other portions of the rule. Having considered the dual jobs portion, the Department now believes that the 2020 Tip final rule may fall short of providing the intended clarity and certainty for employers and could harm tipped employees and non-tipped employees in industries that employ significant numbers of tipped workers. On April 29, 2021, the Department published a final rule confirming the delay as proposed and announcing that it would undertake a separate rulemaking on dual jobs. *See* 81 FR 22597.

The Department is now proposing to withdraw the dual jobs portion of the 2020 Tip final rule and to re-propose new regulatory language that it believes would provide more clarity and certainty for employers while better protecting employees. Specifically, the Department is proposing to amend its regulations to clarify that an employee is only engaged in a tipped occupation under 29 U.S.C. 203(t) when the employee either performs work that produces tips, or performs work that directly supports the tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time. Under the Department's proposal, work that "directly supports" tip-producing work is work that assists a tipped employee to perform the work for which the employee receives tips. In the proposed regulatory text, the Department explains that an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds, in the aggregate, 20 percent of the employee's hours worked during the workweek or (2) is performed for a continuous period of time exceeding 30 minutes. The Department believes it is important to provide a clear limitation on the amount of non-tipped work that tipped employees perform in support of

their tip-producing work, because if a tipped employee engages in a substantial amount of such non-tipped work, that work is no longer incidental to the tipped work, and thus, the employee is no longer employed in a tipped occupation. The Department requests comment on all aspects of its proposal, including its proposal to withdraw the dual jobs portion of the 2020 Tip final rule.

II. Background

A. FLSA Provisions on Tips and Tipped Employees

Section 6(a) of the FLSA requires covered employers to pay nonexempt employees a minimum wage of at least \$7.25 per hour. *See* 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to any "tipped employee" by taking a partial credit, known as a "tip credit," toward the minimum wage based on tips an employee receives. *See* 29 U.S.C. 203(m)(2)(A). An employer that elects to take a tip credit must pay the tipped employee a direct cash wage of at least \$2.13 per hour. The employer may then take a credit against its wage obligation for the difference, up to \$5.12 per hour, if the employees' tips are sufficient to fulfill the remainder of the minimum wage, provided that the employer meets certain requirements.

Section 3(t) defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. 203(t). The legislative history accompanying the 1974 amendments to the FLSA's tip provisions identified tipped occupations to include "waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (Feb. 22, 1974). The legislative history also identified "janitors, dishwashers, chefs, [and] laundry room attendants" as occupations in which employees do not customarily and regularly receive tips within the meaning of section 3(t). *See id.* Since the 1974 Amendments, the Department's guidance documents have identified a number of additional occupations, such as barbacks, as tipped occupations. *See, e.g.,* FOH 30d04(b). However, Congress left "occupation," and what it means to be "engaged in an occupation," in section 3(t) undefined. Thus, Congress delegated to the Department the authority to determine what it means to be "engaged in an occupation" that customarily and regularly receives tips. *See* Fair Labor Standards Amendments of 1966, Public

Law 89-601, 101, § 602, 80 Stat. 830, 830, 844 (1966).

B. The Department's "Dual Jobs" Regulation

The Department promulgated its initial tip regulations in 1967, the year after Congress first created the tip credit provision. *See* 32 FR 13575 (Sept. 28, 1967); Public Law 89-601, sec. 101(a), 80 Stat. 830 (1966). As part of this rulemaking, the Department promulgated a "dual jobs" regulation recognizing that an employee may be employed both in a tipped occupation and in a non-tipped occupation, providing that in such a "dual jobs" situation, the employee is a "tipped employee" for purposes of section 3(t) only while the employee is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. *See* 32 FR 13580-81; 29 CFR 531.56(e). At the same time, the regulation also recognizes that an employee in a tipped occupation may perform related duties that are not "themselves . . . directed toward producing tips." It uses the example of a server who "spends part of her time" performing non-tipped duties, such as "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." 29 CFR 531.56(e). In that example where the tipped employee performs non-tipped duties related to the tipped occupation for a limited amount of time, the employee is still engaged in the tipped occupation of a server, for which the employer may take a tip credit, rather than working part of the time in a non-tipped occupation. *See id.* Section 531.56(e) thus distinguishes between employees who have dual jobs and tipped employees who perform "related duties" that are not themselves directed toward producing tips.

C. The Department's Dual Jobs Guidance

Over the past several decades, the Department has issued guidance interpreting the dual jobs regulation as it applies to employees who perform both tipped and non-tipped duties. The Department first addressed this issue through a series of Wage and Hour Division (WHD) opinion letters. In a 1979 opinion letter, the Department considered whether a restaurant employer could take a tip credit for time servers spent preparing vegetables for use in the salad bar. *See* WHD Opinion Letter FLSA-895 (Aug. 8, 1979) ("1979 Opinion Letter"). Citing the dual jobs regulation and the legislative history

distinguishing between tipped occupations, such as server, and non-tipped occupations, such as chef, the Department concluded that “salad preparation activities are essentially the activities performed by chefs,” and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.*

A 1980 opinion letter addressed a situation in which tipped restaurant servers performed various non-tipped duties including cleaning and resetting tables, cleaning and stocking the server station, and vacuuming the dining room carpet. *See* WHD Opinion Letter WH-502 (Mar. 28, 1980) (“1980 Opinion Letter”). The Department reiterated language from the dual jobs regulation distinguishing between employees who spend “part of [their] time” performing “related duties in an occupation that is a tipped occupation” that do not produce tips and “where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties.” *Id.* Because in the circumstance presented the non-tipped duties were “assigned generally to the waitress/waiter staff,” the Department found them to be related to the employees’ tipped occupation. The letter suggested, however, that the employer would not be permitted to take the tip credit if “specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.” *Id.*

In 1985, the Department issued an opinion letter addressing non-tipped duties both unrelated and related to the tipped occupation of server. *See* WHD Opinion Letter FLSA-854 (Dec. 20, 1985) (“1985 Opinion Letter”). First, the letter concluded (as had the 1979 Opinion Letter) that “salad preparation activities are essentially the activities performed by chefs,” not servers, and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.* Second, the letter explained, building on statements in the 1980 Opinion Letter, that although a “tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the [servers’] regular duties and are assigned generally to the [server] staff,” if “specific employees are routinely assigned to maintenance-type work or . . . tipped employees spend a substantial amount of time in performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities.” *Id.* Under the circumstances described by the employer seeking an opinion—specifically, “one waiter or

waitress is assigned to perform . . . preparatory activities,” including setting tables and ensuring that restaurant supplies are stocked, and those activities “constitute[] 30% to 40% of the employee’s workday”—a tip credit was not permissible as to the time the employee spent performing those activities. *Id.*

WHD’s FOH is an “operations manual” that makes available to WHD staff, as well as the public, policies “established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” In 1988, WHD revised its FOH to add section 30d00(e) which distilled and refined the policies established in the 1979, 1980, and 1985 Opinion Letters. *See* WHD FOH Revision 563. According to the 1988 FOH entry, § 531.56(e) “permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities),” if those duties are “incidental” and “generally assigned” to tipped employees. *Id.* at 30d00(e). To illustrate the types of related, non-tip-producing duties for which employers could take a tip credit, the FOH listed “a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses,” the same examples included in § 531.56(e). *Id.* But “where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” Consistent with WHD’s interpretations elsewhere in the FLSA, the FOH noted a “substantial” amount of time spent performing general preparation or maintenance work as being “in excess of 20 percent,” creating a substantial but limited tolerance for this work. *Id.* This guidance recognized that if a tipped employee performs too much related, non-tipped work, the employee is no longer engaged in a tipped occupation.

WHD did not revisit its 80/20 guidance until more than 20 years later, when it briefly superseded its 80/20 guidance in favor of guidance that placed no limitation on the amount of duties related to a tip-producing occupation that may be performed by a tipped employee, “as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time

immediately before or after performing such direct-service duties.” *See* WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009). This guidance further stated that the Department “believe[d] that guidance [was] necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation” *Id.* Accordingly, it stated that the Department would consider certain duties listed in O*NET for a particular occupation to be related to the tip-producing occupation. *See id.* The guidance cited *Pellon v. Bus. Representation Int’l, Inc.*, 291 F. App’x 310 (11th Cir. 2008) (unpublished), *aff’d*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007), in which the district granted summary judgment to the employer based in part on the infeasibility of determining whether the employees spent more than 20 percent of their work time on such duties; significantly, however, the court believed such a determination was unnecessary because the employees had not shown that their non-tipped work exceeded that threshold. *See* 528 F. Supp. 2d at 1313–15. However, WHD later withdrew this guidance on March 2, 2009, and reverted to and followed the 80/20 approach for most of the next decade. *See* WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009); WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018).

Between 2009 and 2018, both the Eighth Circuit and the Ninth Circuit deferred to the Department’s dual jobs regulations and 80/20 guidance in the FOH. *See Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 632 (9th Cir. 2018) (en banc); *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011). Both courts of appeal concluded that the Department’s dual jobs regulation at 531.56(e) appropriately interprets section 3(t) of the FLSA which “does not define when an employee is ‘engaged in an [tipped] occupation.’” *Applebee’s*, 638 F.3d at 876, 879; *see also Marsh*, 905 F.3d at 623. Both courts further held that the Department’s 80/20 guidance was a reasonable interpretation of the dual jobs regulation. *See Marsh*, 905 F.3d at 625 (“The DOL’s interpretation is consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself.”); *Applebee’s*, 638 F.3d at 881 (“The 20 percent threshold used by the DOL in its Handbook is not inconsistent with § 531.56(e) and is a reasonable interpretation of the terms ‘part of [the] time’ and ‘occasionally’ used in that regulation.”).

In November 2018, WHD reinstated the January 16, 2009, opinion letter

rescinding the 80/20 guidance and articulating a new test. *See* WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018). Shortly thereafter, WHD issued FAB No. 2019–2, announcing that its FOH had been updated to reflect the guidance contained in the reinstated opinion letter. *See* FAB No. 2019–2 (Feb. 15, 2019), *see also* WHD FOH Revision 767 (Feb. 15, 2019). WHD explained that it would no longer prohibit an employer from taking a tip credit for the time an employee performed related, non-tipped duties as long as those duties were performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. *See* WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018), *see also* FOH 30d00(f)(3). WHD also explained that it would use O*NET, a database of worker attributes and job characteristics and source of descriptive occupational information,² to determine whether a tipped employee's non-tipped duties were related to the employee's tipped occupation. *See id.*

A large number of district courts have considered the 2018 Opinion Letter and 2019 FAB and declined to defer to the Department's interpretation of the dual jobs regulation in this guidance. Among other concerns, these courts have noted that the guidance: (1) Does not clearly define what it means to perform related, non-tipped duties “contemporaneously with, or for a reasonable time immediately before or after, tipped duties,” thus inserting “new uncertainty and ambiguity into the analysis,” *see, e.g., Flores v. HMS Host Corp.*, No. 18–3312, 2019 WL 5454647 at *6 (D. Md. Oct. 23, 2019), and companion case *Storch v. HMS Host Corp.*, No. 18–3322; (2) is potentially in conflict with language in 29 CFR 531.56(e) limiting the tip credit to related, non-tipped duties performed “occasionally” and “part of [the] time,” *see Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019); and (3) potentially “runs contrary to the remedial purpose of the FLSA—to ensure a fair minimum wage,” *see Berger v. Perry's Steakhouse of Illinois*, 430 F. Supp. 3d 397 (N.D. Ill. 2019).³ In

addition, some courts have also expressed doubts about whether it is reasonable to rely on O*NET to determine related duties. *See O'Neal*, 2020 WL 210801, at *7 (employer practices of requiring non-tipped employees to perform certain duties would then be reflected in O*NET, allowing employers to influence the definitions).⁴ After declining to defer to the Department's 2018–2019 guidance, many of these district courts have independently concluded that the 80/20 approach is reasonable, and applied a 20 percent tolerance to the case before them.⁵

D. The 2020 Tip Final Rule

The NPRM for the 2020 Tip final rule (2019 NPRM) proposed to codify the Department's 2018–2019 guidance regarding when an employer can continue to take a tip credit for a tipped employee who performs related, non-tipped duties. *See* 84 FR 53956, 53963 (Oct. 8, 2019). Although, as noted above, multiple circuit courts had deferred to the Department's 80/20 guidance, the Department opined in its 2019 NPRM that this guidance “was difficult for employers to administer and led to confusion, in part because employers lacked guidance to determine whether a particular non-tipped duty is ‘related’ to the tip-producing occupation.” *Id.* Some employer representatives raised similar criticism in their comments on the NPRM. In its comment on the 2019 NPRM, for instance, law firm Littler

2020); *Sicklesmith v. Hershey Ent. & Resorts Co.*, 440 F. Supp. 3d 391 (M.D. Pa. 2020); *O'Neal v. Denn-O'Neil*, No. 19–280, 2020 WL 210801 (N.D. Ohio Jan. 14, 2020); *Spencer v. Macado's*, 399 F. Supp. 3d 545 (W.D. Va. 2019); *Esry v. P.F. Chang's China Bistro*, 373 F. Supp. 3d 1205 (E.D. Ark. 2019); *Cope v. Let's Eat Out*, 354 F. Supp. 3d 976 (W.D. Mo. 2019).

A few other courts have followed the guidance. *See Rafferty v. Denny's Inc.*, No. 19–24706, 2020 WL 5939064 (S.D. Fla. Sept. 4, 2020); *Shaffer v. Perry's Restaurants, Ltd.*, No. 16–1193, 2019 WL 2098116 (W.D. Tex. Apr. 24, 2019).

⁴ District courts have also declined to defer to the 2018–19 guidance on the grounds that it did not reflect the Department's “fair and considered judgment,” because the Department did not provide a compelling justification for changing policies after 30 years of enforcing the 80/20 guidance. *See e.g., Williams*, 2020 WL 4692504, at *10; *O'Neal*, 2020 WL 210801, at *7; *see also* 85 FR 86771 (noting that the 2020 Tip final rule addressed this criticism by explaining through the notice-and-comment rulemaking process its reasoning for replacing the 80/20 approach with an updated related duties test).

⁵ *See, e.g., Rorie*, 485 F. Supp. 3d at 1042; *Sicklesmith*, 440 F. Supp. 3d at 404–05; *Belt*, 401 F. Supp. 3d at 536–37; *Esry v. P.F. Chang's*, 373 F. Supp. 3d at 1211; *Berger*, 430 F. Supp. 3d at 412; *Cope*, 354 F. Supp. 3d at 987; *Spencer*, 399 F. Supp. 3d at 554; *Roberson*, 2020 WL 7265860, at *7–*8; *Williams*, 2020 WL 4692504, at *10; *Esry v. OTB Acquisition*, 2020 WL 3269003, at *1; *Reynolds*, 2020 WL 2404904, at *6.

Mendelson argued that the 80/20 guidance was challenging to administer because it did not include a “comprehensive list of related duties or even a way to determine which duties were related”; among other concerns, it also argued that employers found it challenging to track employees' duties.⁶ Littler Mendelson and the National Restaurant Association (NRA) also argued that the 2018–2019 guidance was more consistent with the FLSA than the 80/20 guidance because the statute refers to tipped employees being “engaged in an occupation” in which they receive tips, 29 U.S.C. 203(t), and therefore does not distinguish between duties of a tipped employee for which employers can and cannot take a tip credit.⁷ However, the NRA argued that the Department's retention of a distinction between tipped and non-tipped duties was still a “flawed analytical approach.”

The 2020 Tip final rule amended § 531.56(e) to largely reflect the Department's guidance issued in 2018 and 2019 that addressed whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation. *See* 85 FR 86771. The 2020 Tip final rule reiterated the Department's conclusion from the 2019 NPRM that its prior 80/20 guidance was difficult to administer “in part because the guidance did not explain how employers could determine whether a particular non-tipped duty is ‘related’ to the tip-producing occupation and in part because the monitoring surrounding the 80/20 approach on individual duties was onerous for employers.” *Id.* at 86767. The Department also asserted that the 80/20 guidance “generated extensive, costly litigation.” *Id.* at 86761. The 2020 Tip final rule provided, consistent with the Department's 2018–2019 guidance, that “an employer may take a tip credit for all non-tipped duties an employee performs that meet two requirements. First, the duties must be related to the employee's tipped occupation; second, the employee must perform the related duties contemporaneously with the tip-producing activities or within a reasonable time immediately before or after the tipped activities.” *Id.* at 86767.

Rather than using O*NET as a definitive list of related duties, the final rule adopted O*NET as a source of guidance for determining when a tipped employee's non-tipped duties are related to their tipped occupation. Under the final rule, a non-tipped duty

⁶ WHD–2019–0004–0425.

⁷ WHD–2019–0004–0438.

² O*NET is developed under the sponsorship of the Department's Employment and Training Administration through a grant to the North Carolina Department of Commerce. *See* <https://www.onetcenter.org/overview.html>.

³ *See also Roberson v. Tex. Roadhouse Mgmt. Corp.*, No. 19–628, 2020 WL 7265860 (W.D. Ky. Dec. 10, 2020); *Rorie v. WSP2*, 485 F. Supp. 3d 1037 (W.D. Ark. 2020); *Williams v. Bob Evans Restaurants*, No. 18–1353, 2020 WL 4692504 (W.D. Pa. Aug. 13, 2020); *Esry v. OTB Acquisition*, No. 18–255, 2020 WL 3269003 (E.D. Ark. June 17, 2020); *Reynolds v. Chesapeake & Del. Brewing Holdings*, No. 19–2184, 2020 WL 2404904 (E.D. Pa. May 12,

is presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET. *See id.* at 86771. The 2020 Tip final rule included a qualitative discussion of the potential economic impacts of the rule's revisions to the dual jobs regulations but "[did] not quantify them due to lack of data and the wide range of possible responses by market actors that [could not] be predicted with specificity." *Id.* at 86776. The Department noted that one commenter, the Economic Policy Institute (EPI), provided a quantitative estimate of the economic impact of this portion of the rule but concluded that its estimate was not reliable. *See id.* at 86785. This final rule was published with an effective date of March 1, 2021, *see id.* at 86756; however, as explained below, the Department has extended the effective date for this part of the rule until December 31, 2021.

E. Legal Challenge to the 2020 Tip Final Rule

On January 19, 2021, before the 2020 Tip final rule went into effect, Attorneys General from eight states and the District of Columbia filed a complaint in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule, including that portion amending the dual jobs regulations. (*Pennsylvania* complaint or *Pennsylvania* litigation).⁸ The *Pennsylvania* complaint alleges that this portion of the 2020 Tip final rule is contrary to the FLSA. Specifically, the complaint alleges that the rule's elimination of the 20 percent limitation on the amount of time that tipped employees can perform related, non-tipped work contravenes the FLSA's definition of a tipped employee: An employee "engaged in an occupation in which [they] customarily and regularly" receive tips, 29 U.S.C. 203(t).⁹ According to the complaint, "when employees 'spend more than 20 percent of their time performing untipped related work' they are no longer 'engaged in an occupation in which [they] customarily and regularly receive[] . . . tips.'" ¹⁰

The complaint also alleges that that this portion of the 2020 Tip final rule is arbitrary and capricious for several reasons. First, the complaint alleges that the 2020 Tip final rule's new test for when an employer can continue to take

a tip credit for a tipped employee who performs related, non-tipped duties relied on "ill-defined" terms—"contemporaneously with" and "a reasonable time immediately before or after tipped duties"¹¹—which some district courts have also found to be unclear when construing the 2018–2019 guidance.¹² According to the complaint, the 2020 Tip final rule failed to "provide any guidance as to when—or whether—a worker could be deemed a dual employee during a shift or how long before or after a shift constitutes a 'reasonable time.'" ¹³ The complaint also alleges that the Department failed to offer a valid justification for replacing the 80/20 guidance with a new test for when an employer can take a tip credit for related, non-tipped duties. The complaint disputes the Department's conclusion in the 2020 Tip final rule that its former 80/20 guidance was difficult to administer, noting that courts consistently applied and, in many cases, deferred to the 80/20 guidance.¹⁴ The complaint argues that the 2020 Tip final rule's new test, in contrast, will invite "a flood of new litigation" due to its "murkiness" and its reliance on "ill-defined" terms.¹⁵

The complaint further alleges that the rule's use of O*NET to define "related duties" is "itself" arbitrary and capricious because O*NET "seeks to describe the work world as it is, not as it should be" and "does not objectively evaluate whether a task is actually related to a given occupation."¹⁶ According to the complaint, the use of O*NET to define related, non-tipped duties "dramatically expand[ed] the universe of duties that can be performed by tipped workers," thereby authorizing employer "conduct that has been prohibited under the FLSA for decades."¹⁷ Lastly, the complaint alleges that the Department "failed to consider or quantify the effect" that this portion of the rule "would have on workers and their families" in the rule's economic analysis and "disregard[ed]" the data and analysis provided by a

¹¹ *Id.* ¶ 128.

¹² *See, e.g., Belt*, 401 F. Supp. 3d at 533; *Flores*, 2019 WL 5454647, at *6.

¹³ *Commonwealth of Pennsylvania v. Scalia*, at ¶ 131; *see also id.* ¶ 129 ("The Department never provides a precise definition of 'contemporaneous,' simply stating that it means 'during the same time as' before making the caveat that it 'does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.'")

¹⁴ *See id.* ¶ 127; *see also id.* ¶ 41 (noting that many courts awarded *Auer* deference to the 80/20 guidance).

¹⁵ *Id.* ¶¶ 127–28.

¹⁶ *Id.* ¶ 115.

¹⁷ *Id.* ¶¶ 114–15.

commenter on the NPRM for the 2020 Tip final rule, the EPI.¹⁸ The complaint claims that these asserted flaws in the Department's economic analysis are evidence of a "lack of reasoned decision-making."¹⁹

F. Delay and Partial Withdrawal of the 2020 Tip Final Rule

On February 26, 2021, the Department delayed the effective date of the 2020 Tip final rule until April 30, 2021, to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule, as contemplated by the Regulatory Freeze Memorandum and OMB Memorandum M–21–14. *See* 86 FR 11632. Commenters who supported the proposed 60-day delay of the 2020 Tip final rule, including numerous advocacy organizations and the Attorneys General who filed the *Pennsylvania* lawsuit, urged the Department to specifically reconsider the portion of the 2020 Tip final rule that revised the Department's dual jobs regulations. *Id.* at 11633. EPI supported the proposed delay because it would give the Department time to reassess the Department's economic analysis of this portion of the 2020 Tip final rule, which it argued was flawed. *Id.* On March 25, 2021, the Department proposed to further delay the effective date of three portions of the 2020 Tip final rule, including the portion of the rule that amended the Department's dual jobs regulations to address the FLSA tip credit's application to tipped employees who perform tipped and non-tipped duties, until December 31, 2021. *See* 86 FR 15811 (Partial Delay NPRM). The Department received comments on the merits of the delay and on the merits of the 2020 Tip final rule itself. On April 29, 2021, the Department finalized the proposed partial delay. *See* 86 FR 22597 (Partial Delay final rule).

III. Discussion of Comments on the Partial Delay Rule

A. Comments Regarding the 2020 Tip Final Rule's Revisions to the Dual Jobs Regulations

Commenters who supported the Partial Delay NPRM raised multiple concerns with the substance of the dual jobs portion of the 2020 Tip final rule. In their comments in support of the Partial Delay NPRM, the Attorneys General who filed the *Pennsylvania* complaint and worker advocacy organizations raised legal and policy concerns similar to those raised in the

⁸ *See* Compl., *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258 (E.D. Pa.).

⁹ *Id.*, ¶¶ 87–89.

¹⁰ *Id.* ¶ 87 (citing *Belt*, 401 F. Supp. 3d at 526).

¹⁸ *Id.* at § I(C)(i), ¶¶ 108–9.

¹⁹ *Id.* ¶ 105.

Pennsylvania lawsuit: That the new test for when an employer can take a tip credit for related, non-tipped duties will encourage employers to shift more non-tipped work to tipped employees, depressing tipped employees' wages and possibly eliminating non-tipped jobs, that the new test does not reflect the statutory definition of a tipped employee, that the terms used in the new test are so amorphous that they will lead to extensive litigation, and that O*NET is not an appropriate tool to determine related duties. *See* 86 FR 22600. In its comment supporting the Partial Delay NPRM, EPI stated that the 2020 Tip final rule's revision to the dual jobs regulations created a "less protective" standard for tipped wages, replacing a firm 20 percent limitation on the amount of related, non-tipped duties that tipped employees could perform while being paid the tipped wage of \$2.13 per hour with "vague and much less protective" language. *Id.* EPI noted that because these new regulatory terms, such as "reasonable time," are not defined, they create an "ambiguity that would [be] difficult to enforce" and would create "an immense loophole that would be costly to workers." *Id.*

Commenters who supported the Partial Delay NPRM also raised concerns with how the dual jobs portion of the 2020 Tip final rule was promulgated, specifically, that the economic analysis may not have adequately estimated the impact of this portion of the rule. EPI suggested that the 2020 Tip final rule's economic analysis was flawed because it did not sufficiently estimate the economic impact on workers—as EPI did in a comment it submitted in the 2020 Tip rulemaking, which concluded that the rule "would allow employers to capture more than \$700 million annually from workers." *See id.* at 22600–01. The Attorneys General²⁰ and the National Employment Law Project (NELP)²¹ also argued in their comments in support of the Partial Delay NPRM that the Department's failure to quantitatively estimate the impact of the dual jobs portion of the 2020 Tip final rule or to consider the estimates of the rule's impact submitted by EPI and other groups in the course of that rulemaking is evidence that the rulemaking process was flawed. *See id.* at 22601.

The Department also received comments on the substance of the 2020 Tip final rule from organizations that opposed the Partial Delay NPRM. The NRA²² and Littler Mendelson's

Workplace Policy Institute (WPI)²³ argued that the 2020 Tip final rule reflects a better interpretation of the statutory term "tipped employee" than the 80/20 guidance because the FLSA refers to tipped employees being "engaged in an occupation" in which they receive tips, 29 U.S.C. 203(t), and therefore does not create any distinction between the tipped and non-tipped duties of the employee. *See id.* at 22602. WPI also argued that the 2020 Tip final rule, by removing the 20 percent limitation on related duties and using O*NET to define related duties, would be easier for employers to administer, and both WPI and the NRA argued that the 2020 Tip final rule would avoid the litigation that the 80/20 guidance generated. *See id.* Additionally, the NRA argued that EPI's criticism of the 2020 Tip final rule was flawed because its impact analysis used the Department's 80/20 guidance as its baseline instead of the Department's 2018–2019 guidance. *See id.* More generally, the NRA noted that the restaurant industry has been "uniquely hurt" by the pandemic and stated that, in this challenging economic environment, restaurants need "clear guidelines" and "predictability." *See* NRA.

In the Partial Delay final rule, the Department stated that it shares the concerns of commenters who supported the proposed partial delay that the new test articulated in the 2020 Tip final rule for when an employer can take a tip credit for a tipped employee who performs related, non-tipped work may be contrary to the FLSA. Specifically, the Department stated that it shared commenters' concerns that the new test may not accurately identify when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation under section 3(t) of the statute. *See* 86 FR 22606. Additionally, the Department stated that it shares commenters' concerns that the economic analysis may not have adequately estimated the impact of this portion of the rule and that allowing this portion of the rule to go into effect without further consideration of its impact could potentially lead to a loss of income for workers in tipped industries. *See id.* at 22606–07.

B. Recommendations for Future Rulemaking

Commenters who supported the Partial Delay NPRM also urged the Department to engage in further rulemaking to better address the issue of when an employer can continue to take

a tip credit for tipped employees who perform tipped and non-tipped work. All of the advocacy organizations that supported the Partial Delay NPRM urged the Department to withdraw the portion of the 2020 Tip final rule that revised its dual jobs regulations and to re-propose revisions no less protective of workers than the 80/20 guidance. *See, e.g.,* NELP;²⁴ Restaurant Opportunities Center United (ROC United);²⁵ National Urban League;²⁶ National Women's Law Center;²⁷ One Fair Wage.²⁸ EPI also encouraged the Department to create a rule that is "stronger" than the previous 80/20 guidance "that further clarifies, and limits, the amount of non-tipped work for which an employer can claim a tip credit." *See* 86 FR 22600. EPI suggested that the Department could, among other things, consider tightening the definitions of related and unrelated duties, propose to adopt standards such as those adopted in states such as New York that, for example, bar an employer from taking a tip credit on any day during which a tipped employee spends more than 20 percent of their time in a non-tipped occupation, and/or promulgate enhanced notice and recordkeeping requirements. *See id.*

In its comments supporting the Partial Delay, NELP also stated that a delayed effective date of the dual jobs portion of the rule would give the Department the opportunity to consider how the rule "improperly narrows the protections of the FLSA for tipped workers in a variety of fast-growing industries including delivery, limousine and taxi, airport workers, parking, carwash, valet, personal services and retail, in addition to restaurants and hospitality." *See id.* at 22601.

Although WPI opposed the proposed delay of the dual jobs portion of the 2020 Tip final rule, it included some recommendations for the Department to consider in the event that it ultimately proposed to withdraw and revise this portion of the rule. WPI stated that any alternative should include "concrete guidance on where the lines are to be drawn," adding that, in its view, "there has been no clear definition of what duties are 'tipped' as opposed to merely 'related' or 'non-tipped.'" *See id.* at 22602. WPI further stated that any "quantitative limit" on duties that a tipped employee can perform "must precisely identify which duties fall on either side of the line," recognize that

²⁰ WHD–2019–0004–0420.

²¹ WHD–2019–0004–0453.

²² WHD–2019–0004–0504.

²³ WHD–2019–0004–0519.

²⁴ WHD–2019–0004–0515.

²⁵ WHD–2019–0004–0524.

²⁶ WHD–2019–0004–0516.

²⁷ WHD–2019–0004–0520.

²⁸ WHD–2019–0004–0523.

occupations can evolve over time, and draw upon O*NET as a resource. *See id.*

IV. Need for Rulemaking

Delaying the effective date of this portion of the 2020 Tip final rule has provided the Department the opportunity to consider whether § 531.56(e) of the 2020 Tip final rule accurately identifies when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation, such that an employer can continue to take a tip credit for the time the tipped employee spends on such non-tipped work, and whether the 2020 Tip final rule adequately considered the possible costs, benefits, and transfers between employers and employees related to the adoption of the standard articulated therein. It has also allowed the Department to further consider the comments it received on this portion of the rule in response to its February 5, 2021 proposal to delay the effective date of the 2020 Tip final rule and its March 25, 2021 proposal to delay the effective date of this portion of the rule and to evaluate the legal concerns with this portion of the rule that were raised in the *Pennsylvania* complaint.

In light of the comments received on both delay NPRMs and the allegations raised in the *Pennsylvania* complaint, as well as a review and reconsideration of questions of law, policy, and fact, the Department believes that it is necessary to revisit that portion of the 2020 Tip final rule addressing whether an employee who is performing non-tipped duties is still engaged in a tipped occupation. Specifically, the Department is concerned that the lack of clear guidelines in the 2020 Tip final rule both failed to achieve its goal of providing certainty for employers and created the potential for abuse of the tip credit to the detriment of low-wage tipped workers. In this NPRM, the Department has further reviewed data provided by commenters, including conducting a thorough analysis on transfer estimates using that data. The Department requests comment on withdrawing the dual jobs portion of the 2020 Tip final rule.

A. The 2020 Tip Final Rule Did Not Define Its Key Terms

As noted above, the Department stated that one of its reasons for departing from the 80/20 guidance in the 2020 Tip final rule was that it “generated extensive, costly litigation.” 85 FR 86761. In their comments in opposition to the Partial Delay NPRM, the NRA and WPI argued that the 2020 Tip final rule created a standard that was less susceptible to litigation than

the 80/20 guidance. 86 FR 22606. However, the *Pennsylvania* litigants noted that the 2020 Tip final rule does not clearly define either “contemporaneously” or the phrase “for a reasonable time immediately before or after” and thus is “certain to cause a flood of new litigation.”²⁹ Commenters who supported the Partial Delay NPRM echoed this concern. *See* 86 FR 22600. After consideration, the Department believes that the lack of clear definitions of these key terms may undermine the stated goals of the 2020 Tip final rule.

For example, although the 2020 Tip final rule posited that the requirement that related duties be performed “contemporaneously” is “not difficult to administer in practice,” the Department now believes that the rule’s failure to provide a clear definition of the term may undermine the utility of the rule. *See* 85 FR 86768. Instead, as the *Pennsylvania* litigants noted, the 2020 Tip final rule both stated that the term “contemporaneously” means “during the same time as” and also that it “does not necessarily mean that the employee must perform tipped and non-tipped at the exact same moment in time.” *Id.* These potentially conflicting definitions may have caused confusion for employers and tipped employees alike. Additionally, by stating that a task that is performed “contemporaneously” does not have to be performed at the same time, the Department blurred the distinction between tasks performed contemporaneously and those performed “for a reasonable time immediately before or after” the performance of tipped duties. *See, e.g., id.* at 86769 (describing a scenario in which a bellhop works 48 minutes of every hour on tipped duties and 12 minutes of every hour on related, non-tipped duties as illustrating the new regulatory concept of work that is performed “for a reasonable time immediately before or after” the performance of tipped duties).

Although the 2020 Tip final rule stated that related duties could be performed “for a reasonable time immediately before or after” performing tipped duties, the rule also did not provide a specific definition for the term “reasonable.” In justifying the Department’s decision to use the term, the 2020 Tip final rule stated that “the concept of reasonableness is a cornerstone of modern common law and is familiar to employers in a variety of contexts.” *See* 85 FR 86768. Even if employers are familiar with the general concept of “reasonableness,” it is not

clear from the 2020 Tip final rule how reasonableness would be defined in the context of that rule—determining how long a tipped employee could perform non-tipped, related duties—and the reference to common law implicitly acknowledged that those boundaries would be left to the courts to draw.

The Department believes that because the 2020 Tip final rule did not define these key terms, the 2020 Tip final rule will invite rather than limit litigation in this area, and thus may not support one of the rule’s stated justifications for departing from the 80/20 guidance. Furthermore, a key justification for the 2020 Tip final rule was that it would be easier for employers to administer—but the absence of clear guidelines regarding the boundaries of “reasonable” means that employers would still face uncertain litigation risk. As noted above, the Department seeks comments on the merits of withdrawing the dual jobs portion of the 2020 Tip final rule; in particular, it seeks comments on the extent to which definitions of the key terms used in the dual jobs portion of the 2020 Tip final rule provide clarity and certainty, as compared with the proposed terminology the Department proposes herein.

B. Concerns About Using O*NET To Identify “Related” Duties

In addition to not specifically defining key terms, the Department is concerned that the 2020 Tip final rule’s reliance on O*NET to identify “related” duties may be flawed. As discussed above, the 2020 Tip final rule uses occupational task listings from O*NET to identify which non-tipped duties, when performed for a limited or at a certain time, are part of an employees’ tipped occupation. O*NET, however, is a tool for career exploration. *See* www.onetonline.org. It was not created to identify employer’s legal obligations under the FLSA. The Department now believes that O*NET may not be an appropriate instrument to delineate the duties that are part of a tipped occupation for which an employer may take a tip credit.

O*NET uses data obtained in part by asking employees which duties their employers are requiring them to perform.³⁰ As a result, when employers require tipped employees to perform the work of a non-tipped occupation, O*NET may reflect these duties on the task list for their tipped occupation even though they are not the tasks of the tipped occupation. For example, the

²⁹ *Commonwealth of Pennsylvania v. Scalia*, at ¶ 128.

³⁰ More detailed information about O*NET’s data collection can be found at <https://www.onetcenter.org/ombclearance.html>.

Pennsylvania litigants noted that, at the time of their complaint, O*NET included cleaning bathrooms as tasks of servers, notwithstanding the Department's longstanding position that these duties are not part of the tipped occupation of a server. See Complaint, *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258, ¶ 117 (E.D. Pa., Jan. 19, 2021); see also Br. for Department of Labor as Amicus, at 18, 18 n.6, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011). At the same time, as commenters on the 2019 NPRM noted, O*NET may not reflect all of the duties that are part of a tipped occupation. See Inspire Brands;³¹ National Restaurant Association.³²

In response to concerns that O*NET may not accurately capture the non-tipped duties that are part of tipped occupations, the 2020 Tip final rule provided that a non-tipped duty is merely presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET. See 85 FR 86771. Regarding this presumption, the Department specified that when “industry-wide practices and trends demonstrate that a listed duty is not actually related to the tipped occupation, or that an unlisted duty is actually related to that occupation, then employers would not be able to rely on O*NET” in that case. See *id.* at 86772. As a result, the Department acknowledged, the regulation in the final rule does not afford the “certainty” that the Department sought to provide when it proposed to codify its subregulatory guidance in the 2019 NPRM. *Id.*

After further consideration, the Department has determined that this uncertainty could potentially harm both employers and employees. Although WPI noted in its comment to the Partial Delay NPRM that employers can simply review O*NET's task lists to determine if a particular non-tipped duty is related to a tipped occupation, this is not necessarily the case under the 2020 Tip final rule; as noted above, “industry-wide practices and trends” may show that a task not listed on O*NET is a related duty. See *id.* at 86722. The Department now believes, however, that the rule's reference to “industry-wide practices and trends” is insufficient guidance for employers or employees to determine whether a duty is “actually related to the tipped occupation,” notwithstanding its inclusion in (or absence from) O*NET. As a result, the Department believes that the 2020 Tip final rule may not provide clarity in

defining “related duties,” and fails to support the rule's stated justification for departing from the previous 80/20 guidance because it was “difficult to administer” due to the problems with “categorizing of tasks.” See *id.* at 86770. Given this, the Department is proposing a new functional test for identifying which non-tipped duties, when performed for a limited time, can be part of an employee's tipped occupation. The Department seeks comments on the use of O*NET in the dual jobs portion of the 2020 Tip final rule.

C. Harm to Workers

The Department shares the concerns raised in comments to the Partial Delay that enacting the dual jobs portion of the 2020 Tip final rule could harm tipped employees and non-tipped employees in industries that employ significant numbers of tipped workers. The Department is particularly concerned that the lack of clearly defined limits regarding when employers can continue to take a tip credit for tipped employees who perform related, non-tipped work could lead to employers shifting more non-tipped work to employees in tipped occupations. This concern is particularly acute during the COVID-19 pandemic, when, as ROC United noted in its comment on the Partial Delay NPRM, many restaurants may have shifted a significant portion of their tipped employees to perform more non-tipped work.³³ In their complaint, the *Pennsylvania* litigants cited to data from the Bureau of Labor Statistics (BLS) showing that servers in Massachusetts, Pennsylvania, and Illinois earn less than half the average annual income of workers in each state; for nail technicians, annual incomes were between 40 and 43 percent of the state average.³⁴ If employers require tipped

workers to perform more non-tipped work outside their tipped occupation, these low-wage workers' earnings could be reduced even further. As NELP and other advocacy organizations noted, if employers shift non-tipped work to tipped employees for whom they take a tip credit, this could also harm employees in non-tipped occupations. Specifically, this could “drive down wages for—or even eliminate—back-of-house positions in restaurants, and related maintenance and prep jobs in other workplaces like hotels, carwashes and parking lots, and service establishments.” See NELP;³⁵ see also Oxfam;³⁶ NWLC;³⁷ ROC United;³⁸ National Urban League.³⁹

As the NRA noted in its comment on the Partial Delay NPRM, employers in the restaurant industry have also been hit hard by COVID-19. The Department appreciates the strong desire of restaurants, particularly small and independently-owned restaurants, for certainty as they recover from the impact of the pandemic. However, as noted above, the Department is concerned that the 2020 Tip final rule's test for when an employer can continue to take a tip credit for related, non-tipped duties did not provide such certainty: The rule uses terms that may not be sufficiently clearly defined and may have failed to provide certainty when defining “related duties.” Upon consideration of the comments received regarding the Partial Delay NPRM, the Department believes that revisions to the dual jobs portion of the 2020 Tip final rule are needed to better protect workers and to provide clarity to employers and workers alike. The Department seeks additional comments on the potential economic impact of the dual jobs portion of the 2020 Tip final rule on workers. The Department also seeks comments on whether the dual jobs portion of the 2020 Tip final rule provides enough clarity to employers and workers regarding when employers can continue to take a tip credit for non-tipped duties performed by tipped employees.

V. Proposed Regulatory Revisions

The Department proposes to withdraw and amend the dual jobs regulation at § 531.56(e) to define when an employee is engaged in a tipped occupation for purposes of section 3(t) of the FLSA. As explained above, section 3(t) of the FLSA defines a

³³ WHD-2019-0004-0491.

³⁴ Specifically, the *Pennsylvania* litigants noted that according to the BLS's May 2020 Occupational Employment and Wage Statistics (OEWS) survey, average annual incomes for servers in Massachusetts, Pennsylvania, and Illinois were \$32,970, \$25,380, and \$23,340, respectively; for nail technicians, average annual incomes were \$28,620, \$21,630, and \$24,580. See *Commonwealth of Pennsylvania v. Scalia*, ¶ 150. According to the May 2020 OEWS, average annual incomes in Massachusetts, Pennsylvania, and Illinois were \$70,010, \$53,950, and \$58,070, respectively. See BLS, May 2020 State Occupational Employment and Wage Estimates Massachusetts, https://www.bls.gov/oes/current/oes_ma.htm#00-0000; May 2020 State Occupational Employment and Wage Estimates Pennsylvania, https://www.bls.gov/oes/current/oes_pa.htm; May 2020 State Occupational Employment and Wage Estimates Illinois, https://www.bls.gov/oes/current/oes_il.htm#00-0000. BLS notes that its “May 2020 estimates do not fully reflect the impact of the COVID-19 pandemic.” Technical Notes for May 2020 OES Estimates, https://www.bls.gov/oes/current/oes_tec.htm.

³¹ WHD-2019-0004-0456.

³² WHD-2019-0004-0438.

³⁵ WHD-2019-0004-0515.

³⁶ WHD-2019-0004-0503.

³⁷ WHD-2019-0004-0520.

³⁸ WHD-2019-0004-0524.

³⁹ WHD-2019-0004-0516.

“tipped employee” for whom an employer may take a tip credit as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. 203(t). As also explained above, since it was first promulgated in 1967, § 531.56(e) has recognized that an employee may be employed by the same employer in both a tipped occupation and in a non-tipped occupation.

A straightforward dual jobs scenario exists when an employee is hired by the same employer to perform more than one job, only one of which is in a tipped occupation: For example, when an employee is employed by the same employer to work both as a server and a maintenance person. A dual jobs scenario also exists when an employee is hired to do one job but is required to do work that is not part of that occupation: For example, when an employee is hired as a server but is required to do building maintenance.

Yet another dual jobs scenario exists where an employee is hired to work in a tipped occupation but is assigned to perform non-tipped work that directly supports the tipped producing work for such a significant amount of time that the work is no longer incidental to the tipped occupation and thus, the employee is no longer employed in the tipped occupation. From 1988 to 2018, the Department’s guidance, in recognition of the fact that every tipped occupation usually includes a limited amount of related, non-tipped work, provided a tolerance whereby employers could continue to take a tip credit for a period of time when a tipped employee performed non-tipped work that was related to the tipped occupation. The Department’s guidance also recognized, however, that it was necessary to cap the tolerance at a certain amount of non-tipped work, because at some point, if a tipped employee performs too much non-tipped work, even if that work were related to the tipped occupation, the work was no longer incidental to the tipped work and thus the employee was no longer engaged in a tipped occupation. As the Department explained in legal briefs defending its 80/20 guidance, particularly where the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, providing protections to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute is essential to prevent abuse.

As noted above, past criticisms of the Department’s 80/20 guidance from employer representatives included that the policy was contrary to the FLSA, and that it was difficult for employers to administer because it required employers to monitor employees’ duties and did not provide sufficient guidance for employers to determine whether a particular non-tipped duty was “related” to the tip-producing occupation. In comments received on the Partial Delay Rule, for instance, the NRA expressed its support for the 2020 Tip final rule’s revision to the dual jobs regulation because, in its view, the new test avoided this problem and was consistent with the plain statutory text of the FLSA, which permits employers to take a tip credit based on whether an employee is employed to work in a tipped occupation, not whether the employee is performing certain kinds of duties within the tipped occupation.⁴⁰ However, as the Eighth Circuit recognized in *Applebee’s*, Congress did not define “occupation” or what it means to be “engaged in an occupation” in section 3(t), leaving that for the Department to interpret. *See Applebee’s*, 638 F.3d at 879. In other enforcement contexts, the Department recognizes that job titles alone cannot be determinative, *see, e.g.*, 29 CFR 541.2; thus, merely because someone is hired to work as a server does not mean that they are always “engaged in the occupation” of a server. Furthermore, as explained above, the dual jobs test set forth in the 2020 Tip final rule also distinguished between related and unrelated duties, and therefore did not fully address the concern advanced by the NRA about the kinds of duties a tipped employee performs.

Additionally, many courts upheld the 80/20 guidance because it provided an essential backstop to prevent abuse of the tip credit and, conversely, criticized the dual jobs test set forth in the Department’s 2018–2019 guidance, which was largely codified by the 2020 Tip final rule, as being more difficult to administer than the 80/20 guidance.⁴¹ Like some commenters that supported the Partial Delay rule and the *Pennsylvania* litigants, courts have found that the parameters of the 2020 Tip final rule’s test are so broad and indeterminate that they do not sufficiently define when an employee is employed in a tipped occupation within the meaning of section 3(t) of the FLSA, and that O*NET is not an appropriate tool to use to identify related duties because it catalogues the duties that

employees have been required to perform rather than the duties that fall within the definition of an occupation.⁴²

The Department believes that it is important to retain the longstanding regulatory dual jobs language addressing a straightforward dual jobs situation, where one employee is employed to perform two separate jobs, only one of which is in a tipped occupation. The Department also believes that it is important for its regulations to address the dual jobs scenario where a tipped employee is performing so much non-tipped work even though that non-tipped work is performed in support of the tipped work, that the work is no longer incidental and thus the employee is no longer employed in a tipped occupation. The Department rejects the argument put forth by the NRA and WPI that a regulation that analyzes a tipped employee’s duties and determines when a tip credit should be permitted and not permitted is inconsistent with the statutory language of 3(t), which says that an employer can take a tip credit for an employee who is employed in a tipped occupation. This argument fails to take into account the multiple scenarios outlined above, where an employer hires someone into a tipped occupation but then requires them to perform work outside of the occupation or requires the employee to perform so much non-tipped work that it can no longer be considered part of the tipped occupation.

Because concerns about its dual jobs tests have been identified over the years—both with its prior subregulatory guidance and the 2020 Tip final rule—the Department in this rulemaking is proposing a new test that the Department believes will address the concerns articulated about its prior tests, will be easier to administer, provide employers with more certainty, reduce litigation, and will protect tipped workers against abusive pay practices. In developing this proposed test, the Department also took into consideration the recommendations of organizations that commented on the Partial Delay NPRM, including the recommendation of numerous advocacy organizations that the Department re-propose a test no less protective than the 80/20 guidance and WPI’s recommendation that the Department “precisely identify” the duties for which employers can and cannot take a tip credit if it engages in further rulemaking. The Department believes that its proposed test will better identify when an employer can continue to take a tip credit for the time tipped

⁴⁰ WHD–2019–0004–0504.

⁴¹ *See supra* note 4.

⁴² *See supra* note 3.

employees spend on tasks that do not themselves produce tips but support the tip-producing work, and when an employer cannot take a tip credit for this work because the time spent performing these tasks is so great that work is no longer incidental and thus the employee is no longer engaged in a tipped occupation. Congress delegated to the Department the authority to determine what it means to be “engaged in an occupation” that customarily and regularly receives tips. *See* Fair Labor Standards Amendments of 1966, Public Law 89–601, § 101, § 602, 80 Stat. 830, 830, 844 (1966). The Department has decades of outreach, compliance assistance, stakeholder engagement, and enforcement experience in this area and has relied on that experience to develop a proposed test that provides clarity in determining what work an employer may take a tip credit for and also the flexibility to address unique workplaces and changing occupations. Additionally, the Department believes the proposed test, because it provides clear and specific guidance, will ensure fair and consistent application of the tip credit in instances where tipped employees perform non-tipped duties in support of their tipped work.

The new test proposed in this rulemaking permits an employer to continue to take a tip credit for its tipped employees when they are performing work that is part of the tipped occupation. Work that is part of the tipped occupation includes any work that produces tips, as well as any work that directly supports the tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. To address the criticisms of its past rules that the Department has used largely undefined terms such as “related duties”, or used unhelpful tools such as O*NET, to determine the sorts of duties that fall within the tipped occupation, the new test proposed in this rulemaking provides a number of examples to illustrate the kinds of tasks that would be included in each category of work covered by the regulation: Work that is part of the tipped occupation, which includes a non-substantial amount of directly supporting work, as well as work that is not part of the tipped occupation.

A. Proposed § 531.56(e)—Dual Jobs

Proposed § 531.56(e) would retain the longstanding regulatory dual jobs language which provides that when an individual is employed in a tipped occupation and a non-tipped occupation, the tip credit is available only for the hours the employee spends

working in the tipped occupation. The Department also proposes to make this section gender-neutral by using terms such as “server” and “maintenance person.”

B. Proposed § 531.56(f)

Proposed § 531.56(f) defines what it means for an employee to be engaged in a tipped occupation under section 3(t) of the FLSA. Specifically, an employee is engaged in a tipped occupation when they either perform work that produces tips, or perform work that directly supports the tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. Because an employer may not take a tip credit for work that is not part of the tipped occupation, proposed § 531.56(f) defines the relevant term “tipped occupation” specifically and provides examples of tasks that fall into those categories.

The Department believes that these examples will assist employers and employees in understanding the parameters of those terms and will help ensure consistent application of the test. The proposed regulation lists tasks in three occupations—servers, bartenders, and nail technicians—that would fall within the three categories of work set out in the regulations. For example, the proposed regulations explain that a server’s tip-producing work includes waiting on tables, work that directly supports the server’s tip-producing work includes cleaning the tables to prepare for the next customers, and work which is not part of a server’s occupation includes food preparation and cleaning bathrooms. A bartender’s tip-producing work includes making and serving drinks and talking to customers, work that directly supports the work includes preparing fruit to garnish the prepared drinks, and work that is not part of a bartender’s occupation includes preparing food and cleaning the dining room. Finally, the proposed rule explains that a nail technician’s tip-producing work includes performing manicures and pedicures, work that directly supports the work of a nail technician includes cleaning pedicure baths between customers, and work that is not part of the nail technician’s occupation includes ordering supplies for the nail salon. While not an exhaustive list, the Department believes that these examples set clear parameters for how those three categories of work are defined and applied.

Proposed § 531.56(f)(1)(i) would permit an employer to take a tip credit for the employee’s performance of work that is *part of the tipped occupation*,

defined as work that produces tips. As explained above, the proposed regulation provides specific examples of tip-producing work for three specific occupations, which illustrate that tip-producing work in many instances is work which requires direct service to customers. In addition to the tasks listed in the proposed regulation, other examples of tip-producing work would include a parking attendant’s work parking and retrieving cars, and accepting payment for the same, a hotel housekeeper’s work cleaning hotel rooms, and bussers’ tip-producing work would include filling water glasses and clearing dishes from tables. However, not all tip-producing work involves direct customer service. A busser’s tip-producing work, for example, would also include work, such as putting new linens on tables that is done in support of other tipped employees, such as servers. The Department recognizes that tipped employees in different occupations may have different tip-producing work and requests comment on its definition of tip-producing work and these examples, and seeks input on other occupations and examples that the Department should consider.

Proposed § 531.56(f)(1)(ii) and (1)(iii) would address when and to what extent an employer can continue to take a tip credit for a tipped employee’s work that does not itself generate tips but that supports the tip-producing work of the tipped occupation because it assists a tipped employee to perform the work for which the employee receives tips. As proposed, § 531.56(f)(1)(ii) defines this supportive work as work that *directly supports* tip-producing work, and explains that this work can be considered to be part of the tipped occupation provided that it is not performed for a substantial amount of time.

The Department believes that defining this as work that “directly supports” the tip-producing work is more specific and therefore more helpful than referring to these tasks as duties that are related to the tipped occupation. The Department believes that the “related duties” terminology used in past tests may have inadvertently caused confusion because it could be interpreted to encompass duties that are only remotely related to the tipped occupation, particularly because the Department provided only a few examples of the type of work the Department intended to include in this term. In contrast, the proposed new rule’s limited tolerance for non-tipped work that “directly supports” tip-producing work, which in turn is defined as work that assists a tipped employee to perform the work for which

the employee receives tips, provides a more concrete and specific definition of the term.

The examples included in the proposed regulatory text are not the only tasks that the Department would consider to be directly supporting work under the new test. For example, work that directly supports the work of a server would also include folding napkins, preparing silverware, and garnishing plates before serving the food to customers. Sweeping under tables would be considered to be directly supporting work if it is performed in and limited to the dining room because keeping the serving area clean assists the performance of a server's tip-producing work. Likewise, work that directly supports the work of a bartender would also include wiping down the surface of the bar and tables in the bar area, cleaning bar glasses and implements used to make drinks behind the bar, arranging the bottles behind the bar, and briefly retrieving from a storeroom a particular beer, wine, or liquor, and supplies such as ice and napkins. Work that directly supports the work of a nail technician would also include cleaning manicure tools, cleaning the floor of the nail salon, and scheduling client appointments and taking customer payments. Work that directly supports the tip-producing work of a parking attendant would include moving cars in a parking lot or parking garage to facilitate the parking of patrons' cars. Work that directly supports the tip-producing work of a hotel housekeeper would include stocking the housekeeping cart. These examples illustrate the nexus between the tip-producing work and the supporting work that is required to conclude that the supporting work directly supports the tip-producing work within the meaning of the proposed regulation. The proposed test allows for some flexibility in determining the nexus between the tip-producing work and the directly supporting work. The Department seeks comment on these examples and seeks input on other occupations and examples that the Department should consider.

Proposed § 531.56(f)(1)(iii) would define *substantial amount of time* to include two categories of time. Under proposed § 531.56(f)(1)(iii), an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds 20 percent of the hours worked during the employee's workweek or (2) is performed for a continuous period of time exceeding 30

minutes. Under proposed § 531.56(f)(1)(iii)(A), if a tipped employee spends more than 20 percent of their workweek performing directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek. Under proposed § 531.56(f)(1)(iii)(B), if a tipped employee spends a continuous, or uninterrupted, period of time performing directly supporting work that exceeds 30 minutes, the employer cannot take a tip credit for that entire period of time that was spent on such directly supporting work. The Department believes that these two measurements of time reflect the manner in which tipped employees are most likely to conduct non-tipped, directly supporting work: On the one hand, tipped employees may do an incidental amount of non-tipped, directly supporting work that is interspersed with their tip-producing work throughout the workday, and on the other hand, tipped employees may be assigned non-tipped, directly supporting work for distinct blocks of time. The Department believes that measuring a "substantial amount of time" in this way provides a uniform and accurate measure of when a tipped employee is still engaged in a tipped occupation such that an employer can pay a reduced cash wage for the time spent on that work, but requests comment on this proposed test.

The first prong of the Department's proposed test provides a tolerance that permits an employer to continue taking a tip credit for some part of the work that its tipped employees perform which directly supports their tip-producing work. However, the Department is proposing in its test to limit the amount of this non-tipped work, in recognition that if a tipped employee engages in a substantial amount of such work, the employee is no longer employed in a tipped occupation. The Department has thus proposed, in part, to define "substantial amount of time" as meaning more than 20 percent of the hours worked in a workweek. A 20 percent limitation is consistent with various other FLSA provisions, interpretations, and enforcement positions setting a 20 percent tolerance for work that is incidental to but distinct from the type of work to which an exemption applies.⁴³ The Department believes this

⁴³ See, e.g., 29 U.S.C. 213(c)(6) (permitting 17-year-olds to drive under certain conditions, including that the driving be "occasional and incidental," and defining "occasional and incidental" to, *inter alia*, mean "no more than 20 percent of an employee's worktime in any workweek"); 29 CFR 786.100, 786.150, 786.1,

tolerance is also reasonable and consistent with the Department's previous practice under the 80/20 guidance.

As explained above, prior to 2018, federal courts deferred to the Department's 80/20 guidance, including both the Eighth and the Ninth Circuits. See *Applebee's*, 638 F.3d at 879–81; *Marsh*, 905 F.3d at 623; see also *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014) (describing underlying substantive legal issues by relying on Department's 80/20 guidance and *Applebee's*). District courts also deferred to and relied on the Department's interpretation of the dual jobs regulation.⁴⁴ Even after the Department rescinded the 80/20 guidance, most federal courts to consider the issue have declined to defer to the new interpretation. As explained above, many of those district courts independently determined that a 20 percent tolerance is a reasonable interpretation of the dual jobs regulation.⁴⁵ The Department thus believes that 20 percent of an employee's workweek is an appropriate tolerance for non-tipped work that is part of the tipped employee's occupation. The Department seeks comments, however, on whether a different portion of the employee's workweek would be appropriate or if another metric would be more appropriate.

In addition to the 20 percent limitation, the proposed regulation also defines "substantial amount of time" to

786.200 (nonexempt work for switchboard operators, rail or air carriers, and drivers in the taxicab business will be considered "substantial if it occupies more than 20 percent of the time worked by the employee during the workweek"); 29 CFR 552.6(b) (defining "companionship services" that are exempt from FLSA requirements to include "care" only if such "care . . . does not exceed 20 percent of the total hours worked per person and per workweek").

⁴⁴ See, e.g., *Alverson v. BL Rest. Operations LLC*, No. 16–849, 2017 WL 3493048, at *5–6 (W.D. Tex. Aug. 8, 2017), *rep. & rec. adopted*, 2018 WL 1057045 (W.D. Tex. Feb. 22, 2018); *White v. NIF Corp.*, No. 15–322, 2017 WL 210243, at *4 (S.D. Ala. Jan. 18, 2017); *Romero v. Top-Tier Colorado LLC*, 274 F. Supp. 3d 1200, 1206 (D. Colo. 2017); *Knox v. Jones Group*, 201 F. Supp. 3d 951, 960–61 (S.D. Ind. 2016); *Langlands v. JK & T Wings, Inc.*, No. 15–13551, 2016 WL 2733092, at *3 (E.D. Mich. May 11, 2016); *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 733–34 (D.S.C. 2015); *Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572, 582–84 (S.D.N.Y. 2015); *Schaefer v. Walker Bros. Enters.*, No. 10–6366, 2014 WL 7375565, at *3 (N.D. Ill. Dec. 17, 2014); *Holder v. MJDE Venture, LLC*, No. 08–2218, 2009 WL 4641757, at *3–4 (N.D. Ga. Dec. 1, 2009).

⁴⁵ The courts reasoned that this limitation is consistent with the qualifiers "occasionally," "part of [the] time," found in § 531.56(e). See, e.g., *Belt*, 401 F. Supp. 3d at 536–37; *Rorie*, 485 F. Supp. 3d at 1042; *Berger*, 430 F. Supp. 3d at 412; *Roberson*, 2020 WL 7265860, at *7–*8.

include any continuous period of time that exceeds 30 minutes. This proposal addresses concerns with the 80/20 guidance, which the Department identified in the 2020 Tip final rule, that the guidance did not adequately address the scenario where an employee performs non-tipped, directly supporting work for an extended period of time, and thus essentially ceases to be employed in the tipped occupation for that entire block of time. *See* 85 FR 86769. The 2020 Tip final rule provided an example of a bellhop who performed tipped duties for 8 hours, and worked for an additional 2 hours “cleaning, organizing, and maintaining bag carts.” The Department noted that under the 80/20 guidance, the employer could potentially take a tip credit for the entire 2 hour block of time, even though the bellhop was “engaged in a tipped occupation (bellhop) for 8 hours and a non-tipped occupation (cleaner) for 2 hours.” *Id.* The proposed regulation addresses this concern by requiring employers to pay employees the full cash minimum wage whenever they perform non-tipped work, albeit work that directly supports tipped work, for a continuous block of time that exceeds 30 minutes. The Department’s proposal that an employer cannot take a tip credit for the entire block of time spent on non-tipped work when the work is performed for more than 30 minutes, rather than time that exceeds the 30 minute standard, is premised on the concept that the work is being performed for such a significant, continuous period of time that the tipped employee’s work is no longer being done in support of the tip-producing work, such that the employee is not engaged in a tipped occupation for that entire period.

Particularly because the FLSA’s tip credit provision permits employers to compensate their tipped employees as little as \$2.13 an hour in direct cash wages, it is important to ensure that this reduced direct wage is available to employers only when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute. The tip credit provision allows employers to pay a reduced cash wage based on the assumption that a worker will earn additional money from customer-provided tips—at least \$5.12 per hour in tips. When an employer assigns an employee to perform non-tipped duties continuously for a substantial period of time, such as more than 30 minutes, however, the employee’s non-tipped duties are not being performed in support of the tipped work, and the employee is no

longer earning tips during that time. Therefore, the employee is not engaged in a tipped occupation.

Under the Department’s proposed § 531.56(f)(1)(iii)(B), if a tipped employee performs non-tipped, directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for the entire period of time the non-tipped work is performed. Thus, an employer may take a tip credit for time a server performs directly supporting work such as cleaning the dining room at the end of the day and preparing the tables for the next day’s service, but only if that time does not exceed 30 minutes. An employee who performs non-tipped, directly supporting work for more than 30 minutes does so for a substantial amount of time. The Department believes that a threshold of 30 minutes, the majority of any given work hour, is an appropriate time marker for determining when an employee continuously performing non-tipped work is no longer performing incidental work but instead has ceased to be engaged in their tipped occupation for that entire period. The Department seeks comments, however, on whether a different period of time would better approximate this transition, and on how to best define a substantial amount of time for which the employer should no longer be permitted to pay a cash wage as low as \$2.13 an hour.

The proposed rule also recognizes the different situation where an employee performs incidental, non-tipped work for shorter periods of time. As described above, when an employee performs non-tipped work that directly supports the tip-producing work for 30 minutes or less, proposed § 531.56(f)(1)(iii)(A) provides a general tolerance that permits the employer to take a tip credit for that work before it exceeds 20 percent of the workweek. This tolerance is provided for ease of administration, and in recognition of the fact, as noted above, that most tipped occupations involve an incidental amount of non-tipped work that supports the tip-producing activities and is interspersed with those activities. Such work may also be less foreseeable than when an employer assigns an employee to perform non-tipped directly supporting work continuously for a period of more than 30 minutes, further justifying the tolerance.

The proposed regulation addresses concerns raised in the 2020 Tip final rule that the timeframe used to determine compliance under the Department’s previous 80/20 guidance was unclear. *See* 85 FR 86770. The 20 percent tolerance applies to increments

of directly supporting work spanning 30 continuous minutes or less, and is calculated on a workweek basis. Once an employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any additional time spent on directly supporting work in that workweek and must pay the full minimum wage for that time. If an employee spends more than 30 continuous minutes on work that directly supports the tip-producing work, the employer may not take a tip credit and must pay the full minimum wage for that entire continuous period of time. Any time paid at the full minimum wage would not count towards the 20 percent workweek tolerance. For example, if a server is required to perform an hour of directly supporting work at the end of each of her five 8-hour shifts, each of those hours spent performing directly supporting work must be paid at the full minimum wage and would not count towards the 20 percent workweek tolerance. If that same server also performs 20 minutes of directly supporting work three times each shift, for a total of 1 hour per day, the employer could take a tip credit for the rest of the server’s supporting work because the 5-hour total did not reach the 20 percent tolerance for a 40-hour workweek.

The Department believes that the requirement limiting employer’s ability to pay a reduced cash wage for non-tipped, directly supporting work to less than a substantial amount of time, as discussed above, will not be onerous for employers to implement. The preamble to the 2020 Tip final rule criticized the previous 80/20 guidance, discussing the perceived need for employers to “precisely” track employees’ time spent on non-tipped related duties in order to comply with a percentage-of-time limitation on those duties, and employer’s concerns that such tracking was difficult. *See* 85 FR 86769–70. Upon further review and consideration, however, the Department believes that the limitations on performing non-tipped work included in the proposed rule allow employers ample ability to assign to their tipped employees a non-substantial amount of non-tipped duties that directly support the tip-producing work, without needing to account for employees’ duties minute-by-minute. Twenty percent of an employee’s workweek is a significant amount of time—equal to a full 8 hour workday in a 5-day, 40-hour workweek. Particularly because the proposed guidance provides examples illustrating the type of work

that is part of the tipped occupation, including work that is tip-producing and work that directly supports the tip-producing work, employers should be able to proactively identify work that counts toward the tolerance and assign work to tipped employees accordingly, to avoid going over this tolerance. Similarly, a continuous, uninterrupted block of 30 minutes or more is a significant amount of time, and does not require the minute-by-minute micromanaging with which the 2020 Tip final rule expressed concern. In addition, as noted above, employers are likely to assign such work in a foreseeable manner. As a general matter, “since employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time.” *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 734 (D.S.C. 2015); see also *Marsh*, 905 F.3d at 631 (“[I]t is not impracticable for an employer to keep track of time spent on related tasks.”). Far from being an arbitrary burden, showing that a tipped employee does not perform a substantial amount of non-tipped work is how an employer can properly justify claiming a tip credit rather than directly paying the full minimum wage.

Finally, proposed § 531.56(f)(2) would clarify that an employer cannot take a tip credit for the time a tipped employee spends performing work that is not part of the tipped occupation, defined as any work that does not generate tips and does not directly support tip-producing work. In addition to the work identified in the examples, work that is not part of the tipped occupation of a hotel housekeeper would include cleaning non-residential parts of a hotel, such as a spa, gym, or the restaurant. Work that is not part of the tipped occupation of a busser would include, for example, cleaning the kitchen of the restaurant. Under the proposed rule, all time performing any work that is not part of the tipped occupation must be paid at the full minimum wage. The Department seeks comment on this part of its proposed test, including whether the list of examples appropriately identify work that is not part of the tipped occupation.

The Department requests comments on its proposed revisions to § 531.56(e) and all aspects of the new proposed § 531.56(f).

C. Proposed § 10.28(b)

The Department also proposes to amend the provisions of the Executive Order 13658 regulations, which address

the hourly minimum wage paid by contractors to workers performing work on or in connection with covered federal contracts. See E.O. 13658, 79 FR 9851 (Feb. 12, 2014). The Executive Order also established a tip credit for workers covered by the Order who are tipped employees pursuant to section 3(f) of the FLSA. The Department proposes to amend § 10.28(b) consistent with its proposed revisions to § 531.56(e) and (f) and seeks comment on these proposed revisions.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations require an agency to consider its need for any information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. This proposed rule does not contain a collection of information subject to Office of Management and Budget approval under the PRA.

VII. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.⁴⁶ Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is economically

significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

A. Background

In 2018 and 2019, the Department issued new guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time an employee performs related, non-tipped duties—as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); FAB 2019–2 (Feb. 15, 2019); WHD FOH 30d00(f). This guidance thus removed the 20 percent limitation on related, non-tipped duties that existed under the Department’s prior 80/20 guidance. On December 30, 2020, the Department published the 2020 Tip final rule to largely incorporate this 2018–2019 guidance into its regulations. The Department uses the 2018–2019 guidance as a baseline for this analysis because this is what WHD has been enforcing since the 2018–2019 guidance was issued and is similar to the policy codified in the 2020 Tip final rule.

In this NPRM, the Department proposes to withdraw the dual jobs portion of the 2020 Tip final rule and to re-propose new regulatory language that it believes will provide more clarity and certainty for employers, and will better protect employees. Specifically, the Department is proposing to amend its regulations to clarify that an employer may not take a tip credit for its tipped employees unless the employees are performing work that is part of their tipped occupation. This includes work that produces tips, as well as work that directly supports the tip-producing

⁴⁶ See 58 FR 51735, 51741 (Oct. 4, 1993).

work, provided that the directly supporting work is not performed for a substantial amount of time. Under the Department's proposal, work that "directly supports" tip-producing work is work that assists a tipped employee to perform the work for which the employee receives tips. In the proposed regulatory text, the Department explains that an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds, in the aggregate, 20 percent of the hours worked during the employee's workweek or (2) is performed for a continuous period of time exceeding 30 minutes. In order to analyze this regulatory change, the Department has quantified costs, provided an analysis of transfers, and provided a qualitative discussion of benefits. These impacts depend on the interaction between the policy proposed in this NPRM and any underlying market failure—perhaps most notably in this case, the monopsony power created for employers if their workers receive a substantial portion of their compensation in the form of tips.⁴⁷

B. Costs

The Department believes that this proposed rule would result in three types of costs to employers: Rule familiarization costs, adjustment costs, and management costs. Rule familiarization and adjustment costs would be one-time costs following the

promulgation of the final rule. Management costs would likely be ongoing costs associated with complying with the rule.

1. Potentially Affected Entities

The Department has calculated the number of establishments that could be affected by this proposed rule using 2019 data from the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW). Because this rule relates to the situations in which an employer is able to take a tip credit under the FLSA, it is unlikely that employers in states without a tipped minimum wage or employers in states with a direct cash wage of over \$7.25 would be affected by this proposal, because they are already paying their staff the full FLSA minimum wage for all hours worked. Therefore, the Department has dropped the following states from the pool of affected establishments: Alaska, Arizona, California, Colorado, Connecticut (Drinking Places (Alcoholic Beverages) only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.⁴⁸

Because the QCEW data only provides data on establishments, the Department has used the number of establishments for calculating all types of costs. The Department acknowledges that for some employers, the costs associated with this proposed rule could instead be incurred at a firm level, leading to an overestimate of costs.⁴⁹ Presumably, the headquarters of a firm could conduct the regulatory review for businesses

with multiple locations, but could also require businesses to familiarize themselves with the proposed rule at the establishment level. The Department welcomes comments on whether these costs would be incurred at a firm or establishment level.

The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule, along with a couple of other industries that have tipped workers, which is consistent with using the 2018–2019 guidance as the baseline. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels)), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). See Table 1 for a list of the number of establishments in each of these industries. The Department understands that there may be entities in other industries with tipped workers who may review this rule, and welcomes data and information on other industries that should be included in this analysis.

The Department has calculated that in states that allow employers to pay a lower direct cash wage to tipped workers and in the industries mentioned above, there are 470,894 potentially affected establishments.

Table 1. Number of Establishments in Affected Industries

Industry	Establishments
NAICS 713210 (Casinos (except Casino Hotels))	211
NAICS 721110 (Hotels and Motels)	41,768
NAICS 721120 (Casino Hotels)	175
NAICS 722410 (Drinking Places (Alcoholic Beverages))	30,313
NAICS 722511 (Full-Service Restaurants)	171,296
NAICS 722513 (Limited Service Restaurants)	173,509
NAICS 722515 (Snack and Nonalcoholic Beverage Bars)	39,698
NAICS 812113 (Nail Salons)	13,924
Total	470,894

Source: BLS Quarterly Census of Employment and Wages, 2019

⁴⁷ Jones, Maggie R. (2016), "Measuring the Effects of the Tipped Minimum Wage Using W-2 Data," CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016-03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>.

⁴⁸ Department of Labor, Wage and Hour Division, "Minimum Wages for Tipped Employees," Updated January 1, 2021. <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>.

⁴⁹ An establishment is a single physical location where one predominant activity occurs. A firm is

an establishment or a combination of establishments, and can operate in one industry or multiple industries. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.

2. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. The Department believes one hour per entity, on average, to be an appropriate review time for this proposed rule. This estimate does not include any time employers spend adjusting their business or pay practices; that is discussed in the adjustment cost section below. Many employers are familiar with a 20 percent tolerance, which is part of what is being proposed in this rule, since the Department enforced a 20 percent tolerance for 30 years prior to the 2018–2019 guidance, albeit in a different way. The Department believes that some employers in the industries listed above do not have any tipped employees, or do not take a tip credit, and would therefore not review the rule at all. This review time therefore represents an average of employers who would spend less than one hour or no time reviewing, and others who would spend more time. The Department welcomes comments on how much time employers would spend reviewing this proposed rule.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (Standard Occupational Classification (SOC) 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019.⁵⁰ The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.⁵¹ The Department estimates that regulatory familiarization costs would be \$23,827,236 (470,894 establishments $\times$ \$50.60 $\times$ 1 hour). The Department estimates that all regulatory familiarization costs would occur in Year 1.

3. Adjustment Costs

The Department expects that employers may incur adjustment costs associated with this rule. They may

adjust their business practices and staffing to ensure that workers do not spend more than 20 percent of their time on directly supporting work, and that directly supporting work does not exceed more than 30 minutes continuously. Additionally, as a result of this proposed rule, some duties that are currently considered related, non-tipped duties of a tipped employee, for which employers may take a tip credit under certain conditions, could now be considered duties that are not part of a tipped occupation, for which employers cannot take a tip credit. Accordingly, some employers may also adjust their business practices and staffing to reassign such duties from tipped employees to employees in non-tipped occupations. Some employers may also adjust their payroll software to account for these changes, and may also provide training for managers and staff to learn about the changes. The Department welcomes comments on the types of adjustment costs that employers could incur as a result of this rule.

The Department uses the same number of establishments (470,894) as discussed in the rule familiarization section above, and also assumes that the adjustments would be performed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or an employee of similar position and comparable pay, with a fully loaded wage of \$50.60 per hour. The Department estimates that these adjustments would take an average of one hour per entity. For employers that would need to make adjustments, the Department expects that these adjustments could take more than one hour. However, the Department believes that many employers likely would not need to make any adjustments at all, because either they do not have any tipped employees, do not take a tip credit, or the work that their tipped employees perform complies with the requirements set forth in this proposed rule. Therefore, the hour of adjustment costs represents the average of the employers who would spend more than one hour on adjustments, and the many employers who would spend no time on adjustments. The Department welcomes data on the amount of time employers who need to make adjustments would spend. The Department also welcomes information about how many businesses already manage their staff in a manner that is in compliance with the requirements set forth in this proposed rule, and would therefore not need to make any adjustments. The Department estimates that adjustment costs would be \$23,827,236 (470,894 establishments

$\times$ \$50.60 $\times$ 1 hour). The Department estimates that all adjustment costs would occur in Year 1.

4. Management Costs

The Department also believes that some employers may incur ongoing management costs, because in order to make sure that they can continue to take a tip credit for all hours of an employee's shift, they will have to ensure that tipped employees are not spending more than 20 percent of their time on directly supporting work per workweek, or more than 30 minutes continuously performing such duties. The Department does not believe that these costs will be substantial, because if employers are able to make the upfront adjustments to scheduling, there is less of a need for ongoing monitoring. For example, if employers stop assigning work to tipped employees that will no longer be considered part of the tipped occupation under this proposed rule, this will be a one-time change that does not necessitate ongoing monitoring. Additionally, employers may have also incurred similar management costs under the 2018–2019 guidance, because in order to take a tip credit for all hours, they would have had to ensure that tipped employees did not perform duties not related to their tipped occupation, and that employees' related, non-tipped work was contemporaneous with or for a reasonable time before or after the tipped work.

The Department estimates that employers would spend, on average, 10 minutes per week on management costs in order to comply with this proposed rule. The Department expects that many employers will not spend any time on management tasks associated with this rule, because they do not claim a tip credit for any of their employees, or their business is already set up in a way where the work their tipped employees perform complies with the requirements set forth in this proposed rule (such as a situation where the tipped employees perform minimal directly supporting work). Therefore, this estimate of 10 minutes is an average of those employers who would spend more time on management tasks, and the many employers who would spend no time on management tasks. The Department welcomes comments on how much time employers would spend per week managing their employees to ensure that they comply with this proposed rule. The Department therefore calculates that the average annual time spent will be 8.68 hours (0.167 hours $\times$ 52 weeks).

The Department's analysis assumes that the management tasks would be

⁵⁰ BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/2019/may/oes_nat.htm. Data for 2020 are now available, but the Department believes that it is more appropriate to use 2019 data for the analysis, because wages could have been affected by structural changes associated with the COVID–19 pandemic. The Department has aligned the year of the cost data with the pre-pandemic data used in the transfer analysis discussed later.

⁵¹ The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

performed by Food Service Managers (SOC 11–9051) or employees of similar status and comparable pay. The median hourly wage for these workers was \$26.60 per hour in 2019.⁵² The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$43.36 (\$26.60 + \$12.24 + \$4.52). The Department estimates that management costs would be \$177,227,926 (470,894 establishments × \$43.36 × 8.68 hours). The Department estimates that these management costs would occur each year.

5. Cost Summary

The Department estimates that costs for Year 1 would consist of rule familiarization costs, adjustment costs, and management costs, and would be \$224,882,399 (\$23,827,236 + \$23,827,236 + \$177,227,926). For the following years, the Department estimates that costs would only consist of management costs and would be \$177,227,926. Additionally, the Department estimated average annualized costs of this proposed rule over 10 years. Over 10 years, it would have an average annual cost of \$183.6 million calculated at a 7 percent discount rate (\$151.1 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

C. Transfers

1. Introduction

As previously discussed, the Department recognizes the concerns that it did not adequately assess the impact of the dual jobs provision of the 2020 Tip final rule. Therefore, for this proposed rule, the Department provides the following analysis of the transfers associated with the proposed changes to its dual jobs regulations, pursuant to which employers would not be able to take a tip credit for a substantial amount of directly supporting work, defined as 20 percent of a tipped employee's workweek or a continuous period of more than 30 minutes. The Department has performed two different transfer analyses for this proposed rule. The first analysis refines a methodological approach similar to the one described by the Economic Policy Institute (EPI) in response to the Department's NPRM for the 2020 Tip final rule, which proposed to codify the Department's 2018–2019 guidance, which replaced the 80/20

approach with a different related duties test. *See* 84 FR 53956.⁵³ This analysis helps demonstrate the range of potential transfers that may result from this proposed rule. The second analysis is a retrospective analysis that looks at changes to total hourly wages following the 2018–2019 guidance to help inform whether changes would occur in the other direction following this proposed rule.

Both of the Department's analyses discuss the transfers from employees to employers that may have occurred from the removal of the 80/20 approach, and assumes that the direction of these transfers would be reversed under this proposed rule, which, similar to the 80/20 guidance, includes a 20 percent tolerance on directly supporting work. The proposed rule would also preclude employers from taking a tip credit for a continuous period of more than 30 minutes of directly supporting work.

2. Potential Transfer Analysis

Under the approach outlined in the 2020 Tip final rule, and as originally put forth in the 2018–2019 guidance, employers can take a tip credit for related, non-tipped duties so long as they are performed “contemporaneously with” or for “a reasonable time immediately before or after tipped duties.” Additionally, the 2018–2019 guidance uses the Occupational Information Network (O*NET) to determine whether a tipped employee's non-tipped duties are related to the employee's tipped occupation.⁵⁴ As explained above, the Department is concerned that the terms “contemporaneously with” and “a reasonable time immediately before or after tipped duties” do not provide clear limits on the amount of time workers can spend on non-tipped tasks for which an employer is permitted to take a tip credit. Under the 2018–2019 guidance, transfers would have arisen if employers required tipped employees for whom they take a tip credit, such as servers and bartenders, to perform more related, non-tipped duties, such as cleaning and setting up tables, washing glasses, or preparing garnishes for plates or drinks, than they would have under the prior 80/20 guidance. Because employers would be taking a tip credit for these additional related, non-tipped

duties instead of paying the full minimum wage, tipped employees would earn less pay because they would be spending less time on tip-producing duties, such as serving customers.

However, to retain the tipped workers that they need, employers would have needed to pay these workers as much as their “outside option,” that is, the hourly wage that they could receive in their best alternative non-tipped job with a similar skill level requirement to their current position. For each tipped employee, the Department assumed that by assigning non-tipped work, an employer could have only lowered the tipped employee's total hourly pay rate including tips if the employee's current pay rate was greater than the predicted outside-option wage from a non-tipped job.⁵⁵ As a measure of the upper bound of the amount of tips that employers could have reallocated to pay for additional hours of work, the Department estimated the difference between a tipped worker's current hourly wage and the worker's outside-option wage.

The Department is specifically contemplating an example in which, prior to 2018, a restaurant employed multiple dishwashers and multiple bartenders. The dishwashers earned a direct cash wage of \$7.25 per hour and spent all of their time washing dishes and doing other kitchen duties. The bartenders earned a direct cash wage of \$2.13 per hour and spent all of their time tending bar. Following the removal of the 80/20 approach in the 2018–2019 guidance, the restaurant decided to employ fewer dishwashers, and instead hire one additional bartender and have the bartenders all take turns washing bar glasses throughout their shifts, adding up to more than 20 percent of their time. In this situation, the bartenders are each earning fewer tips because they are spending less time on tip-producing duties, such as preparing drinks, and more time on non-tip-producing duties, such as washing bar glasses. The employers' wage costs have also decreased, as they are paying more workers a direct cash wage of \$2.13 instead of \$7.25. This results in a transfer from employees to employers. This transfer would be reversed following the reinstatement of a time limit on directly supporting work in this proposed rule. The Department is requesting comments and data on how prevalent staffing changes like this were following the 2018–2019 guidance of

⁵³ Shierholz, H. and D. Cooper. 2019. “Workers will lose more than \$700 million annually under proposed DOL rule.” Available at <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

⁵⁴ As explained above, the 2020 Tip final rule—which is not yet in effect—provided that a non-tipped duty is merely presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET.

⁵² BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/2019/may/oes_nat.htm.

⁵⁵ This methodology of estimating an outside wage option was used in the Department's 2020 Tip Regulations under the Fair Labor Standards Act (FLSA) final rule to determine potential transfer of tips with the expansion of tip pooling.

the 2020 Tip Final Rule. The Department also requests comments on whether employers would make staffing changes following this proposed rule.

a. Defining Tipped Workers

The Department used individual-level microdata from the 2018 Current Population Survey (CPS), a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Outgoing Rotation Group (CPS-ORG) and provide more detailed information about those surveyed.⁵⁶ The Department used 2018 CPS-ORG data to avoid any unintentional impacts from the issuance of the 2018–2019 guidance. Because this analysis first looks at transfers that could have occurred following the 2018–2019 guidance, and uses that estimate to inform what the transfers would be following this rule, all data tables in this analysis include estimates for the year 2018, with dollar amounts inflated to \$2019 using the GDP deflator and further refinements as discussed below.

The Department included workers in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic Beverages)) and 722511 (Full-Service Restaurants); referred to in this analysis as “restaurants and drinking places.” The two occupations are classified under BLS Standard Occupational Classification (SOC) codes SOC 35–3031 (Waiters and Waitresses) and SOC 35–3011 (Bartenders).⁵⁷ The Department

considered these two occupations because they constitute a large percentage of the workers in these occupations receive tips (see Table 2 for shares of workers in these occupations who may receive tips). The Department understands that there are other occupations in these industries beyond servers and bartenders with tipped workers, such as SOC 35–9011 (Dining Room and Cafeteria Attendants and Bartender Helpers) and SOC 35–9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop). Additionally, there may also be some tipped workers in other industries who may be affected such as nail technicians, parking attendants, and hotel housekeepers.⁵⁸ The Department welcomes comments on which occupations would be affected, and therefore should be included in the analysis.

Table 2 presents the total number of bartenders and wait staff in restaurants and drinking places. The number of workers is then limited to those potentially affected by the changes proposed in this NPRM. This excludes workers in states that do not allow a tip credit, workers in states that requires a direct cash wage of at least \$7.25, and workers in other states who are paid a direct cash wage of at least the full FLSA minimum wage of \$7.25 (*i.e.*, employees whose employers are not taking a tip credit under the FLSA).⁵⁹ As alluded to above, because this proposed rule relates to the situations in which an

Waitresses (Census Code 4110). The industries correspond to Restaurants and Other Food Services (Census Code 8680) and Drinking Places, Alcoholic Beverages (Census Code 8690).

⁵⁸ The Department considered the additional set of occupations: SOC 39–5090 (Miscellaneous Personal Appearance Workers), SOC 39–5012 (Hairdressers, hairstylists, and cosmetologists), SOC 39–5011 (Barbers), SOC 53–6021 (Parking Attendants), SOC 37–2012 (Maids and Housekeeping Cleaners), and SOC 31–9011 (Massage Therapists). Workers in these occupations reported usually earning overtime pay, tips, and commissions (OTTC) less often than in the tipped occupations that the Department included in its analysis (15.2 percent compared to 56.1 percent). Additionally, a considerably lower proportion of workers in this additional set of occupations reported earning a direct wage below the federal minimum wage per hour (1.2 percent compared to 27.8 percent).

⁵⁹ Workers considered not affected by the 20 percent limitation were those in the following states that either do not allow a tip credit or require a direct cash wage of at least \$7.25 as of 2019: Alaska, Arizona, California, Colorado, Connecticut (Bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

employer takes a tip credit, it is unlikely that employees of employers that cannot or otherwise do not take a tip credit would be affected by this proposal. Both of these populations were also excluded from the analysis of potential transfers. The Department also assumed that nonhourly workers are not tipped employees and excluded these workers from the potentially affected population.⁶⁰ Lastly, workers earning a direct wage below \$2.13 per hour were dropped from the analysis.⁶¹ This results in 630,000 potentially affected workers in these industries and occupations.

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips. CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.⁶² Therefore, the Department assumed bartenders and wait staff who responded affirmatively to this question receive tips. Table 2 presents the share of potentially affected bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2018: Approximately 86 percent of bartenders and 78 percent of wait staff.

⁶⁰ The Department made this assumption because tipped employees are generally paid hourly and because the CPS does not include information on tips received for nonhourly workers. Without knowing the prevalence of tipped income among nonhourly workers, the Department cannot accurately estimate potential transfers from these workers. However, the Department believes the transfer from nonhourly workers will be small because only 10 percent of wait staff and bartenders in restaurants and drinking places are nonhourly and the Department believes nonhourly workers have a lower probability of receiving tips.

⁶¹ The Department was unable to determine whether these workers were earning a direct cash wage below \$2.13 because their employers were not complying with the minimum wage requirements of the FLSA, or whether the data was incorrect.

⁶² According to BLS Current Population Survey data, in 2018, workers in service occupations worked an average of 35.2 hours per week. See <https://www.bls.gov/cps/aa2018/cpsaat23.htm>.

⁵⁶ See Current Population Survey, U.S. Census Bureau, <https://www.census.gov/programs-surveys/cps.html> (last visited April 28, 2021); The Department used the Center for Economic and Policy Research. 2020. CPS ORG Uniform Extracts, Version 2.5. Washington, DC, <http://cedprdata.org/cps-uniform-data-extracts/cps-outgoing-rotation-group/cps-org-data/> (last visited April 27, 2021).

⁵⁷ In the CPS, these occupations correspond to Bartenders (Census Code 4040) and Waiters and

TABLE 2—BARTENDERS AND WAIT STAFF IN RESTAURANTS AND DRINKING PLACES

Occupation	Total workers (millions)	Potentially affected workers (millions) ^a	Potentially affected workers who report earning OTTC	
			Workers (millions)	Percent
Total	2.28	0.63	0.50	79.4
Bartenders	0.37	0.09	0.07	85.5
Waiters/Waitresses	1.91	0.54	0.42	78.4

Source: CEPR, 2018 CPS—ORG.

^aExcludes workers in states that do not allow a tip credit, workers in states that require a direct cash wage of at least \$7.25, and workers in other states who are paid a direct cash wage of at least the full FLSA minimum wage of \$7.25 (*i.e.*, employers whose employers are not using a tip credit). Also excludes nonhourly workers.

Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).

Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

Of the 500,000 bartenders and wait staff who receive OTTC, only 310,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As

shown in Table 3, 69 percent of bartenders' earnings (an average of \$339 per week) and 68 percent of wait staff's earnings (an average of \$251 per week) were from overtime pay, tips, and commissions in 2018. For workers who

reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported their OTTC amounts (69 or 68 percent) was applied to their weekly total income to estimate weekly tips.

TABLE 3—PORTION OF INCOME FROM OVERTIME PAY, TIPS, AND COMMISSIONS FOR BARTENDERS AND WAIT STAFF IN RESTAURANTS AND DRINKING PLACES

Occupation	Those who report the amount earned in OTTC			
	Workers	Average weekly earnings	Average weekly OTTC	Percent of earnings attributable to OTTC
Total	309,690	\$386.44	\$262.56	68
Bartenders	40,354	491.03	338.67	69
Waiters and waitresses	269,335	370.77	251.16	68

Source: CEPR, 2018 CPS—ORG, inflated to \$2019 using the GDP deflator.

Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).

Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

b. Outside-Option Wage

The Department assumed that employers only reduce the hourly wage rate of tipped employees for whom they are taking a tip credit if the tipped employee's total hourly wage, including the tips the employee retains, are greater than the "outside-option wage" that the employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used a quartile regression analysis to predict the wage that these workers would earn in a non-tipped job. Hourly wage was regressed on age, age squared, age cubed, education, gender, race, ethnicity, citizenship, marital status, veteran status, metro area status, and state for a sample of non-tipped workers.⁶³ The Department restricted the regression sample to non-tipped workers earning at least the applicable state minimum wage (inclusive of OTTC), and those

who are employed. This analysis excludes workers in states where the law prohibits employers from taking a tip credit or that require a direct cash wage of at least \$7.25.⁶⁴

In calculating the outside-option wage for tipped workers, the Department defined the comparison sample as non-tipped workers in a set of occupations that are likely to represent outside options. The Department determined the list of relevant occupations by exploring the similarity between the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the O*NET system for occupations that share important similarities with wait staff and bartenders—the occupations had to require "customer and personal service" knowledge and "service orientation"

skills.⁶⁵ The list was further reduced by eliminating occupations that are not comparable to the wait staff and bartender occupations in terms of education and training, as wait staff and bartender occupations do not require formal education or training. See Appendix Table 1 for a list of these occupations.

The regression analysis calculates a distribution of outside-option wages for each worker. The Department used the same percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.⁶⁶ This method

⁶³ For a full list of all occupations on O*NET, see <https://www.onetcenter.org/reports/Taxonomy2010.html>.

⁶⁶ Because of the uncertainty in the estimate of the percentile ranking of the worker's current wage, the Department used the midpoint percentile for workers in each decile. For example, workers whose current wage was estimated to be in the zero to tenth percentile range were assigned the predicted fifth percentile outside-option wage, those with wages estimated to be in the eleventh to twentieth percentile were assigned the predicted fifteenth percentile outside-option wage, etc.

⁶³ For workers who had missing values for one or more of these explanatory variables we imputed the missing value as the average value for tipped/non-tipped workers.

⁶⁴ These states are Alaska, Arizona, California, Connecticut (bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

assumes that a worker's position in the wage distribution for wait staff and bartenders reflects their position in the wage distribution for the outside-option occupations.

c. Potential Transfer Calculation

After determining each tipped worker's outside-option wage, the Department calculated the potential reduction in pay as the lesser of the following three numbers:

- The positive differential between a worker's current earnings (wage plus tips) and their predicted outside-option wage,
- the positive differential between a worker's current earnings and the state minimum wage, and
- the total tips earned by the worker.

The second number is included for cases where the outside-option wage predicted by the analysis is below the state minimum wage, because the worker cannot earn less than their applicable state minimum wage in non-tipped occupations. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than their total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. The Department subtracted predicted overtime pay to better estimate total tips.⁶⁷ For workers who reported receiving OTTC, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for wait staff or bartenders (see Table 2).

To determine the aggregate annual potential total tip transfer, the Department multiplied the weighted sum of weekly tip transfers by 45.2 weeks—the average weeks worked in a year for wait staff and bartenders in the 2018 CPS Annual Social and Economic Supplement. The resulting annual estimate of the upper bound of potential transfers from tipped employees to employers is \$714 million). This estimate is an upper bound, because following the 2018–2019 guidance, an employer could have, at most, had a tipped worker do more related non-tipped work until their overall earnings reached their outside option wage. In order to further refine this estimate, and adjust down this upper bound, the Department requests data on how much related non-tipped work tipped employees were performing prior to the 2018–2019 guidance and how that changed with the removal of the 80/20 approach. The Department requests

information on whether employers increased the number of employees for which they took a tip credit, and decreased the number of employees for which they paid a direct cash wage of at least \$7.25. The Department also requests data about how the amount of time that employees spend on directly supporting work would change following the requirements proposed in this rule.

The above analysis looks only at how the hourly earnings would change. It may also be informative to see how weekly earnings would change. Lowering the total hourly earnings of employees will either:

1. Lower the weekly earnings of these employees if their weekly hours worked remain the same; or
2. Require that these employees work more hours per week to earn the same amount per week.

The workers for whom potential pay reductions could have occurred had average weekly earnings of \$473; on average, their weekly earnings could have been reduced by as much as \$105, assuming their hours worked per week remained the same.

As noted above, this transfer estimate is based on the Department's 2019 proposal to codify the 2018–2019 guidance, which removed the 20 percent limitation on related, non-tipped duties, into the Department's regulations. The Department believes that this transfer analysis both underestimates and overestimates potential transfers. This estimate may be an underestimate because it does not include all possible occupations and industries for which there may be transfers. Additionally, it does not include workers with tipped jobs that are not listed as their main job in the CPS–ORG data. Additionally, the Department believes that transfers that would result from this proposed rule may exceed the transfers that would occur from reinstating the previous 80/20 guidance. As noted above, under this proposal, employers would be prohibited from taking a tip credit for a substantial amount of directly supporting work, defined as 20 percent of the tipped employee's workweek or a continuous period of more than 30 minutes.

The Department believes that these estimates are also an overestimate, because they assume that every employer that takes a tip credit and for whom it was economically beneficial would lower the hourly rate (including tips) of tipped employees to their outside-option wage. In reality, even when it is seemingly economically beneficial from this narrow perspective,

many employers may not have changed their non-tipped task requirements with the removal of the 20 percent limitation because it would have required changes to the current practice to which their employees were accustomed. There are reasons it is not appropriate to assume that all employers are able to extract all the earnings above the outside-option wage of their employees for whom they take a tip credit. For example, decreasing workers' hourly earnings might reduce morale, leading to lower levels of efficiency or customer service. The reduction in workers' earnings may also lead to higher turnover, which can be costly to a company. Part of this turnover may be due to workers' wages falling below their reservation wage and causing them to exit the labor force.⁶⁸ In support of this, researchers have found evidence of downward nominal wage stickiness, meaning that employees rarely experience nominal wage decreases with the same employer.⁶⁹ Although in this case the direct wage paid by the employer would not change, these tipped employees' total hourly pay including tips would decrease due to the employer requiring more work on non-tipped tasks leading to earning fewer tips per hour. While some empirical evidence, such as the Kahn paper cited above, indicates that employers are unlikely to make changes in work requirements that would lower employees' nominal hourly earnings, this evidence may not hold in low-wage industries such as food service and in times of structural changes to the economy, such as during the COVID–19 pandemic.⁷⁰ Additionally, even if employers may be constrained from having current employees take on more non-tipped work, they could institute these changes for any newly hired employees, so the reduction in average earnings would be over a longer-term time horizon.

The Department believes that another potential reason these transfer estimates

⁶⁸ A worker's reservation wage is the minimum wage that the worker requires to participate in the labor market. It roughly represents the worker's monetary value of an hour of leisure. If the worker's reservation wage is greater than their outside option wage, the worker may exit the labor market if tips are reduced.

⁶⁹ See for example Kahn, S. 1997. "Evidence of Nominal Wage Stickiness from Microdata." *The American Economic Review*. 87(5): 993–1008. Hanes, C. 1993. "The Development of Nominal Wage Rigidity in the Late 19th Century." *The American Economic Review* 83(4): 732–756. Kawaguchi, D. and F. Ohtake. 2007. "Testing the Morale Theory of Nominal Wage Rigidity." *ILR Review* 61(1): 59–74. Kaur, S. 2019. "Nominal Wage Rigidity in Village Labor Markets." *American Economic Review* 109(10): 3585–3616.

⁷⁰ See Section VI.E. for a more detailed discussion of the effects of the COVID–19 pandemic.

⁶⁷ Predicted overtime pay is calculated as $(1.5 \times \text{base wage}) \times \text{weekly hours worked over 40}$.

may be an overestimate is because of the interaction with the tip pooling provisions of the 2020 Final Rule. The 2020 Tip final rule codified the Consolidated Appropriations Act (CAA) amendments from 2018, which allowed employers to institute mandatory “nontraditional” tip pools to include both front-of-the-house and back-of-the-house workers, as long as they paid all employees a direct cash wage of at least \$7.25. *See* 85 FR 86765. The portions of the 2020 Tip final rule addressing tip pooling went into effect on April 30, 2021. *See* 86 FR 22598. Following this change, some employers may have been incentivized to no longer take a tip credit, and pay all of their employees the full minimum wage. For these employees, the dual jobs analysis is no longer relevant, because they are already earning at least \$7.25 for all hours worked. To the extent that employers responded to the CAA amendments by electing to stop taking a tip credit in order to institute a nontraditional tip pool, the Department believes that the transfers predicted in this analysis may be an overestimate.

However, the Department does not know to what extent this overestimate has occurred, because data is lacking on how many employers stopped taking a tip credit to expand their tip pools following the CAA amendments. Employers may not have acted on new incentives to shift away from their current tip credit arrangements. Additionally, some states and local areas may not allow employer-mandated tip pooling, so employers in these areas would not have made adjustments following the change in tip pooling provisions. Moreover, there is uncertainty about the future trajectory of state employment regulations; if state-level prohibitions on mandatory tip pooling were to become more widespread, the scope of the tip pooling provisions’ impacts could decrease and, in turn, the scope for this NPRM’s impacts could increase (thus potentially making the \$714 million estimate less of an overstatement farther in the future than in the near-term). Lastly, the CAA amendments were enacted in March 2018, so although the Department expects that it may have taken employers time to implement changes to their pay practices, any employers that stopped taking a tip credit in order to institute a nontraditional tip pool directly following the CAA amendments could have already been excluded from the transfer calculation. The Department does not know if employers would have changed their usage of the tip credit following the CAA amendments, or

waited to make the change until the codification of the CAA in the 2020 Tip final rule. As noted above, the tip pooling provisions of the 2020 Tip final rule went into effect on April 30, 2021.

The Department also looked at the share of workers earning a direct wage of less than \$7.25 in 2018 and 2019, and found no statistically significant difference between those two years. Because of this, and for all of the reasons discussed above, the Department has not quantified the reduction in transfers associated with the fact that the CAA allowed employers to institute nontraditional tip pools that include back-of-the-house workers. However, it welcomes comments on the extent to which employers stopped taking a tip credit in order to expand their tip pools to include back-of-the-house workers.

The transfer estimate may also be an overestimate because it assumes that the 2018–2019 guidance, and the 2020 Tip final rule, completely lacked a limitation on non-tipped work. As discussed above, there was a limit put forth in this approach, but it was not clearly defined.

The Department was unable to determine what proportion of the total tips estimated to have been potentially transferred from these workers were realistically transferred following the replacement of its prior 80/20 guidance with the 2018–2019 guidance. The Department assumes that the likely potential transfers were somewhere between a lower bound of zero and an upper bound of \$714million, depending on interactions between federal and state-level policies. The Department believes that the reasons the estimate is an overestimate outweigh the reasons the estimate is an underestimate, but requests comments and data to help inform this assumption. Therefore, the Department believes that this proposed rule would result in transfers from employers to employees, but at a fraction of the upper bound of transfers.

The Department does not have data to determine what percentage of the maximum possible transfers is likely to result from this proposed rule, and welcomes comments and data to help inform this analysis.

If the proposal results in transfers to tipped workers, it could also lead to increased earnings for underserved populations. Using data from the American Community Survey, the National Women’s Law Center found that about 70 percent of tipped workers are women and 26 percent of tipped

workers are women of color.⁷¹ Tipped workers also have a poverty rate of over twice that of non-tipped workers.⁷²

3. Retrospective Transfer Analysis (Extrapolated Forward)

Because the 80/20 guidance was withdrawn through guidance published in November 2018 and February 2019, the Department also looked at whether employees’ wages and tips changed following the 2018–2019 guidance to help inform the analysis of transfers associated with this proposed rule. If there was a significant drop in tips, it could mean that employers were having employees do more non-tipped work in response to the guidance.

The Department used the 2018 and 2019 CPS–ORG data to estimate earnings of tipped workers for whom their employers are taking a tip credit. Comparisons were restricted to observations in the months of February–November in each year to compare before and after the guidance. The Department looked at the difference in tips per hour, total hourly wages (direct wages plus tips), and weekly earnings in 2018 and 2019. None of the differences in values between these two periods was statistically significant. The Department also ran linear regressions on these three variables using the set of controls used in the outside-option wage regressions discussed above (state, age, education, gender, race/ethnicity, citizenship, marital status, veteran, metro area) and also found that none of the differences were statistically significant.

This lack of a significant decline in tips and total wages could imply that employers had not directed employees to do more non-tipped work following the guidance, and that there would also be little to no transfers associated with the requirement put forth in the proposed rule. However, it is also possible that employers had made no changes in response to the guidance, but would have shifted employees’ duties following the 2020 Tip final rule. As noted above, federal courts largely declined to defer to the Department’s 2018–2019 guidance, and this may have influenced employer’s decisions as well.⁷³ Additionally, it may be that the time period is too short to really observe

⁷¹ National Women’s Law Center, “Women in Tipped Occupations, State by State,” May 2019. <https://nwlc.org/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf>.

⁷² Sylvia A. Allegretto and David Cooper, “Twenty-three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage,” July 10, 2014. <https://files.epi.org/2014/EPI-CWED-BP379.pdf>.

⁷³ *See supra* note 3 (identifying cases in which courts declined to defer to the 2018–19 guidance).

a meaningful difference. The Department chose not to examine data from 2020, as average hourly wages during that year increased as low-wage workers in the leisure and hospitality industry were out of work due to the COVID-19 pandemic, making meaningful comparisons difficult. Furthermore, as noted elsewhere in this regulatory impact analysis, other tip-related policy changes occurred in 2018, thus creating challenges in estimating impacts attributable to each such policy. The Department welcomes comments and data on this analysis, specifically whether employers made changes in response to the 2018–2019 guidance, or whether they were planning to make changes until after the 2020 Tip final rule.

D. Benefits and Cost Savings

The Department believes that one benefit of this proposed rule is increased clarity for both employers and workers. In the 2020 Tip final rule, the Department said that it would not prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. However, the Department did not define “contemporaneously” or a “reasonable time immediately before or after.” If the 2020 Tip final rule’s revisions to the dual jobs regulations had gone into effect, the Department believes that the lack of clear definitions of these terms could have made it more difficult for employers to comply with the regulations and more difficult for WHD to enforce them. The reinstatement of the historically used 20 percent work week tolerance of work that does not produce tips but is part of the tipped occupation, together with the 30 continuous minute limit on directly supporting work, along with examples and explanations, will make it easier for employers to understand their obligations under the Fair Labor Standards Act, and will ensure that workers are paid the wages that they are owed.

Under this proposed rule, employers will also no longer need to refer to O*NET to determine whether a tipped employee’s non-tipped duties are related to their tipped occupation. The duties listed in O*NET could change over time, so an employer would have had to make sure to regularly review the site to ensure that they are in compliance. This proposed rule could result in cost savings related to employers’ time referencing O*NET.

The Department welcomes comments on other cost savings associated with the clarity provided by this rule.

As noted previously in this regulatory impact analysis, the phenomenon of tipping can create monopsony power in the labor market. As a result, the relationship between minimum wages for tipped employees and employment of such workers has been estimated by some to be quadratic—with employment increasing over some range of minimum wage increases and decreasing over a further range.⁷⁴ Although this NPRM does not change the minimum direct cash wage that must be paid when an employer claims a tip credit, one way that an employer could comply with the requirements proposed in this rule is to pay tipped workers a direct cash wage of at least \$7.25 for all hours worked. An employer could discontinue taking a tip credit if they found it more beneficial not to limit the amount of directly supporting work performed by a tipped employee. The Department welcomes comments on the likelihood of this outcome and data that would help facilitate quantification of such changes.

The Department also welcomes comments and data on additional benefits of this proposed rule.

E. Note on the Effects of the COVID-19 Pandemic

The Department notes that this analysis relies on data from 2018 and 2019, which is prior to the COVID-19 pandemic. Because many businesses were shut down during 2020 or had to change their business model, especially restaurants, the economic situation for tipped workers likely changed due to the pandemic. For example, a survey from One Fair Wage found that 83 percent of respondents reported that their tips had decreased since COVID-19, with 66 percent reporting that their tips decreased by at least 50 percent.⁷⁵ This reduction in tips received could result in a decrease in the amount of transfers calculated above.

The labor market has likely changed for tipped workers during the pandemic, and could continue to change following the recovery from the pandemic,

especially in the restaurant business. The full-service restaurant industry lost over 1 million jobs since the beginning of the pandemic,⁷⁶ and by the end of 2020, over 110,000 restaurants had closed permanently.⁷⁷ These industry changes could impact workers’ wages, as well as their ability and willingness to change jobs. There may also be other factors such as safety influencing workers’ choice of workplace, which could distort labor market assumptions and behavior. Workers that value the security and safety of their job could be less willing to leave for another job, even if their net earnings decreased, and this could have an impact on the outside-option analysis.

The Department welcomes data and information on how tipped workers were affected by the pandemic, and how the analysis discussed in this proposed rule would be adjusted to account for these changes.

VIII. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (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. 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. Accordingly, the Department examined this proposed rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).⁷⁸ The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking

⁷⁴ Jones, Maggie R. (2016), “Measuring the Effects of the Tipped Minimum Wage Using W-2 Data,” CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016–03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>; Wessels, Walter John (1997), “Minimum Wages and Tipped Servers,” *Economic Inquiry* 35: 334–349, April 1997.

⁷⁵ One Fair Wage, “Service Workers’ Experience of Health & Harassment During COVID-19”, November 2020. https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf.

⁷⁶ BLS Current Employment Statistics, <https://www.bls.gov/ces/>, Series ID CES7072251101.

⁷⁷ Carolina Gonzales, “Restaurant Closings Top 110,000 With Industry in ‘Free Fall,’” December 7, 2020. <https://www.bloomberg.com/news/articles/2020-12-07/over-110-000-restaurants-have-closed-with-sector-in-free-fall>.

⁷⁸ Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

Places (Alcoholic Beverages)), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). As discussed in Section IV.B.1, there are 470,894 potentially affected establishments. The QCEW does not provide size class data for these detailed industries and states, but the Department calculates that for all

industries nationwide, 99.8 percent of establishments have fewer than 500 employees. If we assume that this proportion holds true for the affected states and industries in our analysis, then there are 469,952 potentially affected establishments with fewer than 500 employees.

The Year 1 per-entity cost for small business employers is \$477.56, which is the regulatory familiarization cost of

\$50.60, plus the adjustment cost of \$50.60, plus the management cost of \$376.36. For each subsequent year, costs consist only of the management cost. See Section IV.B for a description of how the Department calculated these costs. The Department has provided tables with data on the impact on small businesses, by size class, for each industry included in the analysis.

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Table 4.

NAICS 713210 - Casinos (Except Casino Hotels)							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	10	18.9%	18	\$5,209,000	\$520,900	\$478	0.09%
Firms with 5-9 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with 10-19 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with <20 employees	12	22.6%	29	\$5,419,000	\$451,583	\$478	0.11%
Firms with 20-99 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with 100-499 employees	26	49.1%	6,264	\$761,372,000	\$29,283,538	\$478	0.00%
Firms with <500 employees	53	100.0%	6,743	\$817,192,000	\$15,418,717	\$478	0.00%
Firms with >500 employees	24	45.3%	20,148	\$4,914,882,000	\$204,786,750	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 5

NAICS 721110 - Hotels and Motels							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	10,947	35.1%	17,143	\$4,371,463,000	\$399,330	\$478	0.12%
Firms with 5-9 employees	4,818	15.5%	32,968	\$8,336,706,000	\$1,730,325	\$478	0.03%
Firms with 10-19 employees	7,167	23.0%	100,872	\$8,336,706,000	\$1,163,207	\$478	0.04%
Firms with <20 employees	22,934	73.6%	150,997	\$15,921,106,000	\$694,214	\$478	0.07%
Firms with 20-99 employees	7,160	23.0%	240,673	\$20,671,674,000	\$2,887,105	\$478	0.02%
Firms with 100-499 employees	1,081	3.5%	150,879	\$14,128,738,000	\$13,070,063	\$478	0.00%
Firms with <500 employees	31,175	100.0%	542,549	\$50,721,518,000	\$1,626,993	\$478	0.03%
Firms with >500 employees	1,630	5.2%	512,075	\$62,705,672,000	\$38,469,737	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 6

NAICS 721120 - Casino Hotels							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	3	6.5%	0	\$0	\$0	\$478	0.00%
Firms with 5-9 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with 10-19 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with <20 employees	8	17.4%	14	\$8,215,000	\$1,026,875	\$478	0.05%
Firms with 20-99 employees	3	6.5%	195	\$14,229,000	\$4,743,000	\$478	0.01%
Firms with 100-499 employees	27	58.7%	7,177	\$860,044,000	\$31,853,481	\$478	0.00%
Firms with <500 employees	46	100.0%	8,217	\$1,007,450,000	\$21,901,087	\$478	0.00%
Firms with >500 employees	84	182.6%	118,524	\$18,217,851,000	\$216,879,179	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 7

NAICS 722410 - Drinking Places (Alcoholic Beverages)							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	13,749	50.8%	26,626	\$2,881,174,000	\$209,555	\$478	0.23%
Firms with 5-9 employees	6,707	24.8%	44,050	\$2,715,239,000	\$404,837	\$478	0.12%
Firms with 10-19 employees	3,729	13.8%	49,361	\$2,715,239,000	\$728,141	\$478	0.07%
Firms with <20 employees	24,187	89.3%	120,064	\$8,241,853,000	\$340,755	\$478	0.14%
Firms with 20-99 employees	2,741	10.1%	96,465	\$5,063,067,000	\$1,847,161	\$478	0.03%
Firms with 100-499 employees	138	0.5%	14,534	\$859,303,000	\$6,226,833	\$478	0.01%
Firms with <500 employees	27,088	100.0%	232,886	\$14,249,073,000	\$526,029	\$478	0.09%
Firms with >500 employees	64	0.2%	4,151	\$372,813,000	\$5,825,203	\$478	0.01%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 8

NAICS 722511 - Full-Service Restaurants							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	43,191	30.0%	69,719	\$12,037,880,000	\$278,713	\$478	0.17%
Firms with 5-9 employees	26,370	18.3%	179,617	\$23,155,092,000	\$878,085	\$478	0.05%
Firms with 10-19 employees	30,904	21.4%	429,712	\$23,155,092,000	\$749,259	\$478	0.06%
Firms with <20 employees	100,465	69.7%	679,048	\$47,196,499,000	\$469,781	\$478	0.10%
Firms with 20-99 employees	41,179	28.6%	1,549,506	\$72,425,782,000	\$1,758,804	\$478	0.03%
Firms with 100-499 employees	2,504	1.7%	330,685	\$16,855,317,000	\$6,731,357	\$478	0.01%
Firms with <500 employees	144,148	100.0%	2,559,239	\$136,477,598,000	\$946,788	\$478	0.05%
Firms with >500 employees	2,441	1.7%	1,276,925	\$61,492,598,000	\$25,191,560	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 9

NAICS 722513 - Limited Service Restaurants							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	39,481	37.1%	69,109	\$9,918,230,000	\$251,215	\$478	0.19%
Firms with 5-9 employees	20,041	18.8%	133,363	\$14,262,156,000	\$711,649	\$478	0.07%
Firms with 10-19 employees	20,256	19.0%	276,233	\$14,262,156,000	\$704,095	\$478	0.07%
Firms with <20 employees	79,778	74.9%	478,705	\$32,962,211,000	\$413,174	\$478	0.12%
Firms with 20-99 employees	22,427	21.1%	826,711	\$40,270,656,000	\$1,795,633	\$478	0.03%
Firms with 100-499 employees	4,243	4.0%	659,080	\$33,702,776,000	\$7,943,148	\$478	0.01%
Firms with <500 employees	106,448	100.0%	1,964,496	\$106,935,643,000	\$1,004,581	\$478	0.05%
Firms with >500 employees	2,591	2.4%	1,283,835	\$66,321,227,000	\$25,596,768	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 10

NAICS 722515 - Snack and Nonalcoholic Beverage Bars							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	12,657	43.6%	16,075	\$2,029,785,000	\$160,369	\$478	0.30%
Firms with 5-9 employees	6,176	21.3%	42,046	\$3,772,007,000	\$610,752	\$478	0.08%
Firms with 10-19 employees	6,291	21.7%	83,512	\$3,772,007,000	\$599,588	\$478	0.08%
Firms with <20 employees	25,124	86.6%	141,633	\$7,833,377,000	\$311,789	\$478	0.15%
Firms with 20-99 employees	3,528	12.2%	107,810	\$5,072,661,000	\$1,437,829	\$478	0.03%
Firms with 100-499 employees	362	1.2%	37,996	\$2,070,085,000	\$5,718,467	\$478	0.01%
Firms with <500 employees	29,021	100.0%	287,716	\$14,984,672,000	\$516,339	\$478	0.09%
Firms with >500 employees	343	1.2%	164,169	\$10,774,588,000	\$31,412,793	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 11

NAICS 812113 - Nail Salons							
	Number of Firms	Number of Firms as Percent of Small Firms in Industry	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm	First Year Cost per Firm as Percent of Receipts
Firms with 0-4 employees	9,688	74.7%	16,512	\$2,059,539,000	\$212,587	\$478	0.22%
Firms with 5-9 employees	2,455	18.9%	15,647	\$448,685,000	\$182,764	\$478	0.26%
Firms with 10-19 employees	701	5.4%	8,883	\$448,685,000	\$640,064	\$478	0.07%
Firms with <20 employees	12,858	99.1%	41,188	\$3,395,814,000	\$264,101	\$478	0.18%
Firms with 20-99 employees	95	0.7%	2,367	\$119,640,000	\$1,259,368	\$478	0.04%
Firms with 100-499 employees	0	0.0%	0	\$0	\$0	\$478	0.00%
Firms with <500 employees	12,970	100.0%	44,111	\$3,532,063,000	\$272,326	\$478	0.18%
Firms with >500 employees	0	0.0%	0	\$0	\$0	\$478	0.00%

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

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As shown in the tables above, costs for small business entities in these industries are never more than 0.3 percent of annual receipts. Therefore, this rule will not have a significant economic impact on a substantial number of small entities.

IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)⁷⁹ requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of

⁷⁹ See 2 U.S.C. 1501.

\$165 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least one year.⁸⁰ This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and

⁸⁰ Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and Tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This final rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*

1. Assessment of Costs and Benefits

For purposes of the UMRA, this proposed rule includes a federal mandate that would result in increased expenditures by the private sector of more than \$156 million in at least one year, but will not result in any increased expenditures by state, local, and Tribal governments.

The Department determined that the proposed rule would result in Year 1 total costs for the private sector of \$224.9 million, for regulatory familiarization, adjustment costs, and management costs. The Department

determined that the proposed rule would result in management costs of \$177.2 million in subsequent years. Furthermore, the Department estimates that there may substantial transfers experienced as UMRA-relevant expenditures by employers.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.⁸¹ However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of \$53.6 billion to \$107.2 billion (using 2019 GDP).⁸² A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be \$224.9 million. Given OMB's guidance,

the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

X. Executive Order 13132, Federalism

The Department has (1) reviewed this delay in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The 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.

XI. Executive Order 13175, Indian Tribal Governments

This 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.

APPENDIX TABLE 1—LIST OF OCCUPATIONS INCLUDED IN THE OUTSIDE-OPTION REGRESSION SAMPLE

Amusement and Recreation Attendants.
 Bus Drivers, School or Special Client.
 Bus Drivers, Transit and Intercity.
 Cashiers.
 Childcare Workers.
 Concierges.
 Door-To-Door Sales Workers, News and Street Vendors, and Related Workers.
 Driver/Sales Workers.
 Flight Attendants.
 Funeral Attendants.
 Hairdressers, Hairstylists, and Cosmetologists.
 Home Health Aides.
 Hotel, Motel, and Resort Desk Clerks.
 Insurance Sales Agents.
 Library Assistants, Clerical.
 Maids and Housekeeping Cleaners.
 Manicurists and Pedicurists.
 Massage Therapists.
 Nursing Assistants.
 Occupational Therapy Aides.
 Office Clerks, General.
 Orderlies.
 Parking Lot Attendants.
 Parts Salespersons.
 Personal Care Aides.
 Pharmacy Aides.
 Pharmacy Technicians.
 Postal Service Clerks.
 Real Estate Sales Agents.
 Receptionists and Information Clerks.
 Recreation Workers.
 Residential Advisors.
 Retail Salespersons.
 Sales Agents, Financial Services.
 Sales Representatives, Wholesale and Manufacturing, Except Technical and Scientific Products.
 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive.
 Social and Human Service Assistants.

⁸¹ See 2 U.S.C. 1532(a)(4).

⁸² According to the Bureau of Economic Analysis, 2019 GDP was \$21.43 trillion. https://www.bea.gov/system/files/2020-02/gdp4q19_2nd_0.pdf.

APPENDIX TABLE 1—LIST OF OCCUPATIONS INCLUDED IN THE OUTSIDE-OPTION REGRESSION SAMPLE—Continued

Statement Clerks.
 Stock Clerks, Sales Floor.
 Subway and Streetcar Operators.
 Taxi Drivers and Chauffeurs.
 Telemarketers.
 Telephone Operators.
 Tellers.
 Tour Guides and Escorts.
 Travel Agents.
 Travel Guides.

List of Subjects

29 CFR Part 10

Administrative practice and procedure, Construction industry, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages.

29 CFR Part 531

Wages.

For the reasons set forth above, the Department proposes to amend title 29, parts 10 and 531, of the Code of Federal Regulations as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 4 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. Amend § 10.28 by revising paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

§ 10.28 Tipped employees.

* * * * *

(b) * * *

(2) *Dual jobs.* In some situations an employee is employed in dual jobs, as, for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if the employee customarily and regularly receives at least \$30 a month in tips for the work as a server, is engaged in a tipped occupation only when employed as a server. The employee is employed in two occupations, and no tip credit can be taken for the employee's hours of employment in the occupation of maintenance person.

(3) *Engaged in a tipped occupation.* An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation. An employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation.

(i) *Work that is part of the tipped occupation.* Any work performed by the

tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation provided it is not performed for a substantial amount of time.

(A) *Tip-producing work.* Any work for which tipped employees receive tips is tip-producing work. A server's tip-producing work includes waiting tables; a bartender's tip-producing work includes making and serving drinks and talking to customers; a nail technician's tip-producing work includes performing manicures and pedicures.

(B) *Directly supports.* Work that directly supports tip-producing work is also part of the tipped occupation provided that it is not performed for a substantial amount of time. Work that directly supports the work for which employees receive tips is work that assists a tipped employee to perform the work for which the employee receives tips. Work performed by a server that directly supports the tip-producing work includes, for example, preparing items for tables so that the servers can more easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include slicing and pitting fruit for drinks so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail technician would include cleaning the pedicure baths between customers so that the nail technicians can begin customers' pedicures without waiting.

(C) *Substantial amount of time.* An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:

(1) For any workweek, the directly supporting work exceeds 20 percent of

the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or

(2) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any of that continuous period of time.

(ii) *Work that is not part of the tipped occupation.* Work that is not part of the tipped occupation is any work that does not generate tips and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time. For example, preparing food or cleaning the bathroom is not part of a server's occupation. Preparing food or cleaning the dining room is not part of a bartender's occupation. Ordering supplies for the nail salon is not part of a nail technician's occupation.

* * * * *

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

■ 3. The authority citation for part 531 continues to read as follows:

Authority: 29 U.S.C. 203(m) and (t), as amended by sec. 3(m), Pub. L. 75–718, 52 Stat. 1060; sec. 2, Pub. L. 87–30, 75 Stat. 65; sec. 101, sec. 602, Pub. L. 89–601, 80 Stat. 830; sec. 29(B), Pub. L. 93–259, 88 Stat. 55 sec. 3, sec. 15(c), Pub. L. 95–151, 91 Stat. 1245; sec. 2105(b), Pub. L. 104–188, 110 Stat. 1755; sec. 8102, Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348.

■ 4. Amend § 531.56 by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 531.56 “More than \$30 a month in tips.”

* * * * *

(e) *Dual jobs.* In some situations an employee is employed in dual jobs, as, for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least \$30 a month in tips for the employee's work as a server, the employee is engaged in a tipped occupation only when employed as a server. The employee is employed in two occupations, and no tip credit can be taken for the employee's hours of employment in the occupation of maintenance person.

(f) *Engaged in a tipped occupation.* An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation. An employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation.

(1) *Work that is part of the tipped occupation.* Any work performed by the tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation provided it is not performed for a substantial amount of time.

(i) *Tip-producing work.* Any work for which tipped employees receive tips is tip-producing work. A server's tip-producing work includes waiting tables; a bartender's tip-producing work includes making and serving drinks and talking to customers; a nail technician's tip-producing work includes performing manicures and pedicures.

(ii) *Directly supports.* Work that directly supports tip-producing work is also part of the tipped occupation provided that it is not performed for a substantial amount of time. Work that directly supports the work for which employees receive tips is work that assists a tipped employee to perform the work for which the employee receives tips. Work performed by a server that directly supports the tip-producing work includes, for example, preparing items for tables so that the servers can more easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include slicing and pitting fruit for drinks so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail technician would include cleaning all the pedicure baths between customers so that the nail technicians can begin customers' pedicures without waiting.

(iii) *Substantial amount of time.* An employer can take a tip credit for the

time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:

(A) For any workweek, the directly supporting work exceeds 20 percent of the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or

(B) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any of that continuous period of time.

(2) *Work that is not part of the tipped occupation.* Work that is not part of the tipped occupation is any work that does not generate tips and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time. For example, preparing food or cleaning the bathroom is not part of a server's occupation. Preparing food or cleaning the dining room is not part of a bartender's occupation. Ordering supplies for the nail salon is not part of a nail technician's occupation.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2021-0416]

RIN 1625-AA00

Safety Zone; Sabine River, Orange, TX

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain navigable waters of the Sabine River, extending the entire width of the

river, adjacent to the public boat ramp located in Orange, TX. The safety zone is necessary to protect persons and vessels from hazards associated with a high-speed boat race competition in Orange, TX. Entry of vessels or persons into this zone would be prohibited unless authorized by the Captain of the Port Marine Safety Unit Port Arthur or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before July 8, 2021.

ADDRESSES: You may submit comments identified by docket number USCG-2021-0416 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409-719-5086, email Scott.K.Whalen@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On April 29, 2021, the Coast Guard published a temporary safety zone to protect persons and vessels from the hazards associated with high speed boat races in Orange, TX (86 FR 22610). That event was cancelled due to weather. On May 19, 2021 the City of Orange, TX notified the Coast Guard that they rescheduled the races for September 18 and 19, 2021, in the same location, adjacent to the public boat ramp in Orange, TX. The Captain of the Port Port Arthur (COTP) has determined that potential hazards associated with high speed boat races would be a safety concern for spectator craft and vessels in the vicinity of these race events.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters of the Sabine River adjacent to the public boat ramp in Orange, TX before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under

authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone from 7:30 a.m. on September 18, 2021 through 6 p.m. on September 19, 2021. The safety zone would be enforced from 7:30 a.m. to 6 p.m. on both the 18th and the 19th. The safety zone would cover all navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX bounded to the north by the Orange Public Wharf and latitude 30°05'50" N and to the south at latitude 30°05'33" N. The duration of the safety zone is intended to protect participants, spectators, and other persons and vessels, in the navigable waters of the Sabine River during high-speed boat races and will include breaks and opportunity for vessels to transit through the regulated area.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. They will be available on VHF-FM or by telephone.

The COTP or a designated representative may prohibit or control the movement of all vessels in the zone. The COTP or a designated representative may terminate the operation of any vessel at any time it is deemed necessary for the protection of life or property. The COTP or a designated representative may terminate enforcement of the safety zone at the conclusion of the event.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the proposed size, location and duration of the rule. The safety zone will encompass a less than half-mile

stretch of the Sabine River for 10.5-hours on each of two days. The Coast Guard will notify the public by issuing Local Notice to Mariners (LNM), and/or Marine Safety Information Bulletin (MSIB) and Broadcast Notice to Mariners via VHF-FM radio and the rule will allow vessels to seek permission to enter the zone during scheduled breaks.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the temporary safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone that would last 8 hours on each of two days and that would prohibit entry on less than a half-mile stretch of the Sabine River in

Orange, TX. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

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

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

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

Documents mentioned in this NPRM as being available in the docket, and public comments, will be in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. If

you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREA AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.T08-0416 to read as follows:

§ 165.T08-0416 Safety Zone; Sabine River, Orange, Texas.

(a) *Location.* The following area is a safety zone: All navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX bounded to the north by the Orange Public Wharf and latitude 30°05'50" N and to the south at latitude 30°05'33" N. The duration of the safety zone is intended to protect participants, spectators, and other persons and vessels, in the navigable waters of the Sabine River during high-speed boat races and will include breaks and opportunity for vessels to transit through the regulated area.

(b) *Enforcement periods.* This section will be enforced from 7:30 a.m. through 6 p.m. daily on September 18, 2021 and September 19, 2021.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry of vessels or persons into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Port Arthur (COTP) or a designated representative. They may be contacted on VHF-FM channel 13 or 16, or by phone at by telephone at 409-719-5070.

(2) The COTP or a designated representative may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(3) The COTP or a designated representative may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(4) The COTP or a designated representative will terminate enforcement of the special local regulations at the conclusion of the event.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: June 8, 2021.

Molly A. Wike,

Captain, U.S. Coast Guard, Captain of the Port, Marine Safety Zone Port Arthur.

[FR Doc. 2021-12870 Filed 6-22-21; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2021-0369; FRL-10024-69-Region 9]

Air Plan Approval; Arizona; Maricopa County Air Quality Department

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Maricopa County Air Quality Department's (MCAQD) Rule 510 as part of the Arizona State Implementation Plan (SIP). These rule revisions concern revisions to the maximum levels of ambient air pollution for the protection of public health and welfare. We are proposing to approve this rule to regulate these emissions under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before July 23, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R09-OAR-2021-0369 at <https://www.regulations.gov>. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://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 <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Jeffrey Buss, EPA Region IX, (415) 947–4152, buss.jeffrey@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, “we,” “us” and “our” refer to the EPA.

Table of Contents

I. The State’s Submittal

- A. What rules did the State submit?
- B. Are there other versions of these rules?
- C. What is the purpose of the submitted rule revisions?
- II. The EPA’s Evaluation and Proposed Action
 - A. How is the EPA evaluating the rules?
 - B. Do the rules meet the evaluation criteria?
 - C. Public Comment and Proposed Action
- III. Incorporation by Reference
- IV. Statutory and Executive Order Reviews

I. The State’s Submittal

A. What rules did the State submit?

Table 1 lists the rule addressed by this proposal with the date it was amended and submitted by the MCAQD.

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Title	Amended	Submitted
MCAQD	510	Air Quality Standards	12/11/2019	12/20/2019

MCAQD’s December 20, 2019 SIP revision submittal became complete by operation of law on June 20, 2020.

B. Are there other versions of these rules?

We approved an earlier version of MCAQD Rule 510 into the SIP on November 9, 2009.¹

C. What is the purpose of the submitted rule revisions?

MCAQD Rule 510 articulates the maximum levels of ambient air pollutants for the protection of public health and welfare. The revisions to MCAQD Rule 510 update the standards by lowering them to match the current National Ambient Air Quality Standards set forth in 40 CFR part 50. MCAQD references the standards in Rule 510 in its air quality permitting rules. Additionally, the rule requires public notification of ambient air quality. The EPA’s technical support document (TSD) has more information about the rule.

II. The EPA’s Evaluation and Proposed Action

A. How is the EPA evaluating the rules?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress (RFP) or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater

emissions reductions (see CAA section 193).

B. Do the rules meet the evaluation criteria?

These rules are consistent with CAA requirements and relevant guidance regarding enforceability and SIP revisions. We propose approval of Rule 510 because it is more stringent than the version currently in the SIP and will not interfere with any applicable requirement concerning attainment and RFP, as required by CAA sections 110(l) and 193. The TSD has more information on our evaluation.

C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule because it fulfills all relevant requirements. We will accept comments from the public on this proposal until July 23, 2021. If we take final action to approve the submitted rules, our final action will incorporate the rule into the federally enforceable 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 MCAQD rule described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through www.regulations.gov and at the EPA Region IX 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, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve state regulations as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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

¹ 74 FR 57612.

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 Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, 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 the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed 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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 10, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–12923 Filed 6–22–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0515; FRL–10024–72–Region 4]

Air Plan Approval; North Carolina; Revision to Approved Motor Vehicle Emissions Budgets

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the North Carolina State Implementation Plan (SIP), submitted to EPA on July 16, 2020, by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources, Division of Air Quality (NCDAQ) for the purpose of allocating a portion of the available 2026 safety margin in the 2008 8-hour Ozone Maintenance Plan to the 2026 nitrogen oxides (NO_x) and volatile organic compounds (VOC) motor vehicle emissions budgets (“MVEBs” or “budgets”) for the North Carolina portion of the Charlotte-Rock Hill, NC-SC bi-state Area (hereinafter referred to as the “North Carolina portion of the Charlotte Maintenance Area”) to account for uncertainty associated with the mobile emissions model and unanticipated growth in vehicle miles traveled for the North Carolina portion of the Charlotte Maintenance Area. This SIP revision also revises the 2026 MVEBs which are used for transportation conformity. NCDAQ’s July 16, 2020 submission supplements the revised 2008 8-hour Ozone Maintenance Plan submitted by NCDAQ on July 25, 2018, and approved by EPA on September 11, 2019. EPA is proposing to approve North Carolina’s July 16, 2020 SIP revision and deem the MVEBs adequate for transportation conformity purposes because they meet all the statutory and regulatory requirements.

DATES: Comments must be received on or before July 23, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2020–0515 at www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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 www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT:

Dianna Myers, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9207. Ms. Myers can also be reached via electronic mail at myers.dianna@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What action is EPA proposing?

EPA is proposing to approve NCDAQ’s July 16, 2020, SIP revision to allocate a portion of the available safety margin to revise the 2026 NO_x and VOC budgets for the North Carolina portion of Charlotte 2008 8-hour Ozone Maintenance Area¹ for transportation conformity purposes. NCDAQ requested approval of the July 16, 2020 SIP revision in order to account for unanticipated changes in the travel demand model, such as unanticipated growth in vehicle miles traveled, changes and uncertainty in vehicle mix assumptions, and uncertainty associated with mobile emissions modeling.

If EPA finalizes this proposed approval, the revised 2026 budgets from NCDAQ’s July 16, 2020, SIP revision will replace the existing budgets in the State’s 2008 8-hour Ozone Maintenance Plan revision approved on September 11, 2019. *See* 84 FR 47889. If approved, these newly revised 2026 budgets must be used in future transportation conformity analyses for the Area according to the transportation conformity rule. *See* 40 CFR 93.118. Therefore, the September 11, 2019, approved budgets would no longer be applicable for transportation conformity purposes.

In the State’s submission, all emissions inventories (on-road, point, area, and nonroad) from NCDAQ’s September 11, 2019, SIP revision remain the same. The submission only allocates a portion of the available safety margin to the 2026 NO_x and VOC MVEBs. Therefore, EPA is proposing to conclude that North Carolina’s July 16, 2020, SIP revision continues to demonstrate

¹ The North Carolina portion of the Charlotte Maintenance Area for the 2008 ozone NAAQS is comprised of the following counties: Mecklenburg in its entirety and portions of Cabarrus, Gaston, Iredell, Lincoln, Rowan, and Union counties. *See* section II.B. for more detail.

maintenance for the Charlotte Maintenance Area.

II. What is the background for this action?

A. SIP Budgets and Transportation Conformity

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and maintenance plans for nonattainment and maintenance areas for a given NAAQS. These emission control strategy SIP revisions (*e.g.*, reasonable further progress and attainment demonstration SIP revisions) and maintenance plans include budgets of on-road mobile source emissions for criteria pollutants and/or their precursors to address pollution from cars, trucks, and other on-road vehicles. The MVEBs are the portion of the total allowable emissions that are allocated to on-road vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance. The MVEBs serve as a ceiling on emissions from an area's planned transportation system.

Under section 176(c) of the CAA, transportation plans, transportation improvement programs (TIPs), and transportation projects must "conform" to (*i.e.*, be consistent with) the SIP before they can be adopted or approved. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS or an interim milestone. The transportation conformity regulations can be found at 40 CFR parts 51 and 93.

Before budgets can be used in conformity determinations, EPA must affirmatively find the budgets adequate. However, adequate budgets do not supersede approved budgets for the same CAA purpose. If the submitted SIP budgets are meant to replace budgets for the same CAA purpose and year(s) addressed by a previously approved SIP revision, as is the case with this SIP, EPA can approve the revised SIP and budgets and also affirm that the budgets are adequate at the same time. Once EPA approves the SIP with the submitted budgets, the revised budgets must be used by state and Federal agencies in determining whether transportation activities conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of budgets are set out in 40 CFR 93.118(e)(4).

B. Prior Approval of Budgets

Effective July 20, 2012, EPA designated the Charlotte-Rock Hill, NC-

SC Area as Marginal nonattainment for the 2008 8-hour ozone national ambient air quality standard (hereinafter referred to as NAAQS or standard). The North Carolina portion of the Charlotte 2008 Maintenance Area includes Mecklenburg in its entirety and portions of Cabarrus, Gaston, Iredell, Lincoln, Rowan, and Union counties. The Charlotte Maintenance Area also includes a portion of York County located in Rock Hill, South Carolina. *See* 77 FR 30088. The North Carolina portion of the Charlotte Maintenance Area is comprised of three metropolitan planning organizations (MPOs): The Charlotte Regional Transportation Planning Organization (CRTPO) which covers Iredell, Mecklenburg, and Union counties; the Cabarrus-Rowan Metropolitan Planning Organization (CRMPO) which covers Cabarrus and Rowan counties; and the Gaston-Cleveland-Lincoln Metropolitan Planning Organization (GCLMPO) which covers Gaston, Cleveland, and Lincoln counties. Although Cleveland County is included in the GCLMPO planning boundary, it was not included in the North Carolina portion of the Charlotte Maintenance Area. Each MPO has its own budget referred to as a "sub-area budget." The York County, South Carolina portion of this maintenance area has a separate MPO and budgets. The South Carolina portion of the maintenance area implements transportation conformity independent of the North Carolina portion.

EPA approved the redesignation request and maintenance plan for North Carolina's portion of the Charlotte 2008 8-hour ozone Area on July 28, 2015 (80 FR 44873) with 2014 and 2026 NO_x and VOC sub-area MVEBs.² On August 17, 2015 (80 FR 49164), EPA approved North Carolina's section 110(l) noninterference demonstration requesting relaxation of the Federal Reid Vapor Pressure from 7.8 pounds per square inch (psi) to 9.0 psi and a revision to the 2026 NO_x and VOC sub-area MVEBs for Mecklenburg and Gaston Counties only. *See* 80 FR 44868.

Subsequently, on July 25, 2018, NCDAQ submitted a revision to the Charlotte 2008 8-hour ozone maintenance plan to update the emissions forecast and MVEBs for 2026 to account for the small increase in NO_x and VOC emissions associated with the change in vehicle model year coverage due to changes in the state of North

² There are currently six ozone monitors located throughout the North Carolina portion of the Charlotte Maintenance Area and one monitor located in York County, South Carolina. The current design value for the Charlotte Maintenance Area is 70 parts per billion.

Carolina's inspection and maintenance (I/M) program. On September 11, 2019 (84 FR 47889), EPA approved NCDAQ's July 25, 2018 SIP revision related to North Carolina's I/M Program. The September 11, 2019, SIP approval updated the on-road mobile source inventory and revised the 2026 sub-area VOC and NO_x budgets for Cabarrus and Rowan counties. The revised 2026 MVEBs became effective on October 11, 2019.

C. MOVES Emissions Model

The Motor Vehicle Emissions Simulator (MOVES) model is designed by EPA to estimate air pollution emissions from mobile sources. MOVES can be used to estimate exhaust and evaporative emissions as well as brake and tire wear emissions from all types of on-road vehicles for any part of the country, except California.³ MOVES2014 and its subsequent minor updates, MOVES2014a and MOVES2014b, added the capability to estimate exhaust and evaporative emissions from most types of nonroad equipment. North Carolina's July 16, 2020 SIP submittal contains mobile source emissions estimates using MOVES2014 with local inputs data to more accurately represent local vehicle fleets and emissions characteristics.⁴ *See* MOVES2014, MOVES2014a, and MOVES2014b Technical Guidance: Using MOVES to Prepare Emission Inventories for State Implementation Plans and Transportation Conformity, EPA-420-B-18-039, August 2018, available at <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100V7EY.txt>.

III. What is EPA's analysis of North Carolina's submittal?

EPA's analysis involves an emissions comparison between the current SIP-approved MVEBs and the MVEBs that North Carolina has requested EPA approve in the July 16, 2020 SIP submittal. Section III.A. provides information regarding the current SIP-

³ In California, a different on-road emissions model, EMFAC, is used for regulatory purposes instead of MOVES.

⁴ On January 7, 2021 (86 FR 1106), EPA announced the availability of the MOVES3 for official purposes outside of California. MOVES3 is the state of the science emission modeling system that incorporates the latest emissions data and estimates emissions from mobile sources at the national, county, and project level for criteria air pollutants, greenhouse gases, and air toxics. While MOVES3 is available for use in SIPs and transportation conformity analyses outside of California, states and local agencies that had completed a SIP revision with MOVES2014 at the time of the release of MOVES3 could continue to rely on MOVES2014 for that SIP submittal. NCDAQ completed and submitted the SIP revision that is the subject of this proposed action on July 16, 2020, before MOVES3 was released.

approved MVEBs and inventories, while sections III.B. and III.C. contain information and analysis regarding the proposed revisions to the MVEBs and safety margin, respectively. Section III.D. contains EPA's proposed analysis of the adequacy of North Carolina's revised MVEBs pursuant to 40 CFR 93.118(e)(4).

As discussed further below, EPA's analysis of North Carolina's July 16, 2020 SIP submittal indicates that maintenance will continue to be demonstrated after allocation of a portion of the safety margin to the MVEBs because the total level of emissions from all source categories remains equal to or less than the attainment level of emissions. Thus, EPA is proposing to approve North Carolina's July 16, 2020 SIP submittal.

A. Maintenance Demonstration and Emissions Inventory

This section contains information regarding the previous and current SIP-approved MVEBs and inventories. The inventories are provided for illustrative purposes only, as in this action, EPA is not proposing any changes the inventories.⁵

As discussed above, EPA originally approved NCDAQ's 2008 8-hour ozone maintenance SIP for the North Carolina portion of the Charlotte Maintenance Area on July 28, 2015, with the following inventories for NO_x and VOC emissions: Base year actual emissions inventories for 2014; projected, future, interim year inventories for 2015, 2018, and 2022; and projected final year emission inventory for 2026. On September 11, 2019 (84 FR 47889), EPA approved NCDAQ's July 25, 2018 SIP, which revised the MVEBs and the inventories; these remain the current SIP-approved MVEBs and inventories.

Maintenance for the Charlotte Maintenance Area is demonstrated when the emissions in the final year of the maintenance plan ("maintenance year") are less than the baseline attainment year. In the current SIP-approved inventories, the baseline year is 2014 and the maintenance year is 2026. *See* 80 FR 29250. As shown in Table 1, for NO_x, emissions for all years (interim years and maintenance year) are under the baseline of 130.18 tons per summer day (tons/day); in the maintenance year of 2026, emissions are projected to be 60.28 tons/day. Additionally, as shown in Table 2, for VOC, emissions for all years (interim years and maintenance year) are under the baseline of 113.12 tons/day; in the maintenance year of 2026, emissions are projected to be 95.99 tons/day. The downward trend in NO_x and VOC emissions is shown in Table 3 below.

TABLE 1—TOTAL MAN-MADE NO_x EMISSIONS FOR NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA [tons/day]

County	2014	2015	2018	2022	2026
Cabarrus *	11.49	10.73	6.78	5.44	4.44
Gaston *	27.89	27.62	12.03	6.41	7.87
Iredell *	6.86	6.49	5.41	4.68	4.16
Lincoln *	4.36	4.71	6.41	4.29	2.34
Mecklenburg	56.71	52.97	39.16	33.52	31.33
Rowan *	11.74	11.31	8.28	7.01	6.10
Union *	11.13	10.36	6.63	5.09	4.05
Total	130.18	124.19	84.69	66.44	60.28

* Emissions for the portion of the county included in the maintenance area.

TABLE 2—TOTAL MAN-MADE VOC EMISSIONS FOR NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA [tons/day]

County	2014	2015	2018	2022	2026
Cabarrus *	11.50	11.27	9.51	9.23	9.02
Gaston *	12.96	12.74	11.53	10.94	10.74
Iredell *	6.33	6.22	5.29	5.11	4.97
Lincoln *	6.55	6.47	4.81	4.66	4.51
Mecklenburg	50.10	49.16	45.31	44.47	43.99
Rowan *	12.59	12.38	12.47	12.19	12.32
Union *	13.09	12.85	10.91	10.68	10.45
Total	113.12	111.09	99.82	97.28	95.99

* Emissions for the portion of the county included in the maintenance area.

TABLE 3—MAINTENANCE DEMONSTRATION FOR NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA

Year	NO _x (tons/summer day)	VOC (tons/summer day)
2014	130.18	113.12
2015	124.19	111.09
2018	84.69	99.82
2022	66.44	97.28

⁵ As discussed above, if EPA approves NCDAQ's July 16, 2020 SIP submittal, all emissions

inventories (on-road, point, area, and nonroad) from NCDAQ's September 11, 2019, SIP revision remain

the same, while a portion of the safety margin will be allocated to the MVEBs.

TABLE 3—MAINTENANCE DEMONSTRATION FOR NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA—Continued

Year	NO _x (tons/summer day)	VOC (tons/summer day)
2026	60.28	95.99
Reduction in emissions from 2014 to 2026	69.90	17.13

The following table provides the NO_x and VOC on-road mobile emissions inventory for the 2014 (base year) and 2026 (maintenance year) for the 2008 8-hour ozone NAAQS for the North Carolina portion of the Charlotte

Maintenance Area. The emissions are expressed in tons/day and in kg/day because the MVEBs are expressed in kilograms per day kg/day. The MOVES2014 output emissions values were rounded to the nearest kg/day and

were divided by 907.1847 to convert them to units of tons/day. The resulting values in tons/day were rounded to two decimal places.

TABLE 4—ON-ROAD MOBILE SOURCE NO_x AND VOC SUMMER DAY EMISSIONS IN 2014 AND 2026 FOR THE NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA

County	2014 NO _x		2014 VOC		2026 NO _x		2026 VOC	
	tons/day	kg/day	tons/day	kg/day	tons/day	kg/day	tons/day	kg/day
Cabarrus *	6.60	5,989	4.15	3,765	2.00	1,810	2.19	1,982
Gaston **	8.11	7,357	4.61	4,179	2.12	1,924	1.86	1,689
Iredell *	3.36	3,045	1.95	1,768	1.00	903	0.88	801
Lincoln *	3.00	2,723	1.91	1,737	0.83	757	0.86	779
Mecklenburg **	26.99	24,488	14.40	13,060	7.17	6,501	6.98	6,334
Rowan *	6.42	5,825	3.76	3,408	1.73	1,571	1.53	1,389
Union *	5.67	5,146	3.54	3,210	1.62	1,466	1.68	1,520
Total	60.15	54,572	34.32	31,127	16.47	14,932	15.98	14,494

* Emissions for the portion of the county included in the maintenance area.

** The 2014 base year NO_x and VOC emissions for Gaston and Mecklenburg counties have been revised slightly to correct a transcription error in the original maintenance plan.

A safety margin is the difference between the attainment level of emissions from all source categories (i.e., point, area, on-road and nonroad) (2014 in this case) and the projected level of emissions from all source categories in the maintenance year (2026 in this case). The State may choose to allocate some of the safety margin to the MVEBs, for transportation

conformity purposes, so long as the total level of emissions from all source categories remains equal to or less than the attainment level of emissions. North Carolina previously chose to allocate a portion of its NO_x and VOC safety margin to the MVEBs for the entire North Carolina portion of the Charlotte Maintenance Area for the year 2026. See 84 FR 22774 (May 20, 2019) and 84 FR

47889 (Sept. 11, 2019). The current SIP-approved safety margins, percent increase allocated to the 2026 NO_x and VOC MVEBs from the safety margin for each county, and resulting subarea MVEBs in the North Carolina portion of the Charlotte Maintenance Area are listed in Tables 5 through 9 below.

TABLE 5—CURRENT SAFETY MARGINS FOR NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA

Year	NO _x (tons/summer day)	VOC (tons/summer day)
2014	N/A	N/A
2015	– 5.99	– 2.03
2018	– 45.49	– 13.30
2022	– 63.74	– 15.84
2026	– 66.60	– 13.92

TABLE 6—CURRENT PERCENT INCREASE TO THE 2026 MOBILE VEHICLE EMISSIONS BUDGET

County	2026
Cabarrus	25
Gaston	20
Iredell	22
Lincoln	22
Mecklenburg	17
Rowan	25

TABLE 6—CURRENT PERCENT INCREASE TO THE 2026 MOBILE VEHICLE EMISSIONS BUDGET—Continued

County	2026
Union	20

TABLE 7—CABARRUS ROWAN METROPOLITAN PLANNING ORGANIZATION (CRMPO) MVEBS IN 2014 AND 2026
[kg/day] *

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	11,814	7,173	3,381	3,371
Safety margin allocated to MVEB			846	843
Conformity MVEB	11,814	7,173	4,227	4,214

* Includes the portion of Cabarrus and Rowan Counties in the maintenance area.

TABLE 8—GASTON-CLEVELAND-LINCOLN METROPOLITAN PLANNING ORGANIZATION (GCLMPO) MVEBS IN 2014 AND 2026
[kg/day] *

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	10,079	5,916	2,681	2,468
Safety margin allocated to MVEB			551	510
Conformity MVEB	10,079	5,916	3,232	2,978

* Includes the portion of Gaston and Lincoln counties in the maintenance area. Although Cleveland County is included in the MPO, it is not included in the Charlotte ozone maintenance area.

TABLE 9—CHARLOTTE REGIONAL TRANSPORTATION PLANNING ORGANIZATION (CRTPO)—ROCKY RIVER RURAL
PLANNING ORGANIZATION (RRRPO) MVEBS IN 2014 AND 2026
[kg/day] *

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	32,679	18,038	8,870	8,655
Safety margin allocated to MVEB			1,596	1,557
Conformity MVEB	32,679	18,038	10,466	10,212

* Includes all of Mecklenburg County and a portion of Iredell and Union Counties in the maintenance area.

B. Revised MVEBs

In the July 16, 2020 SIP revision, North Carolina requested that EPA approve revisions to the MVEBs for the North Carolina portion of the Charlotte 2008 Ozone Maintenance Area by allocating a portion of the remaining safety margin to the MVEBs.^{6 7} The

MVEB revisions are proposed to accommodate recent updates to the travel demand model impacting vehicle miles traveled, changes and uncertainty in vehicle mix assumptions, and uncertainty associated with mobile modeling in the North Carolina portion of the Charlotte Maintenance Area. The cumulative percent increases—

including both the current SIP-approved percent increases as shown in Table 6, above, as well as the proposed 20 percent increase applied to all counties—to the MVEBs for the North Carolina counties in the Charlotte 2008 Ozone Maintenance Area are listed in the Table 10 below.

TABLE 10—PROPOSED PERCENT INCREASE TO THE 2026 MOBILE VEHICLE EMISSIONS BUDGET

County	2026
Cabarrus	45
Gaston	40
Iredell	42
Lincoln	42
Mecklenburg	37
Rowan	45
Union	40

⁶ As with the original SIP approved on July 15, 2015, and the last revision approved on September 11, 2019, NCDAQ utilized a five-step approach for determining a factor to use to calculate the amount

of safety margin to apply to the MVEBs for 2026. See Appendix A of the submittal for more detailed information.

⁷ The proposed changes to the safety margins are discussed in section III.C., below.

The following tables provide the proposed updated NO_x and VOC sub-area MVEBs with the proposed safety margin allocations in kg/day for transportation conformity purposes for

2026 (2014 is only shown for illustration because no changes are being made to the MVEBs for that year). The amount of the proposed safety margin allocation includes the current

SIP-approved safety margin allocations referenced in the tables above as well as the proposed percentages in values.

TABLE 11—CABARRUS ROWAN METROPOLITAN PLANNING ORGANIZATION (CRMPO) MVEBS IN 2014 AND 2026
[kg/day]*

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	11,814	7,173	3,381	3,371
Safety margin allocated to MVEB .....	.....	.....	1,522	1,517
Conformity MVEB	11,814	7,173	4,903	4,888

*Includes the portion of Cabarrus and Rowan Counties in the maintenance area. The allocation proposed in this action to the NO_x MVEB is 676 kg/day and VOC is 674 kg/day.

TABLE 12—GASTON-CLEVELAND-LINCOLN METROPOLITAN PLANNING ORGANIZATION (GCLMPO) MVEBS IN 2014 AND 2026
[kg/day]*

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	10,079	5,916	2,681	2,468
Safety margin allocated to MVEB	-	-	1,087	1,004
Conformity MVEB	10,079	5,916	3,768	3,472

*Includes the portion of Gaston and Lincoln counties in the maintenance area. Although Cleveland County is included in the MPO, it is not included in the Charlotte ozone maintenance area. The allocation proposed in this action to the NO_x MVEB is 536 kg/day and VOC is 494 kg/day.

TABLE 13—CHARLOTTE REGIONAL TRANSPORTATION PLANNING ORGANIZATION (CRTPO)—ROCKY RIVER RURAL PLANNING ORGANIZATION (RRPO) MVEBS IN 2014 AND 2026
[kg/day]*

	2014 NO _x	2014 VOC	2026 NO _x	2026 VOC
Base On-road Emissions	32,679	18,038	8,870	8,655
Safety margin allocated to MVEB .....	.....	.....	3,371	3,288
Conformity MVEB	32,679	18,038	12,241	11,943

*Includes all of Mecklenburg County and a portion of Iredell and Union Counties in the maintenance area. The allocation proposed in this action to the NO_x MVEB is 1,775 kg/day and VOC is 1,731 kg/day.

C. Revised Safety Margin

As mentioned before, a safety margin is the difference between the attainment level of emissions from all source categories (*i.e.*, point, area, on-road, and nonroad) and the projected level of emissions in the maintenance year from all source categories. NCDAQ has requested EPA approve allocation of some of the available safety margin to the 2026 MVEBs for transportation conformity purposes. The total level of

emissions from all source categories remains equal to or less than the attainment level of emissions.

EPA is proposing to approve changes to the MVEBs that result in additional safety margin allocations to the 2026 MVEBs of 2,987 kg/day (3.29 tons/day) of NO_x and 2,899 kg/day (3.19 tons/day) of VOC. This includes a proposed allocation of 676 and 674 kg/day of NO_x and VOC, respectively for the Cabarrus-Rowan MPO; 536 and 494 kg/day of NO_x and VOC, respectively for the

Gaston-Cleveland MPO; and 1,775 and 1,731 kg/day, respectively for the Charlotte Regional TPO. Thus, if EPA's action is finalized as proposed, the cumulative safety margin emissions allocated to the 2026 MVEBs will be 5,980 kg/day (6.59 tons/day) of NO_x and 5,809 kg/day (6.40 tons/day) of VOC.⁸ The proposed new safety margins available for the North Carolina portion of the Charlotte Maintenance Area are listed below.

TABLE 14—NEW SAFETY MARGINS FOR THE NORTH CAROLINA PORTION OF THE CHARLOTTE MAINTENANCE AREA

Year	NO _x (tons/day)	VOC (tons/day)
2014	N/A	N/A
2015	– 5.99	– 2.03
2018	– 45.49	– 13.30
2022	– 63.74	– 15.84
2026	– 63.31	– 10.73

⁸ The amount of the safety margin is a cumulative total of the current safety margin allocations (shown

in Tables 5 through 7) and the proposed safety margin allocations (shown in Tables 11 through 13).

D. Adequacy of the Budgets

EPA evaluated NCDQA's July 16, 2020 SIP revision allocating a portion of the available safety margin to the 2026 MOVES2014 based budgets in the revised 2008 8-hour ozone Charlotte maintenance plan for use in determining transportation conformity in the North Carolina portion of the Charlotte Maintenance Area. EPA is proposing this action based on our evaluation of these budgets using the adequacy criteria found in 40 CFR 93.118(e)(4) and evaluation of NCDQA's submittal and SIP requirements. EPA is proposing to approve this SIP revision because the SIP continues to serve its intended purpose of maintenance of the 2008 8-hour ozone standard with the newly revised MOVES2014 based budgets and to deem the budgets adequate for transportation conformity purposes because they meet the adequacy criteria in the conformity rule at 40 CFR 93.118(e)(4). Specifically:

- NCDQA's SIP was endorsed by the Governor's designee and was subject to a state public hearing ((e)(4)(i));
- Before NCDQA submitted the SIP revision to EPA, consultation among federal, state, and local agencies occurred and full documentation was provided to EPA and EPA had no concerns ((e)(4)(ii));
- The budgets are clearly identified and precisely quantified ((e)(4)(iii));
- The budgets, when considered together with all other emissions sources, are consistent with applicable requirements for reasonable further progress, attainment, or maintenance ((e)(4)(iv));
- The budgets are consistent with and clearly related to the emissions inventory and control measures in the SIP revision submitted July 16, 2020 ((e)(4)(v)); and
- The July 16, 2020 SIP revision explains and documents changes to the previous budgets, impacts on point and area source emissions, and changes to established safety margins, and reasons for the changes (including the basis for any changes related to emission factors or vehicle miles traveled) ((e)(4)(vi)).

IV. Proposed Action

EPA is proposing to approve NCDQA's July 16, 2020 SIP revision, requesting approval of a revision to the Charlotte 2008 8-hr Ozone Maintenance Plan in order to allocate a portion of the available safety margin to revise the 2026 NO_x and VOC MVEBs. The revised MVEBs ensure continued attainment of the 2008 8-hour ozone NAAQS through the maintenance year 2026. In addition, EPA is proposing to deem the MVEBs

adequate for transportation conformity purposes because the budgets meet the adequacy criteria in the conformity rule at 40 CFR 93.118(e)(4). If approved, the newly revised 2026 budgets for NO_x and VOC identified in Tables 11 through 13 will be used by the MPOs in future transportation conformity determinations. The remaining safety margin is 63.31 tons/day and 13.73 tons/day for NO_x and VOC, respectively. EPA has evaluated North Carolina's submittal and has determined that it meets the applicable requirements of the CAA and EPA regulations, and is consistent with EPA policy.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submittal that complies with the provisions of the Act and applicable federal regulations. *See* 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 proposed action merely proposes to approve state law as meeting Federal requirements and does not propose to impose additional requirements beyond those imposed by state law. For that reason, these proposed actions:

- Are not significant regulatory actions 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);
- Do not impose information collection burdens under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having significant economic impacts on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, October 7, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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

- Do 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 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Carbon monoxide, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements and Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 10, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

[FR Doc. 2021-13081 Filed 6-22-21; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 141

[EPA-HQ-OW-2021-0255; FRL-10024-80-OW]

Lead and Copper Rule Revisions (LCRR) Virtual Engagements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is extending the comment period for the Lead and Copper Rule Revisions (LCRR) Virtual Engagements. In order to provide the public with opportunities to submit additional comments to the LCRR Virtual Engagements docket after participating in or viewing the community, tribal, and stakeholder roundtables, EPA is extending the comment period an additional 30 days, from June 30, 2021 to July 30, 2021.

DATES: The comment period announced in the document published on April 5, 2021 (86 FR 17571), is extended.

Comments must be received by EPA on or before July 30, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2021-0255 via the Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OW-2021-0255 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Erik Helm at the U.S. Environmental Protection Agency, Office of Ground Water and Drinking Water, Standards and Risk Management Division (Mail Code 4607M), 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone: 202-566-1049; or email: Helm.Erik@epa.gov.

SUPPLEMENTARY INFORMATION: On April 5, 2021, EPA published a document in the **Federal Register** (86 FR 17571), announcing that the agency will host virtual engagements beginning in April 2021. The goal of the events is to obtain further public input on EPA’s LCRR, particularly from individuals and communities that are most at-risk of exposure to lead in drinking water. For more information on each event, visit EPA’s drinking water website: <https://www.epa.gov/safewater>. In addition to these events, EPA opened a docket (No. EPA-HQ-OW-2021-0255) to collect input from the public on the LCRR.

EPA hosted public listening sessions on April 28, 2021 and May 5, 2021, and is now working to schedule the

community, tribal, and stakeholder roundtables from the beginning of June to mid-July. EPA intends to make each roundtable available for viewing to those who are not participating but are interested in listening. EPA will be posting meeting materials and additional event details on <https://www.epa.gov/safewater> as they become available. In order to provide the public with opportunities to submit additional comments to the LCRR Virtual Engagements docket once these virtual meetings have been held, EPA is extending the comment submission date to July 30, 2021.

A. Opportunities To View Additional Information and Public Input on the LCRR

EPA is hosting virtual community, tribal, and stakeholder roundtables through mid-July. Community roundtables offer an opportunity through which local organizations can participate in a discussion of LCRR related topics and provide their unique perspective to EPA. These roundtables will focus on communities that are disproportionately impacted by the challenges of lead in drinking water. Participants in these community roundtables will be representative of the interests in these individual communities including, but not limited to, local government entities, public water utilities, community-organized groups, environmental groups, and elected officials.

EPA will also host a virtual tribal roundtable regarding the LCRR in mid-July. This will be a facilitated discussion of topics related to the LCRR among participants who represent tribes and tribal communities including, but not limited to, tribal governments, public water utilities serving Indian country, tribal consortia, and tribally authorized organizations. EPA will soon invite these groups to self-nominate individuals to participate in this discussion. Information and updates on the tribal roundtable will be posted on <https://www.epa.gov/safewater> as it becomes available.

In addition, EPA intends to host a stakeholder roundtable where representatives of national organizations (e.g., environmental, industry, consumer, intergovernmental) can participate in a discussion of LCRR related topics and provide their perspective to the agency.

Lastly, EPA will meet with state coregulators to consider their input provided up to that point to understand the states’ perspectives on the LCRR.

For specific information on the scheduled times and participants in

these roundtable events, visit EPA’s drinking water website: <https://www.epa.gov/safewater>.

B. Public Participation

Submission of Written Comments to the Docket

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2021-0255, at <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from the docket. 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 the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Radhika Fox,

*Principal Deputy Assistant Administrator,
Office of Water.*

[FR Doc. 2021-13309 Filed 6-22-21; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2020-0079; FF09E22000 FXES11130900000 212]

RIN 1018-BE02

Endangered and Threatened Wildlife and Plants; Reclassification of the Hawaiian Stilt From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, and announcement of a public informational meeting and public hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), recently proposed to reclassify the Hawaiian stilt (*Himantopus mexicanus knudseni*) from an endangered species to a threatened

species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. We are reopening the proposed rule comment period to give all interested parties an additional opportunity to comment on the proposed rule. We also announce a public informational meeting and public hearing on the proposed rule.

Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the final rule.

DATES: Comment submission: The comment period on the proposed rule that published March 25, 2021 (86 FR 15855), is reopened. We will accept comments received or postmarked on or before July 23, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational meeting and public hearing: On July 7, 2021, we will hold a public informational meeting from 5 p.m. to 6 p.m. Hawaii Time, followed by a public hearing from 6 p.m. to 8 p.m. Hawaii Time.

ADDRESSES: Availability of documents: You may obtain copies of the March 25, 2021, proposed rule and associated documents on the internet at <http://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0079.

Comment submission: You may submit comments by one of the following methods:

(1) **Electronically:** Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R1-ES-2020-0079, which is the docket number for the March 25, 2021, proposed rule. Then click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) **By hard copy:** Submit by U.S. mail to: Public Comments Processing, Attn: Docket No. FWS-R1-ES-2020-0079, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

Public informational meeting and public hearing: The public

informational meeting and the public hearing will be held virtually using the Zoom platform. See Public Hearing, below, for more information.

FOR FURTHER INFORMATION CONTACT: Greg Koob, Deputy Field Supervisor for Programmatic Operations, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3-123, Honolulu, HI 96850; telephone 808-792-9449. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

On March 25, 2021, we published a proposed rule (86 FR 15855) to reclassify the Hawaiian stilt from endangered to threatened (*i.e.*, to "downlist" the species) with a rule issued under section 4(d) of the Act (16 U.S.C. 1531 *et seq.*). The proposed rule opened a 60-day public comment period, ending May 24, 2021. During the open comment period, we received a request for a public hearing from the Center for Biological Diversity. Therefore, we are reopening the comment period on the March 25, 2021, proposed rule and announcing a public informational meeting and a public hearing to allow the public an additional opportunity to provide comments on the proposed rule.

For a description of previous Federal actions concerning the Hawaiian stilt and information on the types of comments that would be helpful to us in promulgating this rulemaking action, please refer to the March 25, 2021, proposed rule (86 FR 15855).

Public Comments

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on <http://www.regulations.gov>.

Public Hearing

We have scheduled a public informational meeting and public hearing on our March 25, 2021, proposed rule to downlist the Hawaiian

stilt with a rule issued under section 4(d) of the Act (86 FR 15855). We will hold the public informational meeting and public hearing on the date and at the times listed above under *Public informational meeting and public hearing* in **DATES**. We are holding the public informational meeting and public hearing via the Zoom online video platform and via teleconference so that participants can attend remotely. For security purposes, registration is required. To listen and view the meeting and hearing via Zoom, listen to the meeting and hearing by telephone, or provide oral public comments at the public hearing via Zoom or by telephone, you must register. For information on how to register, or if you encounter problems joining Zoom the day of the meeting, visit <https://www.fws.gov/pacificislands>. Registrants will receive the Zoom link and the telephone number for the public informational meeting and public hearing. If applicable, interested members of the public not familiar with the Zoom platform should view the Zoom video tutorials (<https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials>) prior to the public informational meeting and public hearing.

The public hearing will provide interested parties an opportunity to present verbal testimony (formal, oral comments) regarding the March 25, 2021, proposed rule to downlist the Hawaiian stilt with a rule issued under section 4(d) of the Act (86 FR 15855). While the public informational meeting will be an opportunity for dialogue with the Service, the public hearing is not. The purpose of the public hearing is to provide a forum for accepting formal verbal testimony, which will then become part of the record for the proposed rule. In the event there is a large attendance, the time allotted for verbal testimony may be limited. Therefore, anyone wishing to provide verbal testimony at the public hearing is encouraged to provide a prepared written copy of their statement to us through the Federal eRulemaking Portal or by U.S. mail (see **ADDRESSES**, above). There are no limits on the length of written comments submitted to us. Anyone wishing to provide verbal testimony at the public hearing must register before the hearing (<https://www.fws.gov/pacificislands>). The use of a virtual public hearing is consistent with our regulations in title 50 of the Code of Federal Regulations (CFR) at § 424.16(c)(3) (50 CFR 424.16(c)(3)).

Reasonable Accommodation

The Service is committed to providing access to the public informational meeting and public hearing for all participants. Closed captioning will be available during the public informational meeting and public hearing. Further, a full audio and video recording and transcript of the public hearing will be posted online at <https://www.fws.gov/pacificislands> after the hearing. Participants will also have access to live audio during the public informational meeting and public hearing via their telephone or computer speakers. Persons with disabilities requiring reasonable accommodations to participate in the meeting and/or hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** at least 5 business days prior to the date of the meeting and hearing to help ensure availability. An accessible version of the Service's public informational meeting presentation will also be posted online at <https://www.fws.gov/pacificislands> prior to the meeting and hearing (see **DATES**, above). See <https://www.fws.gov/pacificislands> for more information about reasonable accommodation.

Authors

The primary author of this document is Ecological Services staff of the Interior-Region 9/12 Regional Office, U.S. Fish and Wildlife Service, Portland, Oregon.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Signing Authority

The Director, U.S. Fish and Wildlife Service, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the U.S. Fish and Wildlife Service. Martha Williams, Principal Deputy Director Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service, approved this document on June 21, 2021, for publication.

Anissa Craghead,

Acting Regulations and Policy Chief, Division of Policy, Economics, Risk Management, and Analytics, Joint Administrative Operations, U.S. Fish and Wildlife Service.

[FR Doc. 2021-13290 Filed 6-22-21; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2020-0082; FF09E22000 FXES11130900000 212]

RIN 1018-BD97

Endangered and Threatened Wildlife and Plants; Reclassifying the Fender's Blue Butterfly From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify the Fender's blue butterfly (*Icaricia icarioides fenderi*) from endangered to threatened (downlist) under the Endangered Species Act of 1973, as amended (Act). The Fender's blue butterfly is endemic to the Willamette Valley of Oregon. The proposed downlisting is based on our evaluation of the best available scientific and commercial information, which indicates that the species' status has improved such that it is not currently in danger of extinction throughout all or a significant portion of its range, but that it is still likely to become so in the foreseeable future. We also propose a rule under section 4(d) of the Act that provides for the conservation of the species.

DATES: We will accept comments received or postmarked on or before August 23, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by August 9, 2021.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R1-ES-2020-0082, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R1-ES-2020-0082, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275

Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see *Public Comments*, below, for more information).

Document availability: This proposed rule and supporting documents, including the 5-year review, the Recovery Plan, and the species status assessment (SSA) report are available at <https://www.fws.gov/oregonfwo> and at <http://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0082.

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266; telephone 503-231-6179. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act a species may warrant reclassification from endangered to threatened if it no longer meets the definition of endangered (in danger of extinction). The Fender's blue butterfly is listed as endangered, and we are proposing to reclassify (downlist) the Fender's blue butterfly as threatened because we have determined it is not currently in danger of extinction. Downlisting a species as a threatened species can only be made by issuing a rulemaking.

What this document does. This rule proposes to downlist the Fender's blue butterfly from endangered to threatened (*i.e.*, to "downlist" the species), with a rule issued under section 4(d) of the Act, based on the species' current status, which has been improved through implementation of conservation actions.

The basis for our action. Under the Act, we may determine that a species is an endangered species or a threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We may downlist a species if the best available commercial and scientific data indicate the species no

longer meets the applicable definition in the Act. We have determined that the Fender's blue butterfly is no longer in danger of extinction and, therefore, does not meet the definition of an endangered species, but is still affected by the following current and ongoing threats to the extent that the species meets the definition of a threatened species under the Act: The loss, degradation, and fragmentation of prairie and oak savannah habitats including conversion to non-habitat land uses (e.g., urban development, agriculture); elimination of natural disturbance regimes; encroachment into prairie habitats by shrubs and trees due to fire suppression; insecticides and herbicides; and invasion by non-native plants.

We are proposing to promulgate a section 4(d) rule. We propose to prohibit all intentional take of the Fender's blue butterfly and specifically allow incidental take by landowners or their agents while conducting management for the creation, restoration, or enhancement of short-stature native upland prairie or oak savannah conditions under section 9(a)(1) of the Act as a means to provide protective mechanisms to our State and private partners so that they may continue with certain activities that will facilitate the conservation and recovery of the species.

This document consists of: (1) A summary of the status of Fender's blue butterfly and the most recent 5-year review recommendation that the species be reclassified from endangered to threatened status; (2) a proposed rule to list Fender's blue butterfly as a threatened species under the Act; and (3) a proposed rule under section 4(d) of the Act to provide for the conservation of the species (hereafter, a "4(d) rule"). Additionally, to support our species status review, we prepared a Species Status Assessment Report for the Fender's Blue Butterfly (USFWS 2020, entire) that presents a thorough review of the taxonomy, life history, ecology, and overall viability of the Fender's blue butterfly (available at <http://www.regulations.gov>, Docket No. FWS-R1-ES-2020-0082, under Supporting Documents).

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule be based on the best scientific and commercial data available and be as accurate and as effective as possible.

Therefore, we request comments and information from other concerned

governmental agencies, the scientific community, industry, or any other interested parties concerning this proposed rule. In particular, we seek comments concerning:

(1) Reasons we should or should not reclassify Fender's blue butterfly from an endangered species to a threatened species.

(2) New biological or other relevant data concerning any threat (or lack thereof) to Fender's blue butterfly and any existing regulations that may be addressing these or any of the stressors to the species discussed here.

(3) New information concerning the population size or trends of Fender's blue butterfly.

(4) Current or planned activities within the geographic range of Fender's blue butterfly that may have adverse or beneficial impacts on the species.

(5) New information or data on the projected and reasonably likely impacts to Fender's blue butterfly or its habitat associated with climate change or any other factors that may affect the species in the future.

(6) Information on regulations that are necessary and advisable to provide for the conservation of Fender's blue butterfly and that the Service can consider in developing a 4(d) rule for the species.

(7) Information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications, preferably in English) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is

made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species should remain listed as endangered instead of being reclassified as threatened, or we may conclude that the species no longer warrants listing as either an endangered species or a threatened species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions if we conclude it is appropriate in light of comments and new information received. For example, we may expand the incidental-take prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the incidental-take prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the

Fender's blue butterfly. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), our August 22, 2016, Director's Memo on the Peer Review Process, and the Office of Management and Budget's December 16, 2004, Final Information Quality Bulletin for Peer Review (revised June 2012), we sought the expert opinions of 12 appropriate and independent specialists with knowledge of the biology and ecology of Fender's blue butterfly or its habitat regarding the SSA report. The purpose of peer review is to ensure that our determination regarding the status of the species under the Act is based on scientifically sound data, assumptions, and analyses. We received feedback from 5 of the 12 peer reviewers contacted. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the final SSA report, which is the foundation for this proposed rule.

Previous Federal Actions

On January 27, 1998, we published a proposed rule (63 FR 3863) to list the Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) under the Act, without critical habitat. On January 25, 2000, we published the final rule designating endangered status for the Fender's blue butterfly and Willamette daisy, and threatened status for Kincaid's lupine (65 FR 3875).

On November 2, 2005, we published a proposed rule in the **Federal Register** to designate critical habitat for the Fender's blue butterfly, Kincaid's lupine, and Willamette daisy (70 FR 66492). We published the final rule designating critical habitat for the Fender's blue butterfly, Kincaid's lupine, and Willamette daisy on October 31, 2006 (71 FR 63862). The final critical habitat designation included approximately 1,218 hectares (ha) (3,010 acres [ac]) for Fender's blue butterfly in Oregon; 237 ha (585 ac) for Kincaid's lupine in Oregon and Washington; and 291 ha (718 ac) for Willamette daisy in Oregon.

On September 22, 2008, we published the notice of availability of the draft Recovery Plan for the Prairie Species of

Western Oregon and Southwestern Washington (hereafter "recovery plan") in the **Federal Register** (73 FR 54603). The notice of availability for the final recovery plan was published in the **Federal Register** on June 29, 2010 (75 FR 37460).

On July 6, 2005, we announced the initiation of a 5-year review of the Fender's blue butterfly under section 4(c)(2)(b) of the Act (70 FR 38972). The 5-year status review for the Fender's blue butterfly was signed on March 6, 2019.

Background

Status Assessment for the Fender's Blue Butterfly

We prepared an SSA report for the Fender's Blue Butterfly (USFWS 2020, entire) that presents a thorough review of the taxonomy, life history, ecology, and overall viability of the Fender's blue butterfly. In this proposed rule we present only a summary of the key results and conclusions from the SSA report; the full report is available at <http://www.regulations.gov>, as referenced above.

Recovery Planning and Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the List.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all of the guidance provided in a recovery plan.

In 2010, we finalized the Recovery Plan for the Prairie Species of Western Oregon and Southwestern Washington, which applied to a suite of endemic species including Fender's blue butterfly (USFWS 2010, entire). The objective of the recovery plan is to achieve viable populations of the listed species distributed across their historical ranges in a series of interconnected populations. This objective was to be accomplished by establishing metapopulations of restored prairie reserves across the geographic range covered by the recovery plan (USFWS 2010, p. v). The recovery plan set abundance and distribution goals for Fender's blue butterfly by delineating three recovery zones (Salem, Corvallis, and Eugene) encompassing the historical range of the species. The two downlisting criteria established for Fender's blue butterfly were as follows:

(1) Each recovery zone has one functioning network (a metapopulation with several interacting subpopulations, as defined in the recovery plan) with a minimum count of 200 butterflies, distributed among 3 subpopulations, for at least 10 years; in addition to this network, there must be a second functioning network or 2 independent populations with butterflies present each year in each recovery zone. Downlisting goals were set at a 90 percent probability of persistence for 25 years.

(2) Two functioning networks or one functioning network and two independent populations in each zone

must be protected and managed for high-quality prairie habitat. The plan described high-quality prairie as habitat consisting of a diversity of native, non-woody plant species, various nectar plants that bloom throughout the flight season of Fender's blue butterfly, low frequency of nonnative plant species and encroaching woody species, and essential habitat elements (e.g., nest sites and food plants) for native pollinators. At least one of the larval host plant species, *Lupinus sulphureus* ssp. *kincaidii*, *L. arbustus* or *L. albicaulis*, must be present.

All three recovery zones have at least two metapopulations (Table 1). The Baskett, Wren, West Eugene, and Willow Creek metapopulations have had more than 200 butterflies each year

for at least 10 consecutive years and are therefore meeting the recovery criteria. In addition, the Gopher Valley, Oak Ridge, Butterfly Meadows, Greasy Creek, Lupine Meadows, Coburg Ridge, and Oak Basin metapopulations have had butterflies present for at least 10 years though they have not exceeded the count of 200 butterflies. Thus, the species is currently meeting population criteria for downlisting. That said, concern remains for the Corvallis recovery zone in the middle of the species' range, with metapopulations that are generally less robust and more vulnerable to deteriorating in condition over time.

The species is currently meeting habitat management and protection downlisting criteria. In each recovery

zone, we have at least three metapopulations with greater than 75 percent of their habitat protected (Table 1). Managers of protected land either have a habitat management plan in place, or are in the process of creating plans to maintain prairie quality for Fender's blue butterfly. Although the recovery plan has identified the number of nectar species and sufficient amount of nectar to make up high quality habitat, our metapopulations currently do not meet the strict definition as spelled out in the recovery plan. However, we believe that for the species to achieve recovery, it does not need to fulfill this part of the criteria as laid out in the recovery plan. We will discuss this in greater detail below.

TABLE 1—FENDER'S BLUE BUTTERFLY DISTRIBUTION, ABUNDANCE AND PROTECTION ACROSS RECOVERY ZONES

Metapopulation	At least 200 butterflies for 10 years	Number consecutive years ≥200 butterflies	Time period with ≥200 butterflies	Butterflies present for past 10 years	Habitat protection (%)
Salem Recovery Zone:					
Baskett	Y	18	2000–2018	Y	100
Gopher Valley	N	7	2012–2018	Y	100
Hagg Lake	N	8	2011–2018	N	100
Moore's Valley	N	0	—	N	100
Oak Ridge	N	6	2013–2018	Y	35
Turner Creek	N	0	—	N	45
Corvallis Recovery Zone:					
Butterfly Meadows	N	6	2003–2009	Y	24
Finley	N	3	2016–2018	N	100
Greasy Creek	N	0	—	Y	4
Lupine Meadows	N	6	2003–2009	Y	100
Wren	Y	12	2006–2018	Y	93
Eugene Recovery Zone:					
Coburg Ridge	N	2	2006–2007	Y	77
Oak Basin	N	0	—	Y	100
West Eugene	Y	15	2003–2018	Y	100
Willow Creek	Y	25	1993–2018	Y	100

While Fender's blue butterfly meets downlisting criteria, the species does not meet delisting criteria. The three delisting criteria established for Fender's blue butterfly were as follows:

(1) Each of the three recovery zones has a combination of functioning networks and independent populations such that the probability of persistence is 95 percent over the next 100 years; Annual population surveys in each functioning network and independent population must count at least the minimum number of adult butterflies for 10 consecutive years.

(2) Sites supporting populations of Fender's blue butterflies considered in Criterion 1 above must be protected and managed for high-quality prairie habitat as described in the recovery plan.

(3) Monitoring of populations following delisting will verify the ongoing recovery of the species, provide

a basis for determining whether the species should be again placed under the protection of the Act, and provide a means of assessing the continuing effectiveness of management actions.

Delisting may be achieved with a variety of combinations of metapopulations and independent populations in each recovery zone as detailed in the recovery plan. Currently, each recovery zone has at least four metapopulations meaning that each metapopulation would need a minimum of 400 butterflies in each of 10 consecutive years to meet delisting Criterion 1. At this time, none of the recovery zones meet this criterion. For Criterion 2, many of the sites for the Fender's blue butterfly have protection in place. Currently, we have three HCPs, 17 SHA, and many partners agreement in place. These agreements help maintain the species habitat through

prairie habitat restoration and enhancement. Overall, there is currently management and protection for the Fender's blue butterfly habitat. However, these sites do not possess sufficient number of butterflies to meet Criterion 1. Additionally, we also do not have post-delisting monitoring plans or agreements in place to assure habitat management will continue for this conservation-reliant species as per delisting Criterion 3. Therefore, although there are management plans in place for the species habitat, because we do not have sufficient number of butterflies within the metapopulations and we also do not have long term agreements for continual habitat management, this species does not meet the threshold for delisting.

The extinction thresholds underlying downlisting and delisting criteria were derived from a census-based population

viability analysis (PVA) conducted shortly after listing the Fender's blue butterfly (USFWS 2010, pp. IV–29–IV–31 and IV–34). However, for the reasons described below, we are conducting a new PVA using an individual-based population model and reevaluating the delisting recovery criteria in light of the best scientific data that are now available. As described in the SSA report, the PVA used to develop the initial recovery criteria relied upon several assumptions that, based on our improved understanding of the ecology of the butterfly, we now know are outdated and require modification. We also have an additional decade of monitoring data and increased confidence in the accuracy of a standardized monitoring protocol implemented in 2012 (USFWS 2020, pp. 47–52). Furthermore, the recovery plan set specific targets for the abundance and diversity of nectar species required to be of high habitat quality to support Fender's blue butterfly, as well as a minimum density of lupine leaves (the host plant for the species' larval life stage). For various reasons detailed in the SSA report, including a limited dataset and conflicting results regarding the correlation between these resources and densities of Fender's blue butterfly, these targets are also now in question (USFWS 2020, pp. 65–67).

Because we are in the process of reevaluating the current recovery criteria for Fender's blue butterfly as presented in the recovery plan for the species (USFWS 2010, pp. IV–29–IV–31 and IV–34), we did not assess the status of Fender's blue butterfly relative to all of the existing habitat targets. However, in our SSA, we did consider the status of the species relative to the overarching goals of protecting existing populations, securing the habitat, and managing for high-quality prairie habitats; all of these were downlisting and delisting considerations described in the recovery plan (USFWS 2010, p. IV–9). In addition, our evaluation under the SSA framework (USFWS 2016) reflects the fundamental concepts captured in the recovery plan strategy of achieving multiple populations with connectivity between them distributed across the historical range of the species. For example, we find that the minimum number threshold from the recovery plan remains valid because population size targets based on minimum population size eliminate confounding variation from stochastic events that may not reflect demographic changes. In other words, averages may be artificially high or low if you have one unusual weather year.

Additionally, we partially rely upon the habitat targets for nectar species for evaluating the status of the species. We acknowledge that the species needs a variety of different species as nectar sources. The recovery plan identifies the quantity of nectar needed per area and the number of native nectar species. However, we do not find that the quantity defined in these habitat targets of the recovery plan is needed for the recovery of the species as we have seen sites maintain viability despite not meeting the target (*i.e.*, there are sites that are able to maintain viability with lower quantity of nectar and nonnative nectar species). We also explicitly considered not only the quality of the prairie habitat, using the recommended guidelines for prairie quality and nectar availability in the recovery plan, but also the management and protection status of butterfly occurrences (see, *e.g.*, USFWS 2010, p. IV–13, pp. IV–29–IV–31).

In sum, for the purpose of this status review, we evaluated the status of Fender's blue butterfly in terms of the relative viability of the species over time and the conservation biology principles of resiliency, redundancy, and representation of its constituent populations (Shaffer and Stein 2000, pp. 307–310; Wolf *et al.* 2015, entire; Smith *et al.* 2018, entire). Extinction risk is generally reduced as a function of increased population abundance (resiliency), numbers of populations (redundancy), and distribution or geographic or genetic diversity (representation). We combined our assessment of the resiliency, redundancy, and representation of Fender's blue butterfly populations with our evaluation of the ongoing and future threats to the species, as defined under section 4(a)(1) of the Act, to assess the overall status of the species in terms of its current viability and relative viability over a range of plausible futures (Smith *et al.* 2018, p. 306; USFWS 2020, entire).

Taxonomy and Historical Distribution

The Fender's blue butterfly was first described in 1931 as *Plebejus maricopa fenderi* based on specimens collected near McMinnville, Oregon, in Yamhill County (Macy 1931, pp. 1–2). The Fender's blue butterfly was classified in the Lycaenidae family within the subfamily Polyommatainae as a subspecies of Boisduval's blue butterfly based on adult characters and geographic distribution. The species *maricopa* was considered a synonym of the species *icarioides* and was later determined to be a member of the genus *Icaricia*, rather than the genus *Plebejus*. The worldwide taxonomic arrangement

of the subtribe Polyommataina (which contains blue butterflies) was fluctuating between *Plebejus* and *Icaricia* until it was revised in 2013 as *Icaricia*. The current scientific name, *Icaricia icarioides fenderi*, was validated by the Integrated Taxonomic Information System (ITIS) and experts at the McGuire Center for Lepidoptera and Biodiversity, a division of the Florida Museum of Natural History at the University of Florida (see USFWS 2020, p. 15, for all citations).

We do not know the precise historical distribution of Fender's blue butterfly due to the limited information collected on this subspecies prior to its description in 1931. Only a limited number of collections were made between the time of the subspecies' discovery and its presumed last observation on May 23, 1937, in Benton County, Oregon, leading the scientific community to assume the species was extinct (Hammond and Wilson 1993, p. 3). Fender's blue butterfly was rediscovered in 1989 at the McDonald State Forest, Benton County, Oregon, on the uncommon plant, Kincaid's lupine. Surveys since its rediscovery indicate that the distribution of Fender's blue butterfly is restricted to the Willamette Valley in Benton, Lane, Linn, Polk, Yamhill, and Washington Counties in Oregon.

Population Terminology

In some instances, populations that are spatially separated interact, at least on occasion, as individual members move from one population to another. In the case of Fender's blue butterfly, the clear delineation of discrete populations and subpopulations is challenging because of the uncertainty regarding the extent to which individuals at known sites interact with each other or with other individuals on the landscape of adjacent private lands that are inaccessible to researchers and remain unsurveyed. Thus, in the SSA report and in this document, we use the term “metapopulation” as a rough analog to the more familiar term “population”. We use the term metapopulation to describe groups of sites occupied by Fender's blue butterflies that are within 2 kilometers (km) (1.2 miles [mi]) of one another and not separated by barriers. We chose this distance because it is the estimated dispersal distance of Fender's blue butterfly (Schultz 1998, p. 290). We assume that butterflies within a metapopulation are capable of at least occasional interchange of individuals. We do not anticipate that metapopulations across the range of the species will interact with one another given the distance and structural

barriers between them. The definition of metapopulation used here and in the SSA report is not the same as the “functioning network” defined in the recovery plan because the latter does not allow for circumstances when populations do not meet the recovery plan definition of either an independent population or a functioning network. It also included a requirement for a minimum patch size of 18 ha (44 ac) for each network, which we now know is not necessary, as the butterfly can thrive in much smaller patch sizes. Further information regarding these definitions is detailed in the SSA report (USFWS 2020, pp. 41–42).

Locations containing Fender’s blue butterfly occur across multiple land ownerships and have varying degrees of habitat protection, and are managed in different ways. We use the term “site” to identify a management unit or land ownership designation; multiple sites may therefore comprise a single metapopulation. An “independent group” of Fender’s blue butterfly refers to occupied sites that are more than 2 km (1.2 mi) from another occupied site and/or are separated by barriers from other occupied sites such that butterflies are unable to interact.

Summary of the Biology and Life History of the Species

The Fender’s blue butterfly is found only in the prairie and oak savannah habitats of the Willamette Valley of Oregon. Adult Fender’s blue butterflies are quite small, having a wingspan of approximately 25 millimeters (mm) (1 inch [in]). The upper wings of males are brilliant blue in color with black borders and basal areas, whereas the upper wings of females are brown.

The Fender’s blue butterfly relies primarily upon a relatively uncommon lupine plant, the Kincaid’s lupine, also endemic to the Willamette Valley and listed as a threatened species under the Act (65 FR 3875; January 25, 2000), as the host plant for the larval (caterpillar) life stage (Hammond and Wilson 1993, p. 2). The only other host plants known for Fender’s blue butterflies are *Lupinus arbustus* (longspur lupine) and *Lupinus albicaulis* (sickle-keeled lupine) (Schultz *et al.* 2003, pp. 64–67). Females lay single eggs on the underside of the leaves of one of these three lupine species, up to approximately 350 eggs in total. Eggs hatch from mid-May to mid-July, and the larvae feed on the lupine until the plants senesce and the larvae go into diapause for the fall and winter. The larvae break diapause in early spring, feed exclusively on the host lupine, and metamorphose into adults, emerging as butterflies between mid-

April and the end of June. Adult Fender’s blue butterflies only live 7 to 14 days, and feed exclusively on nectar from flowering plants (Schultz 1995, p. 36; Schultz *et al.* 2003, pp. 64–65).

Given its short adult lifespan, the Fender’s blue butterfly has limited dispersal ability. Butterflies are estimated to disperse approximately 0.75 km (0.5 mi) if they remain in their natal lupine patch, and approximately 2 km (1.2 mi) if they disperse between lupine patches (Schultz 1998, p. 290).

Habitat

Both Fender’s blue butterfly and its primary larval host plant, the Kincaid’s lupine, are restricted to the upland prairies and oak savannahs of the Willamette Valley in western Oregon. Although wet prairies are occasionally occupied by the butterfly, most sites are found on upland prairie as that is where Kincaid’s lupine tends to be found. The Willamette Valley is approximately 200 km (130 mi) long and 30 to 50 km (20 to 40 mi) wide, characterized by a broad alluvial floodplain (Franklin and Dyrness 1988, p. 16). The alluvial soils of the Willamette Valley host a mosaic of grassland, woodland, and forest communities. Most grasslands in this region are early seral and require natural or human-induced disturbance for maintenance (Franklin and Dyrness 1988, p. 122). Historically, frequent burning reduced the abundance of shrubs and trees, favoring open prairies or savannahs with a rich variety of native plants and animals. As settlers arrived in the valley, they converted native habitats to agricultural landscapes, annual burning ceased, and both woody species and nonnative weeds encroached on the remaining prairie habitats. Native upland prairies now cover less than one percent of their former area, making them among the rarest of North American ecosystems (USFWS 2020, p. 27).

The upland prairies used by Fender’s blue butterfly are dominated by short-stature vegetation and slopes containing microtopography (small-scale surface features of the earth) of a variable nature. Most importantly, these prairies support at least one of the three larval host plants—Kincaid’s lupine, longspur lupine, or sickle-keeled lupine—required by Fender’s blue butterfly. The leaves of these lupine species grow to approximately 61 cm (24 in) tall, with flowers extending up to 90 cm (35 in); the plant requires sunny open areas without dense canopy cover (USFWS 2020, p. 32). These three lupines are an obligate food source for the larvae or caterpillars, but an abundance of wildflowers is essential for the adult life

form. Nectar from wildflowers is the sole food source for adult butterflies, making a diversity of wildflowers a required component of prairie habitat for Fender’s blue butterfly.

The upland prairie habitats used by Fender’s blue butterfly often contain scattered *Quercus garryana* (Oregon white oak) and the following native grass species: *Danthonia californica* (California oatgrass), *Festuca idahoensis roemerii* (Roemer’s fescue), and *Elymus glaucus* (blue wild rye). Two nonnative grass species are also frequently present, *Arrhenatherum elatius* (tall oatgrass) and *Festuca arundinacea* (tall fescue). Tall grasses, including oatgrass and fescue, inhibit the growth of the lupine host plants and native nectar sources by crowding or shading them out; they can also overtop the lupines, and preclude access by females for oviposition. When tall grasses or other tall vegetation become dominant, they can prevent Fender’s blue butterfly from using the native plant species necessary for the butterfly’s survival and reproduction (USFWS 2020, p. 28). Invasive exotics that form thick stands of cover, such as *Cytisus scoparius* (Scotch broom) or *Rubus armeniacus* (Himalayan blackberry), also contribute to this problem.

Historical and Current Abundance and Distribution

While we do not know the precise historical abundance or distribution of Fender’s blue butterfly, at the time the subspecies was listed as endangered in 2000, we knew of approximately 3,391 individuals on 32 sites (USFWS 2020, p. 35). By retroactively applying the criteria for our refined population terminology, we calculate there would have been 12 metapopulations of Fender’s blue butterfly distributed across approximately 165 ha (408 ac) of occupied prairie in 4 counties at the time of listing (Table 2). Those numbers have now grown across all 3 recovery zones identified for Fender’s blue butterfly (see *Recovery Planning and Recovery Criteria*) as a result of population expansion, population discovery, and population creation; currently, 15 Fender’s blue butterfly metapopulations and 6 independent groups are distributed throughout the Willamette Valley in Benton, Lane, Linn, Polk, Washington, and Yamhill Counties (6 total Counties). There are 137 total sites, containing more than 13,700 individuals of the Fender’s blue butterfly, throughout an area totaling approximately 344 ha (825 ac) of occupied prairie habitat with a broad range of land ownerships and varying degrees of land protection and

management (USFWS 2020, pp. 52–53). In 2016, the estimated number of Fender's blue butterflies hit a presumed all-time high of nearly 29,000

individuals (USFWS 2020, p. 71). Maps showing the historical and current distribution of Fender's blue butterfly throughout its range are available in the

SSA report (USFWS 2020, pp. 51, 54–56).

TABLE 2—COMPARISON OF FENDER'S BLUE BUTTERFLY ABUNDANCE AND DISTRIBUTION BETWEEN TIME OF LISTING IN 2000 AND SURVEY RESULTS FROM 2018

[USFWS 2020, Table 3.4]

	Listed as endangered (2000)	Survey results as of 2018 *
Number of metapopulations	12	15.
Number of independent groups	0	6.
Total abundance (# of individuals)	3,391	13,700.
Number of sites	32	137.
Area of prairie habitat known to be occupied, in hectares (acres)	165 (408)	344 (825).
Counties known to be occupied	4 (Benton, Lane, Polk, and Yamhill).	6 (Benton, Lane, Linn, Polk, Washington, and Yamhill).

* Note this is not a total count, as not all sites can be surveyed every year; thus, the number of individuals reported in 2018 is an underestimate of the rangewide abundance.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an “endangered species” or a “threatened species.” The Act defines an endangered species as a species that is “in danger of extinction throughout all or a significant portion of its range,” and a threatened species as a species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The Act requires that we determine whether any species is an “endangered species” or a “threatened species” because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects. We consider these same five factors in downlisting a species from endangered to threatened (50 CFR 424.11(c)–(e)).

We use the term “threat” to refer in general to actions or conditions that are

known to or are reasonably likely to negatively affect individuals of a species. The term “threat” includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term “threat” may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an “endangered species” or a “threatened species.” In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an “endangered species” or a “threatened species” only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

Determining whether the status of a species has improved to the point that it can be reclassified from endangered to threatened (“downlisted”) or removed from the Federal Lists of Endangered

and Threatened Wildlife and Plants (“delisted”) requires consideration of whether the species is endangered or threatened because of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal of the Act's protections.

The Act does not define the term “foreseeable future,” which appears in the statutory definition of “threatened species.” Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. “Reliable” does not mean “certain”; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan,

reproductive rates or productivity, certain behaviors, and other demographic factors. We used 25 to 35 years as our foreseeable future for this species, which encompasses 35 generations of Fender’s blue butterfly, is a long enough timeframe for to us to observe species responses in response to threats acting on the species, and reflects time frames associated with current conservation agreements for the species.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be reclassified as a threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the full SSA report, which may be found at Docket No. FWS–RX–ES–2020–0082 on <http://www.regulations.gov>.

To assess Fender’s blue butterfly viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species’ ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species’ viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species’ life-history needs. The next stage involved an assessment of the historical and current condition of the

species’ demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species’ responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Factors Affecting the Fender’s Blue Butterfly

In this section, we review the biological condition of the species and its resource needs, and the threats that influence the species’ current and future condition, in order to assess the species’ overall viability and the risks to that viability.

Key Resource Needs for Species Viability

Table 3 summarizes the key ecological resources required by individual Fender’s blue butterflies at various life stages, as presented in the SSA report (from USFWS 2020, Table 2.4).

TABLE 3—RESOURCE NEEDS OF FENDER’S BLUE BUTTERFLY AT THE LEVEL OF THE INDIVIDUAL BY LIFE STAGE

Life stage	Timeline	Resource needs
Egg	Mid-April through June	• Kincaid’s lupine, longspur lupine, or sickle-keeled lupine
Larva (including diapause)	Mid-May through early April (including diapause).	• Kincaid’s lupine, longspur lupine, or sickle-keeled lupine
Pupa	April through May	• Kincaid’s lupine, longspur lupine, or sickle-keeled lupine
Adult butterfly	Mid-April through June	• Early seral upland prairie, wet prairie, or oak savannah habitat with a mosaic of low-growing grasses and forbs, an open canopy, and a disturbance regime maintaining the habitat
		• Kincaid’s lupine, longspur lupine, or sickle-keeled lupine
		• Variety of nectar flowers

Based on our evaluation as detailed in the SSA report, we determined that to be resilient, Fender’s blue butterfly metapopulations need an abundance of lupine host plants and nectar plants within prairie patches at least 6 ha (14.8 ac) in size, with habitat heterogeneity and minimal amounts of invasive plants and woody vegetation. Healthy metapopulations would also contain a minimum of 200 butterflies (resiliency) distributed across multiple groups (redundancy) in lupine patches that are

within 0.5 to 1.0 km (0.31 to 0.62 mi) of one another. Ideally, at the species level, resilient metapopulations would be distributed across the historical range of the species (redundancy and representation) and have multiple “stepping stone”¹ habitats for connectivity across the landscape (redundancy and representation) (USFWS 2020, p. 33). The key resources and circumstances required to support resiliency in Fender’s blue butterfly metapopulations, and redundancy and

representation at the species level, are identified in Table 4 (from USFWS 2020, Table 2.5). Based on the biology of the species and the information presented in the recovery plan, as synthesized in the SSA report, these are the characteristics of Fender’s blue butterfly metapopulations that we conclude would facilitate viability in the wild over time (USFWS 2020, pp. 31–34).

¹ A “stepping stone” habitat is a prairie patch that provides both lupine and nectar plants, and occurs in an area with barrier-free movement for

butterflies; such areas are likely too small to support a subpopulation or metapopulation of butterflies over the long term, but provide sufficient

resources to support multi-generational movement of individuals between larger areas of habitat.

TABLE 4—RESOURCES AND CIRCUMSTANCES NEEDED TO SUPPORT RESILIENCY IN FENDER’S BLUE BUTTERFLY METAPOPULATIONS AND REDUNDANCY AND REPRESENTATION AT THE SPECIES LEVEL, BASED ON THE CONDITIONS REQUIRED FOR THE SPECIES AS DESCRIBED IN THE RECOVERY PLAN
[USFWS 2020, Table 2.5]

Metapopulation Needs		
Habitat Quantity/Quality	Abundance	Distribution
Abundant density of lupine host plants	Minimum of 200 adult butterflies per metapopulation for 10 years.	0.5–1.0 km (0.3–0.6 mi) between lupine patches within a metapopulation
A diversity of nectar plant species throughout the flight season	Consists of multiple sites with butterflies.	Occur across the historical range
Prairie relatively free of invasive plants and woody vegetation, especially those that prevent access to lupine or nectar (e.g., tall grasses).	n/a	Stepping stone prairie patches with lupine and/or nectar to facilitate connectivity within a metapopulation
Patch sizes of at least 6 ha (14.8 ac) per metapopulation	n/a	n/a
Heterogeneity of habitat, including varying slopes and varying micro-topography.	n/a	n/a

Factors Affecting the Viability of the Species

At the time we listed the Fender’s blue butterfly as endangered (65 FR 3875; January 25, 2000), we considered the loss, degradation, and fragmentation of native prairie habitat in the Willamette Valley to pose the greatest threat to the species’ survival. Forces contributing to the loss of the little remaining native prairie included urban development (named as the largest single factor threatening the species at the time); agricultural, forestry, and roadside maintenance activities, including the use of herbicides and insecticides; and heavy levels of grazing. In addition, habitat loss through vegetative succession from prairie to shrubland or forest as a result of the absence of natural disturbance processes, such as fire, was identified as a long-term threat, and the invasion of prairies by nonnative plants was identified as a significant contributor to habitat degradation. Although predation is a natural condition for the species, the listing rule considered that predation may significantly impact remaining populations of Fender’s blue butterfly because they had been reduced to such low numbers. Small population size was also identified as posing a threat of extinction due to the increased risk of loss through random genetic or demographic factors, especially in fragmented or localized populations. The possibility that the rarity of Fender’s blue butterfly could render it vulnerable to overcollection by butterfly enthusiasts was cited as a potential threat. Finally, the listing rule pointed to the inadequacies of existing regulatory mechanisms to protect the Fender’s blue butterfly or its habitat, especially on lands under private

ownership. Threats not recognized or considered at the time of listing, but now known to us, include the potential impacts resulting from climate change (Factor E).

Habitat Loss, Degradation, and Fragmentation

As discussed in the SSA report, habitat loss from land conversion for agriculture and urbanization, and from heavy grazing, has decreased since the time of listing due to land protection efforts and management agreements; these activities are still occurring at some level, especially in Lane and Polk Counties but not at the scope and magnitude seen previously (Factor A) (USFWS 2020, pp. 57–59; see also *Conservation Measures*, below). Habitat degradation due to invasion of prairies by nonnative invasive plants and by woody species (Factors A and E) has decreased in many metapopulations due to active management using herbicides, mowing, and prescribed fire to maintain or restore prairie habitats, as well as augmentation of Kincaid’s lupine and nectar species (USFWS 2020, Appendix C; see also *Conservation Measures*, below). Some nonnative plants, such as the tall oatgrass, can be difficult to effectively manage, thereby requiring development of new methods to combat these invasive plants. While threats have been reduced across the species range, ongoing habitat management is required to maintain these improvements over time and will be critical to the viability of Fender’s blue butterfly. In addition, habitat degradation due to invasion of prairies by nonnative invasive plants and by woody species, which may potentially be exacerbated in the future by the effects of climate change, remains a

significant and ongoing threat at sites that are not managed for prairie conditions.

The overall number of sites supporting Fender’s blue butterfly has increased across all land ownership categories since listing, as has the percentage of sites with habitat management. Although the percentage of sites that are protected has remained roughly the same (just over 70 percent) relative to the time of listing, we now have a far greater number of sites that are protected (101 out of 137 sites protected, compared to 23 of 32 sites at the time of listing). More importantly, there is a significant increase in the proportion of sites that are actively managed to maintain or restore prairie habitat. At listing, only 31 percent of known sites (10 of 32) and only 44 percent of protected sites (10 of 23) were managed for prairie habitat to any degree. At present, 74 percent of current sites (101 of 137) and 100 percent of protected sites (101 of 101) are managed for prairie habitat. This significant increase in the number of sites protected and managed to benefit the Fender’s blue butterfly and its habitat represents substantial progress since listing in addressing the threat of habitat loss and degradation, and demonstrates the effectiveness of existing conservation actions and regulatory mechanisms. Impacts from habitat conversion, woody succession, and invasive plant species are decreasing in areas with existing metapopulations of Fender’s blue butterflies due to active habitat management and protection; these impacts are more likely to stay the same or increase in areas of remaining prairie that are not currently protected or managed (USFWS 2020, p. 59). With continued protection and proper habitat

management, greater range expansion is possible, as explored in detail under Future Scenario 3 (*Future Species Condition*, below), potentially increasing representation and redundancy of the Fender's blue butterfly.

Pesticides

Insecticides and herbicides can directly kill eggs, larvae, and adult butterflies during application of the chemicals to vegetation or from drift of the chemicals from nearby applications in agricultural and urban areas. For instance, *Bacillus thuringiensis* var. *kurstaki*, a bacterium that is lethal to all butterfly and moth larvae, is frequently used to control unwanted insects and has been shown to drift at toxic concentrations over 3 km (2 mi) from the point of application (Barry *et al.* 1993, p. 1977). Sublethal effects may indirectly kill all life stages by reducing lupine host plant vigor, decreasing fecundity, reducing survival, or affecting development time. Both insecticides and herbicides are used in agricultural practices, while herbicides are also used for timber reforestation and roadside maintenance and to control invasive species and woody vegetation encroachment. The threat to Fender's blue butterflies that may occur in roadside populations has been reduced through the development of several HCPs that specifically address pesticide application practices in these areas (*e.g.*, Oregon Department of Transportation HCP; see *Conservation Measures*, below). The potential for exposure of Fender's blue butterfly to herbicides or insecticides remains throughout the species' range, especially in agricultural areas. However, we do not have any record of documented exposure or other data to inform our evaluation of the magnitude of any possible exposure, or the degree to which herbicides or insecticides may be potentially affecting the viability of the species (USFWS 2020, pp. 60–61). That said, while we cannot quantify the magnitude of possible exposure, agricultural land is widely distributed throughout the Willamette Valley, more lands are being converted to agriculture, and pesticide use is generally occurring more now than at any other time in history (Forister *et al.* 2019, p. 4). Because pesticides are used on most agricultural crops to increase crop yield and prevent disease spread, pesticide use in the Willamette Valley is likely to affect multiple metapopulations.

Disease and Predation

Although the listing rule stated that predation may have a significant

negative impact on Fender's blue butterfly due to the reduced size of their populations, the best available information does not indicate that predation is a limiting factor for the species. Small population size was also identified as posing a threat of extinction due to the increased risk of loss through random genetic or demographic factors, especially in fragmented or localized populations (Factor E). Some very small, isolated populations of Fender's blue butterfly known at the time of listing do appear to have become extirpated (USFWS 2020, pp. 51–52), and existing small metapopulations or independent groups remain especially vulnerable to extirpation. Overall, however, the threat of small population size has decreased since listing due to the discovery of new metapopulations, the expansion of existing metapopulations, and the creation of new metapopulations of Fender's blue butterflies. Most, but not all, metapopulations of Fender's blue butterfly have increased in abundance relative to the time of listing, and the total population size has increased from just over 3,000 individuals in 12 metapopulations distributed across 4 counties, to well over 13,000 individuals in 15 metapopulations distributed across 6 counties (USFWS 2020, pp. 52–53).

Overcollection

The best available information does not indicate that Fender's blue butterfly has been subject to overcollection. This threat does not appear to have manifested as anticipated in the listing rule.

Climate Change

The severity of threat posed to Fender's blue butterfly from the impacts of climate change is difficult to predict. The Willamette Valley, and prairies specifically, may fare better than other regions; however, various changes in average annual temperatures and precipitation are predicted and may affect Fender's blue butterfly or its habitat (Bachelet *et al.* 2011, p. 424; USFWS 2017, p. B–10; USFWS 2020, pp. 61–62). Such potential changes include higher water levels in wet prairies during winter and spring, increased spring flooding events, and prolonged summer droughts. Two models have conducted climate change vulnerability assessments for butterfly species within the Willamette Valley using the Special Report on Emissions Scenarios (SRES) created by the Intergovernmental Panel on Climate Change. Under the SRES B1 scenario (comparable to the RCP 4.5 scenario),

both models ranked Fender's blue butterfly as stable. Under the SRES A1B scenario (RCP 6.0), both models ranked Fender's blue butterfly as moderately vulnerable. Under the SRES A2 scenario (RCP 8.5), however, Fender's blue butterfly was ranked as extremely vulnerable under one model and highly vulnerable under the other model due to its limited range and loss of both nectar and host plants. While the models do not agree on the degree of vulnerability, both models did show an increase in vulnerability as climate change scenarios worsened due to the species' limited range and the potential for loss of both nectar and host plants, as well as a possible increase in invasive nonnative plants (Steel *et al.* 2011, p. 5; Kaye *et al.* 2013, pp. 23–24).

In our analysis of the future condition of the Fender's blue butterfly, we considered climate change to be an exacerbating factor in the decrease in nectar plants, lupine plants, and open prairie or oak savannah habitat. Scenario 2 of our assessment of *Future Species Condition* specifically considered the potential for severe consequences of climate change (an RCP 8.5 scenario) for Fender's blue butterfly. If climate change impacts result in less effective habitat management, more invasive species, and disruptions to plant phenology, then we anticipate the potential loss or deterioration of more than half of the existing metapopulations. Although the results indicated an extensive loss of resiliency and redundancy, with seven metapopulations subject to potential extirpation under such conditions, we also projected that all recovery zones would still maintain at least one metapopulation in high condition. We therefore estimate that Fender's blue butterfly would likely sustain populations under such conditions, but its relative viability in terms of resiliency, redundancy, and representation would be diminished. While Scenario 2 looked at a high emissions scenario, Scenario 1 and Scenario 3 considered climate change to continue under RCP 4.5 in which we project that Fender's blue butterfly would remain stable based on the aforementioned models. Therefore, we estimated resiliency, redundancy, and representation would be unlikely to change substantially from climate change.

Conservation Measures

Because of extensive loss of native prairie habitats in the Willamette Valley and the resulting Federal listing of multiple endemic plant and animal species, the region has been the focus of

intensive conservation efforts. Numerous entities, including Federal, State, and county agencies, nongovernmental organizations (NGO) such as land trusts, and private landowners have all become engaged in efforts to restore native Willamette Valley prairie and oak savannah habitats and the associated endemic animal communities. Collectively, the agencies and organizations that manage lands have acquired conservation easements and conducted management actions to benefit prairie and oak savannah habitats; in many cases, conservation efforts have been designed specifically to benefit the Fender's blue butterfly. Various types of agreements have been established with private landowners to perform voluntary conservation actions on their land, while agencies are working collaboratively on habitat restoration and active prairie management under interagency agreements.

Our SSA report summarizes the conservation measures implemented across the range of the Fender's blue butterfly since the species was listed in 2000 (USFWS 2020, pp. 62–65). These measures include native prairie habitat restoration and management on public lands or lands that are managed by a conservation organization, including Baskett Slough National Wildlife Refuge and surrounding areas, William L. Finley National Wildlife Refuge, Fern Ridge Reservoir, West Eugene Wetlands, Willow Creek Preserve, Yamhill Oaks Preserve, Coburg Ridge, Lupine Meadows, Hagg Lake, a small portion of the McDonald State Forest, and some Benton County public lands. The long-term viability of Fender's blue butterfly is dependent on an ongoing, consistent commitment to active management to remove woody vegetation and invasive plants, thereby maintaining the native plant community and open prairie conditions required by this species.

The contributions of private landowners have also made a significant impact on the conservation of Fender's blue butterfly. Approximately 96 percent of the Willamette Valley ecoregion is in private ownership (Oregon Department of Fish and Wildlife 2006), and the majority (66 percent) of designated critical habitat for Fender's blue butterfly is on private lands (71 FR 63862; October 31, 2006). Thus, the conservation and recovery of Fender's blue butterfly, Kincaid's lupine, and the suite of native species associated with them relies in large part on the voluntary actions of willing non-Federal landowners to conserve, enhance, restore, reconnect and actively manage the native prairie habitats that

support these species. Many Fender's blue butterfly sites on private or other non-Federal lands across the range of the species now have Partners for Fish and Wildlife (PFW) agreements, Safe Harbor Agreements (SHAs), or Habitat Conservation Plans (HCPs) in place with the Service.

Through many PFW agreements in place with private landowners in the Willamette Valley, we provide technical assistance to the landowners for the enhancement and restoration of native habitats on their lands; these conservation actions benefit multiple native species, including the Fender's blue butterfly. We administer and implements a programmatic SHA for the benefit of Fender's blue butterfly. This program encourages non-Federal landowners to undertake proactive conservation and restoration actions to benefit native prairie, as well as Fender's blue butterfly and Kincaid's lupine, in Benton, Lane, Linn, Marion, Polk, Washington, and Yamhill Counties of Oregon (USFWS 2016, entire). Currently, 17 properties covering approximately 595 ha (1,471 ac) are enrolled under the programmatic SHA as of November 2020; another 12 agreements that will cover an additional 417 ha (1,031 ac) are in development. In addition, three HCPs in place are designed to minimize and mitigate effects to the Fender's blue butterfly: the Benton County HCP (2011; 50-year term), Yamhill County Road Right-of-Ways HCP (2014; 30-year term), and the Oregon Department of Transportation HCP (2017; 25-year term). These agreements include various provisions ensuring the implementation of best management practices and offsetting any potential negative impacts of activities through augmenting or enhancing populations of Fender's blue butterfly or prairie habitats.

Finally, NGOs have actively pursued conservation easements and acquisition of properties throughout the Willamette Valley to benefit native prairies and the Fender's blue butterfly. Specific examples include the 2005 acquisition and establishment of the Lupine Meadow Preserve by the Greenbelt Land Trust, and the 2008 acquisition and establishment of the Yamhill Oaks Preserve by The Nature Conservancy.

Overall, there are 137 total sites containing Fender's blue butterfly that occur over a broad range of land ownerships with varying degrees of land protection and management. Forty-four sites are on tracts of public land owned by the USACE; BLM; Bureau of Reclamation (BOR); OSU; or the Service, all of which are being managed for prairie habitat to varying degrees given

funding and personnel. Fourteen sites are in public ROWs managed by ODOT or County Public Works and all are being managed for prairie. Thirty sites are on private land without any form of protection or active management for Fender's blue butterfly or its habitat. Another 43 sites are on private land with some level of protection via a conservation easement (20 sites) or under a cooperative agreement (23 sites) and are being managed for prairie habitat. More information on conservation measures performed by NGOs specific to each metapopulation of Fender's blue butterfly are listed in the SSA report in the section *Metapopulation Descriptions under Current Conditions* (USFWS 2020, Appendix C).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Current Species Condition

After assessing the biology of Fender's blue butterfly and the information presented in its recovery plan, we determined that the resiliency of a metapopulation of the species relies on an abundant supply of lupine host plants and nectar plants within prairie patches at least 6 ha (14.8 ac) in size, habitat heterogeneity, and minimal amounts of invasive plants and woody vegetation. Healthy metapopulations would also contain a minimum of 200 butterflies (resiliency) distributed across multiple groups within a metapopulation (redundancy) in lupine patches that are within 0.5 to 1.0 km (0.31 to 0.62 mi) of one another. At the species level, resilient metapopulations would ideally be distributed across the historical range of the species (representation and redundancy across

metapopulations) and have numerous habitat “stepping stones” for connectivity across the landscape (redundancy and representation).

In our evaluation, we used the best scientific data available to evaluate the current condition of each Fender’s blue butterfly metapopulation in terms of resiliency. We developed criteria to assess specific habitat and demographic factors contributing to the overall resilience of metapopulations, and to rank each metapopulation as to whether it is in high, moderate, or low condition; these categories reflected our estimate of the probability of persistence over a period of 25 to 35 years (explained below; see *Future Species Condition*), as detailed in the SSA report (USFWS 2020, pp. 71–73). Criteria used to score metapopulation condition included the number of sites contributing to the metapopulation, butterfly abundance, connectivity, habitat patch size, lupine density, presence of nectar species, and measures of prairie quality and habitat heterogeneity (USFWS 2020, Table 6.2, p. 73).

Five of the existing 15 Fender’s blue butterfly metapopulations are ranked as having a high current condition, while 3 are ranked as moderate, 6 are ranked low, and one may be extirpated (Table 5). Overall, the majority of metapopulations, 8 out of 15, are ranked as either in high or moderate condition, indicating a degree of resiliency across the range of the species. Fender’s blue butterfly currently demonstrates a good degree of metapopulation redundancy, with multiple metapopulations occurring both within and across the three recovery zones spanning the historical range of the species. Although no direct measures of genetic or ecological diversity are available, we consider the species to have a good degree of representation, as there are multiple metapopulations and groups of Fender’s blue butterfly distributed relatively evenly across the geographic range of the species (six in the Salem recovery zone, five in the Corvallis recovery zone, and four in the Eugene recovery zone), in all known habitat types (both prairie and oak savannah) and elevations.

TABLE 5—CURRENT CONDITION OF FENDER’S BLUE BUTTERFLY METAPOPOPULATIONS

Metapopulation	Current condition
Salem Recovery Zone	
Baskett	High.
Gopher Valley	Moderate.
Hagg Lake	High.

TABLE 5—CURRENT CONDITION OF FENDER’S BLUE BUTTERFLY METAPOPOPULATIONS—Continued

Metapopulation	Current condition
Moore’s Valley	Possible extirpation.
Oak Ridge	Moderate.
Turner Creek	Low.
Corvallis Recovery Zone	
Butterfly Meadows	Low.
Finley	Moderate.
Greasy Creek	Low.
Lupine Meadows	Low.
Wren	High.
Eugene Recovery Zone	
Coburg Ridge	Low.
Oak Basin	Low.
West Eugene	High.
Willow Creek	High.

The discovery of Fender’s blue butterflies in additional counties since the listing of the species, as well as the expansion of existing metapopulations, increases both the geographic range of the species and connectivity throughout the landscape. An increased number of metapopulations, composed of a greater number of individuals and with expanded distribution and connectivity across the range of Fender’s blue butterfly (see Table 3), means the species has a greater chance of withstanding stochastic events (resiliency), surviving potentially catastrophic events (redundancy), and adapting to changing environmental conditions (representation) over time.

Future Species Condition

To understand the potential future condition of Fender’s blue butterfly with respect to resiliency, redundancy and representation, we considered a range of potential scenarios that incorporate important influences on the status of the species, and that are reasonably likely to occur. We additionally forecast the relative likelihood of each scenario occurring, based on our experience with the species and best professional judgment (see USFWS 2020, p. 77). Through these future scenarios, we forecast the viability of Fender’s blue butterfly over the next 25 to 35 years. We chose this timeframe because it represents up to 35 generations of the Fender’s blue butterfly, and therefore provides adequate time to collect and assess population trend data. The recovery plan also used this general timeframe for the determination of downlisting criteria and this timeframe can reveal the immediate effects of management strategies given that our current interim

protections (e.g., HCPs, SHAs) have a lifespan ranging from 10–50 years. We bracketed our timeframe to a shorter period based on our knowledge of the species and our ability to project current and future threats and conservation efforts. We scored the projected future condition of each metapopulation based on a ruleset incorporating abundance and trend data, quality of prairie habitat, level of habitat protection, and type of habitat management (see USFWS 2020, pp. 77–83). In addition to the high, moderate, and low condition categories, we added a fourth category in our future scenarios accounting for possible extirpation. The purpose of evaluating the status of Fender’s blue butterfly under a range of plausible future scenarios is to create a risk profile for the species into the future, allowing for an evaluation of its viability over time.

Scenario 1 assumes “continuing efforts”—Fender’s blue butterfly will continue on its current trajectory and influences on viability, habitat management, and conservation measures will all continue at their present levels. Due to our analysis of current management actions, protections, and threats, we consider this scenario as highly likely to play out over the next 25 to 35 years. Scenario 2 is based on an increased level of impact from negative influences on viability, particularly alterations in environmental conditions as a result of climate change. We consider this scenario moderately likely to occur over the next 25 to 35 years due to greater uncertainty in assessing the degree of climate change and the impact it may have on the species. Scenario 3 is based on increased conservation effort, including the potential for improved habitat conditions at currently occupied sites; metapopulation expansion by restoring currently unoccupied prairie sites; and augmentation, translocation, and/or introduction of butterflies. In this scenario, we evaluated the potential for expansion at currently protected sites and protected areas identified as possible introduction sites (USFWS 2020, pp. 81–104). Due to questions regarding potential funding, personnel, and other conservation agreements needed to provide additional protections, we consider this scenario as also moderately likely to occur over the next 25 to 35 years. The results from these three scenarios describe a range of possible conditions in terms of viability of the Fender’s blue butterfly (USFWS 2020, pp. 104–106; Table 6). We used two different methodologies for assessing future conditions. Under scenario 1 and 2, we analyzed trends in

population number and habitat quality and projected that out into the future. Meanwhile, in scenario 3, we mapped out and identified potential areas for conservation and worked with partners

on the feasibility of conservation actions there. We then used these responses to project habitat enhancement in these areas and the impact that enhancement will have on the species' population

trends. While these two methods differ, both apply our knowledge of the species and current and planned or potential management actions in order to project what its condition will be in the future.

TABLE 6—CONDITION SCORES FOR METAPOPOPULATION RESILIENCY, COMPARING CURRENT CONDITION TO THREE PLAUSIBLE FUTURE SCENARIOS AS DESCRIBED IN THE TEXT. RELATIVE LIKELIHOODS OF EACH SCENARIO AT 25 TO 35 YEARS ARE ALSO PROVIDED; SEE USFWS 2020, P. 77, FOR AN EXPLANATION OF CONFIDENCE TERMINOLOGIES USED TO ESTIMATE THE LIKELIHOOD OF SCENARIO OCCURRENCE

Condition score	Number of metapopulations			
	Current condition	Scenario 1— continuing efforts (highly likely)	Scenario 2— considerable impacts (moderately likely)	Scenario 3— conservation efforts (moderately likely)
High	5	7	3	7
Moderate	3	1	5	5
Low	6	5	0	2
Possible Extirpation	1	2	7	1

Because the natural processes that historically maintained this ecosystem and Fender's blue butterfly's early seral habitat are now largely absent from the Willamette Valley, the species is reliant upon ongoing management that sets back succession and controls invasive tall grasses and woody plant species. Therefore, an important consideration in our evaluation of the viability of the species is whether or not management actions will continue that restoration and maintenance of prairie systems, including actions that maintain populations of the lupine host plants and nectar resources in the Willamette Valley.

Scenario 1 results in improved condition for several metapopulations currently ranked as moderate, as conservation efforts continue. On the other hand, metapopulations that are currently in low condition or already at risk of extirpation would likely either remain in that state or (in one case) degrade in condition from low to possible extirpation. Overall, we expect that the viability of Fender's blue butterfly under this scenario would improve relative to its current condition, characterized by increases in resiliency of existing metapopulations. Seven metapopulations would be in high condition, one in moderate condition, five in low, and two at risk of possible extirpation. There would be at least two metapopulations in high condition in each of the three recovery zones; the Salem recovery zone would be in the best condition, with three metapopulations in high condition. The resiliency of metapopulations would be lowest in the Corvallis recovery zone, with three of five metapopulations ranked either low or at risk of

extirpation. Thus, there is a possibility for some loss of redundancy, with the Corvallis recovery zone at greatest risk. We anticipate that most, but not all, of the current metapopulations would maintain viability under this scenario.

Scenario 2 would be expected to result in decreases in resiliency and redundancy, with seven metapopulations subject to possible extirpation. While some metapopulations would likely retain their resiliency, more than half of the current metapopulations would be at risk of extinction within the next 25 to 35 years under this scenario. We anticipate that, under these conditions Fender's blue butterfly would persist, but its long-term viability in terms of resiliency, redundancy, and representation would be greatly diminished even with continued management for the conservation of the species.

Under Scenario 3, we expect resiliency to increase as several metapopulations remain at or move into high condition, with others transitioning from low to moderate condition; seven metapopulations would be in high condition, five in moderate condition, two in low condition, and one at risk of extirpation. Redundancy and representation would be maintained in all recovery zones; all recovery zones would have a minimum of two metapopulations in high condition. We anticipate that all of the currently extant metapopulations would maintain viability under this scenario, with the exception of one that is small and at risk of extirpation under all scenarios considered.

For the reasons described above under *Future Species Condition*, we forecast

the future condition of Fender's blue butterfly out for a period of 25 to 35 years. Although information exists regarding potential impacts from climate change beyond this timeframe, the projections depend on an increasing number of assumptions as they move forward in time, and thus become more uncertain with increasingly long timeframes. For our purposes, as detailed above, we concluded that a foreseeable future of 25 to 35 years was the most reasonable period of time over which we could reasonably rely upon predictions of the future conservation status of Fender's blue butterfly.

Determination of Fender's Blue Butterfly Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an "endangered species" or "threatened species." The Act defines an endangered species as a species that is "in danger of extinction throughout all or a significant portion of its range," and a threatened species as a species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or

manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we found that Fender's blue butterfly has experienced a marked increase in resiliency, redundancy, and representation across its historical range, contributing to an overall increase in viability. We listed the Fender's blue butterfly as endangered in 2000, upon a determination at that time that the species was presently in danger of extinction throughout all or a significant portion of its range (65 FR 3875; January 25, 2000, p. 3886). Since then, our evaluation of the best scientific and commercial data available indicates that the abundance and distribution of Fender's blue butterfly has improved as a result of metapopulation expansion, metapopulation discovery, and metapopulation creation, as well as a marked increase in habitat protection and management across the range of the species. The presence of Fender's blue butterflies in new counties, the expansion of existing metapopulations, and the creation of new metapopulations increases both the geographic range of the species and potential connectivity throughout the landscape. In addition, active recovery efforts occurring since Fender's blue butterfly was listed have led to the amelioration of threats to the species, as detailed above in the section *Conservation Measures*. As described in the Summary of Biological Status and Factors Affecting Fender's Blue Butterfly, there has been a marked reduction in threats to the species posed by Factors A and E, helped in large part by effective conservation actions and existing regulatory mechanisms in place (Factor D). Furthermore, threats identified at the time of listing under Factors B and C have not materialized as originally anticipated. Our assessment of the present condition of the species demonstrates that Fender's blue butterfly is currently found in metapopulations primarily ranked as in high to moderate condition throughout all three recovery zones established for the species within its historical range, exhibiting an appreciable degree of resiliency, redundancy, and representation.

Thus, after assessing the best available information, we conclude that the Fender's blue butterfly no longer meets the Act's definition of an endangered species.

We next consider whether the Fender's blue butterfly meets the Act's definition of a threatened species. Although threats to the species have been reduced relative to the time of listing, the species remains vulnerable. Six out of fifteen metapopulations are currently ranked in low condition, and all future scenarios include the possible extirpation of some existing metapopulations (USFWS 2020, p. 104). Some of these metapopulations (e.g., Lupine Meadows) are in decline for unknown reasons, despite their apparently relatively high-quality habitat (USFWS 2020, p. 71). Eleven of the fifteen metapopulations do not meet the minimum criteria of 200 butterflies each year, and connectivity both within and between metapopulations remains limited due to the reduction and fragmentation of native prairie habitats, as well as the relative rarity and patchy distribution of the primary host plant, Kincaid's lupine. In particular, concern remains for the Corvallis recovery zone in the middle of the species' range, with metapopulations that are generally less robust and more vulnerable to deteriorating in condition over time (under current conditions only one metapopulation in this zone is considered highly resilient, compared to two or more in the other zones).

While it is true that many metapopulations in the Corvallis recovery zone have low current condition, the two remaining metapopulations, Finley and Wren, are heavily managed by local counties. The Finley metapopulation is on a National Wildlife Refuge, was recently introduced, and is continually increasing. Additionally, these two metapopulations occur at opposite ends of these recovery zone, ensuring that no gaps in the species' range will develop even if the "low" metapopulation becomes extirpated. Furthermore, all three of our future scenarios project that the Finley and Wren metapopulations will maintain viability. Therefore, while there remains lingering concern about the condition of the Corvallis recovery zone, this recovery zone possesses sufficient resiliency and redundancy to allow it to maintain viability into the foreseeable future.

With regard to influences on viability, the potential for exposure to pesticides (herbicides, insecticides) is an ongoing threat to the species throughout its range, due to the close proximity of Fender's blue butterfly occurrence sites to agricultural lands as well as areas subject to spraying to control gypsy moths or mosquitoes. In addition, we have yet to develop an effective method for eradicating tall oatgrass, a nonnative

invasive plant that is rapidly expanding into prime prairie habitats and posing a growing management concern. The low availability of lupine host plants, and inadequate supply of appropriate lupine seed for restoration efforts, is also a limiting factor for Fender's blue butterfly. Finally, we consider Fender's blue butterfly to be a "conservation reliant" species (*sensu* Scott *et al.* 2010, p. 92), and it remains highly vulnerable to loss of its prairie habitat should active management cease. Because it relies on consistent disturbance to maintain its early seral prairie habitat, the future viability of Fender's blue butterfly is dependent upon ongoing management to set back succession and control the invasion of tall grasses and woody plant species since the natural processes that once historically maintained this ecosystem are now largely absent from the Willamette Valley. The viability of the Fender's blue butterfly over the long term will therefore require addressing influences on viability including ongoing habitat conversion, loss of habitat disturbance resulting in habitat succession, invasion by nonnative plants, and exposure to insecticides and herbicides, as well as continued conservation and management efforts.

Thus, after assessing the best available information, including but not limited to the current status of the species, ongoing threats to the species, and predicted status of Fender's blue butterfly under various future scenarios, including the consequences of climate change, we conclude that Fender's blue butterfly is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity v. Everson*, 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014) that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore,

we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the “significance” question or the “status” question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity*, we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.*, endangered). In undertaking this analysis for Fender's blue butterfly, we choose to address the status question first—we considered information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For Fender's blue butterfly, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. We examined the following threats: Habitat loss from land conversion for agriculture and urbanization; habitat degradation due to invasion of prairies by nonnative invasive plants and by succession to woody species; insecticides and herbicides; effects of climate change; small population size; and the cumulative effects of these threats. The threats occur in both prairie and oak savannah habitat types throughout the Willamette Valley such that they are affecting all Fender's blue butterfly metapopulations. We found no concentration of threats in any portion of the range of Fender's blue butterfly at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors v. Department of the Interior*, No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity v.*

Jewell, 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the Fender's blue butterfly meets the definition of a threatened species. Therefore, we propose to downlist the Fender's blue butterfly as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Because we are proposing to list this species as a threatened species, the prohibitions in section 9 would not apply directly. We are therefore proposing below a set of regulations to provide for the conservation of the species in accordance with section 4(d), which also authorizes us to apply any of the prohibitions in section 9 to a threatened species. The proposal, which includes a description of the kinds of activities that would or would not constitute a violation, complies with this policy.

Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the “Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation” of species listed as threatened. The U.S. Supreme Court has noted that statutory language like “necessary and advisable” demonstrates a large degree of deference to the agency (see *Webster v. Doe*, 486 U.S. 592 (1988)). Conservation is defined in the Act to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” Additionally, the second sentence of section 4(d) of the Act states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants.” Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of

discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species” (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising this authority under section 4(d), we have developed a proposed rule that is designed to address the specific threats and conservation needs of Fender's blue butterfly. Although the statute does not require us to make a “necessary and advisable” finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Fender's blue butterfly. As discussed above in the Summary of Biological Status and Factors Affecting the Fender's Blue Butterfly, we have concluded that the Fender's blue butterfly is likely to become in danger of extinction within the foreseeable future primarily due to loss and degradation of habitat, including impacts from habitat conversion, woody succession, and invasive plant species (Factors A and E); and the potential exposure of Fender's blue butterfly to herbicides or insecticides (Factor E). Although the condition of Fender's blue butterfly has

improved, the species remains vulnerable to these threats due to the small size of many of its metapopulations, limited connectivity between metapopulations as a consequence of fragmentation and the reduced extent of native prairie habitats, and the relative rarity of its lupine host plants on the landscape. The provisions of this proposed 4(d) rule will promote conservation of Fender's blue butterfly and expansion of their range by increasing flexibility in certain management activities for our State and private landowners. The provisions of this rule are one of many tools that we would use to promote the conservation of the Fender's blue butterfly. This proposed 4(d) rule would apply only if and when we make final the reclassification of Fender's blue butterfly as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of the Fender's blue butterfly by specifically prohibiting the following actions that can affect Fender's blue butterfly, except as otherwise authorized or permitted: Import or export; take; possess and engage in other acts with unlawfully taken specimens; deliver, receive, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce. These prohibitions will result in regulating a range of human activities that have the potential to affect Fender's blue butterfly, including agricultural or urban development; certain agricultural practices (e.g., pesticide use); heavy levels of grazing; mowing; some practices associated with forestry (e.g., road construction); roadside maintenance activities; control of nonnative, invasive plant species; and direct capture, injury, or killing of Fender's blue butterfly.

We have included the prohibition of import, export, interstate and foreign commerce, and sale or offering for sale in such commerce, because while the number of metapopulations and abundance within most metapopulations has increased since the time of listing, the Fender's blue butterfly is not thriving to the degree that the species is considered to be capable of sustaining trade. Rare butterflies such as the Fender's blue are easily subject to overcollection, and the potential for population declines as a result of increased collection was one of the factors considered in the original listing of Fender's blue butterfly as an endangered species. Fortunately, the potential threat of overcollection has not

thus far been realized, but any increased incentive for capture of Fender's blue butterfly from the wild would be highly likely to result in negative impacts to the long-term viability of the species.

The Fender's blue butterfly remains likely to become an endangered species within the foreseeable future throughout all of its range; although the status of the species has improved relative to when it was first listed as an endangered species, the species has not recovered to the point that it is capable of sustaining unrestricted capture or collection from the wild without the likelihood of negative impacts to the long-term viability of the species. Because capture and collection of Fender's blue butterfly remains prohibited as discussed below, maintaining the complementary prohibition on possession and other acts with illegally taken Fender's blue butterfly will further discourage such illegal take. Thus, the possession, sale, delivery, carrying, transporting, or shipping of illegally taken Fender's blue butterflies should continue to be prohibited in order to continue progress toward the conservation and recovery of the species.

Under the Act, "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating incidental and intentional take would help preserve the remaining metapopulations of the Fender's blue butterfly.

Although the number of metapopulations, and abundance within most metapopulations, has increased since the time of listing, Fender's blue butterfly remains a vulnerable species and has not yet attained full recovery. We do not consider the Fender's blue butterfly capable of withstanding unregulated take, either intentional or incidental to otherwise lawful activities, without likely negative impacts to the long-term viability of the species. There are a few circumstances in which allowing incidental take may ultimately benefit the Fender's blue butterfly as a species and further its recovery. We have outlined such circumstances below as exceptions to the prohibitions of take. By allowing take under specified circumstances, the rule will provide needed protection to the species while allowing management flexibility to benefit the species' long-term conservation. Anyone taking, attempting to take, or otherwise possessing a Fender's blue butterfly, or parts thereof,

in violation of section 9 of the Act will still be subject to a penalty under section 11 of the Act, except for the actions that are specifically excepted under the 4(d) rule.

Incidental take by landowners or their agents is allowed while conducting management for the creation, restoration, or enhancement of short-stature native upland prairie or oak savannah conditions within areas occupied by Fender's blue butterfly, subject to the restrictions described herein and as long as reasonable care is practiced. An important aspect of prairie management is the timing and location of treatment. Lupine is patchy and distributed in small clumps low to the ground whereas invasive tall grasses are more uniform. This means the person doing the herbicide spray or other removal work needs to be able to recognize the plants to be sure they are treating the correct areas, the correct species, and know when to treat the area before the seed has set. To help avoid potential issues, we are proposing to have a qualified biologist involved in the planning even if the landowners does the treatment themselves. The biologist does not need to be present on-site on the day of the treatment but does need to be consulted and involved beforehand. Reasonable care may include, but is not limited to: (1) Procuring and/or implementing technical assistance from a qualified biologist on timing and location of habitat management activities prior to implementation; and (2) using best efforts to avoid trampling or damaging Fender's blue butterflies (eggs, larvae, pupae, adults) and their host and nectar plants during all activities.

Fender's blue butterfly is a conservation-reliant species. Active management for prairie conditions within the historical range of the Fender's blue butterfly is essential for long-term viability, and is one of the key recovery actions identified for the species. Allowing certain forms of active management for the purpose of creating, restoring, or enhancing native upland prairie or oak savannah conditions is necessary to facilitate and encourage the implementation of conservation measures that will address one of the primary threats to Fender's blue butterfly, the loss or degradation of native short-stature prairie or oak savannah habitat within the Willamette Valley. Restoration actions may include manual, mechanical, and herbicidal treatments for invasive and nonnative plant control that does not result in ground disturbance including mowing; and planting by hand of native vegetation, especially native food

resources for Fender's blue butterfly larvae (Kincaid's, longspur, or sickle-keeled lupine) or adults (native nectar species). Prescribed burning is a complex endeavor and there is potential for impacts to Fender's blue butterfly beyond that which local metapopulations or subpopulations may be capable of withstanding should the burn exceed its intended geographic limits; therefore, we do not provide an exception for take as a result of prescribed burning here. Take coverage for prescribed burning can be obtained through section 7 consultation, a 10(a)(1)(A) permit, or through the Programmatic Restoration Opinion for Joint Ecosystem Conservation by the Services (PROJECTS) program.

Providing landowners management flexibility facilitates the creation, restoration, and enhancement of native upland prairie and oak savannah habitats. Habitat is considered occupied by Fender's blue butterfly if it is within the historical range of the species and supports or may support lupine, unless a qualified biologist using direct observation has conducted surveys for adult Fender's blue butterfly during the April 15 to June 30 flight period and documented no adult butterflies. Occupied habitat also includes all nectar habitat within 0.5 km (0.3 miles) of habitat containing at least one of the three host lupine species and occupied by Fender's blue butterfly. This proposed 4(d) rule would authorize landowners to plant native vegetation by hand; conduct manual and mechanical treatments to control woody and invasive nonnative plants; perform tractor and hand mowing; and apply herbicides within occupied Fender's blue butterfly habitat. To prevent possible negative effects on the Fender's blue butterfly or its host lupine, the following time restrictions apply to the exceptions to take by landowners in areas occupied by Fender's blue butterfly:

(1) Manual and mechanical treatments for control of woody and invasive and nonnative plant species that do not result in ground disturbance are authorized within occupied habitat outside of the butterfly flight period (April 15 to June 30) to avoid impacts to adult butterflies.

(2) To prevent invasive plant species establishment, tractor mowing is authorized throughout sites with Fender's blue butterflies before February 15 (when lupine emerges) and after August 15 (when lupine undergoes senescence). Mowing with handheld mowers is authorized throughout the year; however, a buffer of at least 8 m (25 ft) must be maintained between the

mower and any individual lupine plant during the Fender's blue butterfly flight season (April 15 to June 30).

(3) Hand wiping, wicking, and spot-spray applications of herbicides for either the removal of nonnative invasive plant species, or to prevent resprouting of woody species subsequent to cutting are authorized year-round. Weed wiping and broadcast application of herbicides are authorized outside of the flight period of April 15 to June 30; however, additional timing and use restrictions are required based on the chemicals used. Contact the Oregon Fish and Wildlife Office prior to herbicide implementation for a list of currently acceptable herbicides, their application methods, their appropriate timing of use, and best management practices associated with herbicide use.

We expect that the actions and activities that are allowed under this proposed 4(d) rule, while they may cause some minimal level of harm or disturbance to individual Fender's blue butterflies, will not on balance adversely affect efforts to conserve and recover the species, and in fact, should facilitate these efforts because they will make it easier for our State and private partners to implement recovery actions and restore the habitats required by Fender's blue butterfly. The loss or degradation of early seral prairie habitats is one of the primary threats to Fender's blue butterfly, and disturbance (such as that described under the take exemptions provided here) is required to restore or maintain the habitat characteristics that are essential to the survival of this conservation-reliant species.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: Scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and

plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve Fender's blue butterfly that may result in otherwise prohibited take without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or our ability to enter into partnerships for the management and protection of the Fender's blue butterfly. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between us and other Federal agencies, such as the existing programmatic consultation on habitat restoration actions in the existing PROJECTS Biological Opinion (USFWS 2015, entire), which includes provisions for management actions that benefit Fender's blue butterfly. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that we could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one

of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), need not be prepared in connection with determining a species' listing status under the Endangered Species Act. In an October 25, 1983, notice in the **Federal Register** (48 FR 49244), we outlined our reasons for this determination, which included a compelling recommendation from the Council on Environmental Quality that we cease preparing environmental assessments or environmental impact statements for listing decisions.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations

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

References Cited

A complete list of references cited in this rulemaking is available on the internet at <http://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0082 or upon request from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, by revising the entry for “Butterfly, Fender's blue” under Insects, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * *	* * *	* * *		* * *
Insects				
* * *	* * *	* * *		* * *
Butterfly, Fender's blue	<i>Icaricia icarioides fenderi</i>	Wherever found	T	65 FR 3875, 1/25/2000; [Federal Register citation of the final rule]; 50 CFR 17.47(f). ^{4d}
* * *	* * *	* * *		* * *

■ 3. Amend § 17.47 by adding paragraph (f) to read as follows:

§ 17.47 Special rules—insects.

* * * * *

(f) Fender's blue butterfly (*Icaricia icarioides fenderi*).

(1) *Definitions*. As used in this paragraph (f), the following terms have these meanings:

(i) *Occupied habitat*. Habitat within the historical range of Fender's blue butterfly in the Willamette Valley of Oregon that supports or may support lupine, unless a qualified biologist using

direct observation has conducted surveys for adult Fender's blue butterfly during the April 15 to June 30 flight period and documented no adult butterflies. Occupied habitat also includes all nectar habitat within 0.5 kilometers (km) (0.3 miles (mi)) of habitat containing at least one of the three host lupine species and occupied by Fender's blue butterfly. Unsurveyed areas within 2 km (1.25 mi) of a known Fender's blue butterfly population shall be assumed occupied if no surveys are conducted.

(ii) *Qualified biologist*. An individual with a combination of academic training in the area of wildlife biology or related discipline and demonstrated field experience in the identification and life history of Fender's blue butterfly, or in habitat restoration methods to benefit Fender's blue butterfly. If capture of individuals is required for accurate identification, the individual must hold a valid permit under section 10(a)(1)(A) of the Act.

(iii) *Lupine*. Any one of the three species of lupines known to be required as host plants for the larvae of the

Fender's blue butterfly: Kincaid's lupine (*Lupinus sulphureus* ssp. *kincaidii*), longspur lupine (*L. arbustus*), and sickle-keeled lupine (*L. albicaulis*).

(2) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to Fender's blue butterfly. Except as provided under paragraph (f)(3) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(3) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

(iii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife.

(iv) Take, as set forth at § 17.31(b).

(v) Take incidental to an otherwise lawful activity caused by:

(A) *Manual and mechanical removal of invasive and/or nonnative plant species.* Manual and mechanical treatments for invasive and nonnative plant control (including encroaching native woody species) that do not result in ground disturbance is authorized within occupied habitat outside the butterfly's flight period of April 15 to June 30, provided:

(1) Landowners or their agents conducting invasive or nonnative plant removal must use reasonable care, which includes, but is not limited to, procuring and/or implementing technical assistance from a qualified biologist on timing and location of habitat management activities and avoidance of ground disturbance to avoid impacts to larvae or pupae. Best management practices for felling of trees, removal of vegetation off-site, and temporary piling of cut vegetation on-

site are available from the Oregon Fish and Wildlife Office.

(2) Reasonable care during all activities includes best efforts to avoid trampling or damaging Fender's blue butterflies (eggs, pupae, larvae, and adults) and their host and nectar plants. Foot traffic shall be minimized in occupied habitat, and especially in the area of any lupine plants.

(B) *Mowing.* Tractor mowing for invasive and nonnative plant control (including encroaching native woody species) and the maintenance of early seral conditions is authorized throughout occupied Fender's blue butterfly habitat before February 15 when lupine emerges and after August 15 when lupine undergoes senescence.

(1) Mowing with handheld mowers is authorized throughout the year; however, a buffer of at least 8 meters (25 feet) must be maintained between the mower and any individual lupine plant during the Fender's blue butterfly flight season (April 15 to June 30).

(2) During mowing, landowners or their agents must use reasonable care, which includes, but is not limited to, procuring and implementing technical assistance from a qualified biologist on timing and location of habitat management activities; avoidance of ground disturbance to avoid impacts to larvae or pupae; and using best efforts during all activities to avoid trampling or damaging Fender's blue butterflies (eggs, pupae, larvae, and adults) and their host and nectar plants. Foot traffic shall be minimized in occupied habitat, and especially in the area of any lupine plants.

(C) *Herbicide application for removal of invasive and/or nonnative plant species.* Hand wiping, wicking, and spot-spray applications of herbicides for either the removal of nonnative invasive plant species, or to prevent resprouting of woody species subsequent to cutting are authorized year-round. Weed wiping and broadcast application of herbicides are authorized outside of the flight period of April 15 to June 30; however, additional timing and use restrictions are required based on the chemicals used. Contact the Oregon Fish and Wildlife Office prior to herbicide implementation for a list of currently acceptable herbicides, their application methods, their appropriate timing of use, and best management practices associated with herbicide use.

(1) During herbicide application, landowners or their agents must use reasonable care, which includes, but is

not limited to, procuring and implementing technical assistance from a qualified biologist on habitat management activities; complying with all State and Federal regulations and guidelines for application of herbicides; and avoiding broadcast spraying in areas adjacent to occupied habitat if wind conditions are such that drift into the occupied area is possible.

(2) Landowners or their agents conducting herbicide application must use best efforts to avoid trampling or damaging Fender's blue butterflies (eggs, pupae, larvae, and adults) and their host and nectar plants. Foot traffic shall be minimized in occupied habitat, and especially in the area of any lupine plants.

(D) *Ground disturbance for the purpose of planting native vegetation.* Limited ground disturbance (digging and placement by hand) is authorized for the purpose of planting native vegetation as part of habitat restoration efforts, especially native food resources used by larvae and adults, in areas occupied by Fender's blue butterfly.

(1) Larvae of the Fender's blue butterfly require lupine. For adults, preferred native nectar sources include, but are not limited to, the following flower species: tapertip onion (*Allium acuminatum*), narrowleaf onion (*Allium amplexans*), Tolmie's mariposa lily (*Calochortus tolmiei*), small camas (*Camassia quamash*), Clearwater cryptantha (*Cryptantha intermedia*), Oregon sunshine (*Eriophyllum lanatum*), Oregon geranium (*Geranium oregonum*), Oregon iris (*Iris tenax*), meadow checkermallow (*Sidalcea campestris*), rose checkermallow (*Sidalcea virgata*), and purple vetch (*Vicia americana*).

(2) While planting native vegetation, landowners or their agents must use reasonable care, which includes, but is not limited to, procuring and implementing technical assistance from a qualified biologist on timing and location of habitat management activities and using best efforts during all activities to avoid trampling or damaging Fender's blue butterflies (eggs, pupae, larvae, and adults) and their host and nectar plants. Foot traffic shall be minimized in occupied habitat, and especially in the area of any lupine plants.

(E) *Summary of authorized methods and timing of habitat restoration activities for the Fender's blue butterfly.*

Management activity	Dates authorized for use in occupied habitat
Manual and mechanical treatments	Outside of the flight period of April 15 to June 30.

Management activity	Dates authorized for use in occupied habitat
Mowing—tractors	Before February 15 and after August 15.
Mowing—handheld	Year-round, with a buffer of 8 m (25 ft) between the mower and any individual lupine plant during the flight period of April 15 to June 30.
Herbicides—hand wiping	Year-round.
Herbicides—wicking	Year-round.
Herbicides—spot-spray	Year-round.
Herbicides—broadcast spray	Outside of the flight period of April 15 to June 30*.
Herbicides—weed wiping	Outside of the flight period of April 15 to June 30*.
Planting native vegetation	Year-round.

* Additional timing restrictions will apply based on the chemicals used. Contact the Oregon Fish and Wildlife Office for additional information.

(F) *Reporting and disposal requirements.* Any injury or mortality of Fender's blue butterfly associated with the actions excepted under paragraphs (f)(3)(v)(A) through (D) of this section must be reported to the Service and authorized State wildlife officials within 5 calendar days, and specimens may be disposed of only in accordance with directions from the Service. Reports should be made to the Service's Office of Law Enforcement (contact information is at § 10.22) or the Service's Oregon Fish and Wildlife Office and to the State of Oregon Department of Parks and Recreation, Stewardship Section, which has jurisdiction over invertebrate species. The Service may allow additional reasonable time for reporting if access to these offices is limited due to closure.

Martha Williams,

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

[FR Doc. 2021-12576 Filed 6-22-21; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 91

[Docket No. FWS-HQ-MB-2021-0048; FXMB12330900000/212/FF09M13000]

RIN 1018-BF62

Revision of Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the regulations governing the annual Migratory Bird Hunting and Conservation Stamp Contest (also known as the Federal Duck Stamp Contest (Contest)). Our proposed amendments would remove the

previously specified permanent theme and the mandatory inclusion of an appropriate hunting element within all Contest entries and revise the qualifications of the judging panel to reflect this change. This change would be scheduled to begin with the 2022 Contest.

DATES: We will accept comments that we receive on or before July 23, 2021. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on the closing date.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-HQ-MB-2021-0048.

- *U.S. Mail:* Public Comments Processing, Attn: FWS-HQ-MB-2021-0048, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: JAO/3W, Falls Church, VA 22041-3803.

We will not accept hand-delivered, emailed, or faxed comments. We will post all comments on <https://www.regulations.gov>. This generally means that your entire submission—including any personal identifying information—will be posted on the website. See Public Comments Procedures and Public Availability of Comments, below, for more information.

FOR FURTHER INFORMATION CONTACT:

Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (202) 208-1050.

SUPPLEMENTARY INFORMATION:

Background

History of the Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Program

On March 16, 1934, Congress passed and President Franklin D. Roosevelt signed the Migratory Bird Hunting Stamp Act, which was later amended to become the Migratory Bird Hunting and Conservation Stamp Act (16 U.S.C. 718-

718j, 48 Stat. 452). Popularly known as the Duck Stamp Act, the law requires all waterfowl hunters who have attained the age of 16 to buy an annual stamp. Funds generated from Duck Stamp sales are used to protect waterfowl and wetland habitat that is incorporated into the National Wildlife Refuge System from willing sellers and those interested in obtaining conservation easements.

Over 1.5 million stamps are sold each year, and, as of 2021, Federal Duck Stamps have generated more than \$1.1 billion for the conservation of more than 6 million acres of waterfowl habitat in the United States. In addition to waterfowl, numerous other birds, mammals, fish, reptiles, and amphibians benefit from habitat protected by the Duck Stamp revenues, including an estimated one-third of the nation's endangered and threatened species. The healthy wetlands protected by Duck Stamp funding sequester carbon and contribute to addressing the impacts of climate change, including absorbing flood waters and storm surge. These wetlands purify water supplies and provide economic support to local communities as they attract outdoor recreationists from many different backgrounds.

History of the Duck Stamp Contest

The first Federal Duck Stamp was designed at President Roosevelt's request by Jay N. "Ding" Darling, a nationally known political cartoonist for the *Des Moines Register* and a hunter and wildlife conservationist. In subsequent years, noted wildlife artists were asked to submit designs for the stamp. The first Contest was opened in 1949 to any U.S. artist who wished to enter. Since then, the Contest has attracted large numbers of entrants, and it remains the only art competition of its kind sponsored by the U.S. Government. The Secretary of the Interior appoints a panel of judges who have expertise in the area of art, waterfowl, or philately to select each year's winning design. Winners receive no compensation for the work, except a pane of Duck Stamps, based on their winning design, signed

by the Secretary of the Interior. However, winners maintain the copyright to their artwork and may sell prints of their designs, which are sought by hunters, conservationists, and art collectors.

Waterfowl hunters have been the greatest contributors to the program, as they are required to purchase Duck Stamps in order to hunt waterfowl. Many individuals not engaged in hunting also purchase Duck Stamps to contribute to conservation or for the stamp's artistic value.

The 2020 Final Rule and 2021 Contest

On May 8, 2020, the Service published a final rule (85 FR 27313) revising the regulations at 50 CFR part 91 governing the annual Federal Duck Stamp Contest. The Contest regulations made permanent the theme “celebrating our waterfowl hunting heritage” for all future Contests. The regulations require the inclusion of a waterfowl hunting-related scene or accessory in every entry but do not specify what accessories to include. Requirements for the judging panel specified that all judges would have one or more prerequisite qualifications, which could include the ability to recognize waterfowl hunting accessories. An image of a drake lesser scaup with a lanyard and duck calls was chosen as the winner of the 2020 Contest, and this image will appear on the 2021–2022 Federal Duck Stamp when it is released for sale in July 2021.

The 2021 Contest species and regulations, with the permanent theme and mandatory inclusion of waterfowl hunting-related accessories or scenes in all entries, have been widely publicized and remain in effect for the 2021 Contest with the entry period beginning on June 1, 2021. The Service encourages artists to continue with their entries for the 2021 Contest and to adhere to the theme, entry qualifications, and judging requirements as published in the current regulations. This proposed rule, even if finalized before the 2021 Contest, will be applicable beginning with the 2022 Contest and each Contest thereafter.

Proposed Changes to the Regulations at 50 CFR Part 91

With this proposed rule, we propose to remove the permanent “celebrating our waterfowl hunting heritage” theme and the mandatory inclusion of an appropriate hunting-related element in Contest entries, and accordingly revise the qualifications for selection as a judge and the scoring criteria for the Contest, beginning with the 2022 Contest, as described below. Since the implementation of the 2020 rule

requiring the inclusion of a mandatory hunting-related element, many Duck Stamp Contest artists have continued to express their dissatisfaction with this element being a requirement for all entries. The Service has proposed this change to allow artists more freedom of expression when designing their entries.

Currently, § 91.14 explains that a live portrayal of any bird(s) of the five or fewer identified eligible waterfowl species must be the dominant feature of the design. In the May 8, 2020, final rule, we added to § 91.14 a paragraph (b) containing an additional permanent requirement that all Contest entries must also include one or more elements that reflect the theme “celebrating our waterfowl hunting heritage.” We propose to remove this requirement. Removing this requirement would not preclude artists from including other appropriate elements (e.g., hunting dogs, decoys, and hunting scenes) in their artwork as long as an eligible waterfowl species is in the foreground, portrayed alive, and is clearly the focus of attention.

Paragraph (b) of § 91.21 outlines the qualifications of the judging panel. In the May 8, 2020, final rule, we revised § 91.21(b) to add “an understanding and appreciation of the waterfowl hunting heritage and ability to recognize waterfowl hunting accessories” as a prerequisite for the judges, among the other qualifications. We propose to remove that prerequisite from the qualifications of Contest judges.

Finally, § 91.23 sets forth the scoring criteria for the competition. In the May 8, 2020, final rule, we revised the criteria to include that Contest entries would also be judged on how well they illustrate the theme of “celebrating our waterfowl hunting heritage.” We propose to remove that judging requirement.

Public Comments Procedures

To ensure that any final action resulting from this proposed rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. We will accept public comments we receive on or before the date listed above in **DATES**. We are striving to ensure that any final rule resulting from this proposed rule would allow sufficient time for artists to prepare their submissions by the June 1, 2022, opening of the 2022 Contest entry submission period. The comments that will be most useful are those supported by quantitative information or studies and those that include citations to, and analyses of, the applicable laws and regulations. Please make your comments

as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

You must submit your comments and materials concerning this proposed rule by one of the methods listed above in **ADDRESSES**. We will not accept comments hand-delivered or those sent by email or fax or to an address not listed in **ADDRESSES**. If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information, such as your address, telephone number, or email address—will be posted on the website. Please note that comments submitted to this website are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

If you mail a hardcopy comment directly to us that includes personal information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy comments on <http://www.regulations.gov>.

In addition, all comments and materials we receive, as well as supporting documentation used in preparing this proposed rule, will be available for public inspection via <http://www.regulations.gov>. Search for FWS-HQ-MB-2021-0048, which is the docket number for this rulemaking.

Public Availability of Comments

As stated above in more detail, 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.

Required Determinations

National Environmental Policy Act

This proposed rule is categorically excluded. It reflects an administrative modification of procedures and the

impacts are limited to administrative effects (516 DM 8.5(a)(3)). A detailed statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) is therefore not required.

Endangered Species Act Consideration

Of the species on our List of Eligible Species, only two species are currently listed as endangered or threatened under section 4 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). No legal complications arise from the dual listing as the two lists are developed under separate authorities and for different purposes. Because this proposed rule is strictly administrative in nature, it has no effect on endangered or threatened species. Thus, it does not require consultation under section 7 of the ESA.

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 proposed rule is not significant.

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

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the

rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. The changes we propose are intended primarily to clarify the requirements for the Contest. These changes would affect individuals, not businesses or other small entities as defined in the Regulatory Flexibility Act. Currently, Duck Stamp sales average approximately 1.5 million each year. Active waterfowl hunters, the only people required to purchase an annual stamp, number approximately 1.1 million each year. Duck Stamps are also purchased by stamp and wildlife art collectors, bird watchers, and other conservationists, and a current stamp can be used for access at any national wildlife refuge that has an entry fee. Many hunters also purchase multiple stamps for different purposes. We are currently unable to quantify numbers of stamps purchased by each user group; we do not anticipate being able to attribute any variability in sales due to the proposed changes in the Contest. In recent years, when no theme is required, we have received an average of 200 entries per year to the Contest. We anticipate that the number of entries into the Federal Duck Stamp Contest will range between 140 and 250 in any given year.

We therefore certify that, if adopted, this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act. A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Clarity of This Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rulemaking, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rulemaking is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

(a) Would not have an annual effect on the economy of \$100 million or more.

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

(c) 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.

Paperwork Reduction Act of 1995 (PRA)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with the Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest and assigned OMB Control Number 1018-0172. You may view the information collection request(s) 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.

Unfunded Mandates Reform Act

This proposed rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rulemaking does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Civil Justice Reform

In accordance with E.O. 12988, the Office of the Solicitor has determined that this proposed 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.

Takings

In accordance with E.O. 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This proposed rule would revise the current regulations at 50 CFR part 91 that govern the Federal Duck Stamp Contest. This rule would not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Government-to-Government Relationship With Tribes

Under the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), and 512 DM 2, we have evaluated possible effects on federally recognized Indian Tribes and have determined that there are no effects. Individual Tribal members must meet the same regulatory requirements as other individuals who enter the Federal Duck Stamp Contest.

Federalism

These proposed revisions to part 91 do not contain significant Federalism

implications. A federalism summary impact statement under Executive Order 13132 is not required.

List of Subjects in 50 CFR Part 91

Hunting, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 91, subchapter G of chapter I, title 50 of the Code of Federal Regulations as follows:

PART 91—MIGRATORY BIRD HUNTING AND CONSERVATION STAMP CONTEST

- 1. The authority citation for part 91 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 718j; 31 U.S.C. 9701.

- 2. Revise § 91.14 to read as follows:

§ 91.14 Restrictions on subject matter for entry.

A live portrayal of any bird(s) of the five or fewer identified eligible waterfowl species must be the dominant feature of the design. The design may depict more than one of the eligible species. The judges' overall mandate is to select the best design that will make an interesting, useful, and attractive duck stamp that will be accepted and prized by hunters, stamp collectors, conservationists, and others. The design must be the contestant's original hand-drawn creation. The entry design may not be copied or duplicated from previously published art, including photographs, or from images in any format published on the internet. Photographs, computer-generated art, or art produced from a computer printer or other computer/mechanical output device (airbrush method excepted) are

not eligible to be entered into the contest and will be disqualified. An entry submitted in a prior contest that was not selected for a Federal or State stamp design may be submitted in the current contest if the entry meets the criteria set forth in this section.

- 3. Amend § 91.21 by revising paragraph (b) to read as follows:

§ 91.21 Selection and qualification of contest judges.

* * * * *

(b) *Qualifications.* The panel of five judges will comprise individuals who have one or more of the following prerequisites: Recognized art credentials, knowledge of the anatomical makeup and the natural habitat of the eligible waterfowl species, an understanding of the wildlife sporting world in which the Duck Stamp is used, an awareness of philately and the role the Duck Stamp plays in stamp collecting, and demonstrated support for the conservation of waterfowl and wetlands through active involvement in the conservation community.

* * * * *

- 4. Revise § 91.23 to read as follows:

§ 91.23 Scoring criteria for contest.

Entries will be judged on the basis of anatomical accuracy, artistic composition, and suitability for reduction in the production of a stamp.

Shannon A. Estenoz,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2021–13476 Filed 6–22–21; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 86, No. 118

Wednesday, June 23, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 17, 2021.

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

Comments regarding this information collection received by July 23, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

displays a currently valid OMB control number.

Forest Service

Title: Small Business Timber Set-Aside Program: Appeal Procedures on Recomputation of Shares.

OMB Control Number: 0596–0141.

Summary of Collection: The Forest Service (FS) administers the Small Business Timber Sale Set-Aside Program in cooperation with the Small Business Administration (SBA) under the authorities of the Small Business Act (15 U.S.C. 631), which establishes Federal policy regarding assistance provided to small businesses; the National Forest Management Act of 1976; the Administrative Procedures Act (5 U.S.C. 522); and SBA's regulations found at 13 CFR part 121. The Set-Aside Program is designed to ensure that qualifying small business manufacturers can purchase a fair portion of National Forest System sawtimber offered for sale.

Need and Use of the Information: Under the program, the FS must re-compute the shares of timber sales to be set aside for qualifying small businesses every five years based on the actual volume of sawtimber purchased by small businesses. Re-computation of shares must occur if there is a change in manufacturing capability, if the purchaser size class changes, or if certain purchaser(s) discontinue operations. The appeal information is collected in writing and is possible, in most locations to be sent via email and attached documents to a Forest Service Officer. The collected information is reviewed by FS officials who use the information to render decisions related to re-computations of timber sale share to be set-aside for small business timber purchasers.

Description of Respondents: Business or other for-profit.

Number of Respondents: 40.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 800.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–13171 Filed 6–22–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #RBS–21–CO–OP–0017]

Inviting Applications for Socially Disadvantaged Groups Grants

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of funding availability.

SUMMARY: This notice announces that the Rural Business-Cooperative Service (Agency) is announcing fiscal year (FY) 2021 funding for applications for the Socially Disadvantaged Groups Grant (SDGG) program. The purpose of this program is to provide technical assistance to socially disadvantaged groups in rural areas. Eligible applicants include cooperatives, groups of cooperatives, and cooperative development centers. This program supports Rural Development's (RD) mission of improving the quality of life for rural Americans and commitment to directing resources to those who most need them. The program funding level for FY 2021 is a total of \$3.0 million. Detailed information can be found on the SDGG website located at <https://www.rd.usda.gov/programs-services/socially-disadvantaged-groups-grant>. Expenses incurred in developing applications are the responsibility of the applicant.

DATES: Completed applications for grants must be submitted electronically by no later than 11:59 p.m. Eastern Time August 9, 2021, through <https://www.grants.gov> to be eligible for grant funding. Please review the *Grants.gov* website at <https://www.grants.gov/web/grants/applicants/organization-registration.html> for instructions on the process of registering your organization as soon as possible to ensure that you are able to meet the electronic application deadline. Applications received after the deadline are not eligible for funding under this notice and will not be evaluated.

ADDRESSES: You are encouraged to contact your USDA Rural Development State Office well in advance of the application deadline to discuss your project and ask any questions about the application process. Contact information for State Offices can be found at: <https://www.rd.usda.gov/contact-us/state-offices>.

Program guidance as well as application templates may be obtained at <https://www.rd.usda.gov/programs-services/socially-disadvantaged-groups-grant> or by contacting your State Office. To submit an electronic application, follow the instructions for the SDGG funding announcement located at <https://www.grants.gov>. You are strongly encouraged to file your application early and allow sufficient time to manage any technical issues that may arise.

FOR FURTHER INFORMATION CONTACT:

David Chestnut, Branch Chief, Program Management Division, Rural Business-Cooperative Service, United States Department of Agriculture, 1400 Independence Avenue SW, Mail Stop-3226, Washington, DC 20250-3226, (202) 720-1400 or by email at: david.chestnut@usda.gov.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency Name: USDA Rural Business-Cooperative Service.

Funding Opportunity Title: Socially Disadvantaged Groups Grant.

Announcement Type: Initial Notice.

Catalog of Federal Domestic

Assistance Number: 10.871.

Dates: Application Deadline. Your electronic application must be received by <https://www.grants.gov> no later than 11:59 p.m. Eastern Time, by August 9, 2021, or it will not be considered for funding.

The Application Template provides specific, detailed instructions for each item of a complete application. The Agency emphasizes the importance of including every item and strongly encourages applicants to follow the instructions carefully, using the examples and illustrations in the Application Template. Prior to official submission of applications, applicants may request technical assistance or other application guidance from the Agency, as long as such requests are made prior to July 23, 2021. Agency contact information can be found in section D (Application and Submission Information) of this document.

Hemp Related Projects: Please note that no assistance or funding from this grant can be provided to a hemp producer unless they have a valid license issued from an approved State, Tribal or Federal plan as per Section 10113 of the Agriculture Improvement Act of 2018, Public Law 115-334. Verification of valid hemp licenses will occur at the time of award. The purpose of this program is to provide technical assistance, so funding for the production of hemp or marketing hemp production is not eligible.

Persistent Poverty Counties: Section 736 of the Consolidated Appropriations Act, 2021, Public Law 116-260, designates funding for projects in persistent poverty counties. Persistent poverty counties as defined in Section 736 is “any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses, and 2007–2011 American Community Survey 5-year average, or any territory or possession of the United States”. Another provision in Section 736 expands the eligible population in persistent poverty counties to include any county seat of such a persistent poverty county that has a population that does not exceed the authorized population limit by more than 10 percent. This provision expands the current 50,000 population limit to 55,000 for only county seats located in persistent poverty counties. Therefore, applicants and/or beneficiaries of technical assistance services located in persistent poverty county seats with populations up to 55,000 (per the 2010 Census) are eligible.

The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. The Agency reserves the right to contact applicants to seek clarification on materials contained in the submitted application. See the Application Guide for a full discussion of each item. For requirements of completed grant applications, refer to Section D (Application and Submission Information) of this document.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, the paperwork burden associated with this notice has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570-0052.

A. Program Description

The SDGG program is authorized by the Consolidated Farm and Rural Development Act (7 U.S.C. 1932 (e)(11)), as amended by the Agriculture Improvement Act of 2018, Public Law 115-334. The primary objective of the SDGG program is to provide technical assistance to socially disadvantaged groups. Grants are available for cooperative development centers, individual cooperatives, or groups of cooperatives (i) that serve socially disadvantaged groups and (ii) of which a majority of the board of directors or governing board is comprised of individuals who are members of socially disadvantaged groups.

Definitions

The definitions applicable to this notice are as follows:

Agency—Rural Business-Cooperative Service, an agency of the United States Department of Agriculture (USDA) Rural Development or a successor agency.

Conflict of interest—A situation in which a person or entity has competing personal, professional, or financial interests that make it difficult for the person or business to act impartially. Federal procurement standards prohibit transactions that involve a real or apparent conflict of interest for owners, employees, officers, agents, or their immediate family members having a financial or other interest in the outcome of the project or that restrict open and free competition for unrestrained trade. Specifically, project funds may not be used for services or goods going to, or coming from, a person or entity with a real or apparent conflict of interest, including, but not limited to, owner(s) and their immediate family members. Examples of conflicts of interest include using grant funds to pay a member of the applicant's board of directors to provide proposed technical assistance to socially disadvantaged groups, paying a cooperative member to provide proposed technical assistance to other members of the same cooperative, and paying an immediate family member of the applicant to provide proposed technical assistance to socially-disadvantaged groups.

Cooperative—A business or organization that is owned and operated for the benefit of its members, with returns of residual earnings paid to such members on the basis of patronage. Eligible cooperatives for the SDGG program are those where a majority of the board of directors or governing board is comprised of individuals who are members of socially disadvantaged groups.

Cooperative development center—A nonprofit corporation or institution of higher education operated by the grantee for cooperative or business development. An eligible cooperative development center for the SDGG program is one where a majority of the board of directors or governing board is comprised of individuals who are members of socially disadvantaged groups. It may or may not be an independent legal entity separate from the grantee.

Feasibility study—An analysis of the economic, market, technical, financial, and management feasibility of a proposed project.

Group of cooperatives—A group of cooperatives whose primary focus is to provide assistance to socially disadvantaged groups; each cooperative must meet the eligibility requirements set forth in the definition of “cooperative” herein. One of the cooperatives must be designated as the lead entity and have legal authority to contract with the federal government.

Immediate family(ies)—A group of individuals who live in the same household or who are closely related by blood, marriage, or adoption, such as a spouse, domestic partner, parent, child, sibling, aunt, uncle, grandparent, grandchild, niece, nephew, or first cousin.

Operating cost—The day-to-day expenses of running a business; for example: utilities, rent on the office space a business occupies, salaries, depreciation, marketing and advertising, and other basic overhead items.

Participant support costs—Direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences or training projects.

Project—Any activities to be funded by the Socially Disadvantaged Groups Grant.

Rural and rural area—Any area of a state other than (a) a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States and (b) any urbanized area contiguous and adjacent to a city or town described in clause (a), and urbanized areas that are rural in character defined by 7 U.S.C.1991(a)(13)(D). For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self-government, and legal powers set forth in a charter granted by the state. Notwithstanding any other provision of this paragraph, within the areas of the County of Honolulu, Hawaii, and the Commonwealth of Puerto Rico, the Secretary may designate any part of the areas as a rural area if the Secretary determines that the part is not urban in character, other than any area included in the Honolulu Census Designated Place or the San Juan Census Designated Place.

Rural Development—A mission area within USDA consisting of the Office of Under Secretary for Rural Development, Rural Business-Cooperative Services, Rural Housing Service, and Rural Utilities Service and any successors.

Socially disadvantaged group—A group whose members have been subjected to racial, ethnic, or gender

prejudice because of their identity as members of a group without regard to their individual qualities.

State—Includes each of the 50 states, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and, as may be determined by the Secretary to be feasible, appropriate, and lawful, the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau.

Technical assistance—An advisory service performed for the purpose of assisting cooperatives or groups that want to form cooperatives such as market research, product and/or service improvement, legal advice and assistance, feasibility study, business planning, marketing plan development, and training.

B. Federal Award Information

Type of Award: Competitive Grant.

Fiscal Year Funds: FY2021.

Total Funding: \$3,000,000.

Maximum Award: \$175,000.

Project Period: 1 year.

Anticipated Award Date: September 30, 2021.

C. Eligibility Information

Applicants must meet all the following eligibility requirements. Applications which fail to meet any of these requirements by the application deadline will be deemed ineligible and will not be evaluated further.

1. **Eligible applicants.** Grants may be made to individual cooperatives, groups of cooperatives, or cooperative development centers that serve socially disadvantaged groups and of which a majority of the board of directors or governing board of the applicant is comprised of individuals who are members of socially disadvantaged groups. You must be able to verify your legal structure in the state or the tribe under which you are legally organized or incorporated. Grants may not be made to public bodies or to individuals. Your application must demonstrate that you meet all definition requirements for one of the three eligible applicant types as defined above. Federally recognized tribes have a government-to-government relationship with the United States and may have difficulty meeting the definition requirements. Therefore, it is recommended that they utilize a separate entity, such as a tribally owned business, tribal authority, tribal non-profit, tribal college or university to apply for SDGG funding that would provide technical assistance to members of the tribe. This separate tribal entity

must also demonstrate that it meets all definition requirements for one of the three eligible applicant types as defined above.

(a) An applicant is ineligible if it has been debarred or suspended or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, “Debarment and Suspension.” The Agency will check the System for Award Management (SAM) to determine if the applicant has been debarred or suspended at the time of application and also prior to funding any grant award. In addition, an applicant will be considered ineligible for a grant due to an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court), is delinquent on the payment of Federal income taxes, or is delinquent on Federal debt. The applicant must certify as part of the application that they do not have an outstanding judgment against them. The Agency will check the Do Not Pay System to verify this information at the time of application and also prior to funding any grant award.

(b) Any corporation or cooperative (i) that has been convicted of a felony criminal violation under any Federal law within the past 24 months or (ii) that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, is not eligible for financial assistance provided with funds appropriated by the Consolidated Appropriations Act, 2021, Public Law 116–260, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government. Certification of compliance with this provision is now completed during registration or annual recertification in SAM.gov via the Financial Assistance General Certifications and Representations.

2. **Cost sharing or matching.** No matching funds are required.

3. **Other eligibility requirements.**

Use of funds: Your application must propose technical assistance that will benefit other socially disadvantaged groups. Any recipient of technical assistance must have a membership that consists of a majority of members from socially disadvantaged groups. Please review section D(6) (Funding Restrictions) of this notice carefully.

Project eligibility: The proposed project must only serve members of

socially disadvantaged groups located in rural areas.

Grant period eligibility: Your application must include a grant period of one-year or less or it will not be considered for funding. The proposed time frame should begin no earlier than October 1, 2021 and end no later than December 31, 2022. Applications that request funds for a time period ending after December 31, 2022, will not be considered for funding. You should note that the anticipated award date is September 30, 2021. Projects must be completed by December 31, 2022 or within the 12-months of award funding, whichever is earlier.

The Agency may approve requests to extend the grant period for up to an additional 12 months at its discretion. However, you may not have more than one SDGG award during the same grant period. If you extend the period of performance for your current award, you may be deemed ineligible to receive a SDGG in the next grant cycle. Further guidance on grant period extensions will be provided in the award document.

Satisfactory performance eligibility: If you have an existing SDGG award, you must be performing satisfactorily to be considered eligible for a new SDGG award. Satisfactory performance includes being up to date on all financial and performance reports as prescribed in the grant award and being current on tasks and timeframes for utilizing grant and matching funds as approved in the work plan and budget. If you have any unspent grant funds on SDGG awards from projects prior to September 30, 2019, your application will not be considered for funding. If your FY 2020 award has unspent funds of 50 percent or more than what your approved work plan and budget projected at the time of evaluation of your FY2020 application, your FY 2021 application may not be considered for funding. The Agency will verify the performance status of any FY 2020 awards and make a determination after the FY 2021 application period closes.

Completeness eligibility: Your application must provide all the information requested in section D (2) (Content and form of application submission) of this notice. Applications lacking sufficient information to determine eligibility and scoring criteria will be considered ineligible.

Duplication of current services. Your application must demonstrate that you are providing services to new customers or new services to current customers. If your work plan and budget is duplicative of your existing award, your application will not be considered for

funding. If your work plan and budget is duplicative of a previous or existing Rural Cooperative Development Grant (RCDDG) and/or SDGG award, your application will not be considered for funding.

Multiple grant eligibility: You may only submit one SDGG grant application each funding cycle. If two applications are submitted (regardless of the applicant name) that include the same Executive Director and/or advisory boards or committees of an existing cooperative or cooperative development center, both applications will be determined ineligible for funding.

D. Application and Submission Information

1. Application Template

The application template to assist you in applying for this funding opportunity is located at <https://www.rd.usda.gov/programs-services/socially-disadvantaged-groups-grant>. Use of the application template is strongly recommended to assist you with the application process. You may also contact your USDA RD State Office for more information. Contact information for State Offices is located at <https://www.rd.usda.gov/contact-us/state-offices>.

2. Content and Form of Application Submission

You must submit your application electronically through *Grants.gov*. Your application must contain all required information. To apply electronically, you must follow the instructions for this funding announcement at <https://www.grants.gov>. Please note that we cannot accept applications through mail or courier delivery, in-person delivery, email, or fax.

You can locate the *Grants.gov* downloadable application package for this program by using a keyword, the program name, or the Catalog of Federal Domestic Assistance Number for this program.

When you enter the *Grants.gov* website, you will find information about applying electronically through the site, as well as the hours of operation.

To use *Grants.gov*, you must already have a DUNS number and you must also be registered and maintain registration in SAM. We strongly recommend that you do not wait until the application deadline date to begin the application process through *Grants.gov*.

You must submit all application documents electronically through *Grants.gov*. Applications must include electronic signatures. Original signatures may be required if funds are awarded.

After applying electronically through *Grants.gov*, you will receive an automatic acknowledgement from *Grants.gov* that contains a *Grants.gov* tracking number.

Your application must also contain the following required forms and proposal elements:

(a) Standard Form SF-424, "Application for Federal Assistance," to include your DUNS number. You must also provide your SAM Commercial and Government Entity (CAGE) Code and expiration date under the applicant eligibility discussion in your proposal narrative. If you do not include the CAGE code and expiration date and the DUNS number in your application, it will not be considered for funding.

(b) Form SF-424A, "Budget Information-Non-Construction Programs." This form must be completed and submitted as part of the application package. You no longer must complete the Form SF 424B, "Assurances—Non-Construction Programs" as a part of your application. This information is now collected through your registration or annual recertification in *SAM.gov* through the Financial Assistance General Certifications and Representation.

(c) You must certify that there are no current outstanding Federal judgments against your property and that you will not use grant funds to pay for any judgment obtained by the United States. You must also certify that you are not delinquent on the payment of Federal income taxes, or any Federal debt. There is no standard form to complete, but to satisfy the certification requirement, you should include this statement in your application: "[INSERT NAME OF APPLICANT] certifies that the United States has not obtained an unsatisfied judgment against its property, is not delinquent on the payment of Federal income taxes, or any Federal debt, and will not use grant funds to pay any judgments obtained by the United States." A separate signature is not required.

(d) Table of Contents. Your application must contain a detailed Table of Contents (TOC). The TOC must include page numbers for each part of the application. Page numbers should begin immediately following the TOC.

(e) Executive Summary. A summary of the proposal, not to exceed one page, must briefly describe the project, tasks to be completed, and other relevant information that provides a general overview of the project.

(f) Eligibility Discussion. A detailed discussion, not to exceed four pages, must describe how you meet the following requirements:

(1) Applicant Eligibility. You must describe how you meet the definition of a cooperative, group of cooperatives, or cooperative development center. Your application must also show that your individual cooperative, group of cooperatives or cooperative development center has a majority of its board of directors or governing board comprised of individuals who are members of socially disadvantaged groups and that the applicant serves socially disadvantaged groups. Your application must include a list of your board of directors/governing board and the percentage of board of directors/governing board that are members of socially disadvantaged groups. *Note:* Your application will not be considered for funding if you fail to show that a majority of your board of directors/governing board is comprised of individuals who are members of socially disadvantaged groups.

You must verify your incorporation and status in the state that you have applied by providing the state's or Tribe's Certificate of Good Standing and your Articles of Incorporation. You may also submit your Bylaws if they provide additional information not included in your Articles of Incorporation that will help verify your legal status. If applying as an institution of higher education, documentation verifying your legal status is not required; however, you must demonstrate that you qualify as an Institution of Higher Education as defined at 20 U.S.C. 1001. You must apply as only one type of applicant. The requested verification documents should be included in Appendix A of your application. If they are not included, your application will not be considered for funding.

(2) Use of Funds. You must provide a brief discussion on how the proposed project activities meet the definition of technical assistance and identify the socially disadvantaged groups that will be assisted.

(3) Project Area. You must provide specific information that details the location of the Project area and explain how the area meets the definition of "rural area."

(4) Grant Period. You must provide a time frame for the proposed project and discuss how the project will be completed within that time frame. Your project must have a time frame of one year or less.

(5) Indirect Costs. Please indicate if you have a negotiated indirect cost rate agreement (NICRA), and if so, the rate. Your negotiated indirect cost rate approval does not need to be included in your application, but you will be required to provide it if a grant is

awarded. Approval for indirect costs that are requested in an application without an approved indirect cost rate agreement is at the discretion of the Agency.

(g) Scoring Criteria. Each of the scoring criteria in this notice must be addressed in narrative form, with a maximum of three pages for each individual scoring criterion, unless otherwise specified. Failure to address each scoring criteria will result in the application being determined ineligible.

(h) The Agency has established annual performance evaluation measures to evaluate the SDGG program. You must provide estimates on the following performance evaluation measures as part of your narrative:

(1) Number of cooperatives assisted; and

(2) Number of socially disadvantaged groups assisted.

3. DUNS Number and SAM

To be eligible (unless you are excepted under 2 CFR 25.110(b), (c) or (d)), you are required to:

(a) Provide a valid DUNS number in your application, which can be obtained at no cost via a toll-free request line at (866) 705-5711;

(b) Register in SAM before submitting your application. You may register in SAM at no cost at: <https://sam.gov/SAM/> You must provide your SAM CAGE Code and expiration date in the application materials. When registering in SAM, you must indicate you are applying for a Federal financial assistance project or program or are currently the recipient of funding under any Federal financial assistance project or program; and

(c) The SAM registration must remain active with current information at all times while the Agency is considering an application or while a Federal grant award or loan is active. To maintain the registration in the SAM database, the applicant must review and update the information in the SAM database annually from date of initial registration or from the date of the last update. The applicant must ensure that the information in the database is current, accurate, and complete. Applicants must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

If you have not fully complied with all applicable DUNS and SAM requirements, the Agency may determine that the applicant is not qualified to receive a Federal award and the Agency may use that determination as a basis for making an award to another applicant. Please refer to section

F(2) (Administrative and national policy requirements) for additional submission requirements that apply to grantees selected for this program.

4. Submission Dates and Times

Application Deadline Date: August 9, 2021.

Explanation of Deadline: Electronic applications must be RECEIVED and accepted by <https://www.grants.gov> by 11:59 p.m. Eastern Time August 9, 2021, to be eligible for funding. Please review the *Grants.gov* website at <https://www.grants.gov/web/grants/applicants/organization-registration.html> for instructions on the process of registering your organization as soon as possible to ensure you can meet the electronic application deadline. *Grants.gov* will not accept applications submitted after the deadline.

5. Intergovernmental Review

Executive Order (E.O.) 12372, "Intergovernmental Review of Federal Programs," applies to this program. This E.O. requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. The Rural Development State Office where the project is located will provide compliance guidance to applicants.

6. Funding Restrictions

Grant funds must be used for technical assistance as defined. No funds made available under this solicitation shall be used to:

(a) Plan, repair, rehabilitate, acquire, or construct a building or facility, including a processing facility;

(b) Purchase, rent, or install fixed equipment, including processing equipment;

(c) Purchase vehicles, including boats;

(d) Pay for the preparation of the grant application;

(e) Pay expenses not directly related to the funded Project;

(f) Fund political or lobbying activities;

(g) Fund any activities considered unallowable by the applicable grant cost principles, including 2 CFR part 200, subpart E and the Federal Acquisition Regulation (48 CFR 1);

(h) Fund architectural or engineering design work for a specific physical facility;

(i) Fund any direct expenses for the production of any commodity or product to which value will be added, including seed, rootstock, labor for harvesting the crop, and delivery of the commodity to a processing facility;

- (j) Fund research and development;
- (k) Purchase land;
- (l) Duplicate current activities or activities paid for by other Federal grant programs;
- (m) Pay costs of the project incurred prior to the date of grant approval;
- (n) Pay for assistance to any private business enterprise that does not have at least 51 percent ownership by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence;
- (o) Pay any judgment or debt owed to the United States;
- (p) Pay any operating costs of the cooperative, group of cooperatives, or cooperative development center not directly related to the project;
- (q) Pay expenses for applicant employee training or professional development not directly related to the project;
- (r) Pay for any goods or services from a person or entity who has a conflict of interest with the grantee; or
- (s) Pay for technical assistance provided to a cooperative that does not have a membership that consists of a majority of members from socially disadvantaged groups.

In addition, your application will not be considered for funding if it does any of the following:

- (a) Requests more than the maximum grant amount;
- (b) Proposes ineligible costs that equal more than 10 percent of total grant funds requested; or
- (c) Proposes participant support costs that equal more than 10 percent of total grant funds requested.

We will consider your application for funding if it includes ineligible costs of 10 percent or less of total grant funds requested if it is determined eligible otherwise. However, if your application is successful, those ineligible costs must be removed and replaced with eligible costs before the Agency will make the grant award or the amount of the grant award will be reduced accordingly. If we cannot determine the percentage of ineligible costs, your application will not be considered for funding.

7. Other Submission Requirements

(a) Applications will not be accepted if the text is less than an 11-point font. You must submit your application electronically, through *Grants.gov*. You must follow the instructions for this funding announcement at <https://www.grants.gov>. A password is not required to access the website.

(b) National Environmental Policy Act. This notice has been reviewed in accordance with 7 CFR part 1970,

“Environmental Policies and Procedures.” We have determined that an Environmental Impact Statement is not required because the issuance of regulations and instructions, as well as amendments to them, describing administrative and financial procedures for processing, approving, and implementing the Agency’s financial programs is categorically excluded in the Agency’s National Environmental Policy Act (NEPA) regulation found at 7 CFR 1970.53(f). We have determined that this notice does not constitute a major Federal action significantly affecting the quality of the human environment.

The Agency will review each grant application to determine its compliance with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist the Agency with this determination.

(c) Civil Rights Compliance Requirements. All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A) and Section 504 of the Rehabilitation Act of 1973.

E. Application Review Information

The State Offices will review applications to determine if they are eligible for assistance based on requirements in this notice, and other applicable Federal regulations. If determined eligible, your application will be scored by a panel of USDA employees in accordance with the point allocation specified in this notice. A recommendation will be submitted to the Administrator to fund applications in highest ranking order. Applications that cannot be fully funded may be offered partial funding at the Agency’s discretion.

1. Scoring Criteria

All eligible and complete applications will be evaluated based on the following criteria. Evaluators will base scores only on the information provided or cross-referenced by page number in each individual evaluation criterion. SDGG is a competitive program, so you will receive scores based on the quality of your responses. Simply addressing the criteria will not guarantee higher scores. The total points possible for the criteria are 105.

(a) *Technical Assistance (maximum score of 25 points)*—Three-page limit. A panel of USDA employees will evaluate your application to determine your ability to assess the needs of and provide effective technical assistance to socially disadvantaged groups. You must discuss the:

(1) Needs of the socially disadvantaged groups to be assisted and explain how those needs were determined;

(2) Proposed technical assistance to be provided to the socially disadvantaged groups; and

(3) Expected outcomes of the proposed technical assistance, including how socially disadvantaged groups will benefit from participating in the project. You will score higher on this criterion if you provide examples of past projects that demonstrate successful outcomes in identifying specific needs and providing technical assistance to socially disadvantaged groups.

(b) *Work Plan/Budget (maximum of 25 points)*—Six-page limit. Your work plan must provide specific and detailed descriptions of the tasks and the key project personnel that will accomplish the project’s goals. The budget will be reviewed for completeness. You must list what tasks are to be done, when it will be done, who will do it, and how much it will cost. Reviewers must be able to understand what is being proposed and how the grant funds will be spent. The budget must be a detailed breakdown of estimated costs. These costs should be allocated to each of the tasks to be undertaken.

A panel of USDA employees will evaluate your work plan for detailed actions and an accompanying timetable for implementing the proposal. Clear, logical, realistic, and efficient plans that allocate costs to specific tasks using applicable budget object class categories provided on the Form SF-424A will result in a higher score. You must discuss at a minimum:

- (1) Specific tasks to be completed using grant funds;
- (2) How customers will be identified;
- (3) Key personnel and what tasks they are undertaking; and
- (4) The evaluation methods to be used to determine the success of specific tasks and overall project objectives.

Please provide qualitative methods of evaluation. For example, evaluation methods should go beyond quantitative measurements of completing surveys or number of evaluations, such as discussion of evaluation methods per task.

(c) *Experience (maximum score of 25 points)*—Three-page limit. A panel of USDA employees will evaluate your experience, commitment, and availability for identified staff or consultants in providing technical assistance, as defined in this notice. You must describe the technical assistance experience for each identified staff member or consultant, as well as years of experience in providing that

assistance. You must also discuss the commitment and the availability of identified staff, consultants, or other professionals to be hired for the project—especially those who may be consulting on multiple SDGG/RCDG projects. If staff or consultants have not been selected at the time of application, you must provide specific descriptions of the qualifications required for the positions to be filled. In addition, resumes for each individual staff member or consultant must be included as an attachment in Appendix B. The attachments will not count toward the maximum page total. We will compare the described experience in this section and in the resumes to the work plan to determine relevance of the experience. Applications that do not include the attached resumes will not be considered for funding. Applications that demonstrate strong credentials, education, capabilities, experience, and availability of project personnel that will contribute to a high likelihood of project success will receive more points than those that demonstrate less potential for success in these areas.

Points will be awarded as follows:

(1) 0 points will be awarded if you do not substantively address the criterion.

(2) 1–9 points will be awarded if qualifications and experience of some, but not all, staff is addressed and, if necessary, qualifications of unfilled positions are not provided.

(3) 10–14 points will be awarded if (ii) is met, plus all project personnel are identified but do not demonstrate qualifications or experience relevant to the project.

(4) 15–19 will be awarded if (ii) and (iii) are met, plus most, but not all, key personnel demonstrate strong credentials and/or experience, and availability indicating a reasonable likelihood of success.

(5) 20–25 points will be awarded if (ii)–(iv) are met, plus all personnel demonstrate strong, relevant credentials or experience and availability indicating a high likelihood of project success.

(d) *Commitment (maximum of 10 points)*—Three-page limit. A panel of USDA employees will evaluate your commitment to providing technical assistance to socially disadvantaged groups in rural areas. You must list the number and location of socially disadvantaged groups that will directly benefit from the assistance provided. You must also define and describe the underserved and economically distressed areas within your service area and provide current and relevant statistics that support your description of the service area. Projects located in persistent poverty counties as defined in

Section 736 of the Consolidated Appropriations Act, 2021, Public Law 116–260, will score higher on this factor.

(e) *Local support (maximum of 10 points)*—Three-page limit. A panel of USDA employees will evaluate your application for local support of the technical assistance activities. Your discussion on local support should include previous and/or expected local support and plans for coordinating with other developmental organizations in the proposed service area or with tribal, State, and local government institutions. You will score higher if you demonstrate strong support from potential beneficiaries and other developmental organizations. You may also submit a maximum of 10 letters of support or intent to coordinate with the application to verify your discussion.

Points will be awarded as follows:

(1) 0 points are awarded if you do not adequately address this criterion.

(2) A range of 1–5 points are awarded if you demonstrate support from potential beneficiaries and other developmental organizations in your discussion but do not provide letters of support.

(3) Additional 1 point is awarded if you provide 2–3 support letters that show support from potential beneficiaries and/or support from local organizations.

(4) Additional 2 points are awarded if you provide 4–5 support letters that show support from potential beneficiaries and/or support from local organizations.

(5) Additional 3 points are awarded if you provide 6–7 support letters that show support from potential beneficiaries and/or support from local organizations.

(6) Additional 4 points are awarded if you provide 8–9 support letters that show support from potential beneficiaries and/or support from local organizations.

(7) Additional 5 points are awarded if you provide 10 support letters that show support from potential beneficiaries and/or support from local organizations.

You may submit a maximum of 10 letters of support. Support letters should be signed and dated after the notice publication date and come from potential beneficiaries and other local organizations. Letters received from Congressional members and technical assistance providers will not be included in the count of support letters received. Additionally, identical form letters signed by multiple potential beneficiaries and/or local organizations will not be included in the count of support letters received. Support letters

should be included as an attachment to the application in Appendix C and will not count against the maximum page total. Additional letters from industry groups, commodity groups, Congressional members, and similar organizations should be referenced, but not included in the application package. When referencing these letters, provide the name of the organization, date of the letter, the nature of the support, and the name and title of the person signing the letter.

(f) *Administrator Discretionary Points (maximum of 10 points)*—In the event two projects have the same score; the Administrator may award points to the applicant that has not received SDGG funds in the past. The Administrator may also award points to applications to increase the geographic diversity of socially disadvantaged groups served by approved projects.

2. Review and Selection Process

Applications will be reviewed in the State Offices to determine if they are eligible for assistance based on requirements in this notice, and other applicable Federal regulations. If determined eligible, your application will be scored by a panel of USDA employees in accordance with the point allocation specified in this notice. The review panel will convene to reach a consensus on the scores for each of the eligible applications. The Administrator may choose to award up to 10 Administrator priority points based on criterion (f) in section E(1) (Scoring Criteria) of this notice. These points will be added to the cumulative score for a total possible score of 105. Applications will be funded in highest ranking order until the funding limitation has been reached. Applications that cannot be fully funded may be offered partial funding at the Agency's discretion. If your application is ranked and not funded, it will not be carried forward into the next competition.

F. Federal Award Administration Information

1. Federal Award Notices

If you are selected for funding, you will receive a signed notice of Federal award by postal or electronic mail, containing instructions on requirements necessary to proceed with execution and performance of the award.

If you are not selected for funding, you will be notified in writing via postal or electronic mail and informed of any review and appeal rights. Funding of successfully appealed applications will be limited to available FY 2021 funding.

2. Administrative and National Policy Requirements

Additional requirements that apply to grantees selected for this program can be found in 2 CFR parts 200, 215, 400, 415, 417, 418, and 421. All recipients of Federal financial assistance are required to report information about first tier subawards and executive compensation (See 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act reporting requirements (See 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

The following additional requirements apply to grantees selected for this program:

(a) Execution of an Agency approved Grant Agreement.

(b) Acceptance of a written Letter of Conditions.

(c) Submission of Form RD 1940–1, “Request for Obligation of Funds.”

(d) Submission of Form RD 1942–46, “Letter of Intent to Meet Conditions.”

(e) Assurance Agreement. By signing the Financial Assistance General Certifications and Representations in SAM, grant recipients affirm that they will operate the program free from discrimination. The grant recipients will maintain the race and ethnic data on their board members and the beneficiaries of the program. The grant recipient will provide alternative forms of communication to persons with limited English proficiency. The Agency will conduct civil rights compliance reviews on grant recipients to identify the collection of racial and ethnic data on program beneficiaries. In addition, the compliance review will ensure that equal access to the program benefits and activities are provided for persons with disabilities and language barriers.

3. Reporting

After grant approval and through grant completion, you will be required to provide the following:

(a) An SF–425, “Federal Financial Report,” and a project performance report will be required on a semiannual basis (due 30 calendar days after end of the semiannual period). The project performance reports shall include a comparison of actual accomplishments to the objectives established for that period;

(b) A statement providing reasons why established objectives were not met, if applicable;

(c) A statement providing reasons for any problems, delays, or adverse conditions, if any, which have affected

or will affect attainment of overall project objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular objectives during established time periods (This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation.);

(d) Objectives and timetable established for the next reporting period;

(e) A final project and financial status report within 90 days after the expiration or termination of the grant in accordance to 2 CFR 200.344; and

(f) Outcome project performance reports and final deliverables.

G. Agency Contacts

For general questions about this announcement and for program technical assistance, please contact the appropriate State Office at <https://www.rd.usda.gov/contact-us/state-offices>. You may also contact the David Chestnut, Branch Chief, Program Management Division, Rural Business-Cooperative Service, USDA at (202) 720–1400 or by email at david.chestnut@usda.gov.

H. Non-Discrimination Statement

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

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotope, American Sign Language, etc.) should contact the responsible Agency or USDA’s TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at <https://www.usda.gov/oascr/how-to-file-a->

program-discrimination-complaint and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

(1) *Mail*: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Email*: OAC@usda.gov.

Mark Brodziski,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. 2021–13169 Filed 6–22–21; 8:45 am]

BILLING CODE 3410–XY–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission Public Briefing, *Civil Rights and Protections in the Federal Response to Hurricanes María and Harvey*.

DATES: Friday, June 25, 2021, 12:00 p.m. ET.

ADDRESSES: Virtual Briefing and Business Meeting.

FOR FURTHER INFORMATION CONTACT:

Angelia Rorison: 202–376–7700; publicaffairs@usccr.gov.

SUPPLEMENTARY INFORMATION: On Friday, June 25, 2021, at 12 p.m. Eastern Time, the U.S. Commission on Civil Rights will hold a virtual briefing on the civil rights implications of the federal response and impact of Hurricanes María in Puerto Rico and Harvey in Texas. At this public briefing, the Commissioners will hear from subject matter experts such as government officials, volunteer organizations, non-governmental advocates, and academics. The Commission will accept written materials from the public for consideration as we prepare our report; submit to FEMAbriefing@usccr.gov no later than July 26, 2021.

This briefing is open to the public via live-stream on the Commission’s YouTube Page at <https://www.youtube.com/user/USCCR/videos>. (Streaming information subject to change.) Public participation is available for the event with view access, along with an audio option for listening. Written testimony and other materials can be found on the Commission’s website here.

Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, June 25, 2021, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

To request additional accommodations, persons with disabilities should email access@usccr.gov by Monday, June 18, 2021 indicating "accommodations" in the subject line.

Briefing Agenda for Civil Rights and Protections in the Federal Response to Hurricanes Maria and Harvey: 12:00 p.m.–2:55 p.m. All Times Eastern Time

- I. Introductory Remarks by Chair Norma V. Cantú and Commissioners Debo Adebile and Michael Yaki: 12:00–12:07 p.m.
- II. Panel 1: 12:07–1:32 p.m.
 - David Bibo, Acting Assoc. Administrator, Response & Recovery, FEMA
 - Tony Robinson, Region 6 Administrator, FEMA
 - Glenn Sklar, Principal Deputy Inspector General, DHS OIG
 - Stephen Begg, Deputy Inspector General, HUD OIG
 - Chris Currie, Director, Homeland Security & Justice, USGAO
 - Tevi Troy, Author, BPC Senior Fellow, & Former HHS Deputy Secretary
 - Jo Linda Johnson, Director, Office of Equal Rights, FEMA
- III. Break: 1:32–1:42 p.m.
- IV. Panel 2: 1:42–2:48 p.m.
 - Kira Romero-Craft, Director of the Southeast Region for LatinoJustice PRLDEF, LatinoJustice
 - Andrés Gallegos, Chairman, National Council on Disability
 - Nicole Roy, Project Coordinator, Salvation Army
 - Charley Willison, Postdoctoral Fellow, Harvard Medical School
- V. Closing Remarks by Chair Norma V. Cantú: 2:48–2:55 p.m.
- VI. Adjourn Meeting.

** Public Comments will be accepted through written testimony only.

* Schedule is subject to change.

Call for Public Comments

In addition to the testimony collected on Friday, June 25, 2021, via virtual briefing, the Commission welcomes the submission of material for consideration as we prepare our report. Please submit such information to FEMABriefing@usccr.gov no later than July 26, 2021, or by mail to OCRE/Public Comments, ATTN: FEMA Briefing, U.S.

Commission on Civil Rights, 1331 Pennsylvania Ave. NW, Suite 1150, Washington, DC 20425. The Commission encourages the use of email to provide public comments due to the current COVID-19 pandemic.

Dated: June 21, 2021.

Angelia Rorison,

Media and Communications Director, U.S. Commission on Civil Rights.

[FR Doc. 2021–13500 Filed 6–21–21; 4:15 pm]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission public business meeting.

DATES: Friday, June 25, 2021, 4:00 p.m. EST.

FOR FURTHER INFORMATION CONTACT:

Angelia Rorison: 202–376–7700; publicaffairs@usccr.gov.

ADDRESSES: Meeting to take place by telephone and is open to the public by telephone: 887–260–1479, Conference ID #: 9200350. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, June 25th, 2021, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

Meeting Agenda

- I. Approval of Agenda
- II. Business Meeting
 - A. Discussion and Vote on Release of Racial Disparities in Maternal Health Report
 - B. Discussion and Vote on Maternal Health Report Findings and Recommendations
- III. Adjourn Meeting

Dated: June 21, 2021.

Angelia Rorison,

Media and Communications Director, U.S. Commission on Civil Rights

[FR Doc. 2021–13503 Filed 6–21–21; 4:15 pm]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission public business meeting.

DATES: Friday, June 18, 2021, 12:00 p.m. EST.

FOR FURTHER INFORMATION CONTACT:

Angelia Rorison: 202–376–7700; publicaffairs@usccr.gov.

ADDRESSES: Meeting to take place by telephone and is open to the public by telephone: 887–260–1479, Conference ID #: 9200350. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, June 18th, 2021, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

Meeting Agenda

- I. Approval of Agenda
- II. Business Meeting
 - A. Discussion and Vote on Release of Racial Disparities in Maternal Health Report
 - B. Discussion and Vote on Appointments to an Advisory Committee
 - C. Discussion and Vote on Revision to Commission Bail Reform Report Timeline
 - D. Management and Operations
 - Staff Director's Report
- III. Adjourn Meeting

Dated June 16, 2021.

Angelia Rorison,

Media and Communications Director, U.S. Commission on Civil Rights.

[FR Doc. 2021–13117 Filed 6–17–21; 11:15 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–11–2021]

Foreign-Trade Zone (FTZ) 38—Spartanburg County, South Carolina; Authorization of Production Activity; Bosch Security Systems, LLC; (Surveillance, Detection, Evacuation, and Management Systems); Greer, South Carolina

On February 17, 2021, Bosch Security Systems, LLC submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 38 in Greer, South Carolina.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (86 FR 11496, February 25, 2021). On June 17, 2021, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time.

The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: June 17, 2021.

Elizabeth Whiteman,
Acting Executive Secretary.

[FR Doc. 2021–13159 Filed 6–22–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–853]

Standard Steel Welded Wire Mesh From Mexico: Final Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that imports of standard steel welded wire mesh (wire mesh) from Mexico are being, or are likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation April 1, 2019, through March 31, 2020.

DATES: Applicable June 23, 2021.

FOR FURTHER INFORMATION CONTACT: Alice Maldonado or Melissa Kinter, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4682 or (202) 482–1413, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2021, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of wire mesh from Mexico, in which we also postponed the final determination until June 16, 2021.¹ We invited interested parties to comment on the *Preliminary Determination*. A summary of the events that occurred since Commerce published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.²

Scope of the Investigation

The product covered by this investigation is wire mesh from Mexico. For a full description of the scope of this investigation, see the “Scope of the Investigation” in Appendix I of this notice.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice as Appendix II. 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 <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/>.

Methodology—Adverse Facts Available (AFA)

For purposes of this final determination, we relied, in part, on facts available pursuant to section 776(a)(2)(A) of the Tariff Act of 1930, as amended (the Act). As discussed in the Issues and Decision Memorandum, because one respondent did not act to the best of its ability in responding to our requests for information, we drew adverse inferences, where appropriate, in selecting from among the facts otherwise available, pursuant to section 776(b) of the Act. The respondent, Deacero S.A.P.I. de C.V. (Deacero), did not respond to Commerce's initial antidumping duty questionnaire, and we have continued to use an adverse inference in selection of facts available for determining the dumping rate for this company, pursuant to section 776(d) of the Act. For further information, see the section “Use of Facts Otherwise Available and Adverse Inferences” in the accompanying Issues and Decision Memorandum.

Verification

Commerce was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. However, we took additional steps in

lieu of an on-site verification to verify the information relied upon in making this final determination, in accordance with section 782(i) of the Act.³

Changes Since the Preliminary Determination

Based on our analysis of both the comments and information received in lieu of on-site verification, we made certain changes to the margin calculations for Aceromex, S.A. de C.V. (Aceromex). For a discussion of these changes, see the “Margin Calculations” section of the Issues and Decision Memorandum.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins and margins determined entirely under section 776 of the Act. Section 735(c)(5)(B) of the Act provides that, if the estimated weighted-average dumping margins for all individually investigated exporters and producers are zero or *de minimis* or determined entirely under section 776 of the Act, then Commerce may use any reasonable method to establish the estimated all-others rate, including averaging the estimated weighted-average dumping margins determined for the individually investigated exporters and producers.

In this investigation, Commerce assigned an estimated weighted-average dumping margin based entirely on facts available, *i.e.*, under section 776 of the Act, to Deacero. Therefore, the only estimated weighted-average dumping margin that is not zero, *de minimis*, or based entirely on facts otherwise available is the margin calculated for Aceromex. Thus, the estimated weighted-average dumping margin calculated for Aceromex is the margin assigned to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The final estimated weighted-average dumping margins are as follows:

¹ See *Standard Steel Welded Wire Mesh from Mexico: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and, Extension of Provisional Measures*, 86 FR 7710 (February 1, 2021) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

² See Memorandum, “Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Standard Steel Welded Wire Mesh from Mexico,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

³ See Commerce's Letter, In Lieu of Verification Questionnaire for Aceromex, dated February 26, 2021; and Aceromex's Letter, “Standard Steel Welded Wire Mesh from Mexico: Submission of Aceromex's Verification Response,” dated March 8, 2021.

Exporter or producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset) (percent) ⁴
Aceromex, S.A. de C.V	23.04	22.01
Deacero S.A.P.I. de C.V	* 110.42	109.39
All Others	23.04	22.01

* AFA.

Disclosure

We intend to disclose the calculations performed in this final determination within five days of the date of publication of this notice to parties in this proceeding, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

For this final determination, for entries made by Aceromex, Deacero, and the companies covered by the all-others rate, in accordance with section 735(c)(4)(A) of the Act, we will direct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after February 1, 2021, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), we will instruct CBP to require a cash deposit for such entries of merchandise equal to the estimated weighted-average dumping margin as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the

company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of export subsidies determined in a companion CVD proceeding when CVD provisional measures are in effect. Accordingly, where Commerce makes an affirmative determination for export subsidies, Commerce offsets the calculated estimated weighted-average dumping margin by the appropriate rate(s). In the companion CVD investigation, we have found export subsidies for all producers and exporters of subject merchandise.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission (ITC) of our final affirmative determination of sales at LTFV. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Because Commerce's final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of wire mesh from Mexico no later than 45 days after our final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, and all cash deposits will be refunded and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order

directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the "Continuation of Suspension of Liquidation" section.

Notification Regarding Administrative Protective Orders

This notice serves as the only reminder to parties subject to 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 return/or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This determination is issued and published pursuant to sections 735(d) and 777(i)(1) of the Act, and 19 CFR 351.210(c).

Dated: June 16, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation covers uncoated standard welded steel reinforcement wire mesh (wire mesh) produced from smooth or deformed wire. Subject wire mesh is produced in square and rectangular grids of uniformly spaced steel wires that are welded at all intersections. Sizes are specified by combining the spacing of the wires in inches or millimeters and the wire cross-sectional area in hundredths of square inch or millimeters squared. Subject wire mesh may be packaged and sold in rolls or in sheets.

Subject wire mesh is currently produced to ASTM specification A1064/A1064M, which covers carbon-steel wire and welded wire reinforcement, smooth and deformed, for concrete in the following seven styles:

1. 6X6 W1.4/W1.4 or D1.4/D1.4
2. 6X6 W2.1/W2.1 or D2.1/D2.1
3. 6X6 W2.9/W2.9 or D2.9/D2.9
4. 6X6 W4/W4 or D4/D4
5. 6X12 W4/W4 or D4/D4

⁴ In the companion countervailing duty (CVD) investigation, Commerce calculated a 1.03 percent export subsidy rate for Aceromex and for all other producers and exporters under the program "Eighth Rule Permit Program." See *Standard Steel Welded Wire Mesh from Mexico: Final Affirmative Countervailing Duty Determination*, 86 FR 10034 (February 18, 2021), and accompanying Issues and Decision Memorandum. Because we determined the LTFV all-others rate based on Aceromex's estimated weighted-average dumping margin, the export subsidy offset for all other producers and exporters is the lesser of the export subsidy rate for Aceromex and the export subsidy rate for all other producers and exporters in the CVD final determination (i.e., 1.03 percent). The cash deposit rate for Deacero is equal to the petition rate (110.42 percent) adjusted for the lowest rate of export subsidies found for any company in the most recently-completed segment in the companion countervailing duty proceeding (i.e., 1.03 percent related to the Eighth Rule Permit Program).

6. 4X4 W2.9/W2.9 or D2.9/D2.9
7. 4X4 W4/W4 or D4/D4

The first number in the style denotes the nominal spacing between the longitudinal wires and the second number denotes the nominal spacing between the transverse wires. In the first style listed above, for example, “6X6” denotes a grid size of six inches by six inches. “W” denotes the use of smooth wire, and “D” denotes the use of deformed wire in making the mesh. The number following the W or D denotes the nominal cross-sectional area of the transverse and longitudinal wires in hundredths of a square inch (*i.e.*, W1.4 or D1.4 is .014 square inches).

Smooth wire is wire that has a uniform cross-sectional diameter throughout the length of the wire.

Deformed wire is wire with indentations or raised transverse ribs, which results in wire that does not have a uniform cross-sectional diameter throughout the length of the wire.

Rolls of subject wire mesh are produced in the following styles and nominal width and length combinations:

Style: 6X6 W1.4/W1.4 or D1.4/D1.4 (*i.e.*, 10 gauge)

Roll Sizes: 5' X 50'

5' X 150'

6' X 150'

5' X 200'

7' X 200'

7.5' X 200'

Style: 6X6 W2.1/W2.1 or D2.1/D2.1 (*i.e.*, 8 gauge)

Roll Sizes: 5' X 150'

Style: 6X6 W2.9/W2.9 or D2.9/D2.9 (*i.e.*, 6 gauge)

Roll Sizes: 5' X 150'

7' X 200'

All rolled wire mesh is included in scope regardless of length.

Sheets of subject wire mesh are produced in the following styles and nominal width and length combinations:

Style: 6X6 W1.4/W1.4 or D1.4/D1.4 (*i.e.*, 10 gauge)

Sheet Size: 3'6" X 7'

4' X 7'

4' X 7'6"

5' X 10'

7' X 20'

7'6" X 20'

8' X 12'6"

8' X 15'

8' X 20'

Style: 6X6 W2.1/W2.1 or D2.1/D2.1 (*i.e.*, 8 gauge)

Sheet Size: 5' X 10'

7' X 20'

7'6" X 20'

8' X 12'6"

8' X 15'

8' X 20'

Style: 6X6 W2.9/W2.9 or D2.9/D2.9 (*i.e.*, 6 gauge)

Sheet Size: 3'6" X 20'

5' X 10'

7' X 20'

7'6" X 20'

8' X 12'6"

8' X 15'

8' X 20'

Style: 6X12 W4/W4 or D4/D4 (*i.e.*, 4 gauge)

Sheet Size: 8' X 20'

Style: 4X4 W2.9/W2.9 or D2.9/D2.9 (*i.e.*, 6 gauge)

Sheet Size: 5' X 10'

7' X 20'

7'6" X 20'

8' X 12'6"

8' X 12'8"

8' X 15'

8' X 20'

Style: 4X4 W4/W4 or D4/D4 (*i.e.*, 4 gauge)

Sheet Size: 5' X 10'

8' X 12'6"

8' X 12'8"

8' X 15'

8' X 20'

Any product imported, sold, or invoiced in one of these size combinations is within the scope.

ASTM specification A1064/A1064M provides for permissible variations in wire gauges, the spacing between transverse and longitudinal wires, and the length and width combinations. To the extent a roll or sheet of welded wire mesh falls within these permissible variations, it is within this scope.

ASTM specification A1064/A1064M also defines permissible oversteeling, which is the use of a heavier gauge wire with a larger cross-sectional area than nominally specified. It also permits a wire diameter tolerance of ± 0.003 inches for products up to W5/D5 and ± 0.004 for sizes over W5/D5. A producer may oversteel by increasing smooth or deformed wire diameter up to two whole number size increments on Table 1 of A1064. Subject wire mesh has the following actual wire diameter ranges, which account for both oversteeling and diameter tolerance:

W/D No.	Maximum oversteeling No.	Diameter range (inch)
1.4 (<i>i.e.</i> , 10 gauge)	3.4	0.093 to 0.211.
2.1 (<i>i.e.</i> , 8 gauge)	4.1	0.161 to 0.231.
2.9 (<i>i.e.</i> , 6 gauge)	4.9	0.189 to 0.253.
4.0 (<i>i.e.</i> , 4 gauge)	6.0	0.223 to 0.280.

To the extent a roll or sheet of welded wire mesh falls within the permissible variations provided above, it is within this scope.

In addition to the tolerances permitted in ASTM specification A1064/A1064M, wire mesh within this scope includes combinations where:

1. A width and/or length combination varies by $\pm$ one grid size in any direction, *i.e.*, ± 6 inches in length or width where the wire mesh's grid size is “6X6”; and/or

2. The center-to-center spacing between individual wires may vary by up to one quarter of an inch from the nominal grid size specified.

Length is measured from the ends of any wire and width is measured between the center-line of end longitudinal wires.

Additionally, although the subject wire mesh typically meets ASTM A1064/A1064M, the failure to include certifications, test reports or other documentation establishing that the product meets this specification does not remove the product from the scope. Wire mesh made to comparable foreign specifications (*e.g.*, DIN, JIS, etc.) or

proprietary specifications is included in the scope.

Excluded from the scope is wire mesh that is galvanized (*i.e.*, coated with zinc) or coated with an epoxy coating. In order to be excluded as galvanized, the excluded welded wire mesh must have a zinc coating thickness meeting the requirements of ASTM specification A641/A641M. Epoxy coating is a mix of epoxy resin and hardener that can be applied to the surface of steel wire.

Merchandise subject to this investigation are classified under Harmonized Tariff Schedule of the United States (HTSUS) categories 7314.20.0000 and 7314.39.0000. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary

II. Background

III. Scope of the Investigation

IV. Use of Adverse Facts Available

V. Margin Calculations

VI. Adjustment for Countervailed Export Subsidies

VII. Discussion of the Issues

Comment 1: Whether Commerce Should

Apply Partial AFA to Aceromex

Comment 2: Indirect Selling Expenses for Sales Made by Kratos

Comment 3: Peninsula's Warehousing Costs in Florida

VIII. Recommendation

[FR Doc. 2021–13158 Filed 6–22–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB086]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC's) Northeast Trawl Advisory Panel (NTAP) will hold a public meeting.

DATES: The meeting will be held on Wednesday, July 28, 2021, from 9 a.m. to 1 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar. Details on the proposed agenda, webinar listen-in access, and briefing materials will be posted at the MAFMC's website: www.mafmc.org.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; www.mafmc.org.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is for the NTAP to discuss (1) charter revisions, (2) restrictor rope research from the working group, (3) decoupling survey time series documentation, and (4) an update on a wingspread publication.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Collins at the Mid-Atlantic Council Office, (302) 526–5253, at least 5 days prior to the meeting date.

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

Dated: June 15, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–13146 Filed 6–22–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB174]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mackerel, Squid, and Butterfish (MSB) Advisory Panel of the Mid-Atlantic Fishery Management Council (Council) will hold a meeting.

DATES: The meeting will be held on Wednesday, July 7, 2021, from 1 p.m. to 4 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via internet webinar. See the Council's website calendar at www.mafmc.org, for details.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their website at www.mafmc.org.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purposes of the meeting are to: (1) Present the Advisory Panel with the upcoming mackerel management track stock assessment results, and (2) create a Fishery Performance Report for mackerel including Advisory Panel input on related mackerel specifications and management measures.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Collins at (302) 526–5253, at least 5 days prior to any meeting date.

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

Dated: June 15, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–13148 Filed 6–22–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB175]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Climate and Communities Core Team (CCCT) is holding an online meeting, which is open to the public.

DATES: The online meeting will be held July 8, 2021, beginning at 9 a.m. Pacific Daylight Time and continuing until 12 p.m. or until business is completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2280, extension 412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Kit Dahl, Staff Officer, Pacific Council; telephone: (503) 820–2422.

SUPPLEMENTARY INFORMATION: The CCCT is meeting to discuss completion of its final report on the Fishery Ecosystem Plan Climate and Communities Initiative. The report will be submitted to the Pacific Council for consideration at its September 2021 meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids

should be directed to Mr. Kris Kleinschmidt, (kris.kleinschmidt@noaa.gov; (503) 820-2412), at least 10 days prior to the meeting date.

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

Dated: June 17, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021-13197 Filed 6-22-21; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB171]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Seattle Multimodal Project at Colman Dock in Washington State

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

ACTION: Notice; request for comments on proposed Renewal incidental harassment authorization.

SUMMARY: NMFS received a request from the Washington State Department of Transportation (WSDOT) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to Seattle Multimodal Project at Colman Dock in Seattle, Washington State. These activities consist of activities that are covered by the current authorization but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than July 8, 2021.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to ITP.Fowler@noaa.gov.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT:

Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least

practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

(1) A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);

(2) The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (e.g., reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

- A preliminary monitoring report showing the results of the required

monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

(3) Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at: www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals. Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA Renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA Renewal

qualifies to be categorically excluded from further NEPA review. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA Renewal request.

History of Request

On September 3, 2020, NMFS issued an IHA to WSDOT to take marine mammals incidental to the fourth year of work associated with the Seattle Multimodal Project at Colman Dock in Seattle, Washington (85 FR 59737; September 23, 2020), effective from September 10, 2020 through September 9, 2021. The initial IHA covered one year of the larger project for which WSDOT obtained prior IHAs (82 FR 31579, July 7, 2017; 83 FR 35226, July 25, 2018; 84 FR 36581, July 29, 2019). On March 18, 2021, NMFS received an application for the Renewal of that initial IHA. As described in the application for Renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but will not be completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

WSDOT has requested incidental take for construction activities related to the Seattle Multimodal Project at Colman Dock in Seattle, Washington State. The activities addressed in this request represent a subset of the activities analyzed in the initial IHA, consisting of vibratory pile removal only, and are identical to the activities described in the initial IHA.

Accordingly the proposed authorized take is for the same eleven species authorized in the initial IHA (see Table 4), and the amount of take is reflective of the take estimation methods described in the initial IHA applied to the remaining work described below.

The following documents are referenced in this notice and include important supporting information:

- Initial 2020 final IHA (85 FR 59737; September 23, 2020);
- Initial 2020 proposed IHA (85 FR 40992; July 8, 2020); and
- Initial IHA application, references cited, marine mammal monitoring plan, preliminary monitoring report, and previous public comments received (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>).

Detailed Description of the Activity

A detailed description of the pile installation and removal activities for which take was authorized in the initial IHA may be found in the **Federal Register** notices of the proposed and final IHA for the initial authorization (85 FR 40992, July 8, 2020; 85 FR 59737, September 23, 2020). Only a subset of the construction activities remain to be conducted, and the location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices.

Below and in Table 1 we describe the specific in-water pile driving and pile removal activities that were planned and already occurred under the initial IHA and those that remain to be completed under this renewal IHA:

- Vibratory driving followed by impact proofing (driving) of 36-inch steel piles. A total of 73 piles were installed using the vibratory hammer over 9 days, with an average of approximately 8 piles installed per day. Vibratory pile driving and impact proofing occurred on different days;
- Vibratory driving and then removal of 24-inch temporary steel piles. A total of 30 piles were planned to be installed and later removed, with an average of 8 piles installed/removed per day;
- Vibratory removal of 355 14-inch timber piles over 18 days, with approximately 20 piles removed per day; and
- Vibratory removal of 30 12-inch steel piles over 3 days, with 10 piles removed per day.

All vibratory and impact pile installation was completed. Only vibratory removal of timber and temporary steel piles remains to be completed (Table 1).

TABLE 1—SUMMARY OF PLANNED IN-WATER PILE DRIVING

Pile size and type	Method	Number of piles planned to be completed in initial IHA	Number of piles completed under initial IHA	Number of piles to be completed in IHA renewal
36-inch Steel	Impact drive (proof)	* 73	73	0
36-inch Steel	Vibratory drive	* 73	73	0
24-inch Steel (temporary)	Vibratory drive	* 30	30	0
24-inch Steel (temporary)	Vibratory remove	* 30	5	25
14-inch Timber	Vibratory remove	355	316	39
12-inch Steel	Vibratory remove	30	30	0

* These are same piles.

The total estimated duration of pile driving activities planned in the initial IHA was 47 days. In consideration of the time required to remove each pile using a vibratory hammer and the number of piles that may be removed per day, a total of eight days of work remain to

remove the rest of the timber piles and temporary steel piles (Table 2).

Due to NMFS and U.S. Fish and Wildlife Service (USFWS) in-water work timing restrictions to protect Endangered Species Act (ESA)-listed salmonids, planned WSDOT in-water construction is limited each year to July

15 through February 15 at this location. For this project, in-water construction is planned to take place between August 1, 2021 and February 15, 2022. The proposed Renewal would be effective from August 1, 2021 through July 31, 2022.

TABLE 2—ESTIMATED DURATION OF REMAINING IN-WATER VIBRATORY PILE REMOVAL

Pile size and type	Number of piles remaining	Piles per day	Minutes per pile	Duration (days)
24-inch steel	25	8	20	4
14-inch timber	39	10	15	4

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of proposed IHA for the initial authorization (85 FR 40992; July 8, 2020) and the **Federal Register** notice of proposed IHA for the Year 3 Seattle Multimodal Project at Colman Dock (84 FR 25757; June 4, 2019) and. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified

Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** notice of proposed IHA for the initial authorization (85 FR 40992; July 8, 2020). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the

specified activity are found in the **Federal Register** notices of proposed IHA (85 FR 40992; July 8, 2020) and final IHA (85 FR 59737; September 23, 2020) for the initial authorization. Specifically, the source levels, corresponding Level A and Level B harassment zones (in m) and ensounded areas (in square kilometers (km²); Table 3), and marine mammal density/occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA. The only change from the methods used to estimate take in the initial IHA is the total duration (days) of pile driving activities, which has been reduced from a total of 47 days of activities, occurring over the course of seven months, in the initial IHA to 8 days of remaining activities estimated to occur within one month.

TABLE 3—LEVEL A AND LEVEL B HARASSMENT ZONES AND ENSONIFIED AREAS

Pile type, size & pile driving method	Level A harassment distance (m)/area (km ²)					Level B harassment distance (m)/area (km ²)
	LF cetacean	MF cetacean	HF cetacean	Phocid	Otariid	
Vibratory drive/removal, 24 inch steel piles	96.6/0.03	8.6/0.00	142.8/0.06	58.7/0.01	4.1/0.00	8,690/40.53
Vibratory removal 14 inch timber pile	8.0/0.00	0.7/0.00	11.8/0.00	4.8/0.00	0.3/0.00	2,154/5.47

LF = low-frequency; MF = mid-frequency; HF = high-frequency.

Authorized takes would be by Level B harassment only, as use of the vibratory hammer has the potential to result in disruption of behavioral patterns for individual marine mammals. The initial IHA authorized take of harbor seals and harbor porpoises by Level A harassment from impact pile driving. However, as described in the initial IHA, based on the nature of the activity remaining in this Renewal (vibratory pile driving) and the anticipated effectiveness of the mitigation measures (*i.e.*, shutdown, see Proposed Mitigation below), Level A harassment is neither anticipated from

vibratory pile driving and is not proposed to be authorized here.

As described in the initial IHA, the initial approach for take calculation was to use the information aggregated in the U.S. Navy Marine Species Density Database (U.S. Navy, 2019) with the following equation:

Total Take = marine mammal density × ensonified area × pile driving days

However, also as described in the initial IHA, adjustments were made to all of these initial estimates based on prior observation of marine mammals in the project area and account for group

numbers, and in fact most estimates were based on a predicted number of individuals entering the Level B harassment zone per month, with several estimates also based on a predicted number entering per day. Take estimates for the activities remaining in this renewal IHA were developed using the identical methods as the initial IHA, in consideration of the remaining 8 days of work, and equated to one month where monthly estimates were used. Table 4 indicates the number of each species or stock proposed for authorization.

TABLE 4—ESTIMATED TAKE PROPOSED TO BE AUTHORIZED BY SPECIES AND STOCK

Species	Total proposed take	Stock	Stock abundance	Percent of stock
Gray whale	1	Eastern North Pacific	26,960	0.004
Humpback whale	3	California/Oregon/Washington	2,900	0.103
Minke whale	1	California/Oregon/Washington	636	0.157
Killer whale	10	West Coast transient	349	2.865
Bottlenose dolphin	7	California/Oregon/Washington offshore	1,924	0.364
Harbor porpoise	100	Washington inland waters	11,233	0.890
Dall's porpoise	5	California/Oregon/Washington	25,750	0.019
Harbor seal	720	Washington northern inland waters	11,036	6.524
Northern elephant seal	1	California breeding	179,000	0.001
California sea lion	232	U.S.	257,606	0.090
Steller sea lion	8	Eastern U.S.	43,201	0.019

We have reviewed the preliminary monitoring report submitted by WSDOT and the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized and, therefore, these estimates are appropriate.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (85 FR 59737; September 23, 2020), with the exception of mitigation measures specific to impact pile driving, which will not occur under this IHA. The discussion of the least practicable adverse impact included in that document remains

accurate. The following measures are proposed for this renewal:

Proposed Mitigation

Time Restriction—The applicant stated that work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In addition, all in-water construction will be limited to the period between August 1, 2021, and February 15, 2022.

Establishing and Monitoring Level A, Level B Harassment Zones, and Exclusion Zones—Before the commencement of in-water construction activities, which include vibratory pile removal, WSDOT shall establish Level A harassment zones where received underwater sound pressure levels (SPLs) or cumulative sound exposure levels (SEL_{cum}) could cause permanent threshold shift (PTS).

WSDOT shall also establish Level B harassment zones where received underwater SPLs are higher than 120 decibels root-mean-square (dB_{rms}) re 1 microPascal (μPa) for continuous noise sources (*e.g.*, vibratory pile removal).

WSDOT shall establish exclusion zones as shown in Table 5 to prevent Level A harassment takes of all marine mammal hearing groups.

For in-water heavy machinery work other than pile driving (*e.g.*, standard barges, *etc.*), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location; or (2) positioning of the pile on the substrate via a crane.

WSDOT shall establish exclusion zones for Southern Resident killer whales (SRKW) and all marine mammals for which takes are not authorized at the Level B harassment

distances. Specifically, for vibratory removal of 24-inch steel piles, a 8.7 km exclusion zone shall be established. For vibratory removal of 14-inch timber

piles, a 2.2 km exclusion zone shall be established.

A summary of exclusion zones is provided in Table 5.

TABLE 5—EXCLUSION ZONES BY SPECIES AND HEARING GROUP

Pile type and size	Exclusion distance (m)					
	LF	MF	HF	Phocid	Otariid	SRKW
24-inch steel	100	10	150	60	10	8,700
14-inch timber	10	10	15	10	10	2,200

NMFS-approved protected species observers (PSOs) shall conduct an initial survey of the exclusion zones to ensure that no marine mammals are seen within the zones beginning 30 minutes before removal of a pile segment begins. If marine mammals are found within the exclusion zone, pile driving of the segment would be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor would wait 15 minutes. If no marine mammals are seen by the observer in that time it can be assumed that the animal has moved beyond the exclusion zone.

If pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated exclusion zone prior to commencement of pile removal, the observer(s) must notify the pile driving operator (or other authorized individual) immediately and continue to monitor the exclusion zone. Operations may not resume until the marine mammal has exited the exclusion zone or 15 minutes have elapsed since the last sighting.

Shutdown Measures—WSDOT shall implement shutdown measures if a marine mammal is detected within or entering an exclusion zone listed in Table 5.

WSDOT shall also implement shutdown measures if SRKW are sighted within the vicinity of the project area and are approaching the Level B harassment zone during in-water construction activities.

If a killer whale approaches the Level B harassment zone during pile driving or removal, and it is unknown whether it is a SRKW or a transient killer whale, it shall be assumed to be a SRKW and WSDOT shall implement the shutdown measure.

If a SRKW or an unidentified killer whale enters the Level B harassment zone undetected, in-water pile driving or pile removal shall be suspended until the whale exits the Level B harassment zone, or 15 minutes have elapsed with

no sighting of the animal, to avoid further Level B harassment.

Further, WSDOT shall implement shutdown measures if the number of authorized takes for any particular species reaches the limit under the IHA (if issued) and if such marine mammals are sighted within the vicinity of the project area and are approaching the Level B harassment zone during in-water construction activities.

Coordination with Local Marine Mammal Research Network—Prior to the start of pile driving for the day, WSDOT shall contact the Orca Network and/or Center for Whale Research to find out the location of the nearest marine mammal sightings. The Local Marine Mammal Research Network consists of a list of over 600 (and growing) residents, scientists, and government agency personnel in the United States and Canada. Sightings are called or emailed into the Orca Network and immediately distributed to other sighting networks including: the NMFS Northwest Fisheries Science Center, the Center for Whale Research, Cascadia Research, the Whale Museum Hotline and the British Columbia Sightings Network.

Sightings information collected by the Orca Network includes detection by hydrophone. The SeaSound Remote Sensing Network is a system of interconnected hydrophones installed in the marine environment of Haro Strait (west side of San Juan Island) to study orca communication, in-water noise, bottom fish ecology and local climatic conditions. A hydrophone at the Port Townsend Marine Science Center measures average in-water sound levels and automatically detects unusual sounds. These passive acoustic devices allow researchers to hear when different marine mammals come into the region. This acoustic network, combined with the volunteer (incidental) visual sighting network allows researchers to document presence and location of various marine mammal species.

Proposed Monitoring and Reporting

Monitoring Measures—WSDOT shall employ NMFS-approved PSOs to conduct marine mammal monitoring for its Seattle Multimodal Project at Colman Dock. The PSOs will observe and collect data on marine mammals in and around the project area for 30 minutes before, during, and for 30 minutes after all pile removal and pile installation work. NMFS-approved PSOs shall meet the following requirements:

1. Independent observers (*i.e.*, not construction personnel) are required;
2. At least one observer must have prior experience working as an observer;
3. Other observers may substitute education (undergraduate degree in biological science or related field) or training for experience;
4. Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and
5. NMFS will require submission and approval of observer Curriculum Vitas;

Monitoring of marine mammals around the construction site shall be conducted using high-quality binoculars (*e.g.*, Zeiss, 10 × 42 power). Due to the different sizes of zones of influence (ZOIs) from different pile sizes, several different ZOIs and different monitoring protocols corresponding to a specific pile size will be established. During vibratory removal of 24-inch steel piles, four land-based PSOs and one ferry-based PSO will monitor the zone. During vibratory removal of 14-inch timber piles, four land-based PSOs will monitor the zone. Locations of the land-based PSOs and routes of monitoring vessels are shown in WSDOT's Marine Mammal Monitoring Plan, which is available online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

To verify the required monitoring distance, the exclusion zones and zones of influence will be determined by using

a range finder or hand-held global positioning system device.

Reporting Measures—WSDOT is required to submit a draft report on all marine mammal monitoring conducted under the IHA (if issued) within 90 calendar days of the completion of the project. A final report shall be prepared and submitted within 30 days following resolution of comments on the draft report from NMFS.

The marine mammal report must contain the informational elements described in the Marine Mammal Monitoring Plan for the initial IHA, dated May 12, 2020, including, but not limited to:

1. Dates and times (begin and end) of all marine mammal monitoring;
2. Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed;
3. Weather parameters and water conditions during each monitoring period (e.g., wind speed, percent cover, visibility, sea state);
4. The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;
5. Age and sex class, if possible, of all marine mammals observed;
6. PSO locations during marine mammal monitoring;
7. Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);
8. Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level B harassment zones while the source was active;
9. Number of individuals of each species (differentiated by month as appropriate) detected within the monitoring zone;
10. Detailed information about any implementation of any mitigation triggered (e.g., shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;
11. Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and
12. Submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).

In the event that personnel involved in the construction activities discover an injured or dead marine mammal,

WSDOT shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the West Coast Region (WCR) regional stranding coordinator (1–866–767–6114) as soon as feasible. If the death or injury was clearly caused by the specified activity, WSDOT must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. WSDOT must not resume their activities until notified by NMFS.

The report must include the following information:

1. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
2. Species identification (if known) or description of the animal(s) involved;
3. Condition of the animal(s) (including carcass condition if the animal is dead);
4. Observed behaviors of the animal(s), if alive;
5. If available, photographs or video footage of the animal(s); and
6. General circumstances under which the animal was discovered.

Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (85 FR 40992; July 8, 2020) and solicited public comments on both our proposal to issue the initial IHA for the Seattle Multimodal Project at Colman Dock and on the potential for a Renewal IHA, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (85 FR 59737; September 23, 2020). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the initial 2020 IHA.

Comment: The Marine Mammal Commission recommended that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated **Federal Register** notice process, which is similarly expeditious and fulfills NMFS's intent to maximize efficiencies.

Response: In prior responses to comments about IHA Renewals (e.g., 84 FR 52464; October 02, 2019 and 85 FR 53342, August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and,

further, promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

Preliminary Determinations

The construction activities proposed by WSDOT are a subset of, and identical to, those analyzed in the initial IHA, and the method of taking and the effects of the action are identical to the initial IHA (though the amount of proposed authorized take is notably lower). The potential effects of WSDOT's activities are limited to Level B harassment in the form of behavioral disturbance. In analyzing the effects of the activities in the 2020 IHA, NMFS determined that WSDOT's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (e.g., less than one-third of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) WSDOT's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the West Coast Region Protected Resources Division, whenever

we propose to authorize take for endangered or threatened species.

The only species listed under the ESA with the potential to be present in the action area are the Mexico Distinct Population Segment (DPS) and Central America DPS of humpback whales. The effects of this Federal action were adequately analyzed in NMFS' Biological Opinion for the Seattle Multimodal Project at Colman Dock, Seattle, Washington, dated October 1, 2018, which concluded that issuance of an IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to WSDOT to conduct the Seattle Multimodal Project at Colman Dock Year 4 in Washington State, between August 1, 2021 and July 31, 2022, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: June 17, 2021.

Catherine Marzin,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021-13154 Filed 6-22-21; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB139]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public online meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Southern Oregon Northern California Coast (SONCC) Coho

Workgroup (Workgroup) will host an online meeting that is open to the public.

DATES: The online meeting will be held Wednesday, July 7, 2021, from 9 a.m., Pacific Daylight Time, until 5 p.m., or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Staff Officer, Pacific Council; telephone: (503) 820-2426.

SUPPLEMENTARY INFORMATION: The purpose of the meeting will be to review Pacific Council guidance from its June 2021 meeting and to continue to develop associated modeling and analyses needed for a risk assessment and potential harvest control rule alternatives for Pacific Council consideration. The Workgroup may also discuss and prepare for future Workgroup meetings and future meetings with the Pacific Council and its advisory bodies.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 business days prior to the meeting date.

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

Dated: June 15, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021-13147 Filed 6-22-21; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS-2021-0008; OMB Control Number 0704-0255]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Construction and Architect-Engineer Contracts

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposed extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by July 23, 2021.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 236, Construction and Architect-Engineer Contracts, and related clauses at DFARS 252.236; OMB Control Number 0704-0255.

Type of Request: Revision and extension of a currently approved collection.

Affected Public: Businesses and other for-profit entities.

Respondent's Obligation: Required to obtain or retain benefits.

Number of Respondents: 1,691.

Responses per Respondent: 5.

Annual Responses: 8,554.

Average Burden per Response: 12.

Annual Burden Hours: 96,814.

Reporting Frequency: On occasion.

Needs and Uses: DoD contracting officers need this information to evaluate contractor proposals for contract modifications; to determine that a contractor has removed obstructions to navigation; to review contractor requests for payment for mobilization and preparatory work; to determine reasonableness of costs allocated to mobilization and demobilization; and to determine eligibility for the 20 percent evaluation preference for United States firms in the award of some overseas construction contracts.

DFARS 236.570(a) prescribes use of the clause at DFARS 252.236–7000, Modification Proposals—Price Breakdown, in all fixed-price construction solicitations and contracts. The clause requires the contractor to submit a price breakdown with any proposal for a contract modification.

DFARS 236.570(b) prescribes use of the following clauses in fixed-price construction contracts and solicitations as applicable:

(1) The clause at DFARS 252.236–7002, Obstruction of Navigable Waterways, requires the contractor to notify the contracting officer of obstructions in navigable waterways.

(2) The clause at DFARS 252.236–7003, Payment for Mobilization and Preparatory Work, requires the contractor to provide supporting documentation when submitting requests for payment for mobilization and preparatory work.

(3) The clause at DFARS 252.236–7004, Payment for Mobilization and Demobilization, permits the contracting officer to require the contractor to furnish cost data justifying the percentage of the cost split between mobilization and demobilization, if the contracting officer believes that the proposed percentages do not bear a reasonable relation to the cost of the work.

DFARS 236.570(c) prescribes use of the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed \$1,000,000:

(1) The provision at DFARS 252.236–7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States outlying area in the Pacific or in a country bordering the Arabian Gulf, requires an offeror to specify whether, or not, it is a United States firm.

(2) The provision at DFARS 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll, requires an offeror to specify whether it is a United States firm, or on Kwajalein Atoll, status as a Marshallese firm.

Comments and recommendations on the proposed information collection should be sent to Ms. Susan Minson, DoD Desk Officer, at Oira_submission@omb.eop.gov. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments, identified by docket number and title, by the following method: *Federal*

eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

DoD Clearance Officer: Ms. Angela Duncan. Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2021–13093 Filed 6–22–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2021–0007; OMB Control Number 0704–0479]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS) Part 234 and Related Clause, Earned Value Management System

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposed extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: DoD will consider all comments received by July 23, 2021.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 234 and related clause at 252.234–7002, Earned Value Management System; OMB Control Number 0704–0479.

Type of Request: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit entities.

Respondent's Obligation: Required to obtain or retain benefits.

Reporting Frequency: On occasion.

Number of Respondents: 10.

Responses per Respondent: 1.

Annual Responses: 10.

Average Burden per Response: 676 hours.

Annual Burden Hours: 6,760.

Needs and Uses: DFARS clause 252.242–7005, Contractor Business Systems, requires contractors to respond to written determinations of significant deficiencies in the contractor's business systems as defined in the clause. The

information contractors are required to submit in response to findings of significant deficiencies in their accounting system, estimating system, material management and accounting system, and purchasing system has previously been approved by the Office of Management and Budget. This request specifically addresses information required by DFARS clause 252.234–7002, Earned Value Management System, which requires contractors to respond in writing to initial and final determinations of significant deficiencies in the contractor's earned value management system. The requirements apply to entities that are contractually required to maintain an earned value management system. DoD needs this information to document actions to correct significant deficiencies in contractor business systems. DoD contracting officers use the information to mitigate the risk of unallowable and unreasonable costs being charged on Government contracts.

Comments and recommendations on the proposed information collection should be sent to Ms. Susan Minson, DoD Desk Officer, at Oira_submission@omb.eop.gov. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments, identified by docket number and title, by the following method: *Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.*

DoD Clearance Officer: Ms. Angela Duncan. Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2021–13094 Filed 6–22–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2021–SCC–0094]

Agency Information Collection Activities; Comment Request; Health Education Assistance Loan (HEAL) Program: Forms

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is

proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before August 23, 2021.

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–2021–SCC–0094. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208C, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

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: Health Education Assistance Loan (HEAL) Program: Forms.

OMB Control Number: 1845–0128.

Type of Review: A revision of a currently approved collection.

Respondents/Affected Public: Private Sector; Individuals and Households.

Total Estimated Number of Annual Responses: 21.

Total Estimated Number of Annual Burden Hours: 4.

Abstract: The HEAL form 504 is required for lenders to make application to the HEAL insurance program, to report accurately and timely on loan actions, including transfer of loans to a secondary agent, and to establish the repayment status of borrowers who qualify for deferment of payments. The HEAL form 508 is required for HEAL borrowers to request deferment of payment of their loan under specific conditions. This collection is removing the datasets previously included in this collection due to the decrease in the number of users.

Dated: June 17, 2021.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–13182 Filed 6–22–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants for Credit Enhancement for Charter School Facilities

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2021 for CSP—Grants for Credit Enhancement for Charter School Facilities (Credit Enhancement), Assistance Listing Number 84.354A. This notice relates to the approved information collection under OMB control number 1855–0007.

DATES:

Applications Available: June 23, 2021.
Deadline for Transmittal of Applications: July 23, 2021.

Deadline for Intergovernmental Review: September 21, 2021.

Pre-Application Webinar Information: The Credit Enhancement program intends to hold a webinar designed to provide technical assistance to interested applicants. Detailed information regarding this webinar will be provided on the Credit Enhancement web page at <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/charter-school-programs/credit-enhancement-for-charter-school-facilities-program/applicant-info-and-eligibility/>.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.

FOR FURTHER INFORMATION CONTACT:

Clifton Jones, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E211, Washington, DC 20202. Telephone: (202) 205–2204. Email: Clifton.Jones@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Credit Enhancement program provides grants to eligible entities to demonstrate innovative methods of helping *charter schools* to address the cost of acquiring, constructing, and renovating facilities by enhancing the availability of loans and bond financing.

The Department looks forward to working with stakeholders to ensure that future competitions best advance the Administration's priorities in this space.

Definitions: The following definitions are from section 4310 of the ESEA (20 U.S.C. 7221i(2)) and 34 CFR 77.1.

Baseline means the starting point from which performance is measured and targets are set. (34 CFR 77.1)

Charter school means a public school that—

(a) In accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that

inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements in section 4310 of the ESEA;

(b) Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

(c) Operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency;

(d) Provides a program of elementary or secondary education, or both;

(e) Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

(f) Does not charge tuition;

(g) Complies with the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), section 444 of the General Education Provisions Act (20 U.S.C. 1232g) (commonly referred to as the "Family Educational Rights and Privacy Act of 1974"), and part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 *et seq.*);

(h) Is a school to which parents choose to send their children, and that—

(i) Admits students on the basis of a lottery, consistent with section 4303(c)(3)(A) of the ESEA (20 U.S.C. 7221b(c)(3)(A)), if more students apply for admission than can be accommodated; or

(ii) In the case of a school that has an affiliated charter school (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated charter school and, for any additional student openings or student openings created through regular attrition in student enrollment in the affiliated charter school and the enrolling school, admits students on the basis of a lottery as described in paragraph (h)(i);

(i) Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such State audit requirements are waived by the State;

(j) Meets all applicable Federal, State, and local health and safety requirements;

(k) Operates in accordance with State law;

(l) Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in *charter schools* pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school; and

(m) May serve students in early childhood education programs or postsecondary students. (20 U.S.C. 7221i(2))

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance. (34 CFR 77.1)

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project. (34 CFR 77.1)

Program Authority: 20 U.S.C. 7221c.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 225.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: \$43,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of

unfunded applications from this competition.

Estimated Range of Awards: \$4,000,000 to \$12,000,000.

Estimated Average Size of Awards: \$11,000,000.

Maximum Award: We will not award a grant for more than \$12,000,000 for a grant project. The Department may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: From the start date indicated on the grant award document until the Federal funds and earnings on those funds have been expended for the grant purposes or until financing facilitated by the grant has been retired, whichever is later.

III. Eligibility Information

1. Eligible Applicants:

(a) A public entity, such as a State or local governmental entity;

(b) A private, nonprofit entity; or

(c) A consortium of entities described in (a) and (b).

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2.a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Administrative Cost Limitation:* Consistent with section 4304(g) of the ESEA (20 U.S.C. 7221c(g)), an eligible entity may use not more than 2.5 percent of the funds received under this program for the administrative costs of carrying out its responsibilities under this program.

3. *Subgrantees:* A grantee under this competition may not award subgrants to

entities to directly carry out project activities described in its application.

4. *Other:* The *charter schools* that a grantee selects to benefit from this program must meet the definition of *charter school* in section 4310 of the ESEA (20 U.S.C. 7221i).

IV. Application and Submission Information

1. Application Submission

Instructions: Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf, which contain requirements and information on how to submit an application.

2. Submission of Proprietary

Information: Given the types of projects that may be proposed in applications for the Credit Enhancement competition, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define “business information” and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to post on our website the application narrative sections of successful applications, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under “Other Attachments Form,” please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. Funding Restrictions:

(a) *Reserve accounts.* An eligible entity receiving a grant must, in accordance with State and local law, directly or indirectly, alone or in collaboration with others, deposit the funds received, other than funds used for administrative costs, in a reserve account established and maintained by

the eligible entity. Amounts deposited in such account must be used by the eligible entity for one or more of the following purposes:

(1) Guaranteeing, insuring, and reinsuring bonds, notes, evidences of debt, loans, and interests therein.

(2) Guaranteeing and insuring leases of personal and real property.

(3) Facilitating financing by identifying potential lending sources, encouraging private lending, and other similar activities that directly promote lending to, or for the benefit of, *charter schools*.

(4) Facilitating the issuance of bonds by *charter schools*, or by other public entities for the benefit of *charter schools*, by providing technical, administrative, and other appropriate assistance (including the recruitment of bond counsel, underwriters, and potential investors and the consolidation of multiple charter school projects within a single bond issue).

Funds received and deposited in the reserve account must be invested in obligations issued or guaranteed by the United States or a State, or in other similarly low-risk securities. Any earnings on funds received must be deposited in the reserve account and used in accordance with this program per ESEA section 4304(f).

(b) *Charter school objectives.* An eligible entity receiving a grant must use the funds deposited in the reserve account to assist one or more *charter schools* to access private-sector capital to accomplish one or more of the following objectives:

(1) The acquisition (by purchase, lease, donation, or otherwise) of an interest (including an interest held by a third party for the benefit of a charter school) in improved or unimproved real property that is necessary to commence or continue the operation of a charter school.

(2) The construction of new facilities, or the renovation, repair, or alteration of existing facilities, necessary to commence or continue the operation of a charter school.

(3) The predevelopment costs required to assess sites for purposes of paragraph (1) or (2) and that are necessary to commence or continue the operation of a charter school per ESEA section 4304(e).

(c) *Other.* Grantees must ensure that all costs incurred using funds from the reserve account are reasonable. Under 20 U.S.C. 7221c(g), an eligible entity may use not more than 2.5 percent of the funds received under this grant for the administrative costs of carrying out its project responsibilities. We specify unallowable costs in 34 CFR 225.21.

No financial obligation of a grantee under this program (such as an obligation under a guarantee, bond, note, evidence of debt, or loan) shall be an obligation of, or guaranteed in any respect by, the United States. The full faith and credit of the United States are not pledged to the payment of funds that may be required to be paid under any obligation made by a grantee under this program. In the event of a default on any debt or other obligation, the United States has no liability to cover the cost of the default.

Applicants that are selected to receive an award must enter into a written Performance Agreement with the Department prior to drawing down funds, unless the grantee receives written permission from the Department in the interim to draw down a specific limited amount of funds.

Grantees must maintain and enforce standards of conduct governing the performance of their employees, officers, directors, trustees, and agents engaged in the selection, award, and administration of contracts or agreements related to this grant. The standards of conduct must mandate disinterested decision-making.

The Secretary, in accordance with chapter 37 of title 31 of the United States Code, will collect all or a portion of the funds in the reserve account established with grant funds (including any earnings on those funds) if the Secretary determines that: (1) The grantee has permanently ceased to use such funds to accomplish the purposes described in the authorizing statute and the Performance Agreement; or (2) not earlier than two years after the date on which it first receives these funds, the grantee has failed to make substantial progress in undertaking the grant project.

(d) We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 40 pages and (2) use the following standards:

- A “page” is 8.5” x 11”, on one side only, with 1” margins at the top, bottom, and both sides.

- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 225.11 and are as follows:

(a) *Quality of project design and significance (35 points):*

In determining the quality of project design and significance, the Secretary considers—

(1) The extent to which the grant proposal would provide financing to *charter schools* at better rates and terms than they can receive absent assistance through the program;

(2) The extent to which the project goals, objectives, and timeline are clearly specified, measurable, and appropriate for the purpose of the program;

(3) The extent to which the project implementation plan and activities, including the partnerships established, are likely to achieve measurable objectives that further the purposes of the program;

(4) The extent to which the project is likely to produce results that are replicable;

(5) The extent to which the project will use appropriate criteria for selecting *charter schools* for assistance and for determining the type and amount of assistance to be given;

(6) The extent to which the proposed activities will leverage private or public-sector funding and increase the number and variety of *charter schools* assisted in meeting their facilities needs more than would be accomplished absent the program;

(7) The extent to which the project will serve *charter schools* in States with strong charter laws, consistent with the criteria for such laws in section 4303(g)(2) of the ESEA; and

(8) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the project.

(b) *Quality of project services (15 points):*

In determining the quality of the project services, the Secretary considers—

(1) The extent to which the services to be provided by the project reflect the identified needs of the *charter schools* to be served;

(2) The extent to which *charter schools* and chartering agencies were involved in the design of, and demonstrate support for, the project;

(3) The extent to which the technical assistance and other services to be provided by the proposed grant project involve the use of cost-effective strategies for increasing *charter schools'* access to facilities financing, including the reasonableness of fees and lending terms; and

(4) The extent to which the services to be provided by the proposed grant project are focused on assisting *charter schools* with a likelihood of success and the greatest demonstrated need for assistance under the program.

(c) *Capacity (35 points):*

In determining an applicant's business and organizational capacity to carry out the project, the Secretary considers—

(1) The amount and quality of experience of the applicant in carrying out the activities it proposes to undertake in its application, such as enhancing the credit on debt issuances, guaranteeing leases, and facilitating financing;

(2) The applicant's financial stability;

(3) The ability of the applicant to protect against unwarranted risk in its loan underwriting, portfolio monitoring, and financial management;

(4) The applicant's expertise in education to evaluate the likelihood of success of a charter school;

(5) The ability of the applicant to prevent conflicts of interest, including conflicts of interest by employees and members of the board of directors in a decision-making role;

(6) If the applicant has co-applicants (consortium members), partners, or other grant project participants, the specific resources to be contributed by each co-applicant (consortium member), partner, or other grant project participant to the implementation and success of the grant project;

(7) For State governmental entities, the extent to which steps have been or will be taken to ensure that *charter schools* within the State receive the funding needed to obtain adequate facilities; and

(8) For previous grantees under the charter school facilities programs, their performance in implementing these grants.

Note: The 35 available points under this selection criterion will be allocated evenly among the factors applicable to a particular applicant. For example, for an applicant for which none of factors (6)–(8) apply, the 35 available points will be allocated among the first five factors. Similarly, for an applicant that is a State governmental entity that is a previous grantee under the charter school facilities programs, the 35 available points will be allocated evenly among factors (1)–(5), (7), and (8).

(d) *Quality of project personnel (15 points):*

In determining the quality of project personnel, the Secretary considers—

(1) The qualifications of project personnel, including relevant training and experience, of the project manager and other members of the project team, including consultants or subcontractors; and

(2) The staffing plan for the grant project.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition

threshold (currently \$250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds \$10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed \$10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic

version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to www.ed.gov/fund/grant/apply/appforms/appforms.html.

5. Performance Measures:

(a) Program Performance Measures.

Under the Government Performance and Results Modernization Act of 2010 (GPRA 2010), the *performance measures* for this program are: (1) The amount of funding grantees leverage for *charter schools* to acquire, construct, and renovate school facilities; and (2) the number of *charter schools* served. Grantees must provide information that is responsive to these measures as part of their annual performance reports.

(b) *Project-Specific Performance Measures.* Applicants must propose project-specific *performance measures* and *performance targets* consistent with the objectives of the project and program. Applicants must provide the following information as directed under 34 CFR 75.110(b):

(1) *Project Performance Measures.* How each proposed project-specific *performance measure* would accurately measure the performance of the project and how the proposed project-specific *performance measure* would be consistent with the *performance measures* established for the program funding the competition.

(2) *Project Performance Targets.* Why each proposed *performance target* is ambitious yet achievable compared to the *baseline* for the *performance measure* and when, during the project period, the applicant would meet the *performance target(s)*.

Note: The Secretary encourages applicants to consider measures and targets tied to their grant activities during the grant period. The measures should be sufficient to gauge the progress throughout the grant period and show results by the end of the grant period.

(3) *Data Collection and Reporting.* (i) The data collection and reporting methods the applicant would use and why those methods are likely to yield reliable, valid, and meaningful performance data; and

(ii) The applicant's capacity to collect and report reliable, valid, and meaningful performance data, as evidenced by high-quality data collection, analysis, and reporting in other projects or research.

Note: If applicants do not have experience with collection and reporting of performance data through other projects or research, they should provide other evidence of their capacity to successfully carry out data collection and reporting for their proposed project.

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain

this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Ruth Ryder,

Deputy Assistant Secretary for Policy and Programs, Office of Elementary and Secondary Education.

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BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Peer Review Opportunities With the U.S. Department of Education's Office of Elementary and Secondary Education (OESE), Office of Postsecondary Education (OPE), and Office of Special Education and Rehabilitative Services (OSERS)

AGENCY: Office of Elementary and Secondary Education, Office of Postsecondary Education, and Office of Special Education and Rehabilitative Services, U.S. Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) announces opportunities for individuals to participate in its peer review process by reviewing applications for competitive grant funding under the programs administered by OESE, OPE, and OSERS.

DATES: Requests to serve as a peer reviewer for fiscal year 2021 will be accepted on an ongoing basis, aligned with this year's grant competition schedule. Requests to serve as a peer reviewer should be submitted at least

four weeks prior to the program's application deadline noted on the Department's website under "Forecast of Funding Opportunities" at www2.ed.gov/fund/grant/find/edlite-forecast.html. This notice highlights the specific needs of OESE, OPE, and OSERS.

ADDRESSES: An individual interested in serving as a peer reviewer must register and upload his or her resume in the Department's grants management system known as "G5" at www.g5.gov.

FOR FURTHER INFORMATION CONTACT:

OESE: Richard Wilson, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W101, Washington, DC 20202. Telephone: (202) 453-6709. Email: richard.wilson@ed.gov.

OPE: Tonya Hardin, U.S. Department of Education, 400 Maryland Avenue SW, Room 2C205, Washington, DC 20202. Telephone: (202) 453-7694. Email: tonya.hardin@ed.gov.

OSERS: Kate Friday, U.S. Department of Education, 400 Maryland Avenue SW, Room 5081B, Potomac Center Plaza, Washington, DC 20202-5076. Telephone: (202) 245-7605. Email: kate.friday@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: The mission of the Department is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. The Department pursues its mission by funding programs that will improve access to high-quality educational opportunities and programs that pursue innovations in teaching and learning with a focus on underserved students. The Department also funds programs in other areas as authorized by statute. Grant funds are awarded to State educational agencies; local educational agencies (*i.e.*, school districts); State, local, or Tribal governments; nonprofit organizations; institutions of higher education (IHEs), including IHEs that have experience in the operation of American Indian Vocational Rehabilitation Service programs; and other entities through a competitive process referred to as a grant competition.

Each year the Department convenes panels of external education professionals and practitioners to serve as peer reviewers.¹ Peer reviewers

evaluate and score submitted applications against program-specific criteria and announced priorities. Application scores are then used to inform the Secretary's funding decisions.

Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, directs Federal agencies to "assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs." We believe that increasing the diversity of peer reviewers is an important element of the Department's efforts to implement this Executive order. As a result, the Department is particularly interested in peer reviewers who represent diverse experiences and perspectives and whose expertise pertains to OESE, OPE, and OSERS grant competitions.

This year, OESE is managing nearly 15 grant competitions to fund a range of projects that support education innovation and research; educator growth and diversity; magnet, community, and charter schools; literacy; arts education; history and civics education; and American Indian/Alaska Native education.

Similarly, OPE is conducting over 20 grant competitions to fund a wide range of projects, including projects to support improvements in educational quality, management, and financial stability at colleges and universities that enroll high numbers of underserved students; projects to provide high-quality support services to improve retention and graduation rates of students who are low income or first-generation college students or individuals with disabilities; projects designed to strengthen foreign language instruction, area and international studies teaching and research, professional preparation and development for educators, and curriculum development at the K-12, graduate, and postsecondary levels; and other innovative projects designed to improve postsecondary education. OPE grant competitions will take place between now and the end of the calendar year.

OSERS is managing nearly 20 grant competitions that will take place between now and September 2021. The competitions in OSERS' Office of Special Education Programs (OSEP) include those under the following

More information on the IES peer review process can be found at: https://ies.ed.gov/director/sro/application_review.asp. IES also administers its research grant competitions on a different timeline from other offices in the Department.

¹ Please note that the Institute of Education Sciences (IES) uses different peer review processes and procedures than those described in this notice.

programs: State Personnel Development Grants; Personnel Development; Technical Assistance and Dissemination; Educational Technology, Media, and Materials; and Parent Training and Information. The remaining competitions in OSERS' Rehabilitation Services Administration (RSA) include those under the following programs: Training of Interpreters for Individuals Who Are Deaf or Hard of Hearing and Individuals Who Are Deaf-Blind, Training in Specialized Training; Rehabilitation Short-Term Training, Client Assistance Program; American Indian Vocational Rehabilitation Training and Technical Assistance Center; and Section 21, Traditionally Underserved Populations.

The Department seeks to expand its pool of peer reviewers to ensure that applications are evaluated by individuals with up-to-date and relevant knowledge of educational interventions and practices across the learning continuum, from early education to college and career, and in a variety of learning settings. Department peer reviewers are education and vocational rehabilitation professionals who have gained subject matter expertise through their education and work as teachers, professors, principals, administrators, school counselors, researchers, evaluators, content developers, or vocational rehabilitation professionals or interpreters. Peer reviewers can be active education professionals, in any educational level or sector, or those who are retired but stay informed of current educational content and issues. No prior experience as a peer reviewer is required.

Peer reviewers for each competition will be selected based on several factors, including each reviewer's program-specific expertise, the number of applications to be reviewed, how peer reviewers can support the Department's implementation of Executive Order 13985, and the availability of prospective reviewers. Individuals selected to serve as peer reviewers are expected to participate in training; independently read, score, and provide written evaluative comments on assigned applications; and participate in facilitated panel discussions. Panel discussions are held via conference calls. The time commitment for peer reviewers is usually several hours a day over a period of one to four weeks. Peer reviewers receive an honorarium payment as monetary compensation for successfully reviewing applications.

If you are interested in serving as a peer reviewer for the Department, you should first review the program web pages of the grant programs that match

your area of expertise. You can access information on each grant program from the link provided on the Department's grants forecast page at www2.ed.gov/fund/grant/find/edlite-forecast.html. If you have documented experience that you believe qualifies you to serve as a peer reviewer for one or more specific grant programs, please register in G5, at www.g5.gov, which allows the Department to manage and assign potential peer reviewers to competitions that may draw upon their professional backgrounds and expertise. A toolkit that includes helpful information on how to be considered as a peer reviewer for programs administered by the Department can be found at www2.ed.gov/documents/peer-review/peer-reviewer-toolkit.pptx. Neither the submission of a resume nor registration in G5 guarantees you will be selected to be a peer reviewer.

In addition to registering in G5, some OPE and OSERS/RSA peer reviews may require being registered in the System for Award Management (SAM). Note that registration in *SAM.gov* requires an active Data Universal Numbering System Number (DUNS). Since registration for some of these processes can take longer than a week, interested individuals are encouraged to register in advance of being contacted by the Department. In addition to registering in G5, some OSERS/OSEP peer reviews require being approved to serve on the Office of Special Education's Standing Panel. Individuals should express their interest to serve as a peer reviewer for OSEP competitions directly to the competition manager listed in the Notice Inviting Applications at least two weeks prior to the application closing date.

If you have interest in serving as a reviewer specifically for OESE competitions (Chart 2 of the Forecast of Funding Opportunities), you must also send your resume to OESEPeerReviewRecruitment@ed.gov. If you have interest in serving as a reviewer specifically for RSA competitions (Chart 4B) also send your resume to RSAPeerReview@ed.gov and osersprs@ed.gov. The subject line of the email should read "Prospective 2021 Peer Reviewer." In the body of the email list all programs for which you would like to be considered to serve as a peer reviewer.

Requests to serve as a peer reviewer should be submitted at least four weeks prior to the program's application deadline, noted on the forecast page, to provide program offices with sufficient time to review resumes and determine an individual's suitability to serve as a peer reviewer for a specific competition.

If you are selected to serve as a peer reviewer, the program office will contact you.

Accessible Format: On request to the person(s) listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6301 *et seq.*), Higher Education Act of 1965, as amended (20 U.S.C. 1001 *et seq.*), Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*), and the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (29 U.S.C. 701 *et seq.*).

Donna M. Harris-Aikens,

Senior Advisor for Policy and Planning, delegated the authority to perform the functions and duties of the Assistant Secretary for Planning, Evaluation and Policy Development.

[FR Doc. 2021-12845 Filed 6-22-21; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Applications for New Awards; Rehabilitation Short-Term Training; Client Assistance Program

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) is issuing a notice inviting applications (NIA) for Federal fiscal year (FFY) 2021 for the Rehabilitation Short-Term Training—Client Assistance Program (CAP Training), Assistance Listing Number 84.246K. This notice relates to the approved information collection under OMB control number 1820–0018.

DATES:

Applications Available: June 23, 2021.
Deadline for Transmittal of Applications: August 9, 2021.

Date of Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information related to the Rehabilitation Services Administration's (RSA) discretionary grant competitions and a PowerPoint presentation specifically related to this Rehabilitation Short-Term Training program competition at <https://ncrtm.ed.gov/RSAGrantInfo.aspx>. OSERS will conduct a pre-application meeting specific to this competition via conference call to respond to questions. Information about the pre-application meeting will be available at <https://ncrtm.ed.gov/RSAGrantInfo.aspx> prior to the date of the call. OSERS invites you to send questions to 84.246K@ed.gov in advance of the pre-application meeting. The teleconference information, including the 84.246K pre-application meeting summary of the questions and answers, will be available at <https://ncrtm.ed.gov/RSAGrantInfo.aspx> within six days after the pre-application meeting.

Deadline for Intergovernmental Review: October 6, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.

FOR FURTHER INFORMATION CONTACT:

Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW, Room 5051, Potomac Center Plaza, Washington, DC 20212–2800. Telephone: (202) 245–7425. Email: 84.246K@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Rehabilitation Short-Term Training program is designed to provide short-term training and technical instruction in areas of special significance to the vocational, medical, social, and psychological rehabilitation programs, supported employment program, independent living services programs, and Client Assistance Program (CAP), including special seminars, institutes, workshops, and other short-term courses. Short-term training projects may be of regional or national scope.

Priority: This priority is from the notice of final priority (NFP) for this program published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FFY 2021, this is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this absolute priority.

This priority is:

Rehabilitation Short-Term Training—Client Assistance Program (CAP Training).

This CAP Training priority is designed to provide CAP professionals the necessary knowledge, competencies, and skills to inform, assist, and advocate for clients and client-applicants regarding expanded education, training, and competitive integrated employment opportunities and other services and benefits available under the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act of 2014 (WIOA).

Under this priority, the grantee must provide comprehensive and in-depth training and technical assistance activities that provide updated information about CAP duties and responsibilities under the Rehabilitation Act; expanded vocational rehabilitation (VR) service provisions in the Rehabilitation Act, including section 113 on pre-employment transition services and section 511 regarding limitations on use of subminimum wage; and on other education, training, and employment opportunities under WIOA, including career pathways, apprenticeships, and customized employment. The training and technical assistance must enhance CAP professionals' individual and systems advocacy competencies and their leadership, relationship-building, and outreach skills. In addition, the training and technical assistance must strengthen the institutional effectiveness of the CAPs in the individual States through strategic planning and resource management capacity-building

activities. In providing the training and technical assistance, the grantee must consider the challenges and opportunities experienced by the VR program and other programs authorized under the Rehabilitation Act, as amended by WIOA, and encourage greater communication and coordination between the CAPs and those programs.

Under this priority, the Secretary funds only applications that meet the project requirements outlined below. Applicants must describe major implementation activities, timelines, and milestones for each of the following project requirements:

(a) Training and technical assistance to increase CAP professionals' knowledge, skills, and competencies in the four broad subject areas and related topics:

(1) The Rehabilitation Act, as amended by WIOA, including—

(i) CAP duties and responsibilities under section 112(a) of the Rehabilitation Act and other pertinent provisions including section 101(a)(16) regarding CAP consultation on draft policies and procedures governing the provision of VR services and section 105(b) regarding CAP membership on the State Rehabilitation Councils (SRC);

(ii) VR service provision requirements in the Rehabilitation Act and its regulations, policy guidance, and legal decisions, including those regarding section 113 on pre-employment transition services and section 511 regarding limitations on use of subminimum wage;

(iii) Requirements related to other projects, programs, and services under the Rehabilitation Act, as amended by WIOA, including the independent living programs authorized in Title VII;

(iv) Expanded training, education, and employment opportunities under WIOA, including but not limited to the provision of pre-employment transition services, apprenticeships, customized employment, career pathways, and the focus on postsecondary credential attainment, including advanced degrees;

(v) Challenges and opportunities in implementing the expanded VR service provisions and other benefits available under the Rehabilitation Act, as amended by WIOA, including consideration of Federal and State statutes, regulations, and policies that impact the delivery of VR services in the States, such as the transition services provisions of the Individuals with Disabilities Education Act;

(vi) Obstacles that individuals with disabilities—including individuals with the most significant disabilities, students and youth with disabilities,

members of traditionally unserved or underserved groups, and individuals in economically disadvantaged communities—experience in accessing VR services and other services and benefits under *Rehabilitation Act*; and

(vii) The complementary roles of CAPs, State VR agencies, SRCs, community rehabilitation programs, WIOA core partners, and key stakeholders of the VR program and other services and programs authorized by the Rehabilitation Act, as amended by WIOA.

(2) Discrete skills related to CAP duties and responsibilities, including—

- (i) Individual advocacy;
- (ii) Systems advocacy;
- (iii) Alternate dispute resolution; and
- (iv) Leadership, relationship-building, and outreach.

(3) Strategic planning, including—

- (i) Assessments of the State's program priorities, challenges, needs, and opportunities in implementing the expanded VR program provisions and other benefits and services under the Rehabilitation Act, as amended by WIOA. Strategic assessments may include targeted reviews of the Unified or Combined State Plans, monitoring reports, Annual Client Assistance Program Report (RSA-227), other State Plans and reports, and input from agency leadership and staff, SRC members, clients, applicants, and other key stakeholders;

- (ii) Development of the individual CAPs' strategic goals and action plans (including their particular training or technical assistance needs), based on identified program priorities, challenges, needs, and opportunities; and

- (iii) Strategic outreach and engagement with State VR agencies, SRCs, and other stakeholders associated with the programs and services authorized under the Rehabilitation Act to increase collaboration in support of improved service delivery and outcomes in the State.

(4) Resource management, including—

- (i) Budgeting and financial oversight practices in support of strategic goals and objectives, consistent with Generally Accepted Accounting Practices; and

- (ii) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, at 2 CFR part 200, pertinent to CAP and VR program operations.

(b) Comprehensive plan for the provision of training and technical assistance on the required subject areas and topics, based on a comprehensive assessment of CAP professionals' needs.

The training and technical assistance plan must describe the following:

(1) Subject areas and topics, specifically, how they will be prioritized and made available in the initial year and subsequent years of the project;

(2) Training activities, consisting of both established training modules and ad hoc training responsive to emerging circumstances or trends;

(3) Technical assistance, consisting of individualized assistance on applying principles and practices from training on the required subject areas and topics, as well as consultation on options for applying existing law, regulations, and RSA-issued guidance to specific factual circumstances that arise in the course of CAP professionals' individual or systems advocacy efforts;

(4) Training and technical assistance curricula, materials, and tools, which may incorporate the resources developed by current and former RSA VR technical assistance centers and demonstration projects, available at the National Clearinghouse of Rehabilitation Training Materials;

(5) Information delivery methods, including in-person and virtual activities, communities of practice, social media, and searchable databases; and

(6) State-of-the-art communication tools and platforms, including an interactive project website, distance learning and convening technologies, and searchable databases.

The comprehensive needs assessment may comprise selective reviews, on a national basis, of RSA-227s, Unified or Combined State Plans, RSA State monitoring reports, other State Plans and reports, and input from CAP professionals and key stakeholders, including VR agency and SRC representatives.

(c) Quality control processes to ensure that training and technical assistance activities and materials are updated to reflect the statutory and regulatory changes in the Rehabilitation Act, as amended by WIOA, the RSA policy guidance updates, and future reauthorizations of the Rehabilitation Act.

(d) Coordination with and leveraging the resources of RSA's vocational rehabilitation technical assistance centers and other Federal or non-Federal programs, including the National Technical Assistance Center on Transition and the recently funded RSA technical assistance centers on Quality Employment and Quality Management in the development and delivery of CAP Training project activities, curriculum, materials, and tools.

(e) Coordination with the entity providing training and technical assistance to the Protection and Advocacy of Individual Rights program, consistent with section 509 of the Rehabilitation Act.

(f) Comprehensive evaluation plan based on performance measures established in this notice inviting applications, consistent with the Government Performance and Results Act.

CAP Training performance will be assessed based on the following considerations:

(a) Increased capacity to provide individual and systems advocacy, alternative dispute resolution, and outreach to unserved or underserved populations, as reported by the CAP professionals.

(b) Trends in pertinent CAP services, including individual and systems advocacy.

(c) Relationship between the observed CAP services trends and the training and technical assistance provided under this priority.

The performance evaluation will be based on a variety of quantitative and qualitative data sources, including, but not limited to:

(a) RSA-227;

(b) Pre- and post-training assessments;

(c) Questionnaires, surveys, and focus groups;

(d) Success stories; and

(e) Peer reviews.

The evaluation plan must include a logic model that outlines the proposed project activities, outputs, outcomes, baselines, and targets. The plan also must describe how the evaluation results will be used to promote continuous program improvement throughout the grant's period of performance.

Program Authority: 29 U.S.C. 772(a)(1).

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of

the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR parts 385 and 390. (e) The NFP.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: \$308,000.

Maximum Award: We will not make an award exceeding \$308,000 for a single budget period of 12 months.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States and public or private nonprofit agencies and organizations, including Indian Tribes and institutions of higher education.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* Under 34 CFR 390.40, a grantee must contribute to the cost of a project under this program in an amount satisfactory to the Secretary. The part of the costs to be borne by the grantee is determined by the Secretary at the time of the grant award. For the purposes of this competition, the grantee is required to contribute at least 10 percent of the total cost of the project under this program. Furthermore, given the importance of cost sharing funds to the long-term success of the project, eligible entities must identify appropriate non-Federal funds in the proposed budget.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs or to obtain a negotiated indirect cost rate, please see

www2.ed.gov/about/offices/list/ocfo/intro.html.

c. Administrative Cost Limitation:

This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200, subpart E, of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c) a grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR part 200.

IV. Application and Submission Information

1. Application Submission

Instructions: Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf, which contain requirements and information on how to submit an application.

2. Submission of Proprietary

Information: Given the types of projects that may be proposed in applications for the CAP Training competition, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define "business information" and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under "Other Attachments Form," please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal

Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 45 pages and (2) use the following standards:

- A "page" is 8.5" x 11", on one side only, with 1" margins at the top, bottom, and both sides.

- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 390.30 and 34 CFR 75.210, have a maximum score of 100 points, and are as follows:

(a) *Relevance to State-Federal rehabilitation service program.* (10 points)

(1) The Secretary reviews each application for information that shows that the proposed project appropriately relates to the mission of the State-Federal rehabilitation service programs.

(2) The Secretary looks for information that shows that the proposed project can be expected to improve the skills and competence of—

(i) Personnel engaged in the administration or delivery of rehabilitation services; and

(ii) Others with an interest in the delivery of rehabilitation services.

(b) *Quality of the project design.* (15 points)

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(c) *Quality of project services.* (20 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(ii) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(d) *Quality of project personnel.* (15 points)

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel.

(ii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(e) *Adequacy of resources.* (10 points)

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the

Secretary considers the following factors:

(i) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(ii) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(f) *Quality of the management plan.* (15 points)

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(g) *Quality of the project evaluation.* (15 points)

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws

that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently \$250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds \$10,000,000, the reporting requirements in 2 CFR part 200, appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, appendix XII, if this grant plus all the other Federal funds you receive exceed \$10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an

objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing

requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit semiannual and annual performance reports that provide the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to www.ed.gov/fund/grant/apply/appforms/appforms.html.

5. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcomes-related goals, and measuring results against those goals.

The GPRA performance measures for this program are as follows:

(1) The number and percentage of cases closed in the VR client or applicant's favor.

(2) The number and percentage of individual cases resolved through Alternative Dispute Resolution.

(3) The percentage of individual CAP programs reporting that their systemic advocacy resulted in a change in policy or practice of an agency.

(4) The number of non-litigation systemic activities not involving individual representation that resulted in the change of one or more policies or practices of an agency.

The program performance measures for this program are as follows:

(1) The number and percentage of CAP professionals reporting increased capacity to provide individual and systems advocacy on the expanded VR service provisions and opportunities under WIOA, as a result of the training and technical assistance activities under this priority.

(2) The number and percentage of CAP professionals reporting increased capacity to reach priority unserved or underserved populations in their States, as a result of the training and technical assistance activities under this priority.

(3) The number and percentage of CAP professionals reporting increased strategic planning and resource management capabilities, as a result of the training and technical assistance activities under this priority.

The CAP Training grantee must collect the quantitative and qualitative data necessary to track and report on the GPRA and program measures, including an estimated total number of CAP professionals nationwide.

Annual project progress toward meeting the performance measures and project goals must be posted on the project website.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs, delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021-13190 Filed 6-17-21; 4:15 pm]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2923-006; ER13-1422-008; ER16-454-002; ER18-2448-003; ER20-1648-003.

Applicants: Sunbury Generation LP, Ebensburg Power Company, Seward Generation, LLC, Robindale Retail Power Services, LLC, Inter-Power/AhlCon Partners, L.P.

Description: Triennial Market Power Analysis for Northeast Region of Sunbury Generation LP, et al.

Filed Date: 6/14/21.

Accession Number: 20210614-5175.

Comments Due: 5 p.m. ET 8/13/21.

Docket Numbers: ER19-2722-004.

Applicants: PJM Interconnection, L.L.C.

Description: Motion of PJM Interconnection, L.L.C. submits Extension of Effective Date.

Filed Date: 6/7/21.

Accession Number: 20210607-5188.

Comments Due: 5 p.m. ET 6/18/21.

Docket Numbers: ER20-71-004; ER20-72-004; ER20-75-004; ER20-76-006; ER20-77-004; ER20-79-004.

Applicants: Coachella Hills Wind, LLC, Coachella Wind Holdings, LLC, Oasis Alta, LLC, Painted Hills Wind Holdings, LLC, Tehachapi Plains Wind, LLC, Voyager Wind IV Expansion, LLC.

Description: Notice of Non-Material Change in Status of Coachella Hills Wind, LLC, et al.

Filed Date: 6/14/21.

Accession Number: 20210614-5176.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER20-1491-003.

Applicants: Wind Wall 1 LLC.

Description: Notice of Change in Status of Wind Wall 1 LLC.

Filed Date: 6/15/21.

Accession Number: 20210615-5120.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2008-000.

Applicants: Louisiana Generating LLC.

Description: Request to Recover Costs Associated with Acting as a Local Balancing Authority of Louisiana Generating LLC.

Filed Date: 5/27/21.

Accession Number: 20210527-5077.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2139-000.

Applicants: Florida Power & Light Company.

Description: § 205(d) Rate Filing: FPL & Seminole NITSA No. 162 New Delivery Point to be effective 7/1/2021.

Filed Date: 6/15/21.

Accession Number: 20210615-5118.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2140-000.

Applicants: Haystack Wind Project, LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization and Requests for Waivers, et al. to be effective 8/16/2021.

Filed Date: 6/15/21.

Accession Number: 20210615-5132.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2141-000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: E&P Agreement for Noosa Energy Storage SA 2100 EP-30 to be effective 6/16/2021.

Filed Date: 6/15/21.

Accession Number: 20210615-5134.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2142-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 6090; Queue No. AF2-367 to be effective 5/17/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5025.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2143-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 6089; Queue No. AF2-368 to be effective 5/17/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5029.

Comments Due: 5 p.m. ET 7/7/21.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings

must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: June 16, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021-13163 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21-76-000]

Bluestone Farm Solar, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On June 15, 2021, the Commission issued an order in Docket No. EL21-76-000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Bluestone Farm Solar, LLC's proposed rate schedule is unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. *Bluestone Farm Solar, LLC*, 175 FERC ¶ 61,221 (2021).

The refund effective date in Docket No. EL21-76-000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL21-76-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the

last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFile" link at <http://www.ferc.gov>. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: June 16, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13166 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4784-106]

Topsham Hydro Partners Limited Partnership; Notice of Waiver Period for Water Quality Certification Application

On June 15, 2021, Topsham Hydro Partners Limited Partnership submitted to the Federal Energy Regulatory Commission (Commission) a copy of its application for a Clean Water Act section 401(a)(1) water quality certification filed with the Maine Department of Environmental Protection, in conjunction with the above captioned project. Pursuant to 40 CFR 121.6, we hereby notify the Maine Department of Environmental Protection of the following:

Date of Receipt of the Certification

Request: June 9, 2021

Reasonable Period of Time to Act on the Certification Request:

One year
Date Waiver Occurs for Failure to Act:

June 9, 2022

If the Maine Department of Environmental Protection fails or

refuses to act on the water quality certification request by the above waiver date, then the agency certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: June 16, 2021.

Kimberly D. Bose,
Secretary.

[FR Doc. 2021-13161 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21-169-000.

Applicants: BRP Sweeny BESS LLC.

Description: BRP Sweeny BESS LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 6/16/21.

Accession Number: 20210616-5074.

Comments Due: 5 p.m. ET 7/7/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20-263-003.

Applicants: Doswell Limited

Partnership.

Description: Report Filing: Refund Report Informational Filing to be effective N/A.

Filed Date: 6/16/21.

Accession Number: 20210616-5051.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-797-002.

Applicants: PJM Interconnection,

L.L.C.

Description: Tariff Amendment: Supplement & Correction: Amendment to ISA, SA No. 5869; Queue No. AE2-126 to be effective 12/3/2020.

Filed Date: 6/15/21.

Accession Number: 20210615-5126.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2135-000.

Applicants: Enerwise Global

Technologies, Inc.

Description: Request for Limited Waiver of Enerwise Global Technologies, Inc.

Filed Date: 6/14/21.

Accession Number: 20210614-5154.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21-2144-000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 4794; Queue No. AC1-116 to be effective 8/22/2017.

Filed Date: 6/16/21.

Accession Number: 20210616-5057.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2145-000.

Applicants: Cedar Creek II, LLC.

Description: Compliance filing: New eTariff Baseline Filing to be effective 7/6/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5063.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2146-000.

Applicants: Southern California

Edison Company.

Description: § 205(d) Rate Filing: DSA Santa Paula Energy Storage, LLC SA No. 1147 & Terminate Ltr Agmt SA No. 1096 to be effective 8/16/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5064.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2147-000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021-06-16 SA 3668 GRE-WMU T-T & T-L to be effective 6/17/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5066.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2148-000.

Applicants: Gulf Power Company.

Description: § 205(d) Rate Filing: Facility Construction Agreement for Affected System Project to be effective 6/17/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5073.

Comments Due: 5 p.m. ET 7/7/21.

Docket Numbers: ER21-2149-000.

Applicants: Minco Wind Energy II, LLC.

Description: Baseline eTariff Filing: MBR Tariff & Application to be effective 8/16/2021.

Filed Date: 6/16/21.

Accession Number: 20210616-5080.

Comments Due: 5 p.m. ET 7/7/21.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings

can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-reg.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: June 16, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13165 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21-2137-000]

IR Energy Management LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of IR Energy Management LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 6, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human

Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Dated: June 16, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13164 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP21-897-000]

Notice of Complaint; ConocoPhillips Company v. El Paso Natural Gas Company, LLC

Take notice that on June 11, 2021, pursuant to Sections 4 and 5 of the Natural Gas Act¹ and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 (2021), ConocoPhillips Company (ConocoPhillips or Complainant) filed a formal complaint against El Paso Natural Gas Company, LLC (EPNG or Respondent), alleging that the Respondent failed to comply with the Natural Gas Act, Commission regulations, Commission precedent, and EPNG's tariff when EPNG declared a Critical Operating Condition for the period February 15, 2021 through February 17, 2021 and subsequently assessed critical condition penalties and charges to ConocoPhillips, all as more fully explained in its complaint.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondent in the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov, or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on July 1, 2021.

Dated: June 15, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13091 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

¹ 15 U.S.C. 717c, 717d.

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings #1**

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–168–000.

Applicants: CED Crane Solar, LLC.

Description: Notice of Self-Certification of CED Crane Solar, LLC.
Filed Date: 6/15/21.

Accession Number: 20210615–5065.

Comments Due: 5 p.m. ET 7/6/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–2462–010.

Applicants: Oregon Clean Energy, LLC.

Description: Notice of Non-Material Change in Status of Oregon Clean Energy, LLC.

Filed Date: 6/14/21.

Accession Number: 20210614–5170.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER19–2462–004; ER10–2630 003; ER16–1914 003; ER18–2264 007.

Applicants: Macquarie Energy LLC, Macquarie Energy Trading LLC, NGP Blue Mountain I LLC, Patua Acquisition Company, LLC.

Description: Response to May 14, 2021 Deficiency Letter of Macquarie Energy LLC, et al.

Filed Date: 6/14/21.

Accession Number: 20210614–5169.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER20–1455–003.

Applicants: Cordova Energy Company LLC.

Description: Report Filing: Reactive Refund Report to be effective N/A.

Filed Date: 6/11/21.

Accession Number: 20210611–5119.

Comments Due: 5 p.m. ET 7/2/21.

Docket Numbers: ER20–1936–003.

Applicants: Walnut Ridge Wind, LLC.
Description: Report Filing: Reactive Refund Report to be effective N/A.

Filed Date: 6/11/21.

Accession Number: 20210611–5117.

Comments Due: 5 p.m. ET 7/2/21.

Docket Numbers: ER21–1690–001.

Applicants: Tri-State Generation and Transmission Association, Inc., Southwest Power Pool, Inc.

Description: Tariff Amendment: Tri-State's Amended Normalization Filing to be effective 6/15/2021.

Filed Date: 6/11/21.

Accession Number: 20210611–5025.

Comments Due: 5 p.m. ET 6/28/21.

Docket Numbers: ER21–2136–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Revisions to Modify the Megawatt Mile Procedure to be effective 8/15/2021.

Filed Date: 6/15/21.

Accession Number: 20210615–5037.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21–2137–000.

Applicants: IR Energy Management LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 8/15/2021.

Filed Date: 6/15/21.

Accession Number: 20210615–5048.

Comments Due: 5 p.m. ET 7/6/21.

Docket Numbers: ER21–2138–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1518R21 Arkansas Electric Cooperative Corp NITSA NOA to be effective 8/1/2021.

Filed Date: 6/15/21.

Accession Number: 20210615–5053.

Comments Due: 5 p.m. ET 7/6/21.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF21–408–000.

Applicants: Safari Energy, LLC.

Description: Refund Report of Safari Energy, LLC [Freepoint].

Filed Date: 6/11/21.

Accession Number: 20210611–5159.

Comments Due: 5 p.m. ET 7/2/21.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM21–24–000.

Applicants: Consumers Energy Company.

Description: Application of Consumers Energy Company to Terminate Its Mandatory Purchase Obligation under the Public Utility Regulatory Policies Act of 1978.

Filed Date: 6/14/21.

Accession Number: 20210614–5155.

Comments Due: 5 p.m. ET 7/12/21.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.asp>) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing

requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 15, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–13092 Filed 6–22–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 14797–001]

California Department of Water Resources; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 14797–001.

c. *Date filed:* November 20, 2019.

d. *Applicant:* California Department of Water Resources.

e. *Name of Project:* Devil Canyon Project.¹

f. *Location:* Along the East Branch of the California Aqueduct, in San Bernardino County, California. The project occupies 220.98 acres of United States lands administered by the U.S. Department of Agriculture, Forest Service, as part of the San Bernardino National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Gwen Knittweis, Chief, Hydropower License Planning and Compliance Office, California Department of Water Resources, P.O. Box 924836, Sacramento, California 94236–0001; (916) 557–4554; email—Gwen.Knittweis@water.ca.gov.

i. *FERC Contact:* Kyle Olcott at (202) 502–8963; or email at kyle.olcott@ferc.gov.

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary*

¹ The proposed Devil Canyon Project is currently licensed as part of the South SWP Project (P–2426). The applicant proposes to relicense the Devil Canyon Project separately.

prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment..> You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FEROnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P-14797-001.

Intervenors—those on the Commission's service list for this proceeding—are reminded that if they file comments with the Commission, they must also serve a copy of their filing on each person whose name appears on the official service list. Note that the list is periodically updated. The official service list can be obtained on the Commission's website (<https://www.ferc.gov>)—click on Documents and Filing and click on eService—or call the Office of the Secretary, Dockets Branch at (202) 502-8715. In addition, if any party files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on the resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on July 15, 2020, revising the regulations under 40 CFR parts 1500–1518 that federal agencies use to implement NEPA (see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43,304). The Final Rule became effective on and applies to any NEPA process begun after September 14, 2020. An agency may also apply the regulations to ongoing activities and environmental documents begun before

September 14, 2020, which includes the Devil Canyon Project. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. The project consists of: (1) A 249-foot-tall, 2,230-foot-long zoned earth and rockfill dam impounding a 995-acre reservoir; (2) intake structures and two 1.3-mile-long steel penstocks; (3) a powerhouse with four turbine-generating units; (4) a switchyard with four step-up transformers; and (5) appurtenant facilities. The project's estimated annual generation is 836 gigawatt-hours.

m. A copy of the application can be viewed on the Commission's website at <https://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

Register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

All filings must (1) bear in all capital letters the title "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

n. The license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must be sent to the certifying authority and to the Commission concurrently.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Deadline for Filing Comments, Recommendations, and Agency Terms and Conditions/Prescriptions.	August 2021.
Deadline for Filing Reply Comments.	September 2021.
Commission Issues NEPA Document.	November 2021.
Comments on NEPA Document Due.	December 2021.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: June 15, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13090 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21-2140-000]

Haystack Wind Project, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Haystack Wind Project, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 6, 2021.

The Commission encourages electronic submission of protests and

interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Dated: June 16, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-13162 Filed 6-22-21; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-10024-61-OMS]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Wyoming

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Environmental Protection Agency (EPA)'s approval of the State of Wyoming's request to revise/modify certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA approves the authorized program revisions/modifications as of June 23, 2021.

FOR FURTHER INFORMATION CONTACT: Shirley M. Miller, U.S. Environmental Protection Agency, Office of Information Management, Mail Stop 2824T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 566-2908, miller.shirley@epa.gov.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, section 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On March 5, 2021, the Wyoming Department of Environmental Quality (WY DEQ) submitted an application titled NeTDMR for revisions/modifications to its EPA-approved programs under title 40 CFR to allow new electronic reporting. EPA reviewed WY DEQ's request to revise/modify its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Wyoming's

request to revise/modify its following EPA-authorized programs to allow electronic reporting under 40 CFR part 123 is being published in the **Federal Register**:

Part 123: EPA-Administered Permit Programs: The National Pollutant Discharge Elimination System (NPDES) Reporting under CFR 122 & 125

WY DEQ was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: June 8, 2021.

Jennifer Campbell,
Director, Office of Information Management.
[FR Doc. 2021-13178 Filed 6-22-21; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2021-0080; FRL-10025-09]

Pesticide Product Registration; Receipt of Applications for New Uses—June 2021

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before July 23, 2021.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number and the File Symbol of the EPA Registration Number of interests as shown in the body of this document, 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <https://www.epa.gov/dockets/where-send-comments-epa-dockets>.

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

FOR FURTHER INFORMATION CONTACT:

Marietta Echeverria, Registration Division (RD) (7505P), main telephone number: (703) 305-7090, email address: RDfRNotices@epa.gov. The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

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).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](https://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 or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

1. *EPA Registration Number:* 100-618 and 100-617. *Docket ID number:* EPA-HQ-OPP-2021-0213. *Applicant:* Syngenta Crop Protection, LLC, 410 Swing Rd., P.O. Box 18300, Greensboro, NC 27419. *Product name:* Propiconazole Technical and Tilt. *Active ingredient:* Propiconazole at 95% (Propiconazole Technical); Propiconazole at 41.8 (Tilt). *Proposed use:* Vegetable, Brassica, head and stem, group 5-16 Contact: RD.

2. *EPA Registration Numbers* 11678-57 and 66222-35. (EPA-HQ-OPP-2021-0135). *Applicant:* Makhteshim Agan of North America, Inc. (d/b/a ADAMA), 3120 Highwoods Boulevard, Suite 100, Raleigh, NC 27604. *Active Ingredient:* Novaluron. *Product type:* Insecticide. *Proposed Uses:* Edible podded pea subgroup 6-19B; Succulent shelled pea subgroup 6-19D; Dried shelled pea subgroup 6-19F; and crop group expansions Edible podded bean subgroup 6-19A; Succulent shelled bean subgroup 6-19C; Dried shelled bean, except soybean, subgroup 6-19E. Contact: RD.

3. *EPA Registration Numbers* 11678-57 and 66222-264. (EPA-HQ-OPP-2021-0355). *Applicant:* Makhteshim Agan of North America, Inc. (d/b/a ADAMA), 3120 Highwoods Boulevard, Suite 100, Raleigh, NC 27604. *Active Ingredient:* Novaluron. *Product type:* Insecticide. *Proposed Uses:* Tree nuts, nutmeat (Crop Group 14-12) and, Almond, hulls. Contact: RD.

4. *EPA Registration Numbers* 71512-7, 71512-9, 71512-10 and 71512-14. (EPA-HQ-OPP-2016-0013). *Applicant:* ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077. *Active Ingredient:* Flonicamid. *Product type:* Insecticide. *Proposed Uses:* Small fruit, vine climbing (except fuzzy kiwifruit) (Crop Group 13-07F). Contact: RD.

5. *EPA Registration Number:* 91746-5. *Docket ID number:* EPA-HQ-OPP-2021-0339. *Applicant:* Belchim Crop Protection N.V./S.A. c/o Belchim Crop Protection US Corporation, 2751 Centreville Rd., Suite 100, Wilmington, DE 19808. *Active ingredient:* Pyridate.

Product type: Herbicide. *Proposed uses:* Lentils, popcorn, rapeseed (crop subgroup 20A). Contact: RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: June 8, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021-13187 Filed 6-22-21; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2021-0132; FRL-10025-30]

Product Cancellation Order for Certain Pesticide Registrations; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA issued a notice in the **Federal Register** of June 8, 2021, concerning cryolite product cancellations voluntarily requested by the registrants and accepted by the Agency. This notice is being issued to correct Table 1 of the cancellation order by removing five entries that indicated an incorrect cancellation date and correcting the cancellation date and the corresponding existing stocks provision date in Units IV and VI for the affected products.

FOR FURTHER INFORMATION CONTACT:

Alexander Hazlehurst, Pesticide Reevaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (703) 347-0221 email address: Hazlehurst.alexander@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be 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-OPP-2021-0132, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP

Docket is (703) 305-5805. Due to the public health concerns related to COVID-19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

II. What does this correction do?

This notice is being issued to correct Table 1 in Unit II and the corresponding

existing stocks and provisions dates in Units IV and VI of the cancellation notice that published in the **Federal Register** on June 8, 2021 (86 FR 30460) (FRL-10024). As such, FR Doc. 2021-11919 that published in the **Federal Register** on June 8, 2021 (86 FR 30460) (FRL-10024-48) is corrected as follows:

1. On page 30460, in Table 1, remove the complete entries for “10163-41, 10163-225, 10163-242, 10163-243, and FL000011.”

2. Insert the following table below Table 1.

TABLE 1A—PRODUCT CANCELLATIONS

EPA Registration No.	Product name	Active ingredients
10163-41	Prokil Cryolite 96	Cryolite.
10163-225	Gowan Cryolite Bait	Cryolite.
10163-242	Prokil Cryolite 75-Dust	Cryolite.
10163-243	Prokil Cryolite 50-Dust	Cryolite.
FL000011	Prokil Cryolite 96	Cryolite.

3. On page 30461, in Unit IV., insert “The effective date of the cancellations that are the subject of this notice for the product registrations identified in Table 1A of Unit II., will be September 30, 2022.”

4. On page 30461, in Unit VI., insert “The registrant may continue to sell and distribute existing stocks of the cryolite products listed in Table 1A of Unit II. until March 31, 2024, which is 18 months after the effective date of the cancellations.”

Prior to the issuance of the cancellation order, the registrant of the five cryolite product registrations in Table 1A, requested the cancellations to be effective on September 30, 2022. The Agency intended to accept this effective cancellation date, but inadvertently neglected to separate out these products with the correct effective date in the prior cancellation order. In addition, as requested, the registrant may continue to sell and distribute existing stocks of the cryolite products listed in Table 1A of Unit II. until March 31, 2024, which is 18 months after the effective date of the cancellations. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1A of Unit II. until exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: June 16, 2021.

Mary Reaves,

*Director, Pesticide Re-Evaluation Division,
Office of Pesticide Programs.*

[FR Doc. 2021-13175 Filed 6-22-21; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2021-0377; FRL-10025-04]

Atrazine, Simazine, and Malathion; Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations and/or Amend Registrations To Terminate Certain Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel their registrations of certain products containing the pesticides atrazine and simazine, and/or to amend their atrazine, simazine, or malathion product registrations to terminate or delete one or more uses. The requests would delete atrazine use in or on roadsides; Conservation Reserve Program (CRP) land; conifers, including Christmas tree plantings; timber and forestry; and miscanthus and other perennial bioenergy crops. The requests would delete simazine use in or on shelterbelts and all forestry uses except for

Christmas tree plantings. The requests would delete malathion use as a mosquito larvicide and in or on cull piles (including the terms cull dumps, fruit dumps, and cull fruit and vegetable dumps). The requests are limited to the product registrations specified in this notice and would not terminate all of the atrazine, simazine, or malathion products registered for use in the United States. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled/uses deleted only if such sale, distribution, or use is consistent with the terms as described in the final order. **DATES:** Comments must be received on or before July 23, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2021-0377, online at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID-19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via

email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Alexander Hazlehurst, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (703) 347-0221; email address: Hazlehurst.alexander@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale,

distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](https://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 or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked

will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

II. What action is the Agency taking?

This document announces receipt by EPA of requests from registrants to cancel certain and/or delete certain uses of atrazine, simazine, and malathion product registrations. The affected products and the registrants making the requests are identified in Tables 1, 2 and 3 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling and/or amending the affected registrations.

TABLE 1—ATRAZINE AND SIMAZINE PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Company
100-886	Bicep Magnum Herbicide	Syngenta Crop Protection, LLC.
279-3449	F9316-2	FMC Corporation.
352-600	DPXMX670	E. I. du Pont de Nemours and Company.
	MT herbicide	
352-723	DuPont Breakfree ATZ Lite	E. I. du Pont de Nemours and Company.
352-724	DuPont Breakfree ATZ Herbicide	E. I. du Pont de Nemours and Company.
352-893	DuPont Breakfree NXT ATZ Herbicide	E. I. du Pont de Nemours and Company.
352-895	DuPont Breakfree NXT ATZ Lite Herbicide	E. I. du Pont de Nemours and Company.
524-497	MON 58442 Herbicide	Bayer CropScience LP.
524-509	MON 78088 Herbicide	Bayer CropScience LP.
8660-12	Herbicide Granules Formula A	United Industries Corporation.
9688-227	Chemsico Herbicide Granules AN	Chemsico (Division of United Industries Corporation).
9688-274	Chemsico Herbicide Granules LAH	Chemsico (Division of United Industries Corporation).
33270-13	Tremor AT	Winfield Solutions, LLC.
33270-14	Tremor AT Lite	Winfield Solutions, LLC.
34704-686	Simazine 90 WDG	Loveland Products, Inc.
34704-687	Simazine 4L Flowable Herbicide	Loveland Products, Inc.
34704-689	Conifer 90 Herbicide	Loveland Products, Inc.
34704-690	Clean Crop Atrazine 4L Turf & Conifer Herbicide	Loveland Products, Inc.
34704-728	Shotgun Flowable Herbicide	Loveland Products, Inc.
34704-860	Rifle Plus Herbicide	Loveland Products, Inc.
34704-892	Bronze	Loveland Products, Inc.
34704-913	SMZ 4L	Loveland Products, Inc.
34704-916	Simazine 90 Herbicide	Loveland Products, Inc.
34704-950	Cadence ATZ Herbicide	Loveland Products, Inc.
34704-952	Cadence Lite ATZ Herbicide	Loveland Products, Inc.
34704-1041	Slider ATZ	Loveland Products, Inc.
34704-1042	Slider ATZ Lite	Loveland Products, Inc.
34704-1070	LPI S-Metolachlor + Atrazine	Loveland Products, Inc.
34704-1072	LPI S-Metolachlor + Atrazine Herbicide	Loveland Products, Inc.
42750-41	Dicambazine	Albaugh, LLC.
42750-44	Atrazine 4L	Albaugh, LLC.
42750-45	Weed pro Atrazine 4L Herbicide	Albaugh, LLC.
42750-50	Brox-AT Herbicide	Albaugh, LLC.
42750-53	Albaugh Atrazine 90 DF	Albaugh, LLC.
55467-6	Volley ATZ Lite Tenkoz Herbicide	Tenkoz, Inc.
55467-7	Volley ATZ Tenkoz Herbicide	Tenkoz, Inc.
59639-106	Atrazine 90 DF Herbicide	Valent U.S.A., LLC.
66222-280	ADA 68702	Makhteshim Agan of North America, Inc. (d/b/a ADAMA).
66222-281	ADA 68703	Makhteshim Agan of North America, Inc. (d/b/a ADAMA).
70506-232	UPL Simazine 4L	UPL NA Inc.
70506-233	Simazine 90DF Herbicide	UPL NA Inc.
KS040002	Weed Pro Atrazine 4L Herbicide	Albaugh, LLC.

TABLE 1—ATRAZINE AND SIMAZINE PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product name	Company
KS130001	Atrazine 4L	Makhteshim Agan of North America, Inc. (d/b/a ADAMA).
SD100003	Slider ATZ	Loveland Products, Inc.
SD100004	Slider ATZ Lite	Loveland Products, Inc.
WA900005	Clean Crop Simazine 4L Flowable Herbicide	Loveland Products, Inc.
WA200002	Atrazine 4L	Loveland Products, Inc.

TABLE 2—ATRAZINE, SIMAZINE, AND MALATHION PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration No.	Product name	Company	Uses to be deleted
100–497	AAtrex® 4L Herbicide	Syngenta Crop Protection, LLC.	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings; timber and forestry.
100–585	AAtrex® Nine-O® Herbicide ..	Syngenta Crop Protection, LLC.	
100–1207	Atrazine Technical	Syngenta Crop Protection, LLC.	
100–1235	Atrazine Base Mix Manufacturing Use Product.	Syngenta Crop Protection, LLC.	
100–1236	Atrazine Wet Paste Manufacturing Use Product.	Syngenta Crop Protection, LLC.	
100–1650	Atrazine 4L MUP	Syngenta Crop Protection, LLC.	
100–1659	Atrazine Nine-O® MUP	Syngenta Crop Protection, LLC.	
1381–158	Atrazine 4L	Winfield Solutions, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers.
4787–5	Fyfanon Technical	FMC Corporation	Mosquito larvicide; cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
5905–250	Fyfanon 8 lb. Emulsion	Helena Agri-Enterprises, LLC	Cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
5905–470	Atrazine 4L	Helena Agri-Enterprises, LLC	Roadsides; Conservation Reserve Program (CRP) land.
5905–522	Atrazine 90 DF Herbicide	Helena Agri-Enterprises, LLC.	
9779–253	Atrazine 90 DF	Winfield Solutions, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers.
9779–295	Simazine 90DF	Winfield Solutions, LLC	Shelterbelt.
9779–296	Simazine 4L	Winfield Solutions, LLC	Shelterbelt.
10163–21	Malathion 8	Gowan Company	Mosquito larvicide; cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
19713–217	Drexel Malathion 5EC	Drexel Chemical Company ..	Mosquito larvicide; cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
19713–288	Drexel Malathion ULV Insecticide.	Drexel Chemical Company.	
19713–304	Green Devil Spray	Drexel Chemical Company.	
19713–330	Drexel Malathion 50% Emulsifiable.	Drexel Chemical Company.	
19713–402	Drexel Malathion Technical ..	Drexel Chemical Company.	
19713–540	Drexel Malathion ULV 96.5%	Drexel Chemical Company.	
19713–565	Atrazine Technical 2	Drexel Chemical Company ..	Roadsides; Conservation Reserve Program (CRP); conifers including Christmas tree plantings; timber and forestry.
19713–566	Drexel Atrazine Technical	Drexel Chemical Company ..	Roadsides; Conservation Reserve Program (CRP); conifers, Christmas tree plantations.
33270–9	Atrazine 90 DF	Winfield Solutions, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers.
33270–10	Atrazine 4L	Winfield Solutions, LLC.	
33270–24	Tremor Atz Nxt	Winfield Solutions, LLC	Miscanthus and other non-food perennial bioenergy crops.
33270–25	Tremor Atz Lite Nxt	Winfield Solutions, LLC.	
34704–452	Malathion 8E Insecticide	Loveland Products, Inc	Cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
34704–787	Malathion Technical	Loveland Products, Inc	Mosquito larvicide; cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
35915–3	Atrazine 90 Herbicide	Sipcam Agro USA, Inc	Roadsides; Conservation Reserve Program (CRP) land; conifers.
35915–14	Oxon Italia Atrazine Technical II.	Sipcam Agro USA, Inc	Roadsides; conifers including Christmas tree plantings; forestry.
47000–107	Prozap Malathion 57% Emulsifiable Liquid.	Neogen Corporation	Cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).

TABLE 2—ATRAZINE, SIMAZINE, AND MALATHION PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT—Continued

Registration No.	Product name	Company	Uses to be deleted
55467–13	Tenkoz Atrazine 4L Herbicide.	Tenkoz, Inc	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings; timber and forestry;
66330–220	Malathion 5 EC	UPL OpenAg	Miscanthus and other non-food perennial bioenergy crops. Cull piles (including terms cull dumps, fruit dumps, and cull fruit and vegetable dumps).
74530–85	Fearless Xtra Herbicide	HELM Agro US, Inc	Miscanthus and other non-food perennial bioenergy crops.
74530–89	Fearless Xtra 5.6L Herbicide	HELM Agro US, Inc.	
83529–87	Sharda Acetochlor 29% + Atrazine 14.5% CS.	Sharda USA, LLC	Miscanthus and other non-food perennial bioenergy crops.
83529–93	Sharda Acetochlor 33.4% + Atrazine 26.9% SE.	Sharda USA, LLC.	
83529–116	Sharda Acetochlor 46.3% + Atrazine 18.3% SE.	Sharda USA, LLC.	
89167–10	AX ATZ 4L	Axion Ag Products, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings.
89167–30	AX Acetozine 2 NG	Axion Ag Products, LLC	Miscanthus and other non-food perennial bioenergy crops.
89167–32	AX Acetozine NG	Axion Ag Products, LLC	Miscanthus and other non-food perennial bioenergy crops.
89167–38	AX ATZ 4L–2 Herbicide	Axion Ag Products, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings.
89168–29	Liberty Atrazine 4L	Liberty Crop Protection, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings.
89168–32	Liberty Atrazine 90 Herbicide	Liberty Crop Protection, LLC.	
89168–35	Liberty ATZ 4L	Liberty Crop Protection, LLC.	
94143–1	INATEK Atrazine Technical ..	INATEK, LLC	Roadsides; Conservation Reserve Program (CRP) land; and conifers.
94144–1	Atrazine 90DF	Infinicrop, LLC	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings.
11773–1	Cornbelt Atrazine 4L	Van Diest Supply Company	Roadsides; Conservation Reserve Program (CRP) land; conifers.
11773–13	Cornbelt Atrazine 90 DF	Van Diest Supply Company	Roadsides; conifers.
33270–26	Simazine 90DF	Winfield Solutions, LLC	Shelterbelt.
33270–27	Simazine 4L	Winfield Solutions, LLC	Shelterbelt.
KS120001	Tenkoz Atrazine 4L Herbicide.	Tenkoz, Inc	Roadsides; Conservation Reserve Program (CRP) land; conifers including Christmas tree plantings; timber and forestry; Miscanthus and other non-food perennial bioenergy crops.

Table 3 of this unit includes the names and addresses of record for the registrants of the products listed in

Tables 1 and 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA

registration numbers of the products listed in Tables 1 and 2 of this unit.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS TO ATRAZINE, SIMAZINE AND MALATHION PRODUCT REGISTRATIONS

EPA company No.	Company name and address
100	Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419.
279	FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.
352	E. I. du Pont de Nemours and Company, 9330 Zionsville Road, Indianapolis, IN 46268.
524	Bayer CropScience LP, 800 North Lindbergh Blvd., St. Louis, MO 63167.
1381	Winfield Solutions, LLC, P.O. Box 64589, MS 5705, St. Paul, MN 55164.
4787	FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.
5905	Helena Agri-Enterprises, LLC, 225 Schilling Blvd., Suite 300, Collierville, TN 38017.
8660	United Industries Corp., D/B/A Sylor Plant Corp., P.O. Box 142642, St. Louis, MO 63114–0642.
9688	Chemisco, Division of United Industries Corporation, P.O. Box 142642, St. Louis, MO 63114–0642.
9779	Winfield Solutions, LLC, P.O. Box 64589, MS 5705, St. Paul, MN 55164.
10163	Gowan Company, P.O. Box 5569, Yuma, AZ 85366.
11773	Van Diest Supply Company, P.O. Box 610, Webster City, IA 50595–0610.
19713	Drexel Chemical Company, 1700 Channel Avenue, P.O. Box 13327, Memphis, TN 38113.
33270	Winfield Solutions, LLC, P.O. Box 64589, MS 5705, St. Paul, MN 55164.
34704	Loveland Products, Inc. (Nutrien), 3005 Rocky Mountain Ave., Loveland, CO 80538.
35915	Sipcam Agro USA, Inc., 2525 Meridian Parkway, Suite 350, Durham, NC 27713.
42750	Albaugh, LLC, P.O. Box 2127, Valdosta, GA 31604.
47000	Neogen Corporation, 620 Leshar Place, Lansing, MI 48912.
55467	Tenkoz, Inc., 1725 Windward Concourse, Suite 410, Alpharetta, GA 30005–1784.
59639	Valent U.S.A. LLC, 4600 Norris Canyon Road, P.O. Box 5075, Walnut Creek, CA 94596.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS TO ATRAZINE, SIMAZINE AND MALATHION PRODUCT REGISTRATIONS—Continued

EPA company No.	Company name and address
66222	Makhteshim Agan of North America, Inc. (d/b/a ADAMA), 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27312.
66330	UPL NA, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
70506	UPL Open Ag, 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
74530	HELM Agro US, Inc., 401 East Jackson Street, Suite 1400, Tampa, FL 33602.
83529	Sharda USA, LLC, 34 E. Germantown Pike #227, Norristown, PA 19401.
89167	Axion Ag Products, LLC, 1880 Fall River Drive, Suite 100, Loveland, CO 80538.
89168	Liberty Crop Protection, LLC, 1880 Fall River Drive, Suite 100, Loveland, CO 80538.
94143	INATEK, LLC, 4110 136th ST CT NW, Gig Harbor, WA 98332.
94144	Infinicrop LLC, 4110 136th ST CT NW, Gig Harbor, WA 98332.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The atrazine, simazine, and malathion registrants have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use deletion should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for voluntary cancellation and/or amendments to delete uses are granted, the Agency intends to publish the cancellation/use deletion order in the **Federal Register**.

In any order issued in response to these requests for cancellation of a product registration/product registrations and/or for an amendment/amendments to delete uses, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Tables 1 and 2 of Unit II.

For voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1 year after the effective date of the cancellation, which will be the date of publication of the cancellation/use deletion order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Once EPA has approved product labels reflecting the requested amendments to delete uses, registrants will be permitted to sell or distribute products under the previously approved labeling for a period of 18 months after the date of **Federal Register** publication of the cancellation/use deletion order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the deleted uses identified in Table 2 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of

canceled products/products whose labels include the deleted uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products/deleted uses.

Authority: 7 U.S.C. 136 *et seq.*

Dated: June 16, 2021.

Mary Reaves,

*Director, Pesticide Re-Evaluation Division,
Office of Pesticide Programs.*

[FR Doc. 2021–13151 Filed 6–22–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0196; FRL–10025–05]

Pesticide Program Dialogue Committee; Request for Nominations to the Pesticide Program Dialogue Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency's (EPA's) Office of Pesticide Programs is inviting nominations from a diverse range of qualified candidates to be considered for appointment to the Pesticide Program Dialogue Committee (PPDC). The PPDC is chartered to provide policy advice, information, and recommendations to the EPA on a wide variety of pesticide regulatory developments and reform initiatives, evolving public policy, and program implementation issues associated with evaluating and reducing risks from pesticide use. To maintain the representation outlined by the charter, nominees will be selected to represent: Environmental/public interest and animal rights groups; farm worker organizations; pesticide industry and trade associations; pesticide user, grower, and commodity groups; federal/

state/local and tribal governments; academia; and public health organizations. Vacancies are expected to be filled by December 2021. Sources in addition to this **Federal Register** notice may be utilized in the solicitation of nominees.

DATES: Nominations must be received on or before July 23, 2021.

ADDRESSES: Submit nominations electronically with the subject line "PPDC Membership 2021" to jewell.shannon@epa.gov.

FOR FURTHER INFORMATION CONTACT: Shannon Jewell, Designated Federal Officer for the PPDC, telephone number: (571) 289-9911 email address: jewell.shannon@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of particular interest to persons who work in agricultural settings or if you are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*); the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 301 *et seq.*); the Pesticide Registration Improvement Act (PRIA) (which amends FIFRA section 33); and the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). Potentially affected entities may include, but are not limited to: Agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farm worker groups; pesticide users and growers; animal rights groups; pest consultants; state, local, and tribal governments; academia; public health organizations; and the public. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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-OPP-2021-0196, is available online at <http://www.regulations.gov>. Please note that due to the public health emergency the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform.

Once the EPA/DC is reopened to the public, the docket will also be available in-person at the Office of Pesticide

Programs Regulatory Public Docket (OPP Docket) in the 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.

For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit <https://www.epa.gov/dockets>.

II. Background

The PPDC is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92-463. EPA established the PPDC in September 1995 to provide policy advice, information and recommendations to the EPA Administrator through the Director of the Office of Pesticide Programs, Office of Chemical Safety and Pollution Prevention. The PPDC provides a public forum to discuss a wide variety of pesticide regulatory developments and reform initiatives, evolving public policy and program implementation issues associated with evaluating and reducing risks from the use of pesticides. The EPA will consider candidates from the following sectors: Environmental/public interest and animal rights groups; farm worker organizations; pesticide industry and trade associations; pesticide user, grower, and commodity groups; federal and state/local/tribal governments; the general public; academia; and public health organizations.

The PPDC usually meets face-to-face twice a year, generally in the spring and the fall. Additionally, members may be asked to serve on work groups to develop recommendations to address specific policy issues. The average workload for members is approximately 4 to 6 hours per month. PPDC members may receive travel and per diem allowances where appropriate and according to applicable federal travel regulations.

III. Nominations

The EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, the agency encourages nominations of women and men of all racial and ethnic groups. All nominations will be fully considered, but applicants need to be aware of the specific representation sought as outlined in the **SUMMARY**

above. Any interested person or organization may nominate qualified persons to be considered for appointment to this advisory committee. Individuals may self-nominate. Nominations may be submitted in electronic format (preferred) or mailed to Shannon Jewell at the address listed under **ADDRESSES**.

To be considered, all nominations should include:

- Current contact information for the nominee, including the nominee's name, organization (and position within that organization), current business address, email address, and daytime telephone number;
- Brief Statement describing the nominee's interest and availability in serving on the PPDC;
- Résumé or CV;
- Short biography (no more than 2 paragraphs) describing the professional and educational qualifications of the nominee, including a list of relevant activities, or any current or previous experience on advisory committees; and
- Letter[s] of recommendation from a third party supporting the nomination. The letter should describe how the nominee's experience and knowledge will bring value to the work of the PPDC.

Other resources, in addition to this **Federal Register** notice, may also be utilized in the solicitation of nominees.

Authority: 5 U.S.C. Appendix 2.

Dated: June 17, 2021.

Michael Goodis,

Acting Director, Office of Pesticide Programs.

[FR Doc. 2021-13189 Filed 6-22-21; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 33522]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended ("Privacy Act"), this document announces the establishment of a computer matching program the Federal Communications Commission ("FCC" or "Commission" or "Agency") and the Universal Service Administrative Company (USAC) will conduct with the Nevada Department of Health and Human Services, Division of Welfare and Supportive Services (Department). The purpose of this matching program

is to verify the eligibility of applicants to and subscribers of the Emergency Broadband Benefit Program, which is administered by USAC under the direction of the FCC, or other federal programs that use qualification for the FCC's Lifeline Program as an eligibility criterion. More information about this program is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before July 23, 2021. This computer matching program will commence on July 23, 2021, and will conclude 18 months after becoming effective.

ADDRESSES: Send comments to Margaret Drake, FCC, 45 L Street NE, Washington, DC 20554, or to Privacy@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Margaret Drake at 202-417-1707 or Privacy@fcc.gov.

SUPPLEMENTARY INFORMATION: The Emergency Broadband Benefit Program (EBBP) was established by Congress in the Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182. EBBP is a program that will help low-income Americans obtain discounted broadband service and one-time co-pay for a connected device (laptop, desktop computer or tablet). This program was created specifically to assist American families' access to broadband, which has proven to be essential for work, school, and healthcare during the public health emergency that exists as a result of COVID-19. A household may qualify for the EBBP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National Lifeline Eligibility Verifier ("National Verifier"), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program. The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive Supplemental Nutrition Assistance Program (SNAP) and Medicaid benefits administered by the Nevada

Department. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Participating Non-Federal Agencies

Nevada Department of Health and Human Services, Division of Welfare and Supportive Services (Department).

Authority for Conducting the Matching Program

Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182; 47 CFR part 54.

Purpose(s)

In the 2016 Lifeline Modernization Order, the FCC required USAC to develop and operate the National Verifier to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is "to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission." 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that the USAC-operated LED will communicate with information systems and databases operated by other Federal and State agencies. Id. at 4011-2, paras. 135-7.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive SNAP and Medicaid benefits administered by the Nevada Department. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for EBBP benefits; are currently receiving benefits; are individuals who enable another individual in their household to qualify for EBBP benefits; are minors whose status qualifies a parent or guardian for EBBP benefits; or are individuals who have received EBBP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to last name, date of birth and the last four digits of the applicant's Social Security Number. The National Verifier will transfer these data elements to the Nevada Department, which will respond "eligible match," "ineligible match," or "no match" regarding whether the individual is enrolled in an EBBP-qualifying assistance program: State of Nevada's SNAP and Medicaid.

System(s) of Records

The USAC records shared as part of this matching program reside in the EBBP system of records, FCC/WCB-3, Emergency Broadband Benefit Program, which was published in the **Federal Register** at 86 FR 11523 (Feb. 25, 2021).

Federal Communications Commission.

Marlene Dortch,
Secretary.

[FR Doc. 2021-13214 Filed 6-22-21; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 33525]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended ("Privacy Act"), this document announces the modification of a computer matching program the Federal Communications Commission ("FCC" or "Commission" or "Agency") and the Universal Service Administrative Company (USAC) will conduct with the Kentucky Cabinet for Health and Family Services, Division of Family Support (Cabinet). The purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline (existing purpose) and the new Emergency Broadband Benefit Program, both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before July 23, 2021. This computer matching program will commence on July 23, 2021, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Margaret Drake, FCC, 45 L Street NE, Washington, DC 20554, or to Privacy@fcc.gov.

FOR FURTHER INFORMATION CONTACT:

Margaret Drake at 202–418–1707 or Privacy@fcc.gov.

SUPPLEMENTARY INFORMATION:

The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid and the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

The Emergency Broadband Benefit Program (EBBP) was established by Congress in the Consolidated Appropriations Act of 2021, Public Law 116–260, 134 Stat. 1182. EBBP is a program that will help low-income Americans obtain discounted broadband service and one-time co-pay for a connected device (laptop, desktop computer or tablet). This program was created specifically to assist American families' access to broadband, which has proven to be essential for work, school, and healthcare during the public health emergency that exists as a result of COVID–19. A household may qualify for the EBBP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National Lifeline Eligibility Verifier ("National Verifier"), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive Medicaid or Supplemental Nutrition Assistance Program (SNAP) benefits administered by the Kentucky Cabinet. Under FCC rules, consumers receiving these benefits qualify for

Lifeline discounts and also for EBBP benefits.

Participating Non-Federal Agencies

Kentucky Cabinet for Health and Family Services, Division of Family Support.

Authority for Conducting the Matching Program

The authority for the FCC's EBBP is Consolidated Appropriations Act of 2021, Public Law 116–260, 134 Stat. 1182; 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 *et seq.*; Lifeline and Link Up Reform and Modernization, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

In the 2016 Lifeline Modernization Order, the FCC required USAC to develop and operate the National Verifier to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is "to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission." 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that the USAC-operated LED will communicate with information systems and databases operated by other Federal and State agencies. *Id.* at 4011–2, paras. 135–7. The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP.

The purpose of this modified matching agreement is to verify the eligibility of applicants and subscribers to Lifeline (existing purpose), as well as to the new EBBP and to other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement would replace the existing agreement with Kentucky, which permits matching only for the Lifeline program by checking an applicant's/subscriber's participation in SNAP or Medicaid. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching

program include, but are not limited to, those individuals who have applied for Lifeline and/or EBBP benefits; are currently receiving Lifeline and/or EBBP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or EBBP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or EBBP benefits; or are individuals who have received Lifeline and/or EBBP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, date of birth, and first and last name. The National Verifier will transfer these data elements to the Kentucky Cabinet which will respond either "yes" or "no" that the individual is enrolled in a qualifying assistance program: Kentucky Cabinet for Health and Family Services, Division of Family Support, SNAP or Medicaid.

System(s) of Records

The records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB–1, Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021).

The records shared as part of this matching program reside in the EBBP system of records, FCC/WCB–3, Emergency Broadband Benefit Program, which was published in the **Federal Register** at 86 FR 11523 (Feb. 25, 2021).

Federal Communications Commission.

Marlene Dortch,
Secretary.

[FR Doc. 2021–13215 Filed 6–22–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 33520]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended ("Privacy Act"), this document announces the modification of a computer matching program the Federal Communications Commission ("FCC" or "Commission" or "Agency") and the Universal Service Administrative Company (USAC) will conduct with the

New Mexico Human Services Department (Department). The purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline (existing purpose) and the new Emergency Broadband Benefit Program, both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before July 23, 2021. This computer matching program will commence on July 23, 2021, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Margaret Drake, FCC, 45 L Street NE, Washington, DC 20554, or to Privacy@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Margaret Drake at 202–418–1707 or Privacy@fcc.gov.

SUPPLEMENTARY INFORMATION: The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid and the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

The Emergency Broadband Benefit Program (EBBP) was established by Congress in the Consolidated Appropriations Act of 2021, Public Law 116–260, 134 Stat. 1182. EBBP is a program that will help low-income Americans obtain discounted broadband service and one-time co-pay for a connected device (laptop, desktop computer or tablet). This program was created specifically to assist American families' access to broadband, which has proven to be essential for work, school, and healthcare during the public health emergency that exists as a result of COVID–19. A household may qualify for the EBBP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National Lifeline Eligibility Verifier ("National Verifier"), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other

data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive Medicaid or Supplemental Nutrition Assistance Program (SNAP) benefits administered by the New Mexico Human Services Department. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Participating Non-Federal Agencies

New Mexico Human Services Department.

Authority for Conducting the Matching Program

The authority for the FCC's EBBP is Consolidated Appropriations Act of 2021, Public Law 116–260, 134 Stat. 1182; 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 *et seq.*; Lifeline and Link Up Reform and Modernization, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

In the 2016 Lifeline Modernization Order, the FCC required USAC to develop and operate the National Verifier to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is "to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission." 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that the USAC-operated LED will communicate with information systems and databases operated by other Federal and State agencies. *Id.* at 4011–2, paras. 135–7. The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP.

The purpose of this modified matching agreement is to verify the eligibility of applicants and subscribers to Lifeline (existing purpose), as well as to the new EBBP and to other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement would replace the existing agreement with New Mexico, which permits matching only for the Lifeline program by checking an applicant's/subscriber's participation in SNAP or Medicaid. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for Lifeline and/or EBBP benefits; are currently receiving Lifeline and/or EBBP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or EBBP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or EBBP benefits; or are individuals who have received Lifeline and/or EBBP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, date of birth, and last name. The National Verifier will transfer these data elements to the New Mexico Human Services Department which will respond either "yes" or "no" that the individual is enrolled in a qualifying assistance program: New Mexico Human Services Department, SNAP or Medicaid.

System(s) of Records

The records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB–1, Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021).

The records shared as part of this matching program reside in the EBBP system of records, FCC/WCB–3, Emergency Broadband Benefit Program, which was published in the **Federal Register** at 86 FR 11523 (Feb. 25, 2021).

Federal Communications Commission.

Marlene Dortch,
Secretary.

[FR Doc. 2021–13218 Filed 6–22–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Sunshine Act Meeting Held With Less Than Seven Days Advance Notice

TIME AND DATE: 10:02 a.m. on Tuesday, June 15, 2021.

PLACE: The meeting was held via video conference on the internet and was webcast to the public.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the Government in the Sunshine Act, notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors met in open session at 10:02 a.m. on Tuesday, June 15, 2021, to consider the following matters:

Summary Agenda

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Final Policy Statement regarding Minority Depository Institutions.

Memorandum and resolution re: Notice of Proposed Rulemaking on Real Estate Lending Standards.

Report of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda

Briefing: Restoration Plan Semiannual Update.

In calling the meeting, the Board determined, on motion of Director Martin J. Gruenberg, seconded by Director David Uejio (Acting Director, Consumer Financial Protection Bureau), concurred in by Director Michael J. Hsu (Acting Comptroller of the Currency), and Chairman Jelena McWilliams, that Corporation business required its consideration of the matters on less than seven days' notice to the public; and that no earlier notice of the meeting than that previously provided on June 10, 2021, was practicable.

Dated this the 15th day of June, 2021.
Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021-13446 Filed 6-21-21; 4:15 pm]

BILLING CODE 6714-01-P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Thursday, June 24, 2021 at 10:00 a.m.

PLACE: Virtual meeting. Note: Because of the Covid-19 pandemic, we will

conduct the open meeting virtually. If you would like to access the meeting, see the instructions below.

STATUS: This meeting will be open to the public. To access the virtual meeting, go to the commission's website www.fec.gov and click on the banner to be taken to the meeting page.

MATTERS TO BE CONSIDERED:

Draft Advisory Opinion 2021-06:

Representative Robin Kelly and the Democratic Party of Illinois
Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission

Proposed Statement of Policy Regarding the Disclosure of Vote Certifications Relating to Litigation Management and Administrative Matters

CONTACT PERSON FOR MORE INFORMATION:
Judith Ingram, Press Officer, Telephone: (202) 694-1220.

Authority: Government in the Sunshine Act, 5 U.S.C. 552b.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2021-13234 Filed 6-21-21; 11:15 am]

BILLING CODE 6715-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of

the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551-0001, not later than July 7, 2021.

A. Federal Reserve Bank of Minneapolis (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. *The Family Trust created under the Last Will and Testament of John R. Beyers dated August 17, 2017, and The RCB Marital Trust created under the Last Will and Testament of John R. Beyers dated August 17, 2017, Patty Beyers as trustee of both trusts, all of Roscoe, South Dakota;* to retain voting shares of Roscoe Community Bankshares, Inc., and thereby indirectly retain voting shares of the First State Bank of Roscoe, both of Roscoe, South Dakota.

Board of Governors of the Federal Reserve System, June 17, 2021.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021-13195 Filed 6-22-21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the renewal of the information collection project "Nursing Home Survey on Patient Safety Culture Database."

DATES: Comments on this notice must be received by August 23, 2021.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at doris.lefkowitz@AHRQ.hhs.gov.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT:

Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427-1477, or by email at doris.lefkowitz@AHRQ.hhs.gov.

SUPPLEMENTARY INFORMATION:**Proposed Project****Nursing Home Survey on Patient Safety Culture Database**

In 1999, the Institute of Medicine called for health care organizations to develop a “culture of safety” such that their workforce and processes focus on improving the reliability and safety of care for patients (IOM, 1999; *To Err is Human: Building a Safer Health System*). To respond to the need for tools to assess patient safety culture in health care, AHRQ developed and pilot tested the Nursing Home Survey on Patient Safety Culture with OMB approval (OMB NO. 0935–0132; Approved July 5, 2007).

The survey is designed to enable nursing homes to assess provider and staff perspectives about patient safety issues, medical error, and error reporting and includes 42 items that measure 12 composites of patient safety culture. AHRQ made the survey publicly available along with a Survey User’s Guide and other toolkit materials in November 2008 on the AHRQ website.

The AHRQ Nursing Home SOPS Database consists of data from the AHRQ Nursing Home Survey on Patient Safety Culture. Nursing homes in the U.S. can voluntarily submit data from the survey to AHRQ through its contractor, Westat. The Nursing Home SOPS Database (OMB NO. 0935–0195, last approved on November 5, 2018) was developed by AHRQ in 2011 in response to requests from nursing homes interested in viewing their organizations’ patient safety culture survey results. Those organizations submitting data receive a feedback report, as well as a report on the aggregated de-identified findings of the other nursing homes submitting data. These reports are used to assist nursing home staff in their efforts to improve patient safety culture in their organizations.

Rationale for the information collection. The Nursing Home SOPS and Nursing Home SOPS Database support AHRQ’s goals of promoting improvements in the quality and safety

of health care in nursing home settings. The survey, toolkit materials, and database results are all made publicly available on AHRQ’s website. Technical assistance is provided by AHRQ through its contractor at no charge to nursing homes, to facilitate the use of these materials for nursing home patient safety and quality improvement.

This database:

- (1) Presents results from nursing homes that voluntarily submit their data,
- (2) Provides data to nursing homes to facilitate internal assessment and learning in the patient safety improvement process, and
- (3) Provides supplemental information to help nursing homes identify their strengths and areas with potential for improvement in patient safety culture.

This study is being conducted by AHRQ through its contractor, Westat, pursuant to AHRQ’s statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to surveys and database development. 42 U.S.C 299a(a)(1) and (8).

Method of Collection

To achieve the goal of this project the following activities and data collections will be implemented:

(1) *Eligibility and Registration Form*—The nursing home (or parent organization) point-of-contact (POC) completes a number of data submission steps and forms, beginning with the completion of an online Eligibility and Registration Form. The purpose of this form is to collect basic demographic information about the nursing home and initiate the registration process.

(2) *Data Use Agreement*—The purpose of the data use agreement, completed by the nursing home POC, is to state how data submitted by nursing homes will be used and provides privacy assurances.

(3) *Nursing Home Site Information Form*—The purpose of the site information form, completed by the

nursing home POC, is to collect background characteristics of the nursing home. This information will be used to analyze data collected with the Nursing Home SOPS survey.

(4) *Data File(s) Submission*—POCs upload their data file(s) using the data file specifications, to ensure that users submit standardized and consistent data in the way variables are named, coded and formatted. The number of submissions to the database is likely to vary each year because nursing homes do not administer the survey and submit data every year. Data submission is typically handled by one POC who is either a corporate level health care manager for a Quality Improvement Organization (QIO), a survey vendor who contracts with a nursing home to collect their data, or a nursing home Director of Nursing or nurse manager. POCs submit data on behalf of 3 nursing homes, on average, because many nursing homes are part of a QIO or larger nursing home or health system that includes many nursing home sites, or the POC is a vendor that is submitting data for multiple nursing homes.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents’ time to participate in the database. An estimated 40 POCs, each representing an average of 3 individual nursing homes each, will complete the database submission steps and forms. Each POC will submit the following:

- Eligibility and registration form (completion is estimated to take about 3 minutes).
- Data Use Agreement (completion is estimated to take about 3 minutes).
- Nursing Home Site Information Form (completion is estimated to take about 5 minutes).
- Survey data submission will take an average of one hour.

The total annual burden hours are estimated to be 54 hours.

Exhibit 2 shows the estimated annualized cost burden based on the respondents’ time to submit their data. The cost burden is estimated to be \$2,509 annually.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents/ POCs	Number of responses per POC	Hours per response	Total burden hours
Eligibility/Registration Form	40	1	3/60	2
Data Use Agreement	40	1	3/60	2
Nursing Home Site Information Form	40	3	5/60	10
Data Files Submission	40	1	1	40

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Number of respondents/ POCs	Number of responses per POC	Hours per response	Total burden hours
Total	NA	NA	NA	54

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents/ POCs	Total burden hours	Average hourly wage rate *	Total cost burden
Eligibility/Registration Forms	40	2	\$46.45	\$93
Data Use Agreement	40	2	46.45	93
Nursing Home Site Information Form	40	10	46.45	465
Data Files Submission	40	40	46.45	1,858
Total	NA	54	NA	2,509

* The wage rate in Exhibit 2 is based on May 2019 National Industry-Specific Occupational Employment and Wage Estimates, Bureau of Labor Statistics, U.S. Dept. of Labor. Mean hourly wages for nursing home POCs are located at https://www.bls.gov/oes/current/naics3_623000.htm. The hourly wage of \$46.45 is the weighted mean of \$47.32 (General and Operations Managers 11–1021; N=26) and \$44.82 (Medical and Health Services Managers 11–9111; N=14).

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: June 16, 2021.

Marquita Cullom,
Associate Director.

[FR Doc. 2021–13126 Filed 6–22–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND
HUMAN SERVICESCenters for Disease Control and
Prevention

[Docket No. CDC–2021–0034]

Advisory Committee on Immunization
Practices (ACIP); Amended Notice of
Meeting

Notice is hereby given of a change in the meeting of the Advisory Committee on Immunization Practices (ACIP); June 23, 2021 and June 24, 2021, 9:00 a.m.–5:30 p.m., EDT (times subject to change), in the original FRN.

The virtual meeting was published in the **Federal Register** on Monday, April 5, 2021, Volume 86, Number 63, page 17606.

The virtual meeting is being amended to add an additional date, June 25, 2021 and time, update meeting times and supplemental information and should read as follows:

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment. The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: <http://www.cdc.gov/vaccines/acip/index.html>.

DATES: The meeting will be held on June 23, 2021, from 10:00 a.m. to 5:00 p.m., EDT (times subject to change); June 24, 2021, from 10:30 a.m. to 5:10 p.m., EDT (times subject to change); and June 25,

2021, from 10:00 a.m. to 12:20 p.m., EDT (times subject to change). Written comments must be received on or before June 25, 2021.

A notice of this ACIP meeting has also been posted on CDC's ACIP website at: <http://www.cdc.gov/vaccines/acip/index.html>. In addition, CDC has sent notice of this ACIP meeting by email to those who subscribe to receive email updates about ACIP.

FOR FURTHER INFORMATION CONTACT: Stephanie Thomas, ACIP Committee Management Specialist, Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases, 1600 Clifton Road NE, MS–H24–8, Atlanta, GA 30329–4027; Telephone: 404–639–8367; Email: ACIP@cdc.gov.

SUPPLEMENTARY INFORMATION:

Purpose: The committee is charged with advising the Director, CDC, on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under provisions of the Affordable Care Act, section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been approved by the Director of the Centers for Disease Control and Prevention and appear on CDC immunization schedules must be covered by applicable health plans.

Matters to be Considered: The agenda will include discussions on cholera

vaccine, dengue vaccine, ebola vaccine, hepatitis vaccines, herpes zoster vaccines, influenza vaccines, orthopoxvirus vaccine, pneumococcal vaccine, rabies vaccine and tickborne encephalitis vaccine. Recommendation votes on dengue vaccine, ebola vaccine, influenza vaccines and rabies vaccine are scheduled. Vaccines for Children (VFC) votes on dengue vaccine and influenza vaccines are scheduled. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda visit <https://www.cdc.gov/vaccines/acip/meetings/meetings-info.html>.

Meeting Information: The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: <http://www.cdc.gov/vaccines/acip/index.html>.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the June 23–25, 2021, ACIP meeting must submit a request at <http://www.cdc.gov/vaccines/acip/meetings/> no later than 11:59 p.m.,

EDT, June 18, 2021, according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by June 21, 2021. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to 3 minutes, and each speaker may only speak once per meeting.

Written Public Comment: The docket will be opened to receive written comments on June 1, 2021. Written comments must be received on or before June 25, 2021.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–13120 Filed 6–22–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE21–006: Rigorously Evaluating Programs and Policies To Prevent Child Sexual Abuse (CSA); Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE21–006: Rigorously Evaluating Programs and Policies To Prevent Child Sexual Abuse (CSA); July 13–14, 2021, 8:30 a.m.–5:00 p.m., EDT.

The videoconference meeting was published in the **Federal Register** on March 29, 2021, Volume 86, Number 58, page 16369.

The meeting is being amended to update the contact person and should read as follows:

FOR FURTHER INFORMATION CONTACT:

Aisha Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341, Telephone: (404) 639–6473; Email: awilkes@cdc.gov.

The meeting is closed to the public.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–13121 Filed 6–22–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Injury Prevention and Control, (BSC, NCIPC)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, National Center for Injury Prevention and Control (BSC, NCIPC). This meeting is partially open to the public. There will be 15 minutes allotted for public comments at the end of the open session from 11:40 a.m., to 11:55 p.m., EDT.

DATES: The meeting will be held on July 29, 2021, from 10:00 a.m. to 12:00 p.m., EDT (OPEN); and from 12:30 p.m., to 4:15 p.m., EDT (CLOSED).

ADDRESSES: *Open Session:* Webinar, Atlanta, Georgia. All participants must register using the link provided to attend the open meeting: https://dceproductions.zoom.us/webinar/register/wn_cz3nu0zfsg29fiojefau8q.

Closed Session: Teleconference.

FOR FURTHER INFORMATION CONTACT:

Gwendolyn H. Cattledge, Ph.D., M.S.E.H., Deputy Associate Director for Science, NCIPC, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta,

GA 30341, Telephone: (770) 488-3953; Email: NCIPCBSC@cdc.gov.

SUPPLEMENTARY INFORMATION: Portions of the meeting as designated above will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92-463 (5 U.S.C. App.).

Purpose: The Board will: (1) Conduct, encourage, cooperate with, and assist other appropriate public health authorities, scientific institutions, and scientists in the conduct of research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases, and other impairments; (2) assist States and their political subdivisions in preventing and suppressing communicable and non-communicable diseases and other preventable conditions and in promoting health and well-being; and (3) conduct and assist in research and control activities related to injury. The BSC, NCIPC makes recommendations regarding policies, strategies, objectives, and priorities; reviews progress toward injury prevention goals; and provides evidence in injury prevention-related research and programs. The Board also provides advice on the appropriate balance of intramural and extramural research, and the structure, progress, and performance of intramural programs. The Board is designed to provide guidance on extramural scientific program matters, including the: (1) Review of extramural research concepts for funding opportunity announcements; (2) conduct of Secondary Peer Review of extramural research grants, cooperative agreements, and contracts applications received in response to funding opportunity announcements as they relate to the Center's programmatic balance and mission; (3) submission of secondary review recommendations to the Center Director of applications to be considered for funding support; (4) review of research portfolios, and (5) review of program proposals.

Matters To Be Considered: The open portion of the agenda will include discussion on NCIPC Research Priorities for Addressing Adverse Childhood Experiences. The closed portion of the agenda will focus on the Secondary Peer Review of extramural research grant applications received in response to three Notice of Funding Opportunities (NOFOs): (1) RFA-CE-21-001—

“Rigorous Evaluation of Policies for their Impacts on the Primary Prevention of Multiple Forms of Violence”; (2) RFA-CE-21-003—“Grants to Support New Investigators in Conducting Research Related to Preventing Interpersonal Violence Impacting Children and Youth”; and (3) RFA-CE-21-004—“Research Grants for Preventing Violence and Violence-Related Injury (R01)”; as well as PHS 2020 Omnibus Solicitation of the NIH, CDC and FDA for Small Business Innovation Research Grant Applications (Parent SBIR [R43/R44] Clinical Trial Not Allowed). Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021-13119 Filed 6-22-21; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-10137 and CMS-10174]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human 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 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 August 23, 2021.

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' website address at website address at <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html>.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786-4669.

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-10137 Solicitation for Applications for Medicare Prescription Drug Plan 2023 Contracts
CMS-10174 Collection of Prescription Drug Data from MA-PD, PDP and Fallout Plans/Sponsors for Medicare Part D Payments

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: Revision of a currently approved collection; *Title of Information Collection:* Solicitation for Applications for Medicare Prescription Drug Plan 2023 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA-PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423 entitled "*Application Procedures and Contracts with PDP Sponsors*."

The information will be collected under the solicitation of proposals from PDP, MA-PD, Cost Plan, Program of All Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) Ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS-10137

(OMB control number: 0938-0936); *Frequency:* Yearly; *Affected Public:* Businesses or other for-profits, Not-for-profit institutions; *Number of Respondents:* 716; *Total Annual Responses:* 382; *Total Annual Hours:* 1,716. (For policy questions regarding this collection contact Arianne Spaccarelli at 410-786-5715.)

2. Type of Information Collection
Request: Extension of a currently approved collection; *Title of Information Collection:* Collection of Prescription Drug Event Data From Contracted Part D Providers for Payment; *Use:* The PDE data is used in the Payment Reconciliation System to perform the annual Part D payment reconciliation, any PDE data within the Coverage Gap Phase of the Part D benefit is used for invoicing in the CGDP, and the data are part of the report provided to the Secretary of the Treasury for Section 9008.

CMS has used PDE data to create summarized dashboards and tools, including the Medicare Part D Drug Spending Dashboard & Data, the Part D Manufacturer Rebate Summary Report, and the Medicare Part D Opioid Prescribing Mapping Tool. The data are also used in the Medicare Trustees Report. Due to the market sensitive nature of PDE data, external uses of the data are subject to significant limitations. However, CMS does analyze the data on a regular basis to determine drug cost and utilization patterns in order to inform programmatic patterns and to develop informed policy in the Part D program.

The information users will be Pharmacy Benefit Managers (PBMs), third party administrators and pharmacies, and the PDPs, MA-PDs, Fallbacks and other plans that offer coverage of outpatient prescription drugs under the Medicare Part D benefit to Medicare beneficiaries. The statutorily required data is used primarily for payment and is used for claim validation as well as for other legislated functions such as quality monitoring, program integrity and oversight. *Form Number:* CMS-10174 (OMB control number: 0938-0982); *Frequency:* Yearly; *Affected Public:* Businesses or other for-profits, Not-for-profit institutions; *Number of Respondents:* 739; *Total Annual Responses:* 1,499,238,090; *Total Annual Hours:* 2,998. (For policy questions regarding this collection contact Ivan Iveljic at 410-786-3312.)

Dated: June 17, 2021.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2021-13194 Filed 6-22-21; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2020-E-1642]

Determination of Regulatory Review Period for Purposes of Patent Extension; GIVLAARI

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for GIVLAARI 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 drug 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 August 23, 2021. 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 December 20, 2021. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before August 23, 2021. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of August 23, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

• **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2020-E-1642 for "Determination of Regulatory Review Period for Purposes of Patent Extension; GIVLAARI." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

• **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The

Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-420-7500.

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 drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes

effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug 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 drug 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 drug product GIVLAARI (givosiran). GIVLAARI is indicated for the treatment of adults with acute hepatic porphyria. Subsequent to this approval, the USPTO received a patent term restoration application for GIVLAARI (U.S. Patent No. 9,133,461) from Alnylam Pharmaceuticals, Inc., and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated August 20, 2020, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of GIVLAARI 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 GIVLAARI is 1,533 days. Of this time, 1,363 days occurred during the testing phase of the regulatory review period, while 170 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 (FD&C Act) (21 U.S.C. 355(i)) became effective:* September 11, 2015. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on September 11, 2015.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* June 4, 2019. The applicant claims November 15, 2018, as the date the new drug application (NDA) for GIVLAARI (NDA 212194) was initially submitted. However, FDA records indicate that NDA 212194 was submitted on June 4, 2019.

3. *The date the application was approved:* November 20, 2019. FDA has verified the applicant's claim that NDA 212194 was approved on November 20, 2019.

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 190 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, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), 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 comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (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 Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: June 16, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–13176 Filed 6–22–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1729]

Authorization and Revocation of Emergency Use of Drugs During the COVID–19 Pandemic; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of an Emergency Use Authorization (EUA) (the Authorization) for a drug for use during the COVID–19 pandemic. FDA issued the Authorization under the Federal Food, Drug, and Cosmetic Act (FD&C Act), as requested by B. Braun Melsungen AG. The Authorization contains, among other things, conditions on the emergency use of the authorized drug. The Authorization follows the February 4, 2020, determination by the Secretary of HHS that there is a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves a novel (new) coronavirus. The virus is now named SARS–CoV–2, which causes the illness COVID–19. On the basis of such determination, the Secretary of HHS declared on March 27, 2020, that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID–19 pandemic, pursuant to the FD&C Act, subject to the terms of any authorization issued under that section. FDA is also announcing the revocation of the Authorization issued to Eli Lilly and Company for bamlanivimab alone. FDA revoked this authorization on April 16, 2021. Reprinted in this document is the issuance of the Authorization and the revocation, which include an explanation of the reasons for issuance or revocation.

DATES: The Authorization for B. Braun Melsungen AG was effective as of March 12, 2021 and the revocation for Eli Lilly and Company was effective as of April 16, 2021.

ADDRESSES: Submit written requests for single copies of the Authorization and/or revocation to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the Authorizations may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorizations.

FOR FURTHER INFORMATION CONTACT:

Michael Mair, Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4332, Silver Spring, MD 20993–0002, 301–796–8510 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations.

II. Criteria for EUA Authorization

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States (U.S.) military forces, including personnel operating under the authority of title 10 or title 50, United States Code, of attack with (i) a biological, chemical, radiological, or nuclear agent or agents; or (ii) an agent or agents that may cause, or are otherwise associated with, an imminently life-threatening and specific risk to U.S. military forces;¹ (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of Homeland Security pursuant to section 319F–2 of the Public Health Service (PHS) Act (42 U.S.C. 247d–6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under

¹ In the case of a determination by the Secretary of Defense, the Secretary of HHS shall determine within 45 calendar days of such determination, whether to make a declaration under section 564(b)(1) of the FD&C Act, and, if appropriate, shall promptly make such a declaration.

section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), 512 or 515 of the FD&C Act (21 U.S.C. 355, 360(k), 360b and 360e) or section 351 of the PHS Act (42 U.S.C. 262), or conditionally approved under section 571 of the FD&C Act (21 U.S.C. 360ccc). FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA ² concludes: (1) That an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) The product may be effective in diagnosing, treating, or preventing (i) such disease or condition; or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section 564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to

the product for diagnosing, preventing, or treating such disease or condition; (4) in the case of a determination described in section 564(b)(1)(B)(ii), that the request for emergency use is made by the Secretary of Defense; and (5) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under section 564(c)(4) of the FD&C Act.

III. The Authorization

The Authorization follows the February 4, 2020, determination by the Secretary of HHS that there is a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves a novel (new) coronavirus. The virus is now named SARS-CoV-2, which causes the illness COVID-19. Notice of the Secretary's determination was provided in the **Federal Register** on February 7, 2020 (85 FR 7316). On the basis of such determination, the Secretary of HHS declared on March 27, 2020, that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section. Notice of the Secretary's declaration was provided in the **Federal Register** on April 1, 2020 (85 FR 18250). Having concluded that the criteria for issuance of the Authorizations under section 564(c) of the FD&C Act are met, FDA has authorized the emergency use of a drug during the COVID-19 pandemic. On March 12, 2021, FDA issued an EUA to B. Braun Melsungen AG for Propofol-Lipuro 1% injectable emulsion, subject to the terms of the Authorization. The Authorization in its entirety (not including the authorized version of the fact sheets and other written materials) follows, below in section VI Electronic Access, and provides an explanation of the reasons for issuance, as required by section 564(h)(1) of the FD&C Act.

IV. EUA Criteria for Issuance No Longer Met

On November 9, 2020, FDA issued an Authorization to Eli Lilly and Company for bamlanivimab alone and reissued the Authorization on February 9, 2021 and March 2, 2021. Notice of the issuance of the Authorization was published in the **Federal Register** on February 19, 2021 (86 FR 10290), as required by section 564(h)(1) of the FD&C Act. FDA authorized bamlanivimab alone for emergency use for the treatment of mild to moderate

COVID-19 in adults and pediatric patients (12 years of age and older weighing at least 40 kg) with positive results of direct SARS-CoV-2 viral testing, and who are at high risk for progressing to severe Coronavirus Disease 2019 (COVID-19) and/or hospitalization. Subsequent to the issuance of the Authorization, as described in the revocation letter reprinted in this notice, FDA considered new data and new information that became available. Under section 564(g)(2) of the FD&C Act, the Secretary of HHS may revoke an EUA if, among other things, the criteria for issuance are no longer met. On April 16, 2021, FDA revoked the EUA for Eli Lilly and Company for bamlanivimab alone because the criteria for issuance were no longer met. Based on a review of the new data and new information, FDA concluded it is no longer reasonable to believe that the known and potential benefits of bamlanivimab alone outweigh the known and potential risks for the product. A summary of these new data and new information includes the following:

- Vesicular stomatitis virus-based pseudovirus expressing spike protein with variant substitutions, specifically E484K and L452R, exhibit large reductions (>1,000 fold) in susceptibility to bamlanivimab alone in neutralization assays.
- The Centers for Disease Control and Prevention (CDC) national genomic surveillance program has reported an increasing frequency of SARS-CoV-2 variants that are expected to be resistant to bamlanivimab alone.
- Testing technologies that enable health care providers to test individual patients for SARS-CoV-2 viral variants prior to initiation of treatment with monoclonal antibodies are not available and frequencies are changing rapidly. Therefore, empiric treatment with monoclonal antibody therapies that are expected to retain activity broadly across the U.S. is needed to reduce the likelihood of treatment failure.
- On April 8, 2021, the National Institutes of Health updated its treatment guidelines for COVID-19 recommending against the use of bamlanivimab alone.

Accordingly, FDA revoked the EUA for emergency use of bamlanivimab alone to treat COVID-19, pursuant to section 564(g)(2) of the FD&C Act.

V. The Revocation

Having concluded that the criteria for revocation of the Authorization under section 564(g) of the FD&C Act are met, FDA has revoked the EUA for Eli Lilly and Company for bamlanivimab alone.

² The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

The revocation in its entirety follows, below in section VI Electronic Access, and provides an explanation of the reasons for revocation, as required by section 564(h)(1) of the FD&C Act.

VI. Electronic Access

An electronic version of this document and the full text of the Authorization and revocation are available on the internet from [https://](https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization)

www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization.

BILLING CODE 4164-01-P



FDA U.S. FOOD & DRUG
ADMINISTRATION

March 12, 2021

B. Braun Melsungen AG
Attention: Rebecca Stolarick
Registered Agent
901 Marcon Boulevard
Allentown, PA 18109

RE: Emergency Use Authorization 096

Dear Ms. Stolarick:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Propofol-Lipuro 1% injectable emulsion for infusion to maintain sedation via continuous infusion in patients greater than 16 years old who require mechanical ventilation in an Intensive Care Unit (ICU) setting during the 2019 coronavirus disease (COVID-19) pandemic, as described in the Scope of Authorization (Section II) of this letter, pursuant to Section 564 of the Federal Food, Drug and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3).

On February 4, 2020, pursuant to Section 564(b)(1)(C) of the Act, the Secretary of the Department of Health and Human Services (HHS) determined that there is a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad, and that involves the virus that causes COVID-19.¹ On the basis of such determination, the Secretary of HHS on March 27, 2020, declared that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to Section 564 of the Act, subject to terms of any authorization issued under that section.²

Propofol-Lipuro 1% injectable emulsion for infusion is an intravenous (IV) sedative hypnotic drug that can be utilized to maintain sedation via continuous infusion in patients greater than 16 years old with suspected or confirmed COVID-19 who require mechanical ventilation in an ICU setting.

The Agency has noted that Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), the virus that causes COVID-19, has led to an increased population with critical illness,

¹ U.S. Department of Health and Human Services, *Determination of a Public Health Emergency and Declaration that Circumstances Exist Justifying Authorizations Pursuant to Section 564(b) of the Federal Food, Drug, and Cosmetic Act*, 21 U.S.C. § 360bbb-3, February 4, 2020.

² U.S. Department of Health and Human Services, *Declaration that Circumstances Exist Justifying Authorizations Pursuant to Section 564(b) of the Federal Food, Drug, and Cosmetic Act*, 21 U.S.C. § 360bbb-3, 85 FR 18250 (April 1, 2020).

Page 2 – B. Braun Melsungen

necessitating sedation drug products for mechanically ventilated patients. As a result, there is an insufficient supply of the FDA-approved propofol available for use in mechanically ventilated critically ill patients.³ Based on the totality of scientific evidence available, FDA has concluded that it is reasonable to believe that the Propofol-Lipuro 1% injectable emulsion for infusion may be effective to maintain sedation via continuous infusion in patients greater than 16 years old with suspected or confirmed COVID-19 who require mechanical ventilation in an ICU setting.

Having concluded that the criteria for issuance of this authorization under Section 564(c) of the Act are met, I am authorizing the emergency use of your Propofol-Lipuro 1% injectable emulsion for infusion, as described in the Scope of Authorization (Section II) of this letter, subject to the terms of this authorization.

I. Criteria for Issuance of Authorization

I have concluded that the emergency use of Propofol-Lipuro 1% injectable emulsion for infusion, as described in the Scope of Authorization (Section II) of this letter, meets the criteria for issuance of an authorization under Section 564(c) of the Act, because I have concluded that:

1. SARS-CoV-2 can cause a serious or life-threatening disease or condition, including severe respiratory illness requiring mechanical ventilation, to humans infected by this virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that Propofol-Lipuro 1% injectable emulsion for infusion may be effective to maintain sedation via continuous infusion in patients greater than 16 years old with suspected or confirmed COVID-19⁴ who require mechanical ventilation in an ICU setting, and that, when administered as described in the Scope of Authorization (Section II) and used under the conditions described in this authorization, the known and potential benefits of Propofol-Lipuro 1% injectable emulsion for infusion outweigh the known and potential risks of such product; and
3. There is no adequate, approved, and available alternative to the emergency use of Propofol-Lipuro 1% injectable emulsion for infusion due to insufficient supplies of FDA-approved alternatives to fully meet the emergency need during the COVID-19 pandemic.⁵

³ FDA also assessed the supply of FDA-approved alternatives, which includes dexmedetomidine and midazolam. At the time of this authorization, FDA has determined that there is insufficient supply of the FDA-approved alternatives to fully meet the emergency need for Propofol-Lipuro 1% injectable emulsion for infusion in 100 mL vials.

⁴ In the circumstances of this public health emergency, it would not be feasible to require healthcare providers to seek to limit Propofol-Lipuro 1% injectable emulsion for infusion only to be used for patients with suspected or confirmed COVID-19; therefore, this authorization does not limit use to such patients.

⁵ No other criteria of issuance have been prescribed by regulation under Section 564(c)(4) of the Act.

II. Scope of Authorization

I have concluded, pursuant to Section 564(d)(1) of the Act, that the scope of this authorization is limited as follows:

- Propofol-Lipuro 1% injectable emulsion for infusion will be used only to maintain sedation via continuous infusion in patients greater than 16 years old who require mechanical ventilation.⁶
- Propofol-Lipuro 1% injectable emulsion for infusion will be administered only by a licensed healthcare provider in an ICU setting.
- Propofol-Lipuro 1% injectable emulsion for infusion will not be administered to pregnant women, unless there are no FDA-approved products available to maintain sedation for these patients should they require mechanical ventilation in an ICU setting.
- Propofol-Lipuro 1% injectable emulsion for infusion will be used only in accordance with the dosing regimens as detailed in the authorized Facts Sheets.

Product Description

Propofol-Lipuro 1% injectable emulsion for infusion is classified as a sedative hypnotic drug. The authorized product is an injectable emulsion in 100 mL vials containing 10 mg/mL of propofol for continuous IV administration to maintain sedation in patients greater than 16 years old who require mechanical ventilation in an ICU setting.

Propofol-Lipuro 1% injectable emulsion for infusion is authorized for emergency use as described in the Scope of Authorization (Section II) with the following product-specific information to be made available to healthcare providers and patients, parents and caregivers, respectively, through B. Braun Melsungen's website at:

<https://www.bbraunusa.com/en/company/newsroom/covid19.html#>.

- Fact Sheet for Health Care Providers: Emergency Use Authorization (EUA) of Propofol-Lipuro 1% injectable emulsion for infusion
- Fact Sheet for Patients, Parents, and Caregivers: Emergency Use Authorization (EUA) of Propofol-Lipuro 1% injectable emulsion for infusion

I have concluded, pursuant to Section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of Propofol-Lipuro 1% injectable emulsion for infusion, when used in accordance with this Scope of Authorization (Section II), outweigh its known and potential risks.

I have concluded, pursuant to Section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that Propofol-Lipuro 1% injectable

⁶ See footnote 4.

Page 4 — B. Braun Melsungen

emulsion for infusion may be effective when used in accordance with this Scope of Authorization (Section II), pursuant to Section 564(c)(2)(A) of the Act.

Having reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, I have concluded that Propofol-Lipuro 1% injectable emulsion for infusion (as described in this Scope of Authorization (Section II)) meets the criteria set forth in Section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of your product under an EUA must be consistent with, and may not exceed, the terms of the Authorization, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of an EUA and under the circumstances set forth in the Secretary of HHS's determination under Section 564(b)(1)(C) described above and the Secretary of HHS's corresponding declaration under Section 564(b)(1), Propofol-Lipuro 1% injectable emulsion for infusion is authorized to maintain sedation via continuous infusion in patients greater than 16 years old with suspected or confirmed COVID-19 who require mechanical ventilation in an ICU setting as described in the Scope of Authorization (Section II) under this EUA, despite the fact that it does not meet certain requirements otherwise required by applicable federal law.

III. Conditions of Authorization

Pursuant to Section 564 of the Act, I am establishing the following conditions on this authorization:

B. Braun Melsungen and Authorized Distributors⁷

- A. B. Braun Melsungen and authorized distributor(s) will ensure that the authorized Propofol-Lipuro 1% injectable emulsion is distributed and the authorized labeling (i.e., Fact Sheets) will be made available to healthcare facilities and healthcare providers consistent with the terms of this letter.
- B. B. Braun Melsungen and authorized distributor(s) will ensure appropriate storage is maintained until the product is delivered to healthcare facilities and/or healthcare providers.
- C. B. Braun Melsungen authorized distributor(s) will ensure that the terms of this EUA are made available to all relevant stakeholders (e.g., U.S. government agencies, state and local government authorities, authorized distributors, healthcare facilities, healthcare providers) involved in distributing or receiving authorized Propofol-Lipuro 1% injectable emulsion for infusion. B. Braun Melsungen will provide to all relevant stakeholders a copy of this letter of authorization and communicate any subsequent amendments that might be made to this letter of authorization and its authorized accompanying materials (i.e., Fact Sheets).

⁷ "Authorized Distributor(s)" are identified by the sponsor in EUA requests as an entity allowed to distribute the product.

- D. B. Braun Melsungen may request changes to this authorization, including to the authorized Fact Sheets for Propofol-Lipuro 1% injectable emulsion for infusion. Any request for changes to this EUA must be submitted to the Division of Anesthesiology, Addiction Medicine, and Pain Medicine (DAAP)/Office of Neuroscience/Office of New Drugs/Center for Drug Evaluation and Research (CDER). Such changes require appropriate authorization from FDA prior to implementation.⁸
- E. B. Braun Melsungen may develop and disseminate instructional and educational materials (e.g., materials providing information on product administration and/or patient monitoring) that are consistent with the authorized emergency use of Propofol-Lipuro 1% injectable emulsion for infusion as described in this letter of authorization and authorized labeling, without FDA's review and concurrence, when necessary to meet public health needs. Any instructional and educational materials that are inconsistent with the authorized labeling of Propofol-Lipuro 1% injectable emulsion for infusion are prohibited. Should the Agency become aware of any instructional or educational materials that are inconsistent with the authorized labeling of Propofol-Lipuro injectable emulsion for infusion, the Agency will require B. Melsungen to cease distribution of such instructional or educational materials.
- F. B. Braun Melsungen will report to FDA serious adverse events and all medication errors associated with the use of the Propofol-Lipuro 1% injectable emulsion for infusion that are reported to B. Braun Melsungen using either of the following options.

Option 1: Submit reports through the Safety Reporting Portal (SRP) as described on the [FDA SRP web page](#).

Option 2: Submit reports directly through the Electronic Submissions Gateway (ESG) as described on the [FAERS electronic submissions web page](#).

Submitted reports under both options should state: "Propofol-Lipuro 1% use for COVID-19 under Emergency Use Authorization (EUA)". For reports submitted under Option 1, include this language at the beginning of the question "Describe Event" for further analysis. For reports submitted under Option 2, include this language at the beginning of the "Case Narrative" field.

⁸ The following types of revisions may be authorized without reissuing this letter: (1) changes to the authorized labeling; (2) non-substantive editorial corrections to this letter; (3) new types of authorized labeling, including new fact sheets; (4) new carton/container labels; (5) expiration dating extensions; (6) changes to manufacturing processes, including tests or other authorized components of manufacturing; (7) new conditions of authorization to require data collection or study; (8) new strengths of the authorized product, new product sources (e.g., of active pharmaceutical ingredient) or of product components. All changes to the authorization require review and concurrence from DAAP/CDER. For changes to the authorization, including the authorized labeling, of the type listed in (3), (6), (7), or (8), review and concurrence also is required from the Counter-Terrorism and Emergency Coordination Staff/Office of the Center Director/CDER and the Office of Counterterrorism and Emerging Threats/Office of the Chief Scientist.

Page 6 — B. Braun Melsungen

- G. All manufacturing, packaging, and testing sites for both drug substance and drug product will comply with current good manufacturing practice requirements of Section 501(a)(2)(B) of the Act.
- H. B. Braun Melsungen will submit information to the Agency within three working days of receipt concerning significant quality problems with distributed drug product of Propofol-Lipuro 1%, that includes the following: (i) Information concerning any incident that causes the drug product or its labeling to be mistaken for, or applied to, another article; or (ii) Information concerning any microbiological contamination, or any significant chemical, physical, or other change or deterioration in the distributed drug product, or any failure of one or more distributed batches of the drug product to meet established specifications. If a quality problem affects unreleased product and may also implicate product(s) previously released and distributed, then the quality alert should be submitted for all impacted lots. B. Braun Melsungen will include in its notification to the Agency whether the batch, or batches, in question will be recalled. If FDA requests that these, or any other batches, at any time, be recalled, B. Braun Melsungen must recall them.
- I. Braun Melsungen will manufacture Propofol-Lipuro 1% injectable emulsion for infusion to meet all quality standards, and per the manufacturing process and control strategy as detailed in B. Braun Melsungen's EUA request. B. Braun Melsungen will not implement any changes to the description of the product, manufacturing process, facilities and equipment, and elements of the associated control strategy that assure process performance and quality of the authorized product, without prior notification to and concurrence by the Agency as described in condition D.
- J. B. Braun Melsungen will list Propofol-Lipuro 1% injectable emulsion for infusion with a unique product NDC under the marketing category of Unapproved Drug- Other. Further, the listing will include each establishment where manufacturing is performed for the drug and the type of operation performed at each such establishment.
- K. Through a process of inventory control, B. Braun Melsungen and authorized distributor(s) will maintain records distribution of the authorized product (i.e., lot numbers, quantity, receiving site, receipt date).
- L. B. Braun Melsungen and authorized distributor(s) will make available to FDA upon request any records maintained in connection with this EUA.

Hospitals and Other Healthcare Facilities to Whom The Authorized Product Is Distributed and Healthcare Providers Administering the Authorized Product

- M. Healthcare facilities and healthcare providers will ensure that they are aware of the letter of authorization, and the terms herein, and that the authorized Fact Sheets are made available to healthcare providers and to patients and caregivers, respectively, through appropriate means, prior to administration of Propofol-Lipuro 1% injectable emulsion for infusion as described in the Scope of Authorization (Section II) under this EUA.

- N. Healthcare facilities and healthcare providers receiving Propofol-Lipuro 1% injectable emulsion for infusion will track serious adverse events that are considered to be potentially attributable to the use of Propofol-Lipuro 1% injectable emulsion for infusion under this authorization and must report these to FDA in accordance with the Fact Sheet for Healthcare Providers. Complete and submit a MedWatch form (www.fda.gov/medwatch/report.htm), or Complete and submit FDA Form 3500 (health professional) by fax (1-800-FDA-0178) (these forms can be found via link above). Call 1-800-FDA-1088 for questions. Submitted reports should state, “Propofol-Lipuro 1% injectable emulsion for infusion use for COVID-19 under Emergency Use Authorization (EUA)” at the beginning of the question “Describe Event” for further analysis.
- O. Healthcare facilities and healthcare providers will ensure that appropriate storage is maintained until the products are administered consistent with the terms of this letter.
- P. Through a process of inventory control, healthcare facilities will maintain records regarding the dispensed authorized Propofol-Lipuro 1% injectable emulsion for infusion (i.e., lot numbers, quantity, receiving site, receipt date), product storage, and maintain patient information (e.g., patient name, age, disease manifestation, days of infusion per patient, other drugs administered).
- Q. Healthcare facilities will ensure that any records associated with this EUA are maintained until notified by B. Braun Melsungen and/or FDA. Such records will be made available to B Braun Medical, HHS, and FDA for inspection upon request.

Conditions Related to Printed Matter, Advertising and Promotion

- R. All descriptive printed matter, as well as advertising and promotional material, relating to the use of the Propofol-Lipuro 1% injectable emulsion for infusion shall be consistent with the authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.
- S. No descriptive printed matter, as well as advertising or promotional material, relating to the use of the Propofol-Lipuro 1% injectable emulsion for infusion may represent or suggest that such products are safe or effective.
- T. All descriptive printed matter, as well as advertising and promotional material, relating to the use of Propofol-Lipuro 1% injectable emulsion for infusion clearly and conspicuously shall state that:
- the Propofol-Lipuro 1% injectable emulsion for infusion is not FDA-approved, but has been authorized for emergency use by FDA to maintain sedation via continuous infusion in patients greater than 16 years old with suspected or confirmed COVID-19 who require mechanical ventilation in an ICU setting

Page 8 – B. Braun Melsungen

- the Propofol-Lipuro 1% injectable emulsion for infusion is authorized only for the duration of the declaration that circumstances exist justifying the authorization of the emergency use under Section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

IV. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of drugs and biologics for prevention and treatment of COVID-19 is terminated under Section 564(b)(2) of the Act or the EUA is revoked under Section 564(g) of the Act.

Sincerely,

--/S/--

RADM Denise M. Hinton
Chief Scientist
Food and Drug Administration



FDA U.S. FOOD & DRUG
ADMINISTRATION

April 16, 2021

Susan Warner, Pharm.D.
Advisor
Global Regulatory Affairs - US
Eli Lilly and Company
Lilly Corporate Center
Indianapolis, Indiana 46285

RE: Emergency Use Authorization 090

Dear Dr. Warner:

This letter is in response to your request, dated April 15, 2021, that the Food and Drug Administration (FDA) revoke the Emergency Use Authorization (EUA) for emergency use of bamlanivimab for the treatment of mild to moderate COVID-19 in adults and pediatric patients (12 years of age and older weighing at least 40 kg) with positive results of direct SARS-CoV-2 viral testing, and who are at high risk for progressing to severe Coronavirus Disease 2019 (COVID-19) and/or hospitalization. The EUA (EUA 090) was originally issued on November 9, 2020 and reissued on February 9, 2021 and March 2, 2021.

The authorization of a product for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revised or revoked when the criteria under section 564(b)(1) of the Act no longer exist, the criteria under section 564(c) of the Act for issuance of such authorization are no longer met, or other circumstances make such revision or revocation appropriate to protect the public health or safety.

As part of the Agency's ongoing review of the circumstances and appropriateness of EUA 090, FDA has continually reviewed new data and additional new information to assess whether the criteria for issuance of EUA 090 continue to be met. Under section 564(c)(2) of the Act, an EUA may be issued only if FDA concludes, among other things, "that, based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) the product may be effective in diagnosing, treating, or preventing—(i) such disease or condition [...]; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product [...]."

Since the initial authorization of bamlanivimab for emergency use, there has been a sustained increase in SARS-CoV-2 viral variants across the U.S. that are resistant to bamlanivimab administered alone. As part of the Agency's ongoing review of the circumstances and appropriateness of EUA 090, we reviewed emerging information and assessed whether, based on the totality of scientific evidence available, the criteria for issuance of the EUA continue to be met.

Page 2 – Dr. Warner, Eli Lilly and Company

A summary of these new data and new information includes the following:

- Vesicular stomatitis virus-based pseudovirus expressing spike protein with variant substitutions, specifically E484K and L452R, exhibit large reductions (>1,000 fold) in susceptibility to bamlanivimab alone in neutralization assays.
- The Center for Disease Control (CDC) national genomic surveillance program has reported an increasing frequency of SARS-CoV-2 variants that are expected to be resistant to bamlanivimab alone.
 - As of mid-March 2021, approximately 20% of isolates sequenced in the U.S. were reported as lineages expected to be resistant to bamlanivimab alone, increasing from approximately 5% in mid-January 2021.
 - The CDC national genomic surveillance program has published detailed data regarding variants of the B.1.427 and B.1.429 lineages, first detected in California, which harbor the L452R substitution. These variants have now been identified at frequencies exceeding 20% in eight states and frequencies exceeding 10% in two additional states.
 - There are recent reports that variants with the E484K substitution are circulating at rates exceeding 10% in the New York City metropolitan area including northern New Jersey.
- Testing technologies that enable health care providers to test individual patients for SARS-CoV-2 viral variants prior to initiation of treatment with monoclonal antibodies are not available and frequencies are changing rapidly. Therefore, empiric treatment with monoclonal antibody therapies that are expected to retain activity broadly across the U.S. is needed to reduce the likelihood of treatment failure.
- On April 8, 2021, the National Institutes of Health updated its treatment guidelines for COVID-19 recommending against the use of bamlanivimab alone.

Given the above, we have concluded that the known and potential benefits of bamlanivimab alone no longer outweigh the known and potential risks for the product. As such, FDA has determined that the criteria under section 564(c) of the Act for issuance of EUA 090 referenced above are no longer met.

In your letter requesting that FDA revoke EUA 090, you state that you do not intend to request the return of bamlanivimab that has been distributed prior to this revocation, as the distributed product continues to be authorized for use together with etesevimab under EUA 094. FDA concurs with this approach toward disposition of the previously distributed bamlanivimab authorized for emergency use under EUA 090. Stakeholders may order etesevimab alone to pair with existing supply of bamlanivimab that may be on hand.

Accordingly, FDA revokes the EUA for emergency use of bamlanivimab administered alone for the treatment of mild to moderate COVID-19, pursuant to section 564(g)(2) of the Act.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

--/S/--

RADM Denise M. Hinton
Chief Scientist
Food and Drug Administration

Dated: June 17, 2021.

Lauren K. Roth,
Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–13183 Filed 6–22–21; 8:45 am]

BILLING CODE 4164–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–E–1256; FDA–2020–E–1257; and FDA–2020–E–1258]

Determination of Regulatory Review Period for Purposes of Patent Extension; TURALIO

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for TURALIO and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications 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 drug 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 August 23, 2021. 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 December 20, 2021. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before August 23, 2021. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of August 23, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket Nos. FDA–2020–E–1256; FDA–2020–E–1257; and FDA–2020–E–1258, for “Determination of Regulatory Review Period for Purposes of Patent Extension; TURALIO.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management

Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: 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 drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug 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 drug 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 drug product, TURALIO (pexidartinib), indicated for treatment of adult patients with symptomatic tenosynovial giant cell tumor associated with severe morbidity or functional limitations and not amenable to improvement with surgery. Subsequent to this approval, the USPTO received patent term restoration applications for TURALIO (U.S. Patent Nos. 7,893,075; 8,461,169; and 9,169,250) from Plexxikon Inc. and the USPTO requested FDA’s assistance in determining the patents’ eligibility for patent term restoration. In a letter dated May 8, 2020, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of TURALIO 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 TURALIO is 3,637 days. Of this time, 3,394 days occurred during the testing phase of the regulatory review period, while 243 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 (FD&C Act) (21 U.S.C. 355(i)) became effective:* August 19, 2009. FDA has verified the applicant’s claim that the date the investigational new drug application became effective was on August 19, 2009.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* December 3, 2018. FDA has verified the applicant’s claim that the new drug application (NDA) for TURALIO (NDA 211810) was initially submitted on December 3, 2018.

3. *The date the application was approved:* August 2, 2019. FDA has verified the applicant’s claim that NDA 211810 was approved on August 2, 2019.

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 applications for patent extension, this applicant seeks 1,664 days, 1,244 days or 810 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, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), 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 comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (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 Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: June 16, 2021.

Lauren K. Roth,
Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–13186 Filed 6–22–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: SBIR/STTR Commercialization Readiness Pilot (CRP) Program.

Date: July 15, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Allen Richon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7892, Bethesda, MD 20892, 301-379-9351, allen.richon@nih.hhs.gov.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; HIV Coinfections and HIV Associated Cancers Study Section.

Date: July 15, 2021.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jingsheng Tuo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, Bethesda, MD 20892, 301-451-5953, tuo@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Infectious Diseases and Immunology Panel C.

Date: July 15–16, 2021.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shahrooz Vahedi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 810G, Bethesda, MD 20892, (301) 496-9322, vahedis@mail.nih.gov.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; HIV Immunopathogenesis and Vaccine Development Study Section.

Date: July 15–16, 2021.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shiv A. Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301-443-5779, prasads@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Reproductive Biology.

Date: July 16, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yunshang Piao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, Bethesda, MD 20892, (301) 402-8402, piaoy3@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Infectious Diseases and Immunology Research Enhancement Review.

Date: July 19, 2021.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Liangbiao Zheng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3202, MSC 7808, Bethesda, MD 20892, 301-996-5819, zhengli@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Human Complex Mental Function.

Date: July 19, 2021.

Time: 1:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Pamela Jeter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 10J08, Bethesda, MD 20892, (301) 435-2591, pamela.jeter@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in infectious diseases vaccines, therapeutics and vector biology.

Date: July 20, 2021.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gagan Pandya, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 3200, MSC 7808, Bethesda, MD 20892, 301-435-1167, pandyaga@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 17, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021-13184 Filed 6-22-21; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Treatment (CSAT) National Advisory Council (NAC) will meet on August 12, 2021, 1:00 p.m.–4:30 p.m. (EDT).

The meeting is open to the public and will include consideration of minutes from the SAMHSA CSAT NAC meeting of March 31, 2021; an update on CSAT activities; a discussion with SAMHSA leadership; and discussion of recovery and recovery support. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before August 6, 2021. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations must notify the contact person on or before August 6, 2021. Five minutes will be allotted for each presentation.

The meeting will be conducted via WebEx and telephone only, and registration is required to participate during this meeting. To attend virtually, or to obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at <http://snacregister.samhsa.gov/MeetingList.aspx>, or communicate with the CSAT National Advisory Council Designated Federal Officer; Tracy Goss (see contact information below).

Meeting information and a roster of Council members may be obtained by accessing the SAMHSA Committee website at <http://www.samhsa.gov/about-us/advisory-councils/csat-national-advisory-council> or by contacting the CSAT National Advisory Council Designated Federal Officer.

Council Name: SAMHSA's Center for Substance Abuse Treatment National Advisory Council.

Date/Time/Type: August 12, 2021, 1:00 p.m.–4:30 p.m. EDT, OPEN.

Place: SAMHSA, 5600 Fishers Lane, Rockville, Maryland 20857.

Contact: Tracy Goss, Designated Federal Officer, CSAT National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail),

Telephone: (240) 276-0759, Email: tracy.goss@samhsa.hhs.gov.

Dated: June 16, 2021.

Carlos Castillo,

Committee Management Officer, SAMHSA.

[FR Doc. 2021-13132 Filed 6-22-21; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA-2021-0003]

Notice of Request for Revision of a Currently Approved Information Collection for the Chemical Facility Anti-Terrorism Standards (CFATS)

AGENCY: Cybersecurity and Infrastructure Security Agency, DHS.

ACTION: 30-Day notice and request for comments; revision of Information Collection Request: 1670-0014.

Authority: 6 U.S.C. 621-629.

SUMMARY: The Infrastructure Security Division (ISD) within the Cybersecurity and Infrastructure Security Agency (CISA) is issuing a 60-day notice and request for comments to revise Information Collection Request (ICR) 1670-0014. CISA will submit the ICR to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. DHS previously published this information collection request (ICR), in the **Federal Register**, on Monday, March 23, 2021 at 86 FR 15490 for a 60-day public comment period. No comments was/were received by DHS. To access and review all documents related to this information collection, please visit the Federal eRulemaking Portal site at <http://www.regulations.gov> and enter Docket Number CISA-2021-0003 in the search box. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until August 23, 2021.

ADDRESSES: You may submit comments, identified by docket number CISA-2021-0003 through the Federal eRulemaking Portal available at <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All comments received via <https://www.regulations.gov> will be posted to the public docket at <https://www.regulations.gov>, including any personal information provided.

Do not submit comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information

(CVI), Protected Critical Infrastructure Information (PCII), or Sensitive Security Information (SSI) directly to the public regulatory docket. Contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below with questions about comments containing protected information. CISA will not place comments containing protected information in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. Comments containing protected information will be held in a separate file to which the public does not have access and CISA will place a note in the public docket documenting receipt of the comment. If CISA receives a request to examine or copy this information, CISA will treat it as any other request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department's FOIA regulation found in part 5 of Title 6 of the Code of Federal Regulations (CFR).

FOR FURTHER INFORMATION CONTACT:

Lona Saccomando, 703-235-5263, CISARegulations@cisa.dhs.gov.

SUPPLEMENTARY INFORMATION: The CFATS Program identifies chemical facilities of interest and regulates the security of high-risk chemical facilities through a risk-based approach. The CFATS Program is authorized under the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014¹ or "CFATS Act of 2014". CISA collects necessary information through 1670-0014 to implement CFATS.

CISA's Methodology in Estimating the Burden for the Request for Redetermination

This instrument collects information to support a facility's request for redetermination of high-risk which CISA is obligated to perform pursuant to the CFATS Act of 2014. The collection of information may be concurrent with a facility's submission of a Top-Screen pursuant to 6 CFR 27.210(d) or collected after CISA reviews a Top-Screen that reflects material modifications made by the facility. This instrument authorizes CISA to collect both the reason for the redetermination as well as supporting documentation.

CISA is proposing minor revisions to the instrument that reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651-74, such as updating the Agency name to

¹ The Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (also known as the CFATS Act of 2014, Pub. L. 113-254) codified the CFATS program into the Homeland Security Act of 2002. See 6 U.S.C. 621 *et seq.*, as amended by Public Law 116-136, Sec. 16007 (2020).

conform with the Agency's new designation as CISA, as well as a clearer description of the scope of the instrument. The scope of this instrument remains unchanged.

Number of Respondents

The current information collection estimated that 625 respondents would submit a request for a Request for Redetermination annually. Based on data collected between CY 2018-2020, 215 respondents, on average, submitted a Request for Redetermination annually. Because of the historical pattern of lower submissions over the past three years, CISA proposes to decrease the estimated number of respondents from 625 to 250 respondents. CISA will retain the number of responses per respondent of 1.0.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent to prepare and submit a Request for Redetermination is 0.25 hours (15 minutes). CISA continues to believe this is a reasonable burden estimate for this instrument.

Annual Burden Hours

The annual burden hours for a Request for Redetermination is [0.25 hours × 250 respondents × 1 response per respondent], which equals 62.5 hours.

Total Capital/Startup Burden Cost

CISA provides access to CSAT free of charge and assumes that each respondent already has computer hardware and access to the internet for basic business needs. Therefore, there are no annualized capital or start-up costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Recordkeeping Burden

There are no recordkeeping burden costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.²

Total Annual Burden Cost

CISA assumes that Site Security Officers (SSOs) are responsible for submitting a Request for Redetermination. For the purpose of this notice, CISA maintains this assumption.

Therefore, to estimate the total annual burden, CISA multiplied the annual burden of 62.5 hours by the average hourly wage rate of SSOs which is

² The recordkeeping burden for facilities under CFATS is accounted for by CISA under the CSAT Information Collection No. 1670-0007.

\$85.82 per hour.³ Therefore, the total annual burden cost for the Request for Redetermination instrument is \$5,364 (*i.e.*, 62.5 total annual burden hours × \$85.82 per hour).⁴

CISA's Methodology in Estimating the Burden for the Request for an Extension

This instrument collects information to request extensions for CFATS reporting requirements.

CISA is proposing minor revisions to the instrument that reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651–74, such as updating the Agency name to conform with the Agency's new designation as CISA, as well as a clearer description of the scope of the instrument. The scope of this instrument remains unchanged.

Number of Respondents

The current information collection estimated that 730 respondents would submit a request for a Request for an Extension annually. Based on data collected between CY 2018–2020, 374 respondents, on average, submitted a Request for an Extension annually. In addition, there was also a slight increase in the number of times a respondent would request an extension. Because of the historical pattern of lower submissions over the past three years with a slight increase in the number of responses per respondent, CISA proposes to decrease the estimated number of respondents from 730 to 400 respondents and increase the number of responses per respondent from 1.00 to 1.25.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent to prepare and submit a Request for an Extension is 0.083 hours (5 minutes). CISA continues to believe this is a reasonable burden for gathering and providing supporting documentation for this instrument.

³ The above Average Hourly Wage Rate is the May 2019 Bureau of Labor Statistics average wage for "Management Occupations (Major Group (11–0000))" of \$58.88 times the wage rate benefit multiplier of 1.4575 (to account for fringe benefits) equaling \$85.82. The benefits multiplier is estimated by dividing total compensation of \$38.26 by salaries and wages of \$26.25, based on Employer Cost for Employee Compensation, September 2020 data, released December 17, 2020 (<https://www.bls.gov/news.release/cecec.nr0.htm>).

⁴ Throughout this analysis, CISA presents rounded hourly time burden estimates and hourly compensation rates to assist in reproducing the results. However, CISA's actual calculations use unrounded figures; as such, estimates calculated using the values presented in this analysis may not exactly match the reported results.

Annual Burden Hours

The annual burden hours for the Request for an Extension is [0.083 hours × 400 respondents × 1.25 response per respondent], which equals 41.7 hours.

Total Capital/Startup Burden Cost

CISA provides access to CSAT free of charge and assumes that each respondent already has computer hardware and access to the internet for basic business needs. Therefore, there are no annualized capital or start-up costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Recordkeeping Burden

There are no recordkeeping burden costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Annual Burden Cost

CISA assumes that SSOs are responsible for submitting a Request for an Extension. For the purpose of this notice, CISA maintains this assumption.

Therefore, to estimate the total annual burden, CISA multiplied the annual burden of 41.7 hours by the average hourly wage rate of SSOs, which is \$85.82 per hour. Therefore, the total annual burden cost for the Request for an Extension instrument is \$3,576 (*i.e.*, 41.7 total annual burden hours × \$85.82 per hour).

Top-Screen Update

This instrument collects information about the reason a facility submits an updated Top-Screen (*e.g.*, closure or sale of the facility).

CISA is proposing minor revisions to the instrument that reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651–74, such as updating the Agency name to conform with the Agency's new designation as CISA, as well as a clearer description of the scope this instrument. The scope of this instrument remains unchanged.

Number of Respondents

The current information collection estimated that 1,250 respondents would submit a request for a Top-Screen Update annually. Based on data collected between CY 2018–2020, 2,353 respondents, on average, submitted a Top-Screen Update annually. Because of the historical pattern of higher submissions, CISA proposes to increase the estimated number of respondents from 1,250 to 2,500 respondents. CISA will retain the number of responses per respondent of 1.5.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent to prepare and submit a Top-Screen Update is 0.083 hours (5 minutes). CISA continues to believe this is a reasonable burden per response for this instrument.

Annual Burden Hours

The annual burden hours for a Top-Screen Update is [0.083 hours × 2,500 respondents × 1.5 responses per respondent], which equals 312.5 hours.

Total Capital/Startup Burden Cost

CISA provides access to CSAT free of charge and assumes that each respondent already has computer hardware and access to the internet for basic business needs. Therefore, there are no annualized capital or start-up costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Recordkeeping Burden

There are no recordkeeping burden costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Annual Burden Cost

CISA assumes that SSOs are responsible for submitting a Top-Screen Update. For the purpose of this notice, CISA maintains this assumption.

Therefore, to estimate the total annual burden, CISA multiplied the annual burden of 312.5 hours by the average hourly wage rate of SSOs, which is \$85.82 per hour. Therefore, the total annual burden cost for the Top-Screen Update instrument is \$26,818 (*i.e.*, 312.5 total annual burden hours × \$85.82).

CISA's Methodology in Estimating the Burden for Compliance Assistance

This instrument collects information when a facility requests a consultation or seeks technical assistance about its CFATS regulatory requirements. This instrument also collects information to respond to potentially non-compliant facilities; verify material modifications during the redetermination process; or follow-up on security issues or results of a recent incident.

CISA is proposing minor revisions to the instrument that reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651–74, such as updating the Agency name to conform with the Agency's new designation as CISA, as well as a clearer description of the scope instrument. The scope of this instrument remains unchanged.

Number of Respondents

The current information collection estimated that 455 respondents would submit a request for Compliance Assistance annually. Based on data collected between CY 2018–2020, 1,540 respondents, on average, submitted a request for Compliance Assistance annually. Because of the historical pattern of higher submissions, CISA proposes to increase the estimated number of respondents from 455 to 1,600 respondents. CISA previously estimated a response rate of 1.5 requests per respondent annually; however, based on the historical pattern of requests for Compliance Assistance, CISA proposes to decrease the number of responses per respondent to 1.0.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent to prepare and submit a Request for Compliance Assistance is 0.083 hours (5 minutes). CISA continues to believe this is a reasonable burden per response for this instrument.

Annual Burden Hours

The annual burden hours for the Compliance Assistance instrument is $[0.083 \text{ hours} \times 1,600 \text{ respondents} \times 1.0 \text{ responses per respondent}]$, which equals 133.3 hours.

Total Capital/Startup Burden Cost

CISA assumes that each respondent already has computer hardware and access to the internet for basic business needs. Therefore, there are no annualized capital or start-up costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Recordkeeping Burden

There are no recordkeeping burden costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Annual Burden Cost

CISA assumes that SSOs are responsible for submitting a Compliance Assistance. For the purpose of this notice, CISA maintains this assumption.

Therefore, to estimate the total annual burden, CISA multiplied the annual burden of 133.3 hours by the average hourly wage rate of SSOs, which is \$85.82 per hour. Therefore, the total annual burden cost for the Compliance Assistance instrument is \$11,443 (*i.e.*, $133.3 \text{ total annual burden hours} \times \$85.82 \text{ per hour}$).

CISA's Methodology in Estimating the Burden for the Declaration of Reporting Status

This instrument collects information when a facility notifies CISA that it is not required to register in CSAT or submit a Top-Screen.

CISA is proposing minor revisions to the instrument that reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651–74, such as updating the Agency name to conform with the Agency's new designation as CISA, as well as a clearer description of the scope instrument. The scope of this instrument remains unchanged.

Number of Respondents

The current information collection estimated that 480 respondents would submit a Declaration of Reporting Status annually. Based on data collected between CY 2018–2020, 20 respondents, on average, submitted a Declaration of Reporting Status annually. Because of the historical pattern of lower submissions, CISA proposes to decrease the estimated number of respondents from 480 to 100 respondents. CISA will retain the number of responses per respondent of 1.0.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent to prepare and submit a Declaration of Reporting Status is 0.25 hours (15 minutes). CISA continues to believe this is a reasonable burden estimate for this instrument.

Annual Burden Hours

The annual burden hours for the Declaration of Reporting Status is $[0.25 \text{ hours} \times 100 \text{ respondents} \times 1 \text{ response per respondent}]$, which equals 25 hours.

Total Capital/Startup Burden Cost

CISA assumes that each respondent already has computer hardware and access to the internet for basic business needs. Therefore, there are no annualized capital or start-up costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Recordkeeping Burden

There are no recordkeeping burden costs incurred by chemical facilities of interest or high-risk chemical facilities for this information collection.

Total Annual Burden Cost

CISA maintains the assumption found in the other instruments within this Information Collection that SSOs are responsible for submitting information

to CISA. Thus, CISA assumes that an SSO will submit the Declaration of Reporting Status.

Therefore, to estimate the total annual burden, CISA multiplied the annual burden of 25 hours by the average hourly wage rate of SSOs, which is \$85.82 per hour. Therefore, the total annual burden cost for the Declaration of Reporting Status instrument is \$2,145 (*i.e.*, $25 \text{ total annual burden hours} \times \$85.82 \text{ per hour}$).

OMB is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submissions of responses).

Analysis

Agency: Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

Title: Chemical Facility Anti-Terrorism Standards (CFATS).

OMB Number: 1670–0014.

Instrument: Request for Redetermination.

Frequency: “On occasion” and “Other.”

Affected Public: Business or other for-profit.

Number of Respondents: 250 respondents.

Estimated Time per Respondent: 0.25 hours.

Total Burden Hours: 62.5 annual burden hours.

Total Burden Cost (capital/startup): \$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$5,364.

Instrument: Request for an Extension.

Frequency: “On occasion” and “Other.”

Affected Public: Business or other for-profit.

Number of Respondents: 400 respondents.

Estimated Time per Respondent:
0.083 hours (5 minutes).

Total Burden Hours: 41.7 annual burden hours.

Total Burden Cost (capital/startup):
\$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$3,576.

Instrument: Top-Screen Update.

Frequency: "On occasion" and "Other."

Affected Public: Business or other for-profit.

Number of Respondents: 2,500 respondents.

Estimated Time per Respondent:
0.083 hours (5 minutes).

Total Burden Hours: 312.5 hours.

Total Burden Cost (capital/startup):
\$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$26,818.

Instrument: Compliance Assistance.

Frequency: "On occasion" and "Other."

Affected Public: Business or other for-profit.

Number of Respondents: 1,600 respondents.

Estimated Time per Respondent:
0.083 hours (5 minutes).

Total Burden Hours: 133.3 annual burden hours.

Total Burden Cost (capital/startup):
\$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$11,443.

Instrument: Declaration of Reporting Status.

Frequency: "On occasion" and "Other."

Affected Public: Business or other for-profit.

Number of Respondents: 100 respondents.

Estimated Time per Respondent: 0.25 hours.

Total Burden Hours: 25 annual burden hours.

Total Burden Cost (capital/startup):
\$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$2,145.

Samuel Vazquez,

Acting Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2021-13106 Filed 6-22-21; 8:45 am]

BILLING CODE 9110-9P-P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA-2020-0018]

Agency Information Collection Activities: Proposed Collection; Comment Request; Cybersecurity and Infrastructure Security Agency (CISA) Visitor Request Form

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day Notice and request for comments; reinstatement without change of information collection request: 1670-0036.

SUMMARY: The Department of Homeland Security (DHS), Cybersecurity and Infrastructure Security Agency (CISA), Office of Compliance and Security (OCS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a reinstatement, without change, of a previously approved information collection for which approval has expired. CISA will submit the following Information Collection Request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. CISA previously published a notice about this ICR, in the **Federal Register** on February 17, 2021, for a 60-day public comment period. There were no comments received. The purpose of this notice is to allow additional 30-days for public comments. **DATES:** The comment period for the information collection request published on February 17, 2021 at 86 FR 9949. Comments must be submitted on or before July 23, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Michael Washington, 202-591-0713, michael.washington@cisa.dhs.gov.

SUPPLEMENTARY INFORMATION: Public Law 107-296 The Homeland Security Act of 2002, Title II, recognizes the Department of Homeland Security role in integrate relevant critical infrastructure and cybersecurity information, analyses, and vulnerability assessments (whether such information, analyses, or assessments are provided or produced by the Department or others) in order to identify priorities for protective and support measures by the Department, other agencies of the Federal Government, State and local government agencies and authorities, the private sector, and other entities while maintaining positive control of sensitive information regarding the national infrastructure. In support of this mission CISA Office of Compliance and Security must maintain a robust visitor screening capability.

The CISA Office of Compliance and Security will collect, using an electronic form, information about each potential visitor to CISA facilities and the nature of each visit. The Office of Compliance and Security will use collected information to make a risk-based decision to allow visitor access to CISA facilities.

This proposed information collection previously published in the **Federal Register** on February 17, 2021, at 86 FR 9949 with a 60 day public comment period. No relevant comments were received. This information collection expired on February 28, 2021. CISA is requesting a reinstatement, without change, of a previously approved information collection for which approval has expired. The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: Cybersecurity and Infrastructure Security Agency (CISA) Visitor Request Form.

OMB Control Number: 1670-0036.

Frequency: Annually.

Affected Public: Private and Public Sector.

Number of Respondents: 20,000.

Estimated Time per Respondent: 10 minutes.

Total Burden Hours: 3,333 hours.

Total Respondent Opportunity Cost: \$125,144.

Total Respondent Out-of-Pocket Cost: \$0.

Total Government Cost: \$250,473.

Samuel Vazquez,

Acting Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2021-13109 Filed 6-22-21; 8:45 am]

BILLING CODE 9110-9P-P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA-2020-0020]

ICTAP Training Survey

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments; new information collection request, 1670-NEW.

SUMMARY: The Emergency Communications Division (ECD) within Cybersecurity and Infrastructure Security Agency (CISA) will submit the following Information Collection

Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. CISA previously published a notice about this ICR, in the **Federal Register** on February 19, 2021 for a 60-day public comment period. In response, there were no comment received. The purpose of this notice is to allow additional 30-days for public comments.

DATES: The comment period for the information collection request published on February 19, 2021 at 86 FR 10332. Comments are encouraged and will be accepted until July 23, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact John Peterson COMU@cisa.dhs.gov at 202-503-5074.

SUPPLEMENTARY INFORMATION: The National Emergency Communications Plan (NECP) is the Nation's over-arching strategic plan to drive measurable improvements in emergency communications across all levels of government and disciplines. First released in 2008, the plan is periodically updated to reflect the ongoing evolution of emergency communications technologies and

processes. In support of the NECP, the Interoperable Communications and Technical Assistance Program (ICTAP) within the Cybersecurity and Infrastructure Security Agency (CISA) Emergency Communications Division (ECD) provides a portfolio of no-cost communications technical assistance (TA) to support the implementation of the NECP, state's and territories' Statewide Communication Interoperability Plans (SCIPs), broadband planning, voice and digital network engineering, training, exercise support, and operational assessment focused on interoperable emergency communications at all levels of government.

The purpose of the ICTAP Training Survey is to obtain anonymous feedback regarding several of the training courses offered by the ICTAP. The feedback and experience given by survey respondents will assist the ICTAP in improving, revising, and updating the course materials for future students. The three courses which the ICTAP would like to obtain feedback are for:

- Communications Unit Leader (COML);
- Communications Unit Technician (COMT); and
- Information Technology Service Unit Leader (ITSL).

COML is designed for all state/territory, tribal, regional, and local emergency response professionals and for support personnel with a communications background. It is designed to familiarize these professionals with the role and responsibilities of a COML under the National Incident Management System (NIMS) Incident Command System (ICS) and to provide hands-on exercises that reinforce the lecture materials. CISA and FEMA Emergency Management Institute (EMI) offer this course jointly as "L0969, NIMS ICS All-Hazards Communications Unit Leader Course." Under the NIMS ICS structure, a COML is the focal point within the Communications Unit. This course provides DHS-approved and NIMS-compliant instruction to ensure that every state/territory has trained personnel capable of coordinating on-scene emergency communications during a multi-jurisdictional response or planned event.

COML is designed for all state/territory, tribal, regional, and local emergency response professionals and for support personnel with a communications background. It is designed to familiarize these professionals with the role and responsibilities of a COML under the National Incident Management System

(NIMS) Incident Command System (ICS) and to provide hands-on exercises that reinforce the lecture materials. CISA and FEMA Emergency Management Institute (EMI) offer this course jointly as “L0969, NIMS ICS All-Hazards Communications Unit Leader Course.” Under the NIMS ICS structure, a COML is the focal point within the Communications Unit. This course provides DHS-approved and NIMS-compliant instruction to ensure that every state/territory has trained personnel capable of coordinating on-scene emergency communications during a multi-jurisdictional response or planned event.

The COMT course provides introductory and refresher training for the NIMS ICS COMT position. It introduces public safety professionals and support staff to various communications concepts and technologies including interoperable communications solutions, LMR communications, satellite, telephone, data, and computer technologies used in incident response and planned events. It is designed for state/territory, tribal, urban, and local emergency response professionals and support personnel in all disciplines who have a technical communications background. Participants develop the essential core competencies required for performing the duties of the COMT in an all-hazards incident, including responsibilities while operating in a local, regional, or state-level All-Hazards Incident Management Team.

In 2018 and 2019, ICTAP introduced the ITSL course, and SAFECOM/ National Counsel of Statewide Interoperability Coordinators (NCSWIC) have coordinated with FEMA National Integration Center (NIC) and other organizations focused on public safety communications to establish the best way to integrate the ITSL into the ICS. The ITSL is needed to provide information management, cybersecurity, and application management for the many critical incident/event related functions to include: Incident/Unified Command Post, Incident Communications Centers, and various tactical operations centers, joint information center (JIC), staging areas, and field locations. The ITSL course targets Federal, state/territory, tribal, urban, local, and emergency response professionals, and support personnel in all disciplines with a communications background and an aptitude for and extensive experience in information technology. Specifically, the training course provides an overview of the ITSL components including Communications/IT Help Desk or

Unified Help Desk, IT Infrastructure Manager, Network Manager. It covers their roles and responsibilities and provides an in-depth overview with exercises for the ITSL’s major functions, to include ensuring reliable and timely delivery of IT services to participating agencies and officials.

The ICTAP Training Survey will not collect any personal identifiable information (PII) from respondents (emergency communications stakeholders) of the survey. In collecting feedback regarding the ITSL, COML, and COMT courses, the survey will collect what state the respondent lives, where they took the course, did the course provide the information needed, should the course curriculum be updated, and any comments to improve the course material. The survey will encompass 10 questions regarding the former student’s experience, anything that they liked, disliked, or something new that they would like to see incorporated into the refreshed class. It is estimated that it will take each participant 10 minutes to complete the training survey. For 300 respondents annually, the burden is 50 hours. To estimate the cost of this collection, CISA uses the mean hourly wage of “All Occupations” of \$25.72. CISA then applies a load factor of 1.4597 to this average wage to obtain a fully loaded average hourly wage of \$37.54. The total respondent cost burden for this collection is \$1,877 (50 hours × \$37.54).

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title of Collection: Interoperable Communications and Technical Assistance Program (ICTAP) Training Survey.

OMB Control Number: 1670–NEW.

Frequency: Annually.

Affected Public: State, Local, Tribal, and Territorial Governments.

Number of Annualized Respondents: 300.

Estimated Time per Respondent: 10 Minutes.

Total Annualized Burden Hours: 50 hours.

Total Annualized Respondent Opportunity Cost: \$1,877.16.

Total Annualized Respondent Out-of-Pocket: \$0.

Total Annualized Government Cost: \$4,082.67.

Samuel Vazquez,

Acting Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2021–13107 Filed 6–22–21; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2020–0005]

1670–NEW: SAFECOM Nationwide Surveys Generic Clearance

AGENCY: Emergency Communications Division (ECD), Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments; new Information Collection Request, 1670–NEW.

SUMMARY: The Emergency Communications Division (ECD) within Cybersecurity and Infrastructure Security Agency (CISA) will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. CISA previously published a notice about this ICR, in the **Federal Register** on February 19, 2021 for a 60-day public comment period. In response, there were no comment received. The purpose of this notice is to allow additional 30-days for public comments.

DATES: The comment period for the information collection request published on February 17, 2021 at 86 FR 9948. Comments are due by July 23, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: Eric Runnels, 703-705-6279, *necp@cisa.dhs.gov*.

SUPPLEMENTARY INFORMATION: In 2006, Congress passed Public Law 109-295, which included SEC. 671. EMERGENCY COMMUNICATIONS also known as the "21st Century Emergency Communications Act of 2006". The legislation established the Department of Homeland Security (DHS) Office of Emergency Communications, which was re-designated in 2018 as the Emergency Communications Division (ECD) within the Cybersecurity and Infrastructure Security Agency (CISA), to lead the development and implementation of a comprehensive approach to advancing national interoperable communications capabilities.

The following responsibilities were established:

6 U.S.C. 571(c) requires the DHS Secretary through the ECD Assistant Director to:

(4) Conduct extensive, nationwide outreach to support and promote the ability of emergency response providers and relevant government officials to continue to communicate in the event of natural disasters, acts of terrorism, and other man-made disasters;

(13) develop and update periodically, as appropriate, a National Emergency Communications Plan under section 572 of this title;

(14) perform such other duties of the Department necessary to support and promote the ability of emergency response providers and relevant government officials to continue to communicate in the event of natural disasters, acts of terrorism, and other man-made disasters; and

(15) perform other duties of the Department necessary to achieve the goal of and maintain and enhance interoperable emergency communications capabilities.

6 U.S.C. 572(a) requires the Secretary in cooperation with State, local, and

tribal governments, Federal departments and agencies, emergency response providers, and the private sector, develop not later than 180 days after the completion of the baseline assessment under section 573 of this title, and periodically update, a National Emergency Communications Plan.

Lastly, 6 U.S.C. 573 requires the DHS Secretary to conduct an assessment of Federal, State, local, and tribal governments that defines the range of capabilities needed by emergency response providers and relevant government officials, assesses the current available capabilities to meet such communications needs; identify the gaps between such current capabilities and defined requirements; at least every five years.

These authorities in addition to DHS responsibilities through Executive Order 13618 in the area of national security/emergency providers' communications require a continuous examination of nationwide emergency communications capabilities.

The frequency and complexity of emergencies are on the rise during a time when technology is advancing at a faster pace than any other time in history. In order to perform these statutory regulations, it is important to understand the continuously changing requirements of emergency response providers and government officials at all levels of government, evolving risks, and the public safety community's ability to integrate new technologies while also preparing for emergent technologies. As a result, CISA is seeking a PRA Generic Clearance to allow for flexibility in implementing surveys that are relevant to the current security environment.

To meet the statutory requirements of 6 U.S.C. 573, ECD conducts the SAFECOM Nationwide Survey every 5 years to assess evolving capability needs and gaps and track progress against policy initiatives; status of strategic plans; and major industry or market shifts affecting the emergency communications capability.

CISA ECD conducts a web-based survey entitled the SAFECOM Nationwide Survey, hereinafter referred to as the SNS. The purpose of the survey is to gather information to assess available emergency communications capabilities and identify gaps and needs for emergency response providers to effectively communicate during all types of natural or man-made hazards. CISA ECD uses the information collected to complete a statutorily mandated assessment and shares the data with all stakeholders that have a role in emergency communications. In

order to ascertain this information, the SNS deploys four similar surveys across the nation to various emergency response disciplines at each level of government—federal, state, territorial, tribal, and local. The survey solicits responses regarding issues affecting the public safety community to determine a jurisdiction's level of operability, interoperability and continuity and thus their overall emergency communications capability level. CISA ECD analyzes the data collected from this general survey to identify major gaps and themes affecting emergency communications across levels of government. Additionally, this analysis informs the development of supplemental surveys tailored to specific needs across the public safety community, as well as future iterations of the Nationwide Baseline Communications Assessment (NCBA) and National Emergency Communications Plan (NECP).

The results from the most recent surveys led to major updates to the update of the NECP released in September 2019. The NECP sets strategic priorities for the entire Nation. Additionally, the current collection allowed CISA ECD to share reliable data with emergency communications partners at all levels of government which assists them with: (1) Statewide Communications Interoperability Plan (SCIP) development, (2) Threat and Hazard Identification Risk Analysis (THIRA) development, (3) state-level grant programs and guidance, (4) federal grant applications assistance, and (5) funding and resource sharing strategy development.

CISA ECD conducts SAFECOM supplemental surveys. The surveys can be conducted as focus groups, in-person interviews, web- and paper-based. CISA ECD uses the information collected to complete statutorily mandated requirements (6 U.S.C. 571(c), 572(a), and 573) and shares the data with all stakeholders with a role in emergency communications. In order to ascertain this information, the SAFECOM supplemental surveys deploy topic-specific or targeted surveys across the nation to various emergency response disciplines at each level of government: Federal, state, territorial, tribal, and local. The surveys solicit responses regarding targeted issues affecting all public safety, emergency response communities and/or specific subsets of the SNS population. CISA ECD analyzes the data collected from these supplemental surveys to identify changing requirements, mitigate risks, and inform the data collected from the 5-year Nationwide Survey.

ECD uses electronic submission to reduce the burden on respondents including web-based surveys and assessment tools, such as Survey Monkey. Its target audience—mainly first responders—is frequently interrupted, have variable schedules, and frequently work long hours. Electronic submission provides a more user-friendly interface, provides anonymity to the users, ensures the maximum response rate, eliminates paper, printing, and postage costs along with the need for data entry.

We will also utilize alternative submission methods for both the SNS and the supplemental surveys. An Adobe PDF-fillable form which can be returned via email to sns@cisa.dhs.gov, direct emails with questionnaires attached, an in-person surveys, focus-groups, and a paper copy that will be mailed directly to the respondent(s) requesting a hard copy. The paper copy can be returned either via a prepaid envelope, scanned and emailed to sns@cisa.dhs.gov, and/or faxed to CISA ECD. We anticipate that .5% of respondents will utilize these alternative submission methods.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title of Collection: SAFECOM Nationwide Surveys Generic Clearance.

OMB Control Number: 1670–NEW.

Frequency: Annually.

Affected Public: State, Local, Tribal, and Territorial Governments.

Number of Annualized Respondents: 8,398.

Estimated Time per Respondent: 0.5 hours.

Total Annualized Burden Hours: 4,199 hours.

Total Annualized Respondent Opportunity Cost: \$168,298.74.

Total Annualized Respondent Out-of-Pocket Cost: \$0.

Total Annualized Government Cost: \$235,863.

Samuel Vazquez,

Acting Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2021–13111 Filed 6–22–21; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2021–0009]

Revision of a Currently Approved Information Collection for the Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program

AGENCY: Cybersecurity and Infrastructure Security Agency, DHS.

ACTION: 60-Day notice and request for comments; revision of information collection request: 1670–0029.

Authority: 6 U.S.C. 621–629.

SUMMARY: The Infrastructure Security Division (ISD) within the Cybersecurity and Infrastructure Security Agency (CISA) is issuing a 60-day notice and request for comments to revise Information Collection Request (ICR) 1670–0029. CISA will submit the ICR to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are due August 23, 2021.

ADDRESSES: You may submit comments, identified by docket number CISA–2021–0009 through the Federal eRulemaking Portal available at <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All comments received via <https://www.regulations.gov> will be posted to the public docket at <https://www.regulations.gov>, including any personal information provided.

Do not submit comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information (CVI), Protected Critical Infrastructure Information (PCII), or Sensitive Security Information (SSI) directly to the public regulatory docket. Contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below with questions about comments containing such protected information. CISA will not place comments containing such protected information in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. Additionally, CISA will hold them in a separate file to which the public does not have access and place a note in the public docket that CISA has received such protected materials from the commenter. If CISA receives a request to examine or copy this information, CISA will treat it as any other request under the Freedom of Information Act (FOIA).

FOR FURTHER INFORMATION CONTACT: Lona Saccomando, 202–579–0590, CISARegulations@cisa.dhs.gov.

SUPPLEMENTARY INFORMATION: The CFATS Program identifies chemical facilities of interest and regulates the security of high-risk chemical facilities through a risk-based approach. The CFATS Program is authorized under the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014¹ or “CFATS Act of 2014”. CISA collects necessary information through 1670–0029 to implement the CFATS Personnel Surety Program.

Program Description

High-risk chemical facilities regulated by CISA under the CFATS Program must submit a Site Security Plan (SSP) or an Alternative Security Program (ASP) that describes how they will meet or exceed 18 risk-based performance standards (RBPS), including RBPS 12—Personnel Surety. Under RBPS 12, high-risk chemical facilities regulated under CFATS are required to account for the conduct of certain types of background checks in their Site Security Plans. Specifically, RBPS 12 requires high-risk chemical facilities to:

Perform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including, (i) Measures designed to verify and validate identity; (ii) Measures designed to check criminal history; (iii) Measures designed to verify and validate legal authorization to work; and (iv) Measures designed to identify people with terrorist ties[.6 CFR 27.230(a)(12).

The first three aspects of RBPS 12 (checks for identity, criminal history, and legal authorization to work) are performed by the facility. The fourth aspect (*i.e.*, the check for terrorist ties) was implemented in December 2016 at Tier 1 and Tier 2 facilities.² In July of 2019 the Department implemented the CFATS Personnel Surety Program for all tiers.³ A complete description of the CFATS Personnel Surety Program is provided in the July 2019 notice and

¹ The Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (also known as the CFATS Act of 2014, Pub. L. 113–254) codified the CFATS program into the Homeland Security Act of 2002. See 6 U.S.C. 621 *et seq.*, as amended by Public Law 116–136, Sec. 16007 (2020).

² The initial notice of implementation was published on December 18, 2015 at 80 FR 79058 and may be viewed at <https://www.federalregister.gov/d/2019-14591>.

³ The notice of implementation at all high-risk chemical facilities was published on July 9, 2019 at 84 FR 32768 and may be viewed at <https://www.federalregister.gov/d/2019-14591>.

additional information can be found on CISA's website.⁴

As required by the Notice of Action issued by OMB on May 23, 2019, CISA "phased in gradually" the CFATS Personnel Surety Program.⁵ Since July of 2019, when CISA published the implementation notice for the CFATS Personnel Surety Program announcing full implementation, CISA has selected between 50 to 100 facilities a month to update their SSP or ASP to implement security measures designed to ensure that certain individuals with or seeking access to the restricted areas or critical assets at those chemical facilities are screened for terrorist ties. CISA expects to complete implementing the CFATS Personnel Surety Program at every high-risk chemical facility by the second quarter of FY2022.

High-Risk Chemical Facilities Have Flexibility When Implementing the CFATS Personnel Surety Program

High-risk chemical facilities have flexibility to tailor their implementation of the CFATS Personnel Surety Program to fit their individual circumstances and, in this regard, to best balance who qualifies as an affected individual, unique security issues, costs, and burden. For example, a high-risk chemical facility may, in its Site Security Plan:

- Restrict the number and types of persons allowed to access its restricted areas and critical assets, thus limiting the number of persons who will need to be checked for terrorist ties.
- Define its restricted areas and critical assets, thus potentially limiting the number of persons who will need to be checked for terrorist ties.
- Choose to escort visitors accessing restricted areas and critical assets in lieu of performing terrorist ties background checks under the CFATS Personnel Surety Program. The high-risk chemical facility may propose in its SSP or ASP traditional escorting solutions and/or innovative escorting alternatives such as video monitoring (which may reduce facility security costs), as appropriate, to address the unique security risks present at the facility.

Options Available to High-Risk Chemical Facilities To Comply With RBPS 12(iv)

As described in the July 2019 Implementation Notice, the CFATS

Personnel Surety Program provides high-risk chemical facilities several options to comply with RBPS 12(iv). In addition to the alternatives expressly described in the July 2019 Implementation notice, CISA permits high-risk chemical facilities to propose alternative measures for terrorist ties identification in their SSPs or ASPs, which CISA will consider on a case-by-case basis in evaluating high-risk chemical facilities' SSPs or ASPs. In addition, a high-risk chemical facility may choose one option or a combination of options to comply with RBPS 12(iv).

Identifying affected individuals who have terrorist ties is an inherently governmental function and requires the use of information held in government-maintained databases that are unavailable to high-risk chemical facilities. 72 FR 17688, 17709 (April 9, 2007). Thus, under RBPS 12(iv), CISA and high-risk chemical facilities must work together to satisfy the "terrorist ties" aspect of the Personnel Surety performance standard. To implement the provisions of RBPS 12(iv), and in accordance with Title XXI of the Homeland Security Act of 2002, as amended,⁶ the following options will be available to enable high-risk chemical facilities to facilitate terrorist-ties vetting of affected individuals.

Option 1. High-risk chemical facilities may submit certain information about affected individuals that CISA will use to vet those individuals for terrorist ties. Specifically, the identifying information about affected individuals will be compared against identifying information of known or suspected terrorists contained in the federal government's consolidated and integrated terrorist watchlist, the Terrorist Screening Database (TSDB), which is maintained by the Department of Justice (DOJ) Federal Bureau of Investigation (FBI) in the Terrorist Screening Center (TSC).⁷

Option 2. High-risk chemical facilities may submit information about affected individuals who already possess certain credentials that rely on security threat assessments conducted by the Department. See 72 FR 17688, 17709 (April 9, 2007). This will enable CISA to verify the continuing validity of these credentials.

Option 3. High-risk chemical facilities may comply with RBPS 12(iv) without submitting to CISA information about affected individuals who possess Transportation Worker Identification

Credentials (TWICs), if a high-risk chemical facility electronically verifies and validates the affected individual's TWICs through the use of TWIC readers (or other technology that is periodically updated using the Canceled Card List).

Option 4. High-risk chemical facilities may visually verify certain credentials or documents that are issued by a Federal screening program that periodically vets enrolled individuals against the Terrorist Screening Database (TSDB). CISA continues to believe that visual verification has significant security limitations and, accordingly, encourages high-risk chemical facilities choosing this option to identify in their Site Security Plans the means by which they plan to address these limitations.

Since the implementation of the CFATS Personnel Surety Program and by the end of 2020; the CISA reviewed the activity of 1,666 unique facilities at which the program had been implemented. Of the 1,666 facilities, 1,547 selected a single option, 102 selected two options, and 17 facilities selected three options. Four of the 1,666 facilities proposed alternative measures for terrorist ties identification in their SSPs or ASPs, which CISA considered and subsequently approved. CISA's review also found that facilities overwhelmingly selected Option 1 as a means to comply with RBPS 12(iv). Specifically, a total of 1,635 facilities out of the 1,666 facilities reviewed selected Option 1 as a method to comply with the check for terrorist ties in their SSP or ASP.

Information Collected About Affected Individuals

Option 1: Collecting Information To Conduct Direct Vetting

If high-risk chemical facilities select Option 1 to satisfy RBPS 12(iv) for an affected individual, the following information about the affected individual would be submitted to CISA:

- For U.S. Persons (U.S. citizens and nationals, as well as U.S. lawful permanent residents):
 - Full Name;
 - Date of Birth; and
 - Citizenship or Gender.
- For Non-U.S. Persons:
 - Full Name;
 - Date of Birth;
 - Citizenship; and
 - Passport information and/or alien registration number.

To reduce the likelihood of false positives in matching against records in the Federal Government's consolidated and integrated terrorist watch list, high-risk chemical facilities would also be able to submit the following optional

⁴ Additional information about the CFATS Personnel Surety Program is available at <https://www.cisa.gov/cfats-resources>.

⁵ The Notice of Action issued by OMB on May 23, 2019 about the CFATS Personnel Surety program may be viewed at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1670-001#.

⁶ 6 U.S.C. 621 *et seq.*

⁷ For more information about the TSDB, see DOJ/FBI-019 Terrorist Screening Records System, 72 FR 47073 (August 22, 2007).

information about an affected individual to CISA:

- Aliases;
- Gender (for Non-U.S. Persons);
- Place of Birth; and/or

- Redress Number.⁸

High-risk chemical facilities have the option to create user defined fields to collect and store additional information to assist with the management of an

affected individual's records. Any information collected in user defined fields will not be used to support vetting activities. Table 1 summarizes the biographic data that would be submitted to CISA under Option 1.

TABLE 1—REQUIRED AND OPTIONAL DATA FOR AN AFFECTED INDIVIDUAL UNDER OPTION 1

Data elements submitted to CISA	For a U.S. person	For a non-U.S. person
Full Name	Required.	
Date of Birth	Required.	
Gender	Must provide Citizenship or Gender	Optional.
Citizenship .....	.....	Required.
Passport Information and/or Alien Registration Number	N/A	Required.
Aliases	Optional.	
Place of Birth	Optional.	
Redress number	Optional.	
User Defined Field(s)	Optional (Not used for vetting purposes).	

Option 2: Collecting Information To Use Vetting Conducted Under Other DHS Programs

In lieu of submitting information to CISA under Option 1 for vetting of terrorist ties, high-risk chemical facilities also have the option, where appropriate, to submit information to CISA to electronically verify that an affected individual is currently enrolled in another DHS program that vets for terrorist ties.

To verify an affected individual's enrollment in one of these programs under Option 2, CISA would collect the

following information about the affected individual:

- Full Name;
- Date of Birth; and
- Program-specific information or credential information, such as expiration date, unique number, or issuing entity (e.g., state for Commercial Driver's License [CDL] associated with an Hazardous Materials Endorsement [HME]).

To reduce the likelihood of false positives, high-risk chemical facilities may also submit the following optional information about affected individuals to CISA:

- Aliases;
- Gender;
- Place of Birth; and/or
- Citizenship.

High-risk chemical facilities have the option to create a user defined field to collect and store additional information to assist with the management of an affected individual's records. Any information collected in user defined fields will not be used to support vetting activities. Table 2 summarizes the biographic data that would be submitted to CISA under Option 2.

TABLE 2—REQUIRED AND OPTIONAL DATA FOR AN AFFECTED INDIVIDUAL UNDER OPTION 2

Data Elements Submitted to CISA	
Full Name	Required.
Date of Birth	Required.
Program-specific information or credential information, such as expiration date, unique number, or issuing entity.	Required.
Aliases	Optional.
Gender	Optional.
Place of Birth	Optional.
Citizenship	Optional.
User Defined Field(s)	Optional (Not used for vetting purposes).

Other Information Collected

CISA may also contact a high-risk chemical facility or its designees to request additional information (e.g., visa information) pertaining to an affected individual in order to clarify suspected data errors or resolve potential matches (e.g., an affected individual has a common name). Such requests will not

imply, and should not be construed to indicate, that an affected individual's information has been confirmed as a match to a record of an individual with terrorist ties.

CISA may also collect information provided by individuals or high-risk chemical facilities in support of any adjudication requests under Subpart C

of the CFATS regulation,⁹ or in support of any other redress requests.¹⁰

The information that is collected is used by CISA (1) to compare affected individuals information to known and suspected terrorists, or (2) to electronically verify and validate that the affected individual is enrolled in another DHS program that compares an

⁸ For more information about Redress Numbers, please go to <http://www.dhs.gov/one-stop-travelers-redress-process#1>.

⁹ See 6 CFR 27.300–345.

¹⁰ More information about access, correction, and redress requests under the Freedom of Information Act and the Privacy Act can be found in Section 7.0 of the Privacy Impact Assessment for the CFATS

Personnel Surety Program, dated March 10, 2020, and available at DHS/CISA/PIA 018 Chemical Facility Anti-Terrorism Standards Personnel Surety Program | Homeland Security.

affected individual's information to known and suspected terrorists.

Proposed Revisions to the CFATS Personnel Surety Program Information Collection Request

The revisions proposed in this ICR are minor revisions to the instrument that: (1) Reflect the passage of the Cybersecurity and Infrastructure Security Act of 2018, 6 U.S.C. 651–74, such as updating the Agency name to conform with the Agency's new designation as CISA; (2) increase the number of annual respondents from 72,607 respondents to 149,271 respondents; (3) increase the annual burden from 12,101 hours to 24,879 hours; (4) remove the costs associated with capital/startup costs because they are incorporated within the estimated number of respondents; and (4) update the average hourly wage rate of Site Security Officers. CISA is not proposing any revision to the scope of the instrument.

CISA's Methodology in Estimating the Burden for the Personnel Surety Program

Number of Respondents

The current information collection estimates that 72,607 respondents (*i.e.*, affected individuals) would be submitted annually. The current estimate was calculated by adding the estimated the number of initial respondents and the number of annual respondents.

The "initial respondents" are those affected individuals with existing access at a high-risk chemical facility and will be submitted by the facility after receiving authorization or approval of an SSP or ASP requiring the facility to implement measures to comply with RBPS 12(iv). "Annual respondents" are the number of respondents CISA estimates will be submitted each year by high-risk chemical facilities that have completed the initial respondent's submission and are now in the maintenance phase (*e.g.*, adding new affected individuals due to employee hires).

1. Revision to Methodology on How Respondents Are Estimated

CISA has generally assumed that new facilities implementing the Personnel Surety Program for the first time as a high-risk chemical facility under CFATS will have a one-time requirement to submit information about initial respondents with existing access to the restricted areas or critical assets at the high-risk chemical facility. In the current Information Collection, this one-

time cost was estimated as a startup cost. However, based on CISA's experience implementing the Personnel Surety Program, CISA has determined that the per submission burden associated with first time submissions (*i.e.*, "initial respondents") does not differ from the burdens associated with the per submission burdens associated with subsequent submissions to maintain the program (*i.e.*, "annual respondents"). As such, starting with this revision, CISA will no longer consider initial respondents as start-up costs.¹¹ Instead, as discussed below, new facilities submitting information about affected individuals to CISA for the first time will be consolidated into the number of annual respondents, based on the observed numbers of new facilities per year. Therefore, although this collection will include one respondent type (*i.e.*, "annual respondents"), the annual number of respondents for this collection will continue to include both historical categories of "initial" and "annual" respondents.

2. Annual Respondents From New Facilities

In this collection, CISA will include the average number of facilities to be determined high risk for the first time in the number of annual respondents. As shown in the table below, there is, on average over the past four years, 134.5 facilities which are determined to be high-risk for the first time each year.

TABLE 3—NUMBER OF FIRST TIME HIGH-RISK CHEMICAL FACILITIES BY CALENDAR YEAR

Calendar year	Number of facilities determined high-risk for the first time
2017	133
2018	117
2019	116
2020	172
Average	134.5

Since implementing the Personnel Surety Program, CISA has received information about affected individuals from 1,666 facilities, totaling 228,337

¹¹ Startup costs typically refer to additional costs that a respondent will incur in order to comply with the collection, such as the purchase of new equipment required to collect the information. In this case, there is no additional burden or cost associated with an initial submission under the PSP as compared to subsequent submissions. As such, it is unnecessary to separate initial and subsequent submissions when estimating the burdens for this collection.

respondents, for an average of 137.1 respondents per facility.

Therefore, CISA estimates the number of annual respondents for facilities determined to be high risk for the first time by multiplying the average number of respondents per facility (137.1) by the average number of new facilities per year (134.5) for an average of 18,434 annual respondents per year.

3. Annual Respondents From Facilities at Which the CFATS Personnel Surety Program Has Been Implemented

In the current Information Collection, the annual number of respondents at high-risk chemical facilities at which the Personnel Surety Program has been implemented was estimated based on the annual hires rates for total private industry. The annual hire rate accounts for the replacement of employee separations as well as new hires. CISA is retaining this methodology. CISA applied the annual hires rate of 57.3% for total private industry, as estimated from the Bureau of Labor Statistics (BLS)¹² to the total number of respondents that have already been checked for terrorist ties, resulting in 130,837 annual respondents.¹³

4. Revised Estimate of the Annual Respondents

Using the methodology above, the total number of annual respondents for this collection is the sum of: (a) The number of annual respondents from first time high risk facilities (*i.e.*, 18,434 annual respondents), and (b) the number of annual respondents from new hires¹⁴ at high-risk chemical facilities at which the CFATS Personnel Surety program has been implemented (*i.e.*, 130,837 respondents), which totals to an estimated 149,271 annual respondents. Table 05 presents the number of annual respondents.

TABLE 4—ANNUAL NUMBER OF RESPONDENTS

Type of submission	Number of respondents
New Hires	130,837
First Time High Risk Facilities	18,434
Total	149,271

¹² Bureau of Labor Statistics, Job Openings and Labor Turnover—January 2021, released March 11, 2021 https://www.bls.gov/news.release/archives/jolts_03112021.pdf. Table 14.

¹³ 228,337 respondents × 57.3% = 130,837.

¹⁴ New hires include replacements for employee turnover, as well as new hires.

Estimated Time per Respondent

In the current information collection, the estimated time per respondent is 10 minutes (0.1667 hours) per affected individual. This conservative estimate includes the time to edit or remove a record if a high-risk chemical facility opts to subsequently notify the CISA that an affected individual no longer has access. The current estimate also assumes that each record includes both optional and required data elements. Thus, a revision to modify which data fields are required versus optional does not increase the estimated time per response. Thus, CISA is choosing to retain an estimate of 10 minutes (0.1667 hours) per affected individual.

Annual Burden Hours

In the current information collection, the estimated annual burden is 12,101 hours. To estimate the annual burden hours for this collection, CISA multiplied the number of annual respondents by the estimated time burden of 0.1667 hours (10 minutes), for an estimated annual burden of 24,879 hours (*i.e.*, 0.1667 hours multiplied by 149,271 annual respondents).

Total Capital/Startup Burden Cost

CISA provides access to the CFATS Personnel Surety Program application free of charge and assumes that each high-risk chemical facility already has access to the internet for basic business needs. As described earlier in this notice, CISA expects that all high-risk chemical facilities will have implemented the CFATS Personnel Surety Program prior to the end of CY 2021.

In the current collection, CISA assumed that new facilities implementing the Personnel Surety program for the first time as a high-risk chemical facility under CFATS will have a one-time requirement to submit information about initial respondents with existing access to the restricted areas or critical assets at the high-risk chemical facility. While this was considered a start-up cost in previous collections, for this ICR, CISA no longer considers new facilities submitting as a start-up cost, as the cost for an initial respondent does not differ from the cost of an annual respondent.

Consideration of Other Capital Costs

This information collection request maintains the existing assumptions found in the current information collection request with regard to activities listed in 5 CFR 1320.3(b)(1). Specifically, that 5 CFR 1320.3(b)(1) and 5 CFR 1320.8 require CISA to estimate the total time, effort, or financial

resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. Therefore, many costs (*e.g.*, physical modification of the facility layout) a high-risk chemical facility may choose to incur to develop or implement its SSP or ASP should not be accounted for when estimating the capital costs associated with this information collection.

Furthermore, CISA maintains the same assumptions found in the current information collection request with regards to estimating certain high-risk chemical facility capital costs, such as: (1) Capital costs for computer, telecommunications equipment, software, and storage to manage the data collection, submissions, and tracking; (2) capital and ongoing costs for designing, deploying, and operating information technology (IT) systems necessary to maintain the data collection, submissions, and tracking; (3) cost of training high-risk chemical facility personnel to maintain the data collection, submissions, and tracking; and (4) site security officer time to manage the data collection, submissions, and tracking. CISA continues to exclude these costs in accordance with 5 CFR 1320.3(b)(2), which directs Federal agencies to not count the costs associated with the time, effort, and financial resources incurred in the normal course of their activities (*e.g.*, in compiling and maintaining business records) if the reporting, recordkeeping, or disclosure activities are usual and customary.

CISA continues to exclude these usual and customary costs because the time, effort, and financial resources are costs that high-risk chemical facilities incur to conduct background checks for identity, criminal history, and legal authorization to work under 6 CFR 27.230(a)(12)(i)–(iii), and also under various other Federal, State, or local laws or regulations.

Total Recordkeeping Burden

The current information collection does not have any recordkeeping costs because the recordkeeping costs, if any, to create, keep, or retain records pertaining to background checks as part of a high-risk chemical facility's SSP or ASP, are properly estimated in the recordkeeping estimates associated with the SSP Instrument under Information Collection 1670–0007. CISA retains this assumption and estimate of no recordkeeping costs.

Total Annual Burden Cost

CISA assumes that Site Security Officers (SSOs) are responsible for

submitting about affected individuals. For the purpose of this notice, CISA maintains this assumption.

To estimate the total annual burden, CISA multiplied the annual burden of 24,879 hours by the average hourly wage rate of Site Security Officers of \$88.48¹⁵ per hour. Therefore, the total annual burden cost for the CFATS Personnel Surety Program is \$2,201,152 (*i.e.*, 24,879 hours multiplied by \$88.48 per hour). For the three-year period for which this collection will be approved, the total cost burden would be \$6,603,456 (*i.e.*, \$2,201,152 annual cost multiplied by 3 years).

OMB is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submissions of responses).

Analysis

Agency: Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

Title: Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program.

OMB Number: 1670–0029.

Instrument: CFATS Personnel Surety Program.

Frequency: “Other.”

Affected Public: Business or other for-profit.

Number of Respondents: 149,271 respondents.

Estimated Time per Respondent: 0.1667 hours (10 minutes).

¹⁵ The above Average Hourly Wage Rate is the May 2020 Bureau of Labor Statistics average wage for “Management Occupations (Major Group (11–0000))” of \$60.81 times the wage rate benefit multiplier of 1.4596 (to account for fringe benefits) equaling \$88.48. The benefits multiplier is estimated by dividing total compensation of \$38.60 by salaries and wages of \$26.53, based on Employer Cost for Employee Compensation, December 2020, released March 18, 2021 (<https://www.bls.gov/news.release/pdf/eccec.pdf>).

Total Burden Hours: 24,879 annual burden hours.

Total Burden Cost (capital/startup): \$0.

Total Recordkeeping Burden: \$0.

Total Burden Cost: \$2,201,152.

Samuel Vazquez,

Acting Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2021–13110 Filed 6–22–21; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7038–N–08]

60-Day Notice of Proposed Information Collection: Single Family Premium Collection Subsystem—Periodic (SFPCS–P), OMB Control No.: 2502–0536

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* August 23, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at Colette.Pollard@hud.gov for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at Colette.Pollard@hud.gov or telephone 202–402–3400. This is not a toll-free number. Persons

with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Single Family Premium Collection Subsystem—Periodic (SFPCS–P).

OMB Approval Number: 2502–0536.

OMB Expiration Date: 2/28/2022.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The Single Family Mortgage Insurance Subsystem—Periodic (SFPCS–P) allows the lenders to remit the single-family periodic mortgagee insurance premium (PMIP) using funds obtained from the mortgagor during the collection of the monthly mortgage payment. The SFPCS–P strengthens HUD's ability to manage and process PMIP collections and corrections to submitted data. It also improves data integrity for the Single Family Mortgage Insurance Program and enables FHA to track borrower's insurance PMIP status. Therefore, the FHA approved lenders remit PMIP payments that are required by the authority for this collection of information in 24 CFR 203.264 and 24 CFR 203.269 and to comply with the Federal Credit Reform Act of 1990, 2 U.S.C. 661, *et seq.*

Respondents: Business or other for-profit.

Estimated Number of Respondents: 730.

Estimated Number of Responses: 8,760.

Frequency of Response: 12 per year/ monthly.

Average Hours per Response: .15.

Total Estimated Burden: 1,314 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

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

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Janet M. Golrick,

Acting, Chief of Staff for the Office of Housing, Federal Housing Administration.

[FR Doc. 2021–13095 Filed 6–22–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2020–N147;
FXES1113090000C2–201–FF09E32000]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews for 37 Southeastern Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews for 37 species under the Endangered Species Act, as amended. A 5-year review is an assessment of the best scientific and commercial data available at the time of the review. We are requesting submission of any such information that has become available since the previous status review for each species.

DATES: To allow us adequate time to conduct these reviews, we must receive your comments or information on or before August 23, 2021. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For instructions on how and where to request or submit information, see Request for New Information under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

General Information: Aaron Valenta, (404) 679–4144, via email at aaron.valenta@fws.gov, and via U.S. mail at U.S. Fish and Wildlife Service, 1875 Century Boulevard, Atlanta, GA 30345.

Species-Specific Information and Submission of Comments: Please refer to Request for New Information under **SUPPLEMENTARY INFORMATION.**

Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1-800-877-8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), for 17 plant and 20 animal species. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since the last review for the species, particularly information on the status, threats, and recovery of the species that may have become available.

Why do we conduct 5-year reviews?

Under the ESA, we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in title 50 of the Code of Federal Regulations at 50 CFR 17.11(h) (for wildlife) and 50 CFR 17.12(h) (for plants). Listed wildlife and plants can also be found at: http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp and http://ecos.fws.gov/tess_public/pub/listedPlants.jsp, respectively. Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing species under active review. On the basis of such reviews under section 4(c) (2)(B), we determine whether any species should be removed from the list (*i.e.*, delisted) or reclassified from endangered to threatened or from threatened to

endangered (16 U.S.C. 1533(c)(2)(B)). Using the best scientific and commercial data available, we will consider a species for delisting if the data substantiate that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification would require a separate rulemaking process. For additional information about 5-year reviews, refer to our fact sheet at <http://www.fws.gov/endangered/what-we-do/recovery-overview.html>.

Which species are under review?

This notice announces our active 5-year status reviews of the species in the following table.

Common name/ scientific name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (Federal Register citation and publication date)	Contact's mailing address
ANIMALS					
<i>Birds</i>					
Crow, white-necked (<i>Corvus leucognaphalus</i>).	José Cruz-Burgos, caribbean_es@fws.gov , 787-851-7297.	Endangered	Dominican Republic, Haiti	56 FR 13598; 4/3/1991.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
Warber, Elfin-woods (<i>Setophaga angelae</i>).	Iván Llerandi-Román, caribbean_es@fws.gov , 787-851-7297.	Threatened	Puerto Rico	81 FR 40534; 6/22/2016.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
Tern, Roseate (<i>Sterna dougallii dougallii</i>).	Maritza Vargas, caribbean_es@fws.gov , 787-851-7297.	Threatened	Western Hemisphere and adjacent oceans (Florida, Puerto Rico, and Virgin Islands).	52 FR 42064; 11/2/1987.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Reptiles</i>					
Anole, Culebra Island giant (<i>Anolis roosevelti</i>).	Ángel Colón Santiago, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico	42 FR 37371; 7/21/1977.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
Iguana, Mona ground (<i>Cyclura stejnegeri</i>).	Jan P. Zegarra, caribbean_es@fws.gov , 787-851-7297.	Threatened	Puerto Rico	43 FR 4618; 2/3/1978.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Amphibians</i>					
Salamander, reticulated flatwoods (<i>Ambystoma bishopi</i>).	Harold Mitchell, panamacity@fws.gov , 850-769-0552.	Endangered	Florida, Georgia	74 FR 6700; 2/10/2009.	USFWS, 1601 Balboa Ave., Panama City, FL 32405.
Toad, Puerto Rican crested (<i>Peltophryne lemur</i>).	Carlos Pacheco, caribbean_es@fws.gov , 787-851-7297.	Threatened	Puerto Rico	52 FR 28828; 8/4/1987.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Fishes</i>					
Dace, blackside (<i>Phoxinus cumberlandensis</i>).	Mike Floyd, kentuckyes@fws.gov , 502-695-0468.	Threatened	Kentucky, Tennessee, Virginia	52 FR 22580; 6/12/1987.	USFWS, 330 W. Broadway, Ste. 265, Frankfort, KY 40601.
Shiner, Cahaba (<i>Notropis cahabae</i>).	Jennifer Grunewald, alabama@fws.gov , 251-441-5181.	Endangered	Alabama	55 FR 42961; 10/25/1990.	USFWS, 1208B Main Street, Daphne, AL 36526.
<i>Clams</i>					
Elktoe, Cumberland (<i>Alasmidonta atropurpurea</i>).	Andy Ford, cookeville@fws.gov , 931-528-6481.	Endangered	Kentucky, Tennessee	62 FR 1647; 1/10/1997.	USFWS, 446 Neal Street, Cookeville, TN 38501.
Pigtoe, Cumberland (<i>Pleurobema gibberum</i>).	Andy Ford, cookeville@fws.gov , 931-528-6481.	Endangered	Tennessee	56 FR 21084; 5/7/1991.	USFWS, 446 Neal Street, Cookeville, TN 38501.

Common name/ scientific name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (Federal Register citation and publication date)	Contact's mailing address
Pigtoe, finereyed (<i>Fusconaia cuneolus</i>).	Andrew Henderson, fw4esasheville@fws.gov , 828-258-3939.	Endangered	Alabama, Tennessee, Virginia	41 FR 24062; 6/14/ 1976.	USFWS, 160 Zillico St., Asheville, NC 28801.
Pigtoe, heavy (<i>Pleurobema taitianum</i>).	Jennifer Grunewald, alabama@fws.gov , 251-441- 5181.	Endangered	Alabama, Mississippi	52 FR 11162; 4/7/ 1987.	USFWS, 1208B Main Street, Daphne, AL 36526.
Pocketbook, speckled (<i>Lampsilis streckeri</i>).	Chris Davidson, arkansas-es_ recovery@fws.gov , 501- 513-4481.	Endangered	Arkansas	54 FR 8339; 2/28/ 1989.	USFWS, 110 South Amity Rd. Suite 300, Conway, AR 72032.

Snails

Elimia, lacy (<i>Elimia crenatella</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Threatened	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.
Lioplax, cylindrical (<i>Lioplax cyclostomaformis</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Endangered	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.
Pebblesnail, flat (<i>Lepyrium showalteri</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Endangered	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.
Rocksail, painted (<i>Leptoxis taeniata</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Threatened	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.
Rocksail, plicate (<i>Leptoxis plicata</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Endangered	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.
Rocksail, round (<i>Leptoxis ampla</i>).	Morgan Brizendine, alabama@fws.gov , 251-441-5181.	Endangered	Alabama	63 FR 57610; 10/28/ 1998.	USFWS, 1208B Main Street, Daphne, AL 36526.

Scientific name/ common name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (Federal Register citation and publication date)	Contact's mailing address

PLANTS

Flowering Plants

<i>Apios priceana</i> (Price's potato-bean).	Scott Wiggers, mississippi_field_office@fws.gov , 601- 321-1126.	Threatened	Alabama, Illinois, Kentucky, Mississippi, Tennessee.	55 FR 429; 1/5/1990	USFWS, 6578 Dogwood View Pky., Jackson, MS 39213.
<i>Calyptromma rivalis</i> (palma de manaca).	Maritza Vargas, caribbean_es@fws.gov , 787-851-7297.	Threatened	Puerto Rico	55 FR 4157; 2/6/ 1990.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Carex lutea</i> (golden sedge).	Dale Suiter, Raleigh_ES@fws.gov , 919-856-4520.	Endangered	North Carolina	67 FR 3120; 1/23/ 2002.	USFWS, 551 Pylon Drive, #F, Raleigh, NC 27606.
<i>Chamaecrista glandulosa</i> var. <i>mirabilis</i> (no common name).	José G. Martínez, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico	55 FR 12788; 4/5/ 1990.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Cranichis ricartii</i> (no common name).	José G. Martínez, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico	56 FR 60933; 11/29/ 1991.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Dalea foliosa</i> (leafy prairie-clover).	Geoff Call, cookeville@fws.gov , 931-528-6481.	Endangered	Alabama, Illinois, Tennessee ..	56 FR 19953; 5/1/ 1991.	USFWS, 446 Neal Street, Cookeville, TN 38501.
<i>Leptocereus grantianus</i> (no common name).	Carlos Pacheco, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico	58 FR 11550; 2/26/ 1993.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Marshallia mohrii</i> (Mohr's Barbara's buttons).	Scott Wiggers, mississippi_field_office@fws.gov , 601- 321-1126.	Threatened	Alabama, Georgia	53 FR 34698; 9/7/ 1988.	USFWS, 6578 Dogwood View Pky., Jackson, MS 39213.
<i>Oxypolis canbyi</i> (Canby's dropwort).	April Punsalan, charleston_recovery@fws.gov , 843-727- 4707.	Endangered	Delaware, Georgia, Maryland, North Carolina, South Caro- lina.	51 FR 6690 2/25/1986	USFWS, 176 Croghan Spur, Suite 200, Charleston, SC 29407.
<i>Platanthera integrilabia</i> (white fringeless or- chid).	Geoff Call, cookeville@fws.gov , 931-528-6481.	Threatened	Alabama, Georgia, Kentucky, Mississippi, South Carolina, Tennessee.	81 FR 62826; 9/13/ 2016.	USFWS, 446 Neal Street, Cookeville, TN 38501.
<i>Ribes echinellum</i> (Miccosukee goose- berry).	Vivian Negron-Ortiz, panamacity@fws.gov , 850- 769-0552.	Threatened	Florida, South Carolina	50 FR 29338; 7/18/ 1985.	USFWS, 1601 Balboa Ave., Panama City, FL 32405.
<i>Schoepfia arenaria</i> (no common name).	José G. Martínez, caribbean_es@fws.gov , 787-851-7297.	Threatened	Puerto Rico	56 FR 16021; 4/19/ 1991.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Solanum dryophilum</i> (erubia).	Maritza Vargas, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico	53 FR 32827; 8/26/ 1988.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.
<i>Zanthoxylum thomasianum</i> (St. Thomas prickly-ash).	Jaime Yrigoyen, caribbean_es@fws.gov , 787-851-7297.	Endangered	Puerto Rico, Virgin Islands	50 FR 51867; 12/20/ 1985.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.

Scientific name/ common name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (Federal Register citation and publication date)	Contact's mailing address
<i>Non-Flowering Plants</i>					
<i>Thelypteris inabonensis</i> , <i>T. verecunda</i> , <i>T. yaucoensis</i> (no com- mon names).	Maritza Vargas, <i>caribbean es@fws.gov</i> , 787-851-7297.	Endangered	Puerto Rico	58 FR 35887; 7/2/ 1993.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622.

What information do we consider in our 5-year reviews?

A 5-year review considers all new information available at the time of the review. In conducting the review, we consider the best scientific and commercial data that have become available since the most recent status review. We are seeking new information specifically regarding:

(1) Species biology, including but not limited to life history and habitat requirements and impact tolerance thresholds;

(2) Historical and current population conditions, including but not limited to population abundance, trends, distribution, demographics, and genetics;

(3) Historical and current habitat conditions, including but not limited to amount, distribution, and suitability;

(4) Historical and current threats, threat trends, and threat projections in relation to the five listing factors (as defined in section 4(a)(1) of the ESA);

(5) Conservation measures for the species that have been implemented or are planned; and

(6) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information received will be considered during the 5-year review and ongoing recovery programs for the species.

Request for New Information

To ensure that 5-year reviews are based on the best available scientific and commercial information, we request new information from all sources. Please use the contact information listed in the table above that is associated with the species for which you are submitting information. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

How do I ask questions or provide information?

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in the table above. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1-800-877-8339 for TTY assistance.

Public Availability of Comments

Before including your address, phone number, electronic mail address, or other personal identifying information in your submission, you should be aware that your entire submission—including your personal identifying information—may be made publicly available at any time. Although you can request that personal information be withheld from public review, we cannot guarantee that we will be able to do so.

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Leopoldo Miranda-Castro,

Regional Director, South Atlantic-Gulf and Mississippi Basin Regions.

[FR Doc. 2021-13170 Filed 6-22-21; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R7-ES-2020-N109;

FXES11140700000-201-FF07CAFB00]

Endangered and Threatened Wildlife and Plants; Draft Recovery Plan for the Alaska-Breeding Population of Steller's Eider, First Revision

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft first revision of the recovery plan for the threatened Alaska-breeding population of Steller's

eiders (*Polysticta stelleri*). We request review and comment on the revised plan from local, State and Federal agencies, Tribes, and the public. We will also accept any new information on the status of the Alaska-breeding population of Steller's eiders throughout its range to assist in finalizing the recovery plan.

DATES: *Comment submission:* To ensure consideration, we must receive written comments on or before August 23, 2021. However, we will accept information about the species at any time.

ADDRESSES: *Document availability:* You may obtain a copy of the draft recovery plan by one of the following methods:

- *Internet:* Download the document at <https://www.fws.gov/alaska/pages/endangered-species/stellers-eider>.

- *U.S. Mail:* U.S. Fish and Wildlife Service; Attention: Neesha Stellrecht, Fairbanks Fish and Wildlife Field Office; 101 12th Ave.; Fairbanks, AK 99701.

- *Telephone:* Neesha Stellrecht, 907-456-0297.

Comment submission: You may submit comments by one of the following methods:

- *Mail or hand delivery:* Submit written comments to the above U.S. mail address.

- *Email:* neesha_stellrecht@fws.gov. Please include "Steller's eider recovery plan" in the subject line.

For additional information about submitting comments, see Availability of Public Comments in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Neesha Stellrecht, by one of the methods in **ADDRESSES**. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800-877-8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft recovery plan, first revision (draft plan), for the threatened Alaska-breeding population of Steller's eiders for public review and comment. The original recovery plan for this population was approved in 2002. The draft revised plan, when finalized, would replace the

2002 version. The draft plan includes objective, measurable criteria and recovery actions as may be necessary for removal of the species from the Federal List of Endangered and Threatened Wildlife. We request review and comment on the draft plan from local, State, and Federal agencies, and the public.

Recovery Planning

Section 4(f) of the Endangered Species Act (Act) of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Also pursuant to section 4(f) of the Act, a recovery plan must, to the maximum extent practicable, include (1) a description of site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species; (2) objective, measurable criteria that, when met, would support a determination under section 4(a)(1) that the species should be removed from the List of Endangered and Threatened Species; and (3) estimates of the time and costs required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

The Service has revised its approach to recovery planning. The revised process is intended to reduce the time needed to develop and implement recovery plans, increase recovery plan relevancy over a longer timeframe, and add flexibility to recovery plans so they can be adjusted to new information or circumstances. A recovery plan will include statutorily required elements (objective, measurable criteria; site-specific management actions; and, estimates of time and costs), along with a concise introduction and our strategy for how we plan to achieve species recovery. The recovery plan is supported by a separate Species Status Assessment. The essential component to flexible implementation under this recovery process is producing a separate working document called the Recovery Implementation Strategy (implementation strategy). The implementation strategy steps down from the more general description of actions in the recovery plan to detail the specific, near-term activities needed to implement the recovery plan. The implementation strategy will be adaptable by being able to incorporate new information without having to concurrently revise the recovery plan, unless changes to statutory elements are required. The implementation strategy will be developed following publication

of the final recovery plan and will be made available on the Service's website at that time.

Species Background

The Alaska-breeding population of Steller's eider (*Polysticta stelleri*), a small sea duck, was listed as a threatened distinct population segment under the Act in 1997 (62 FR 31748) due to the contraction of its breeding range in Alaska. Steller's eiders spend the majority of their lives in the marine environment, occupying terrestrial habitats only during the nesting season, which occurs from approximately early June to early September. Nesting in Alaska is concentrated in tundra wetland habitat near Utqiagvik, and occurs at lower densities elsewhere on Alaska's Arctic Coastal Plain. Alaska-breeding Steller's eiders molt and winter in the southern Bering Sea and northern Pacific Ocean, where they intermix with Russia-breeding Steller's eiders. Combined, these two breeding populations comprise the Pacific-wintering population of Steller's eiders. Considerable uncertainty about the drivers of population growth and the factors inhibiting recovery of the Alaska-breeding population exists; however, known threats include ingestion of lead ammunition, shooting, collisions with human-built structures, human disturbance in nesting areas, nest predation, and changes to the ecological community in the nesting area (e.g., less extreme cycles of lemming abundance). Refer to the Species Status Assessment Report (USFWS 2019) for a full discussion of the population's biology and threats.

Draft Recovery Plan

Recovery Criteria

The ultimate recovery goal is to remove the Alaska-breeding population of Steller's eiders from the Federal List of Endangered and Threatened Wildlife (delist) by ensuring the long-term viability of the population in the wild. In the draft plan, we have identified the following two recovery criteria alternatives, based on the best available information about the species.

1. If the abundance of the Pacific-wintering population is known to be increasing or stable, over 20 years the number of Steller's eiders must be ≥ 50 , 200, and 100, near Utqiagvik, in the Utqiagvik Triangle, and in the Arctic Coastal Plain study areas, respectively, or the total number of Steller's eiders breeding in Alaska must be ≥ 350 , with a wide enough distribution to ensure adequate redundancy and representation; or

2. If the trend of the Pacific-wintering population is unknown or decreasing, over 20 years the number of Steller's eiders breeding in Alaska must be ≥ 75 , 300, and 150, near Utqiagvik, in the Utqiagvik triangle, and in the Arctic Coastal Plain study areas, respectively, or the total number of Steller's eiders breeding in Alaska must be ≥ 525 , with a wide enough distribution to ensure adequate redundancy and representation.

Additionally, threats including (but not limited to) ingestion of lead ammunition, mortality from shooting, collisions with structures, human disturbance in the breeding area, nest predation, and changes to the ecological community must be found to not affect the ability of the population to meet and maintain the demographic criteria above.

Recovery Strategy

To achieve the recovery criteria, the recovery strategy for Alaska-breeding Steller's eiders includes working with Federal agencies and other partners to improve survival and reproductive rates by eliminating known threats such as lead contamination, shooting, collisions, and disturbance, and protect both breeding and non-breeding habitats. Considerable uncertainty about the ecology, population dynamics, and constraints to population growth remains; therefore, a number of recovery actions are focused on monitoring population size and continuing research to improve our understanding of Steller's eider ecology, threats, and efficacy of management actions.

Availability of Public Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

The authority for this action is section 4(f) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Gregory Siekaniec,

Regional Director, Alaska Region.

[FR Doc. 2021-13153 Filed 6-22-21; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs**

[212A2100DD AAK6006201
AOR3030.999900]

Indian Child Welfare Act (ICWA) Grants to Indian Organizations for Off-Reservation Indian Child and Family Service Programs

AGENCY: Bureau of Indian Affairs, Office of Indian Services.

ACTION: Solicitation of proposals.

SUMMARY: The Secretary of the Interior (Secretary), through the Bureau of Indian Affairs (BIA), is soliciting grants from Indian Organizations to establish and operate off-reservation Indian child and family service programs. The intent of the Indian child and family service programs are to provide services for stabilizing Indian families and Tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort.

DATES: Grant application packages must be submitted no later than 5 p.m. Eastern Daylight Time, July 16, 2021. The BIA will not consider proposals received after this time and date.

ADDRESSES: Grant application packages must be submitted through *Grants.gov*. For information on how to apply for grants in *Grants.gov*, see the instructions available at: <https://www.grants.gov/help/html/help/Applicants/HowToApplyForGrants.htm>.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding the application process, please contact Jo Ann Metcalfe, Grant Officer, via email at jo.metcalfe@bia.gov or phone at (703) 390-6410.

SUPPLEMENTARY INFORMATION:

- I. Background
 - A. Authority
 - B. Paperwork Reduction Act
- II. Eligibility
- III. Categories of Available Funding
- IV. Funding Limitations
- V. Proposal Application Guidelines
 - A. Background
 - B. Items To Consider Before Preparing an Application, Funding Limitations, 2-Year Timeframes, and No-Cost Extensions
 - C. Mandatory Components and Requirements for Applications
 - D. Submission of Application in Digital Format
 - E. Categories of Funding, Review Criteria and Evaluation
 - F. Transfer of Funding and Transfer of Funds

- G. Reporting Requirements for Award Recipients
- H. Additional Information

I. Background

In Fiscal Year (FY) 2020, the Congress appropriated \$1.0 million to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932). In FY 2021, the Congress again allocated \$1.0 million for ICWA, to fund off-reservation Indian Organizations authorized by section 202 of the ICWA (25 U.S.C. 1932), just as it did in the FY 2020 appropriations.

The BIA is the Federal agency charged with administering ICWA funding to Federally recognized Tribes and will distribute a total of \$2.0 million (subject to fund availability) grants to off-reservation Indian Organizations through a competitive grant process as outlined in 25 CFR 23.31–23.35, Subpart D., Grants to off-reservation Indian Organizations for Title II Indian Child and Family Services Programs which will include, but are not limited to:

- (1) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
- (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.^a

This solicitation contains guidelines and instructions for writing and submitting a proposal. The BIA will use a competitive evaluation process.

A. Authority

This ICWA grant is funding that is provided through non-recurring appropriations made by the Congress in its annual appropriations to the BIA. These funds were provided on a year-to-year basis and may or may not be provided in future years.

In the House Report (H. R.) 116–100, Department of the Interior, Environment and Related Agencies Appropriations Bill, 2020, the House Appropriations Committee directed the BIA to utilize the \$1.0 million specifically provided within the \$16.431 million enacted for

^a25 U.S.C. 1932.

the ICWA to fund off-reservation Indian organizations authorized by section 202 of the ICWA (25 U.S.C. 1932).

The House Report (H. R.) 116–448, Department of the Interior, Environment and Related Agencies Appropriations Bill, 2021 provided \$1,000,000 once again as provided in the fiscal year 2020 for off-reservation programs authorized by section 202 of ICWA (25 U.S.C. 1932).

Additional authorizing statutes for the program include:

- Section 202 of ICWA (25 U.S.C. 1932)
- Public Law 93–638, ISDEAA of 1975, as amended
- Public Law 101–630, The Indian Child Protection and Family Violence Prevention Act
- Public Law 114–165, Native American Children's Safety Act (NACSA) of 2016
- 25 CFR part 23, ICWA
- 25 U.S.C. 1901 *et seq.*, ICWA of 1978
- 2 CFR, Grants and Agreements, Volume 1, 1–299
- 43 CFR part 18 (31 U.S.C. 1352) New Restrictions on Lobbying
- Indian Child Welfare Act Title II Authorities

B. Paperwork Reduction Act

The information collection contained in this notice is authorized under OMB Control Number 1076–0131, which expires June 30, 2021. 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.

II. Eligibility

Eligibility for funding will be limited to activities that support and are consistent with the intent and activities outlined in the Indian Child Welfare Act (ICWA) section 202 (25 U.S.C. 1932).

Indian Organizations may apply individually or as a consortium for a grant under this notice. Indian Organization, solely for purpose of eligibility for grants, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians. A consortium is created by an agreement or association between two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when its administratively feasible to provide an adequate level of service within the area. An applicant may not submit more than one application nor be the

beneficiary of more than one grant under this notice.

III. Categories of Available Funding

Category of funding will be under ICWA.

IV. Funding Limitations

Award Type: Grant.

Estimated Total Funding: \$2,000,000.

Expected Number of Grant Awards: 10–15.

Award Ceiling: \$100,000 per Budget period.

Award Floor: \$80,000 per Budget period.

Anticipated Project Start Date: October 1, 2021.

Anticipated Project End Date: September 30, 2023.

Length of Project Period: Two Fiscal Years.

Category: ICWA.

Cost Sharing or Matching: No (volunteer).

Matching requirement(s) are voluntary. Title II of the Indian Child Welfare Act, at Section 201(b), clearly encourages Tribes to seek funds from other sources to enhance the quality and scope of ICWA child and family services programs.

V. Proposal Application Guidelines

A. Background

On January 13, 1994, Indian Affairs (IA) published in the **Federal Register** (59 FR 2248) regulations revising 25 CFR part 23, the rules that govern the Title II ICWA grant program. The announcement converted the previous competitive ICWA grant award process to initiate a noncompetitive award system for eligible Federally recognized Tribes.

In FY 1995, the eligible Tribes began to continuously access their recurring ICWA funds in the Tribal Priority Allocation (TPA) budget Subactivity section of the Tribe's budget system. The funding process managed centrally by IA for off-reservation Indian Organizations was discontinued after the conversion to the noncompetitive process for eligible federally recognized Tribes. The BIA last awarded the ICWA off-reservation grants to Indian Organizations in FY 1994. Rather, some federally recognized Tribes have contracted with off-reservation Indian Organizations, if and where needed.

In FY 2020, the Congress appropriated \$1.0 million specifically to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932). In FY 2021, the Congress allocated again \$1.0 million for the ICWA, to fund off-reservation programs

authorized by section 202 of the ICWA (25 U.S.C. 1932) for the second consecutive fiscal year. These are considered one-time funding for the earmark as included in the two consecutive fiscal year appropriations act.

The BIA will distribute the FY 2020 and FY 2021 funding to off-reservation Indian Organizations through a competitive grant process as outlined in 25 CFR 23.31–23.35, in subpart D, Grants to Off-reservation Indian Organizations for Title II Indian Child and Family Services Programs.

B. Items To Consider Before Preparing an Application, Funding Limitations, 2-Year Timeframes and No-Cost Extensions

Awards are subject to available funding. The BIA's obligation under this solicitation notice is contingent on receipt of available appropriated funds. No liability on part of the U.S. Government for any payment may arise until funds are made available to the awarding officer for this grant. No liability may arise until the recipient receives notice of such availability and is confirmed in writing by the grants officer.

C. Mandatory Components and Requirements for Applications

1. Complete the Standard Form—Federal Assistance (SF-424). Go to www.grants.gov to download the application:

- Select the “forms” tab. This will open the page with table titled “SF-424 FAMILY FORMS”;
- Under the column “Agency Owner,” third row down, is form name listed is “Application for Federal Assistance SF-424.” Click on the PDF letters to download the three-page document.

2. Required Documents: Applicants must attach the following documents.

- a. Project Narrative:
 - Includes an Executive Summary and a Technical Summary. The Project Narrative must not exceed 20 pages.
 - An Executive Summary includes an overview or an initial assessment of the project and includes a description of the specific ICWA services and activities the Indian Organization provides to Indian communities. The Executive Summary must outline the Organization's understanding of the ICWA and explain the existing working relationship with Indian child and family service programs, specifically in reference to family reunification and the prevention of Indian family breakups. This section will describe the challenges or needs faced by the communities

served and how the goal/vision for this proposal will meet those needs. At a minimum, it should include:

- A technical description of the proposed project and communities served, including geographic location, the population in the service area, and available information relevant to ICWA.
- A description of the existing ICWA services in context to readiness to exercise the project's objectives and goals. The description must identify strengths and gaps in ICWA services where relevant. Provide examples of other Federal project and/or similar projects for which funding is being requested.

- Describe the deliverable services that the project is expected to develop and the resources available to implement proposed project(s).

- The Technical Summary is a narrative description of the program's skills and abilities, which includes the Scope of Work (SOW) outlining what will be done. This section must provide a clear link between the proposed activities and need identified in the Executive Summary. It must clearly state the project's measurable goals, objectives, activities, methodology used, including culturally defined approaches, which the applicant will incorporate to achieve the identified goals and objectives. Indicate the project purpose (*i.e.*, start up, expansion, or replacement), describe the proposed project and what it will accomplish (*e.g.*, number of children and families it will service, service area, type of services).

- The SOW must include a detailed outline of the project(s) deliverables, timeline, and milestones that will enhance ICWA services provided to children and families. The SOW explains how the applicant will measure and/or track its objectives and outcomes of the proposed project (performance measures), and why the methods utilized will achieve the stated goals. Tools may include quarterly performance reports and other data collected during reporting period.

- **Deliverables:** Is the result that clearly defines each item(s) that the project will deliver. Whether it is a product or a service, state the reason why the task/item is being executed in the project for the customer—Tribe.

- **Timeline:** Is the road map that outlines the project from start to finish. The document delineates the major phases across the schedule of the project's duration.

- **Milestones:** Breaks down the timeline into manageable parts or tasks. This document should help to monitor the project's progress and assist the

planned schedule. Key milestones, such as, project kickoffs, meetings, hand offs, and how proposed project activities and services will reach the population identified.

■ *Performance Measures and Outcomes:* Is the process that the applicant will use to collect data and analyze the services provided to the organization, individual, group, or system (e.g., number of Indian children and families supported in family reunification foster and adoptive homes).

b. Documentation of Authority to Apply:

Applicants applying as an Indian Organizations must submit documentation of authority that demonstrates Tribal support (e.g., a Tribal resolution, letters of support, cooperative service agreements). The documentation must give the Tribal Organization authority to apply for the grant and contain authorized signature(s) by the application due date. Applicants applying as a Tribal consortium must submit documentation of authority to apply from each Tribe and include a copy of the bylaws or other governance documents that allow the consortium's action with the application. This documentation must give the consortium authority to apply for the grant, contain authorized signature(s), and be submitted by the application due date.

c. Resume(s):

Provide the resumes (with areas of expertise) of key consultants and personnel, and the nature of their involvement, including their relationship to the applicant as Tribal staff, consultant, subcontractor, etc. This information may be included as an attachment to the application and will not be counted towards the 20-page limitation.

d. Budget Narrative:

Provide a budget narrative that describes separately all major line item grant expenditures such as personnel, fringe benefits, travel, equipment, supplies, direct client services, contractual, indirect costs, or other major expenditures. Budget narrative must correlate to the project scope of work and clearly break the project down into defined tasks with an associated budget line item for each task. Include justification for each task and identify cost.

e. Critical Information Page:

Applicants must provide proof of its Indian Organization or consortium status as defined in Section II of this notice. Applicants must include a list and the contact information of the Indian Organization Project Lead(s) and

personnel. The list must include those individuals that will oversee the project work, make authorized decisions, and is responsible for submitting the quarterly, annual, and the final reports, plus quarterly financial status reports. The designated lead personnel may not be a consultant. The designated Indian Organization Project Lead(s) is authorized to make decisions on the grant activities.

f. Federal DUNS Number:

Each Indian Organization must verify that it is registered in *SAM.gov* (<https://sam.gov/SAM>), have a Federal DUNS number.

g. ASAP Enrollment with the BIA:

Each Indian Organization must be actively enrolled with the BIA in the Automated Standard Application for Payment (ASAP) system to receive the grant. This information must be provided in the critical information page.

Applications must submit the SF-424 and all six (7) attachments (a-g) described above. The BIA will not accept or review any incomplete applications.

D. Submission of Application in Digital Format

Submission of a complete application in digital form to *grants.gov* is required. For instructions, see <https://www.grants.gov/help/html/help/Applicants/HowToApplyForGrants.htm>. In very limited circumstances, the BIA may accept a non-digital application. Please contact the BIA at least a week prior to the submission deadline for approval.

The budget should use the SF-424A form. Please use descriptive file names to help the BIA quickly locate specific components of the application.

E. Categories of Funding, Review Criteria and Evaluation

Applications will be evaluated for responsiveness to ICWA components under each Funding Category. Review criteria and the scoring system for each Category are identified below.

1. Project Description and Scoring System:

Executive Summary (30 points): The Committee will evaluate the applications based on the clarity and content outlined in the Project Narrative [Executive and Technical Summaries, Section VIII, B (1)]. The Committee will assess if the application:

- Demonstrates an understanding of the ICWA.
- Describes examples of other Federal project and/or similar projects for which funding is being requested.

- If the application describe the current Indian population served and if it operates an existing child and family service programs, application contents emphasize the prevention of Indian family breakups and how project(s) will complement these existing services.

- Applicant understands the challenges faced by the community and proposed project clearly defines how it address these challenges.

- If the application offers a clearly defined narrative description of the program for the service area for the project that describes service population and geographic area.

- Describes specific services and/or activities with recent baseline data with plans that address gaps in services identified.

2. Project Objective, Technical Description, and Scope of Work (25 points): This criterion will evaluate the project objective, technical description, and scope of work as described in Section VIII, B (2). The clarity of the described work and the appropriateness of the project in terms of meeting the intent and goals of the grant. The Committee will assess if the application:

- Includes activities, in the proposed project, that directly relates to the intent and provisions of the grant.

- Offer examples that reflect an understanding of the social problems or issues affecting the resident Indian client population (including cultural issues) that the applicant proposes to serve and provide a clear link between the proposed activities and the needs identified of the population to be served.

- Includes the technical barriers created by existing public and private programs for example availability of transportation, distance between community to be served, specific needs of the Indian clientele and how the proposed project will reach population in the service area identified.

- Presents measurable goals, objectives, and timeline for implementation of proposed projects that are clearly defined; and describes how it will measure its progress in achieving projects goals and objectives.

- Includes documentation that the Indian Organization or consortium has authority to apply for the grant, is legally established, and submits letters of support from the Tribe(s).

3. Deliverable Products (25 points): The Committee will evaluate the extent to which the expected outcome and budget proposal meets the applicant's stated goals, based on the deliverables described below. The Committee will assess if the application:

- Presents a narrative that includes a needs assessment, quantitative data, and demographics of the Indian population to be served.

- Estimates the number of Indian people or families served based on available data.

- Offers a narrative description of the program; the program goals and objectives, stated in measurable terms.

- Includes culturally defined approaches and/or procedures by which the applicant will accomplish the identified goals and objectives.

- Explains the internal monitoring process or describes how it will measure the project's progress and accomplishments.

- Provides a budget narrative that separately describes all major line item grant expenditures and it correlates to the project scope of work.

- Clearly breaks the project down into defined tasks with an associated budget line item for each task; includes justification for each task and costs identified.

- Has a budget that includes how the cost of goods and services are determined and how they will fulfill the objectives of the project.

- Has a reasonable budget, based on the resources needed to implement the project(s) in the identified specific geographic location.

4. Key Personnel and Administration (20 points): The Committee will evaluate key personnel experience working with Tribal communities on ICWA related matters. The Committee will assess how the Indian Organizations performs administrative functions and produces quality project deliverables. The Committee will assess if the application:

- Provides proof of its Indian Organization or consortium status.

- Includes resumes that demonstrate key personnel have ICWA experience, and position descriptions.

- Submitted the Federal Assistance form (SF-424).

- Includes a DUNS Number.

- Includes certification that the

bookkeeping and accounting procedures used meet existing Federal standards for grant administration and management.

- Includes verification, in accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, that character and background investigations of key personnel is or will be conducted.

- Demonstrates compliance with a Drug-Free Workplace.

- Demonstrates financial management capability by providing its most recent audit report.

The BIA, Director will approve all final award selections. The BIA will notify all award applicants in writing.

F. Transfer of Funding and Transfer of Funds

The BIA's obligation under this solicitation is contingent upon receipt of Congressionally appropriated funds. No liability on the part of the U.S. Government for any payment may arise until funds are made available to the Grants Officer for this award until recipient receives notice of such availability, to be confirmed in writing by the Grant Officer. All payment under this agreement will be made by the U.S. Government by electronic funds transfer (through the Automated Standard Application for Payment (ASAP)). All payments will be deposited in accordance with the banking information designated for the applicant in the System for Award Management (SAM).

G. Reporting Requirements for Award Recipients

During the life of a grant project, deliverables will include an annual project/technical progress update, and a final written report addressing components outlined in the Scope of Work. Annual written progress and financial status reports are to be submitted to the BIA using the *GrantSolutions.gov* portal 30 days following the end of the first year and annually thereafter. Reporting dates will be established by the BIA's Grants Officer and written into the agreement once the award has been made but will coincide with the Federal fiscal year calendar.

The annual report consists of two parts: (1) A narrative report: a summary of events, accomplishments, problems and results during the year, and (2) a financial report SF-425: a list in of expenditures during the quarter, how the funds were spent, and the amount remaining. The project monitor will access the reports in the Grant Solutions system.

1. Delivery Schedules:

The Tribal awardees will deliver all products and data generated under the project to the BIA via the *GrantSolutions.gov* portal within 90 days after project completion, as required by the signed agreement, and may withhold sensitive information (e.g., proprietary Tribal data or Traditional Knowledge). Such information may be redacted at the Tribal government's discretion because information in the possession of the BIA or submitted to the BIA throughout the process, including final work product,

constitute Government records and may be subject to the disclosure to third parties under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department of the Interior's FOIA regulations at 43 CFR part 2, unless a FOIA exemption or exception applies or other provisions of law protect the information.

2. Digital Format Requirements for Reports and Data:

The BIA requires that all deliverable products and reports be uploaded to *GrantSolutions.gov*. Reports can be provided in Microsoft Word or Adobe Acrobat PDF formats. Spreadsheet data can be provided in Microsoft Excel, Microsoft Access, or Adobe PDF formats. All vector figures should be converted to PDF format. Raster images can be provided in PDF, JPEG, TIFF, or any of the Windows metafile formats.

3. Number of Copies:

The submitted proposal should account for the requirement that all final products be delivered in the format described above, one digital copy.

H. Additional Information

1. DUNS Registration:

Request a DUNS number online at <http://fedgov.dnb.com/webform>. U.S.-based entities may also request a DUNS number by telephone by calling the Dun & Bradstreet Government Customer Response Center, Monday–Friday, 7 a.m. to 8 p.m. CST at the following numbers:

U.S. and U.S. Virgin Islands: 1-866-705-5711

Alaska and Puerto Rico: 1-800-234-3867 (Select Option 2, then Option 1) For Hearing Impaired Customers Only call: 1-877-807-1679 (TTY Line)

Once assigned a DUNS number, entities are responsible for maintaining up-to-date information with Dun & Bradstreet.

2. Entity Registration in SAM and Printing Confirmation:

Registration in System for Award Management (SAM) is required and online at <http://www.sam.gov/>. Once registered in SAM with BIA, entities must renew and revalidate their SAM registration at least every 12 months from the date previously registered. Entities are strongly urged to revalidate their registration as often as needed to ensure that their information is up to date and in sync with changes that may have been made to DUNS and IRS information. For SAM assistance, call: 1-866-606-8220. If the tribe's SAM registration name is not exactly the same as the legal name on BIA's list, the tribal organization should contact their local Procurement Technical Assistance Center (PTAC) as soon as possible.

Changing a name can take several weeks. Find your local PTAC at <http://www.dla.mil/HQ/SmallBusiness/PTAC.aspx>. Alaska tribes may also call 1-800-478-7232.

To print confirmation page:

- Go to www.sam.gov.
- Click on "Search Records."
- Click on "Quick Search" or "DUNS Number Search" or "CAGE Code Search" query boxes to enter tribe's information (any of these should work).
- Click "Search."

• If correct Entity Name and information are displayed, click "Save PDF" on right side of screen and add that to the application as the attachment for Requirement 2.

3. Excluded Entities:

Applicant entities identified in the SAM.gov Exclusions database as ineligible, prohibited/restricted or excluded from receiving Federal awards, certain subawards, and certain Federal assistance and benefits, will not be considered for Federal funding, as applicable to the funding being requested under this Federal program.

4. Registration in ASAP with BIA:

Although a Tribe or Indian Organization may be registered in the Automated Standard Application for Payments (ASAP) already with another agency, it must be specifically enrolled with the BIA. To register in ASAP, an enrollment form must be completed and emailed to Jo Ann Metcalfe at jo.metcalfe@bia.gov. As soon as the Tribe is enrolled, a user ID will be emailed to the point of contact listed on the enrollment form. Next, a password will automatically be mailed by USPS to the tribe, but you can call the ASAP Help Desk at 855-868-0151 and press 2 then 3 to reach an agent who can help to request a password via email to expedite the process. Upon receiving a password, you will then have access to your online ASAP account to name the required roles for setup—this process is not immediate. To complete the process, call the ASAP Help Desk again and remain on the line with them while they assist you in setting up and linking the Tribe's banking information to BIA's Agency Locator Code (ALC/Region). BIA's ALC is 14200699. Once this is completed, you will receive a confirmation email and it will take the Treasury 5-10 business days to approve your ASAP enrollment with BIA. This process only needs to be done once and does not need to be regularly updated unless the Tribal staff changes who is

named as the primary role in ASAP set up.

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021-13198 Filed 6-22-21; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

**[212D0102DR/DS5A300000/
DR.5A311.IA000118]**

Land Acquisitions; Wilton Rancheria

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Principal Deputy Assistant Secretary—Indian Affairs made a final agency determination to acquire 35.92 acres, more or less, in the City of Elk Grove, Sacramento County, California (Site) in trust for the Wilton Rancheria for gaming and other purposes on January 19, 2017.

DATES: The final determination was made on January 19, 2017. The land was acquired in trust on February 10, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS-3543 MIB, 1849 C Street NW, Washington, DC 20240, telephone (202) 219-4066, paula.hart@bia.gov.

SUPPLEMENTARY INFORMATION: On January 19, 2017, the Principal Deputy Assistant Secretary—Indian Affairs issued a decision to accept the Site, consisting of approximately 35.92 acres, more or less, of land in trust for the Wilton Rancheria (Tribe), under the authority of the Indian Reorganization Act, 25 U.S.C. 5108. The Principal Deputy Assistant Secretary—Indian Affairs determined that Tribe's request also meets the requirements of the Indian Gaming Regulatory Act's "Restored Lands" exception, 25 U.S.C. 2719(b)(1)(B)(iii), to the general prohibition contained in 25 U.S.C. 2719(a) on gaming on lands acquired in trust after October 17, 1988.

The Assistant Secretary—Indian Affairs, on behalf of the Secretary of the Interior, acquired title to Site in the name of the United States of America in trust for Tribe on February 10, 2017. The 35.92 acres, more or less, are located in Sacramento County, California and are described as follows:

Being a portion of Lot A as shown on that certain map entitled "Subdivision No. 00-038.00 Lent Ranch Marketplace" filed for record on December 14, 2007 in

Book 372 of Maps, Page 27, located in the City of Elk Grove, County of Sacramento, State of California, more particularly described as follows:

Commencing at a point which is the northeasterly corner of Lot A of said map, being a 3/4" iron pipe with plug stamped L.S. 6815; Thence leaving said point of commencement along the northeasterly line of said Lot A, South 37°55'18" East, a distance of 533.10 feet; Thence leaving said northeasterly line, entering and passing through said Lot A, South 51°30'01" West, a distance of 24.29 feet to the true point of beginning; Thence leaving said Point of Beginning and continuing through said Lot A, South 51°30'01" West, a distance of 1780.56 feet to a point on the southwesterly line of said Lot A, also being a point on the northeasterly right-of-way line of Promenade Parkway as shown on said map;

Thence northwesterly and northerly, respectively, along said right-of-way line, the following Twenty-one (21) arcs, courses and distances:

(1) From a radial line which bears South 57°17'37" West, along a non-tangent curve concave to the east, having a radius of 1,452.00 feet, northwesterly 564.43 feet along said curve through a central angle of 22°16'20";

(2) North 79°33'57" East, a distance of 6.00 feet;

(3) from a radial line which bears South 79°33'57" West, along a non-tangent curve concave to the southeast, having a radius of 25.00 feet, northeasterly 40.55 feet along said curve through a central angle of 92°56'41";

(4) North 82°30'38" East, a distance of 51.72 feet;

(5) North 07°29'22" West, a distance of 100.00 feet;

(6) South 82°30'38" West, a distance of 53.51 feet;

(7) along a tangent curve concave to the northeast, having a radius of 25.00 feet, northwesterly 40.62 feet along said curve through a central angle of 93°06'07";

(8) South 85°36'45" West, a distance of 6.00 feet;

(9) from a radial line which bears South 85°36'45" West, along a non-tangent curve concave to the east, having a radius of 1,454.00 feet, northerly 93.58 feet along said curve through a central angle of 03°41'16";

(10) North 00°42'00" West, a distance of 147.80 feet;

(11) North 89°18'00" East, a distance of 6.00 feet;

(12) from a radial line which bears South 89°18'00" West, along a non-tangent curve concave to the southeast, having a radius of 25.00 feet,

northeasterly 39.27 feet along said curve through a central angle of 90°00'00";

(13) North 89°18'00" East, a distance of 6.00 feet;

(14) North 00°42'00" West, a distance of 50.00 feet;

(15) South 89°18'00" West, a distance of 13.34 feet;

(16) along a tangent curve concave to the northeast, having a radius of 25.00 feet, northwesterly 38.46 feet along said curve through a central angle of 88°08'33";

(17) South 87°26'33" West, a distance of 6.00 feet;

(18) North 02°33'27" West, a distance of 51.58 feet;

(19) North 00°42'00" West, a distance of 563.84 feet;

(20) North 89°18'00" East, a distance of 6.00 feet;

(21) from a radial line which bears South 89°18'00" West, along a non-tangent curve concave to the east, having a radius of 25.00 feet, northerly 6.76 feet along said curve through a central angle of 15°30'00" to the northwest corner of said Lot A and a point on the common line between said Lot A and Lot G of said Map;

Thence leaving said northeasterly line, along said common line, the following four (4) arcs, courses and distances:

(1) North 89°12'25" East, a distance of 86.70 feet;

(2) along a tangent curve concave to the southwest, having a radius of 330.00 feet, southeasterly 314.08 feet along said curve through a central angle of 54°31'51";

(3) South 36°15'44" East, a distance of 86.17 feet;

(4) along a tangent curve concave to the north, having a radius of 25.00 feet, easterly 37.96 feet along said curve through a central angle of 87°00'21";

Thence leaving said common line, entering and passing through said Lot A, the following eight (8) arcs, courses and distances:

(1) South 32°02'06" East, a distance of 66.91 feet;

(2) from a radial line which bears North 33°08'11" West, along a non-tangent curve concave to the south, having a radius of 978.00 feet, easterly 417.51 feet along said curve through a central angle of 24°27'35";

(3) North 81°19'25" East, a distance of 19.83 feet;

(4) along a tangent curve concave to the south, having a radius of 879.00 feet, easterly 342.73 feet along said curve through a central angle of 22°20'25";

(5) South 76°20'11" East, a distance of 12.19 feet;

(6) along a tangent curve concave to the southwest, having a radius of 342.00

feet, southeasterly 157.69 feet along said curve through a central angle of 26°25'03";

(7) along a compound curve concave to the southwest, having a radius of 342.00 feet, southeasterly 71.04 feet along said curve through a central angle of 11°54'08";

(8) South 38°01'00" East, a distance of 346.19 feet to the point of beginning.

The Basis of Bearings for this description is the California State Plane Coordinate System, Zone 2, NAD 83, Epoch Date 1997.30 as measured between NGS Station "Eschinger", 1st Order and NGS Station "Keller", 1st Order. Said Bearing is North 20°56'36" West. Distances shown are ground based.

APN: 134-1010-001-0000 (Portion)

Authority: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1, and is published to comply with the requirements of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the **Federal Register**.

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021-13199 Filed 6-22-21; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[212 LLUTG02000 L12200000.PM0000]

Notice of Public Meeting, San Rafael Swell Recreation Area Advisory Council, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) San Rafael Swell Recreation Area Advisory Council (Council) will meet as indicated below.

DATES: The Council is scheduled to meet on August 10, 2021, from 12:30 p.m. to 5 p.m. and on August 11, 2021, from 7:30 a.m. to 2 p.m. A virtual meeting platform and/or teleconference may substitute if public safety concerns remain to prevent the spread of COVID-19.

ADDRESSES: The meeting will be held at the Emery County Courthouse, 75 East

Main Street, Castle Dale, Utah 84513.

Written comments to address the Council may be sent to Lance Porter, Green River District Manager, 170 South 500 West, Vernal, Utah 84078, or via email with the subject line "San Rafael Swell Advisory Council meeting" to utprmail@blm.gov.

FOR FURTHER INFORMATION CONTACT:

Lance Porter, Green River District Manager, 170 South 500 West, Vernal, Utah 84078; phone (435) 781-4400; or email l50porte@blm.gov. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1-800-877-8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: The John D. Dingell, Jr. Conservation, Management, and Recreation Act (Pub. L. 116-9) established the Council to provide advice and information for the BLM in planning and managing the San Rafael Swell Recreation Area. The seven-member council represents a wide range of interests including local government, recreational users, grazing allotment permittees, conservation organizations, expertise in historical uses of the recreation area, and Tribes. More information can be found at: <https://www.blm.gov/get-involved/resource-advisory-council/near-you/utah/San-Rafael-Swell-RAC>. Agenda topics for August 10 include an overview of special status species, visitor use patterns, campground implementation, and virtual maps. Agenda topics for August 11 include a short field trip to visit two well-known recreation sites (if COVID-19 public safety concerns do not apply), and a land use planning update. The final agenda and meeting information will be posted on the Council's web page 30 days before the meeting.

The meeting is open to the public; however, transportation, lodging, and meals are the responsibility of the participating individuals. A public comment period will be offered each day of the scheduled meeting. Depending on the number of people wishing to comment and the time available, the time for individual comments may be limited. People wishing to speak will be asked to sign in before the scheduled oral comment time for planning and record keeping purposes. Written comments may also be sent to the Green River District Manager at the address listed in the **ADDRESSES** section of this notice. All

comments received will be provided to the Council.

Public Disclosure of Comments:

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed Council meeting minutes will be maintained in the Green River District Office and will be available for public inspection and reproduction during regular business hours within 90 days following each meeting. Minutes will also be posted to the Council web page.

Authority: 43 CFR 1784.4–2.

Gregory Sheehan,

State Director.

[FR Doc. 2021–13112 Filed 6–22–21; 8:45 am]

BILLING CODE 4310–DQ–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The Joint Board for the Enrollment of Actuaries gives notice of a teleconference meeting of the Advisory Committee on Actuarial Examinations (a portion of which will be open to the public) on July 8 and 9, 2021.

DATES: Thursday, July 8, 2021, from 9:00 a.m. to 5:00 p.m. (EDT), and Friday, July 9, 2021, from 8:30 a.m. to 5:00 p.m. (EDT).

ADDRESSES: The meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Van Osten, Designated Federal Officer, Advisory Committee on Actuarial Examinations, at (202) 317–3648 or Elizabeth.j.vanosten@irs.gov.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet by teleconference on Thursday, July 8, 2021, from 9:00 a.m. to 5:00 p.m. (EDT), and Friday, July 9, 2021, from 8:30 a.m. to 5:00 p.m. (EDT).

The purpose of the meeting is to discuss topics and questions that may

be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the May 2021 Pension (EA–2L) and Basic (EA–1) Examinations in order to make recommendations relative thereto, including the minimum acceptable pass scores. Topics for inclusion on the syllabus for the Joint Board's examination program for the November 2021 Pension (EA–2F) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the May 2021 EA–2L and EA–1 Examinations fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. (EDT) on July 8, 2021, and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. (EDT). Time permitting, after the close of this discussion by Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should contact the Designated Federal Officer at NHQJBEA@IRS.GOV and include the written text or outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. Persons who wish to attend the public session should contact the Designated Federal Officer at NHQJBEA@IRS.GOV to obtain teleconference access instructions. Notifications of intent to make an oral statement or to attend the meeting must be sent electronically to the Designated Federal Officer by no later than July 1, 2021. In addition, any interested person may file a written statement for consideration by the Joint Board and the Advisory Committee by sending it to NQJBEA@IRS.GOV.

Dated: June 17, 2021.

Thomas V. Curtin, Jr.,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2021–13174 Filed 6–22–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–856]

Bulk Manufacturer of Controlled Substances Application: Purisys, LLC.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Purisys, LLC. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before August 23, 2021. Such persons may also file a written request for a hearing on the application on or before August 23, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on March, 12, 2021, Purisys, LLC., 1550 Olympic Drive, Athens, Georgia 30601–1602, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
3,4-Methylenedioxymphet-amine.	7400	I
3,4-Methylenedioxymethamphetamine.	7404	I
3,4-Methylenedioxy-N-ethylamphetamine.	7405	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to bulk manufacture the listed controlled substances for the internal use intermediates or for sale to its customers. The company plans to manufacture the above-listed controlled substances as clinical trial and starting materials to make compounds for distribution to its customers. No other

activity for these drug codes is authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021-13096 Filed 6-22-21; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1122-0006]

Agency Information Collection Activities; Proposed eCollection Requested; Extension of a Currently Approved Collection

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice, Office on Violence Against Women (OVW) 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 August 23, 2021.

FOR FURTHER INFORMATION CONTACT: Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202-514-5430 or *Catherine.poston@usdoj.gov*.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

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

(2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Semiannual Progress Report for the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-0006. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes 200 grantees from the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (ICJR Program) (also known as Grants to Encourage Arrest Policies and Enforcement of Protection Orders) which encourages state, local, and tribal governments and state, local, and tribal courts to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law requiring the coordinated involvement of the entire criminal justice system. Eligible applicants are states and territories, units of local government, Indian tribal governments, coalitions, victim service providers and state, local, tribal, and territorial courts.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 200 respondents (ICJR Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. An ICJR Program grantee will only be required to complete the sections of the form that pertain to its own specific activities (victim services, law enforcement, training, etc.).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 400 hours, that is 200 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Melody Braswell, Deputy

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: June 17, 2021.

Melody Braswell,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2021-13168 Filed 6-22-21; 8:45 am]

BILLING CODE 4410-FX-P

DEPARTMENT OF LABOR

Notice of Update to the Department of Labor's List of Goods Produced by Child Labor or Forced Labor

AGENCY: The Bureau of International Labor Affairs, United States Department of Labor.

ACTION: Notice: Announcement of public availability of updated list of goods produced by child labor or forced labor.

SUMMARY: This notice announces the publication of an update to the list of goods—along with countries of origin—that the Bureau of International Labor Affairs (ILAB) has reason to believe are produced by child labor or forced labor in violation of international standards (the List). ILAB is required to develop and make available to the public the List pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA of 2005), amended.

FOR FURTHER INFORMATION CONTACT: Director, Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693-4843 (this is not a toll free number) or *ILAB-TVPRAdol.gov*. Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the Federal Information Relay Service at 1-877-889-5627.

SUPPLEMENTARY INFORMATION: The Bureau of International Labor Affairs (ILAB) announces an update to the ninth edition of the List of Goods Produced by Child Labor or Forced Labor (List), pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005, as amended (TVPRA). ILAB published the initial List on September 10, 2009, and has since published nine updated editions. This 2021 update to the ninth edition contains one additional good (polysilicon) from one country (China).

Section 105(b) of the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA of 2005"), Public Law

109–164 (2006), 22 U.S.C 7112(b), as amended by Section 133 of the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Public Law 115–425, directs the Secretary of Labor, acting through ILAB, to “develop and make available to the public a list of goods from countries that ILAB has reason to believe are produced by forced labor or child labor in violation of international standards, including, to the extent practicable, goods that are produced with inputs that are produced with forced labor or child labor.” (TVPPRA List).

The primary purposes of the List are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the countries listed and to promote efforts to eliminate such practices. The 2020 report, including a discussion of the List’s methodology, the updated List, and an updated bibliography of sources, are available on the Department of Labor website at: <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/>.

(Authority: 22 U.S.C. 7112(b)(2)(C))

Signed at Washington, DC, this 14 day of June, 2021.

Thea Lee,

Deputy Undersecretary for International Affairs.

[FR Doc. 2021–12894 Filed 6–22–21; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0858]

Permit-Required Confined Spaces; Extension of the Office of Management and Budget’s (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget’s (OMB) approval of the information collection requirements contained in the Standard on Permit-Required Confined Spaces.

DATES: Comments must be submitted (postmarked, sent, or received) by August 23, 2021.

ADDRESSES:

Electronically: You may submit comments, including attachments, electronically at <http://>

www.regulations.gov, the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to <http://www.regulations.gov>. Documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2011–0858). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, see the “Public Participation” heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance process to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA’s estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act

also requires OSHA to obtain such information with a minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining said information (29 U.S.C. 657).

The purpose of the information collection requirements specified in the Permit-Required Confined Spaces Standard (29 CFR 1910.146) is to ensure that employers systematically evaluate the dangers in permit spaces before entry is attempted, and to ensure that adequate measures are taken to make the spaces safe for entry. Section 1910.146(c)(2) requires the employer to post danger signs to inform exposed employees of the existence and location of, and the dangers posed by, permit spaces.

Section 1910.146(c)(4) requires the employer to develop and implement a written “permit-space program” when the employer decides that its employees will enter permit spaces. The written program is to be made available for inspection by employees and their authorized representatives. Section 1910.146(d) provides the employer with the requirements of a permit-required confined space program.

Section 1910.146(c)(5)(i)(E) requires that the determinations and supporting data specified by paragraphs (c)(5)(i)(A), (c)(5)(i)(B), and (c)(5)(i)(C) of this section are documented by the employer and are made available to each employee who enters a permit space or to that employee’s authorized representative.

Under paragraph (c)(5)(ii)(H) of § 1910.146, the employer is required to verify that the space is safe for entry and that the pre-entry measures required by paragraph (c)(5)(ii) of this section have been taken, using a written certification that contains the date, the location of the space, and the signature of the person providing the certification. The certification is to be made before entry and is required to be made available to each employee entering the space or to that employee’s authorized representative.

Section 1910.146(c)(7)(iii) requires the employer to document the basis for determining that all hazards in a permit space have been eliminated using a certification that contains the date, the location of the space, and the signature of the person making the determination. The certification is to be made available to each employee entering the space or to that employee’s authorized representative.

Section 1910.146(c)(8)(i) requires that the employer inform the contractor that

the workplace contains permit spaces and that permit space entry is allowed only through compliance with a permit space program meeting the requirements of this section. Section 1910.146(c)(8)(ii) requires that the employer apprise the contractor of the elements, including the hazards identified and the host employer's experience with the space, that make the space in question a permit space. Section 1910.146(c)(8)(iii) requires that the employer apprise the contractor of any precautions or procedures that the host employer has implemented for the protection of employees in or near permit spaces where contractor personnel will be working. Section 1910.146(c)(8)(v) requires the employer to debrief the contractor at the conclusion of the entry operations regarding the permit space program followed and regarding any hazards confronted or created in permit spaces during entry operations.

Section 1910.146(c)(9)(iii) requires that the contractor inform the host employer of the permit space program that the contractor will follow and of any hazards confronted or created in permit spaces, either through a debriefing or during the entry operation.

Section 1910.146(d)(5)(vi) requires the employer to immediately provide each authorized entrant or that employee's authorized representative with the results of any testing conducted in accord with paragraph (d) of the Standard.

Section 1910.146(d)(14) requires employers to review the permit space program, using the canceled permits retained under paragraph (e)(6) within 1 year after each entry and revise the program as necessary, to ensure that employees participating in entry operations are protected from permit space hazards.

Section 1910.146(e)(1) requires the employer to document the completion of measures required by paragraph (d)(3) by preparing an entry permit before employee entry is authorized. Paragraph (f) of § 1910.146 specifies the information to be included on the entry permit. Paragraph (e)(3) requires that the employer make the completed permit available at the time of entry to all authorized entrants by posting the permit at the entry portal or by any other equally effective means, so that the entrants can confirm that pre-entry preparations have been completed. Paragraph (e)(6) requires the employer to retain each canceled entry permit for at least one year; any problems encountered during an entry operation must be noted on the pertinent permit so that revisions to the permit space program can be made.

Section 1910.146(g)(4) requires that the employer certify that the training required by paragraphs (g)(1) through (g)(3) has been accomplished by preparing a written certification record.

Section 1910.146(h)(3) requires the employer to ensure that all authorized entrants communicate with the attendant as necessary to enable the attendant to monitor entrant status and to enable the attendant to alert entrants of the need to evacuate the space as required by paragraph (l)(6) of the Standard. Section 1910.146(h)(4) requires the employer to ensure that all authorized entrants alert the attendant whenever the entrant recognizes any warning sign or symptom of exposure to a dangerous situation (paragraph (h)(4)(i)), or the entrant detects a prohibited condition (paragraph (h)(4)(ii)).

Section 1910.146(i)(5) requires the employer to ensure that each attendant communicate with authorized entrants as necessary to monitor entrant status and to alert entrants of the need to evacuate the space under the conditions specified in paragraphs (i)(6)(i)–(i)(6)(iv) of the Standard. Section 1910.146(i)(7) requires the employer to ensure that the attendant summon rescue and other emergency services as soon as the attendant determines that authorized entrants may need assistance to escape from permit space hazards. Section 1910.146(i)(8) requires that the employer ensure that the attendant warn unauthorized persons that they must stay away from the permit space (paragraph (i)(8)(i)); advise unauthorized persons that they must exit immediately if they have entered the permit space (paragraph (i)(8)(ii)); and inform authorized entrants and the entry supervisor if unauthorized persons have entered the permit space (paragraph (i)(8)(iii)).

Section 1910.146(j)(2) requires the employer to ensure that each entry supervisor verifies, by checking that the appropriate entries have been made on the permit, that all tests specified by the permit have been conducted and that all procedures and equipment specified by the permit are in place before endorsing the permit and allowing entry to begin.

Section 1910.146(k)(1)(i) requires the employer to evaluate a prospective rescuer's ability to respond to a rescue summons in a timely manner, considering the hazard(s) identified; Section 1910.146(k)(1)(ii) requires the employer to evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the particular permit space or

types of permit spaces identified. Section 1910.146(k)(1)(iv) requires that the employer inform each rescue team or service of the hazards they may confront when called on to perform rescue at the site. Section 1910.146(k)(1)(v) requires that the employer provide the rescue team or service selected with access to all permit spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans.

Section 1910.146(k)(4) requires that if an injured entrant is exposed to a substance for which a "Material Safety Data Sheet" (MSDS) [now referred to as an SDS (Safety Data Sheet)] or other similar written information is required to be kept at the worksite, that the employer make the MSDS or written information available to the medical facility treating the exposed entrant.

Section 1910.146(l)(1) requires that employers consult with affected employees and their authorized representatives on the development and implementation of all aspects of the permit space program required by paragraph (c). Section 1910.146(l)(2) requires that employers make all information required to be developed by this section available to affected employees and their authorized representatives.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements 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 costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply—for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting an adjustment increase for the information collection requirements of 415,512.80 burden hours (from 1,660,526.00 to 2,076,038.80). The burden hour increase is related to updated data estimates showing an increase in the number of permit space entrants (from 1,471,634 to 1,488,877) and establishments with permit spaces (from 210,281 to 214,994) affected by the Standard. It is also related to the adjustment of the

estimated percentage of establishments assumed to incur burden hour costs conducting atmospheric monitoring and testing.

The agency is requesting an increase in capital and operation and maintenance costs of \$14,100.00 (from \$630,900.00 to \$645,000.00) for atmospheric testing and monitoring equipment. This increase is also related to the updated data estimates showing an increase in the number of permit space entrants and establishments with permit spaces affected by the Standard.

The agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Permit-Required Confined Spaces.

OMB Control Number: 1218-0203.

Affected Public: Business or other for-profits.

Number of Respondents: 214,994.

Frequency of Responses: On occasion.

Total Responses: 13,959,314.

Average Time per Response: Varies.

Estimated Total Burden Hours: 2,076,038.80.

Estimated Cost (Operation and Maintenance): \$645,000.00.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID-19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA-2011-0858). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so that the agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627 for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1-2012 (77 FR 3912).

Signed at Washington, DC, on June 15, 2021.

James S. Frederick,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021-13188 Filed 6-22-21; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2012-0002]

Asbestos in Construction Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Asbestos in Construction Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by August 23, 2021.

ADDRESSES:

Electronically: You may submit comments, including attachments, electronically at <http://www.regulations.gov>, the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to <http://www.regulations.gov>. Documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA-2012-0002). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates. For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693-2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of a continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C.

651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with a minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining said information (29 U.S.C. 657).

The Asbestos in Construction Standard (29 CFR 1926.1101) protects workers from adverse health effects arising from workplace exposure to asbestos, including lung cancer, mesothelioma, asbestosis (an emphysema-like condition) and gastrointestinal cancer. The standard requires employers to monitor worker exposure, provide medical surveillance, and maintain accurate records of worker exposure to asbestos. These records will be used by employers, workers, and the Government to ensure that workers are not harmed by exposure to asbestos in the workplace.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements 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 costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply—for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The agency is requesting an adjustment increase of 433,878.37 burden hours, from, 3,765,456.27 to 4,199,334.64 hours. There are several reasons for this change in burden.

First, the agency has updated the data sources used to estimate the number of respondents and unit costs. Second, in estimating the change in the number of buildings that may contain ACM/PACM, the 2018 ICR mistakenly omitted data from some years from the calculation. Correcting this error increases the number of buildings. Because the number of buildings is used to calculate

the number of covered employees, the number of covered employees increased as a result of this change, increasing burden. Finally, this ICR renewal switches from using rounded decimal estimates of unit burden to unrounded fractions (for instance, from 0.08 to 5/60 for an item with five minutes of burden). This has a net effect of increasing burden.

Type of Review: Extension of a currently approved collection.

Title: Asbestos in Construction Standard (29 CFR 1926.1101).

OMB Control Number: 1218–0134.

Affected Public: Business or other for-profits.

Number of Respondents: 1,104,261.

Frequency: On occasion.

Average Time per Response: Varies.

Estimated Number of Responses: 41,566,377.

Estimated Total Burden Hours: 4,199,334.64.

Estimated Cost (Operation and Maintenance): \$66,912,839.51.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID-19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA-2012-0002) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so that the agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social

security numbers and dates of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download through this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office at (202) 693–2350, (TTY) (877) 889–5627) for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on June 15, 2021.

James S. Frederick,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–13185 Filed 6–22–21; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Thursday, June 24, 2021.

PLACE: Due to the COVID-19 Pandemic, the meeting will be open to the public via live webcast only. Visit the agency's homepage (www.ncua.gov) and access the provided webcast link.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

1. Board Action, Federal Credit Union Loan Interest Rate Ceiling.
2. NCUA Rules and Regulations, Current Expected Credit Loss Methodology.
3. NCUA Rules and Regulations, Capitalization of Interest.

CONTACT PERSON FOR MORE INFORMATION: Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703–518–6304.

Melane Conyers-Ausbrooks,
Secretary of the Board.

[FR Doc. 2021–13237 Filed 6–21–21; 11:15 am]

BILLING CODE 7535–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Survey of Multiemployer Pension Plan Withdrawal Liability Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval of information collection.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget (OMB) extend approval under the Paperwork Reduction Act, of a survey of terminated and insolvent multiemployer pension plans to obtain withdrawal liability information. PBGC needs the withdrawal liability information to estimate its multiemployer program liabilities for purposes of its financial statements. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments must be submitted on or before August 23, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* paperwork.comments@pbgc.gov. Refer to withdrawal liability survey in the subject line.

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

Commenters are strongly encouraged to submit public comments electronically. PBGC expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to withdrawal liability survey. All comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or

calling 202-326-4040 during normal business hours. TTY users may call the Federal Relay Service toll-free at 800-877-8339 and ask to be connected to 202-326-4040.

FOR FURTHER INFORMATION CONTACT:

Hilary Duke (duke.hilary@pbgc.gov), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, 202-326-4400, extension 3839. (TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4400, extension 3839.)

SUPPLEMENTARY INFORMATION: When a contributing employer withdraws from an underfunded multiemployer pension plan, the plan sponsor assesses withdrawal liability against the employer. The plan sponsor is required to determine and collect withdrawal liability in accordance with section 4219 of the Employee Retirement Income Security Act of 1974 (ERISA). The plan sponsor assesses withdrawal liability by issuing a notice to an employer, including the amount of the employer's liability and a schedule of payments. PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219) requires the plan sponsor to file with PBGC a certification that notices have been provided to employers.

PBGC collects information about withdrawal liability that is owed by withdrawn employers of terminated¹ and insolvent² multiemployer pension plans. PBGC distributes annual surveys that newly insolvent plans receiving financial assistance and newly terminated plans not yet receiving financial assistance are required to complete and return to PBGC. Smaller plans with less than 500 participants are not required to complete the survey. PBGC needs the information from the survey about withdrawal liability payments and settlements, and whether employers have withdrawn from the plan but have not yet been assessed withdrawal liability, to estimate with more precision PBGC's multiemployer program liabilities for purposes of its

¹ Under section 4041A(f)(2) of ERISA, PBGC may prescribe reporting requirements for terminated multiemployer pension plans, which PBGC considers appropriate to protect the interests of plan participants and beneficiaries or to prevent unreasonable loss to the corporation.

² Under section 4261(b)(1) of ERISA, PBGC provides financial assistance under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.

financial statements.³ PBGC also uses the information for its Multiemployer Pension Insurance Modelling System assumptions on collection of withdrawal liability. Information provided to PBGC is confidential to the extent provided in the Freedom of Information Act and the Privacy Act.

PBGC estimates that the survey will be sent to about 6 newly terminated and insolvent plans per year. PBGC estimates that each survey would require approximately 20 hours to complete by a combination of pension fund office staff (50%) and outside professionals (attorneys and actuaries) (50%). PBGC estimates a total hour burden of 60 hours (based on 10 hours of pension fund office time per plan). The estimated dollar equivalent of this hour burden, based on an assumed hourly rate of \$75 for administrative, clerical, and supervisory time is \$4,500. PBGC estimates a total cost burden for the withdrawal liability survey of \$24,000 (based on a 60 attorney and actuary hours (10 hours x 6 plans) assuming an average hourly rate of \$400).

The existing collection of information was approved under OMB control number 1212-0071 (expires November 30, 2021). PBGC intends to request that OMB approve PBGC's use of this survey for 3 years. 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.

PBGC is soliciting public comments to—

- 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 methodologies 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

³ Section 4008 of ERISA requires the corporation, as soon as practicable after the close of each fiscal year, to transmit a report to the President and the Congress, including financial statements setting forth the finances of the corporation at the end of the fiscal year and the result of its operations (including the source and application of its funds) for the fiscal year.

other forms of information technology, e.g., permitting electronic submission of responses.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2021–13134 Filed 6–22–21; 8:45 am]

BILLING CODE 7709–02–P

PENSION BENEFIT GUARANTY CORPORATION

Announcement of OMB Approvals of Information Collections

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of OMB approval.

SUMMARY: The Office of Management and Budget (OMB) has approved a Pension Benefit Guaranty Corporation (PBGC) information collection under the Paperwork Reduction Act. This notice lists the approved information collection and provides its OMB control number and current expiration date.

FOR FURTHER INFORMATION CONTACT:

Melissa Rifkin (rifkin.melissa@pbgc.gov), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–229–6563. TTY users may call the Federal Relay Service toll-free at 800–877–8339 and ask to be connected to 202–229–6563.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and its implementing regulations require Federal agencies, after receiving OMB approval of information collections, to display OMB control numbers and inform respondents of their legal significance. In accordance with those requirements, PBGC hereby notifies the public that the following information collection, that is contained in PBGC's regulations and does not have a corresponding form, has been approved by OMB.

- OMB Control Number 1212–0065 Disclosure of Information in Distress and PBGC-Initiated Terminations. The expiration date for this information collection contained in 29 CFR parts 4041 and 4042 is April 30, 2024.

The PRA 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. Publication of this notice satisfies this requirement with respect to the above-

listed information collections, as provided in 5 CFR 1320.5(b)(2)(ii).

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2021–13135 Filed 6–22–21; 8:45 am]

BILLING CODE 7709–02–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Mergers and Transfers Between Multiemployer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval of information collection.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of a collection of information contained in PBGC's regulation on Mergers and Transfers Between Multiemployer Plans. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments must be submitted on or before August 23, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* paperwork.comments@pbgc.gov. Refer to OMB control number 1212–0022 in the subject line.

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026.

Commenters are strongly encouraged to submit public comments electronically. PBGC expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to OMB control number 1212–0022. All comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. TTY users may call the Federal Relay Service toll-free at 800–877–8339 and ask to be connected to 202–326–4040.

FOR FURTHER INFORMATION CONTACT:

Hilary Duke (duke.hilary@pbgc.gov), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–326–4400, extension 3839. (TTY and TDD users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4400, extension 3839.)

SUPPLEMENTARY INFORMATION: Section 4231(a) and (b) of the Employee Retirement Income Security Act of 1974 (ERISA) requires plans that are involved in a merger or transfer to give PBGC 120 days notice of the transaction and provides that if PBGC determines that specified requirements are satisfied, the transaction will be deemed not to be in violation of ERISA section 406(a) or (b)(2) (dealing with prohibited transactions).

PBGC's regulation on Mergers and Transfers Between Multiemployer Plans (29 CFR part 4231) sets forth the procedures for giving notice of a merger or transfer under section 4231 and for requesting a compliance determination. The regulations specify the information that must be included in a merger or transfer notice. A request for a compliance determination must provide additional information to enable PBGC to make an explicit finding that the merger/transfer requirements have been satisfied.

Section 4231(e) of ERISA clarifies PBGC's authority to facilitate a merger (a “facilitated merger”) of two or more multiemployer plans if certain statutory requirements are met. For purposes of section 4231(e), “facilitation” may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies. In addition, subject to the requirements of section 4231(e)(2), PBGC may provide financial assistance (within the meaning of section 4261 of ERISA) to facilitate a merger (a “financial assistance merger”) it determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency. PBGC's regulations specify the information

requirements for a voluntary request for a facilitated merger under section 4231(e) of ERISA, including a financial assistance merger.

PBGC uses information submitted by plan sponsors under the regulation to determine whether mergers and transfers conform to the requirements of ERISA section 4231 and the regulation.

The collection of information under the regulation has been approved by OMB under control number 1212-0022 (expires November 30, 2021). PBGC intends to request that OMB extend its approval for another 3 years. 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.

PBGC estimates that there are 14 transactions each year (excluding financial assistance mergers). The estimated annual burden of the collection of information for 14 transactions (excluding financial assistance mergers) is 14 fund office hours and \$84,400 in contractor costs for work by attorneys and actuaries. PBGC further estimates that there is one request each year for a financial assistance merger. The annual burden of the collection of information for financial assistance mergers is 10 fund office hours and \$36,000 in contractor costs. The total annual burden of the collection of information is approximately 24 fund office hours and \$120,400 in contractor costs.

PBGC is soliciting public comments to—

- 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 methodologies 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.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2021-13131 Filed 6-22-21; 8:45 am]

BILLING CODE 7709-02-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021-103 and CP2021-106]

New Postal Products

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 24, 2021.

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 website (<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 3011.301.¹

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 3030, and 39 CFR part 3040, 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 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. Docket No(s): MC2021-103 and CP2021-106; Filing Title: USPS Request to Add Priority Mail Contract 707 to Competitive Product List and Notice of Filing Materials Under Seal; Filing Acceptance Date: June 16, 2021; Filing Authority: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; Public Representative: Kenneth R. Moeller; Comments Due: June 24, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021-13143 Filed 6-22-21; 8:45 am]

BILLING CODE 7710-FW-P

¹ See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19-22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92196; File No. SR–CboeBZX–2021–019]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

June 16, 2021.

On March 1, 2021, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the VanEck Bitcoin Trust (“Trust”) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the *Federal Register* on March 19, 2021.³

On April 28, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust would be for the Shares to reflect the performance of the MVIS® CryptoCompare Bitcoin Benchmark Rate (“Benchmark”), less the expenses of the

Trust’s operations.⁸ The Benchmark will be used to calculate the Trust’s net asset value (“NAV”). The Benchmark is designed to be a price for bitcoin in USD and there is no component other than bitcoin in the Benchmark. The current platform composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken. In calculating the Benchmark, the methodology captures trade prices and sizes from platforms and examines twenty three-minute periods leading up to 4:00 p.m. E.T. It then calculates an equal-weighted average of the volume-weighted median price of these twenty three-minute periods, removing the highest and lowest contributed prices.⁹

Each Share will represent a fractional undivided beneficial interest in the Trust’s net assets. The Trust’s assets will consist of bitcoin held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.¹⁰

The Administrator will determine the NAV and NAV per Share of the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. E.T. The NAV of the Trust is the aggregate value of the Trust’s assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust’s NAV, the Administrator values the bitcoin held by the Trust based on the price set by the Benchmark as of 4:00 p.m. E.T.¹¹

The Trust will provide information regarding the Trust’s bitcoin holdings, as well as an Intraday Indicative Value (“IIV”) per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange’s Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust’s bitcoin holdings during the trading day.¹²

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in blocks of 50,000 Shares at the Trust’s NAV. Authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust’s account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver bitcoin to such authorized participants when they redeem Shares with the Trust.¹³

II. Proceedings To Determine Whether To Approve or Disapprove SR–CboeBZX–2021–019 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”¹⁶

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice,¹⁷ in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters’ views on whether the proposed Trust and Shares would be susceptible to manipulation?

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 91326 (March 15, 2021), 86 FR 14987 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-cboebzx-2021-019/sr-cboebzx2021019.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91695, 86 FR 24066 (May 5, 2021). The Commission designated June 17, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Notice, *supra* note 3.

⁸ VanEck Digital Assets, LLC is the sponsor of the Trust, and Delaware Trust Company is the trustee. The State Street Bank and Trust Company will be the administrator (“Administrator”) and transfer agent. Van Eck Securities Corporation will be the marketing agent in connection with the creation and redemption of Shares. Van Eck Securities Corporation provides assistance in the marketing of the Shares. A third-party regulated custodian (“Custodian”) will be responsible for custody of the Trust’s bitcoin. See Notice, *supra* note 3, 86 FR at 14995.

⁹ See *id.* at 14995–996.

¹⁰ See *id.* at 14995.

¹¹ See *id.* at 14996.

¹² See *id.*

¹³ See *id.* at 14995.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ *Id.*

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ See Notice, *supra* note 3.

What are commenters' views generally on whether the Exchange's proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters' views generally with respect to the liquidity and transparency of the bitcoin markets, the bitcoin markets' susceptibility to manipulation, and thus the suitability of bitcoin as an underlying asset for an exchange-traded product?

2. What are commenters' views of the Exchange's assertion that regulatory and financial landscapes relating to bitcoin and other digital assets have changed significantly since 2016?¹⁸ Are the changes that the Exchange identifies sufficient to support the determination that the proposed listing and trading of the Shares are consistent with the Act?

3. The Exchange states that "approving this proposal . . . [would] allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk" associated with retail exposure through other means.¹⁹ Further, the Exchange asserts that "the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues."²⁰ What are commenters' view regarding such an assertion?

4. According to the Exchange, "[n]early every measurable metric related to [Chicago Mercantile Exchange's] Bitcoin Futures has trended consistently up since launch and/or accelerated upward in the past year."²¹ Based on data provided and the academic research cited by the Exchange, do commenters agree that the Chicago Mercantile Exchange ("CME") now represents a regulated market of significant size?²² What are commenters' views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on CME to manipulate the Shares? What of the Exchange's assertion that the combination of (a) CME bitcoin futures leading price discovery; (b) the overall size of the bitcoin market; and (c) the ability for market participants to buy or sell large amounts of bitcoin without significant market impact helps to prevent the Shares from becoming the predominant force on pricing in either

the bitcoin spot or CME bitcoin futures markets?²³

5. What are commenters' views on the Exchange's statement, generally, that bitcoin is resistant to price manipulation and that other means to prevent fraudulent and manipulative acts and practices exist to justify dispensing with the requisite surveillance sharing agreement with a regulated market of significant size related to bitcoin?²⁴ What of the Exchange's assertion in support of such statement that significant liquidity in the spot market and the decreasing impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly?²⁵ What of the assertion that offering only in-kind creations and redemptions provides unique protections against potential attempts to manipulate the Shares and that the price the Sponsor uses to value the Trust's bitcoin "is not particularly important"?²⁶

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²⁷

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by July 14, 2021. Any person who wishes to file a rebuttal to any other person's submission must file

that rebuttal by July 28, 2021. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2021-019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2021-019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2021-019 and should be submitted by July 14, 2021. Rebuttal comments should be submitted by July 28, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

J. Matthew DeLesDernier,
Assistant Secretary.

¹⁸ See *id.* at 14989.

¹⁹ See *id.* at 14990.

²⁰ See *id.* at 14994.

²¹ See *id.* at 14991.

²² See *id.* at 14989.

²³ See *id.* at 14995.

²⁴ See *id.* at 14994 n.54.

²⁵ See *id.* at 14995.

²⁶ See *id.* at 14999.

²⁷ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²⁸ 17 CFR 200.30-3(a)(57).

[FR Doc. 2021-13101 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92198; File No. SR-DTC-2021-009]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide Enhanced Clarity for Deadlines and Processing Times

June 16, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 8, 2021, The Depository Trust Company (“DTC”) 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. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(4) thereunder.⁴ 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 of DTC is attached hereto as Exhibit 5,⁵ as described in greater detail below.

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

The proposed rule change would amend the Service Guides and the OA to provide enhanced clarity around (i) deadlines, timeframes, and cutoffs established by DTC in connection with DTC services (“DTC-established Stakeholder Deadlines”), and (ii) the times and timeframes for DTC actions and processes relating to DTC services (“DTC Processing Times”). In particular, the proposed rule change would enhance the transparency around the ability of DTC to extend DTC-established Stakeholder Deadlines, and around DTC Processing Times, which are standards, rather than deadlines, as further described below.

(i) DTC-established Stakeholder Deadlines

The Service Guides provide Participants with procedures and information pertaining to DTC settlement and asset services. The procedures and information include, among other things, descriptions of DTC-established Stakeholder Deadlines for Participant and stakeholder⁶ action relating to DTC services. The OA is designed to provide Participants and other stakeholders with information and procedures related to DTC eligibility for securities, and to provide the requirements for, among other things, the orderly processing of securities, corporate actions, and distributions. The OA includes descriptions of DTC-established Stakeholder Deadlines in connection with the requirements and services.⁷

The purpose of DTC-established Stakeholder Deadlines is to help DTC efficiently and effectively manage its services and systems, in order to timely process instructions and securities transactions at DTC. However, there are times when, due to the facts and circumstances of a particular situation,

⁶ Stakeholders include issuers, agents (as defined in the OA), underwriters (as defined in the OA), and other parties, as context requires.

⁷ For example, the OA requires that, in order for DTC to make a same day allocation of funds, the agent must provide DTC with CUSIP-specific details for the payment before 2:50 p.m. on payable date, and that the details must match the amount of funds that are received by DTC no later than 3:00 p.m. See OA, *supra* note 5, at 27.

DTC determines to extend a DTC-established Stakeholder Deadline. The situations can include, but are not limited to, a Participant operational issue or a change to a different deadline (whether DTC or external) that could affect the ability of one or more Participants to meet the DTC-established Stakeholder Deadline.

(ii) DTC Processing Times

The Service Guides and the OA also describe DTC Processing Times in connection with certain services.⁸ The purpose of describing these DTC Processing Times is to provide Participants and other stakeholders with information about the typical timing or timeframe of a DTC action or process, in order to help Participants and other stakeholders to more efficiently and effectively use and understand DTC’s services and processes. For example, if a Service Guide states that the processing time for a particular service is typically two business days, the Participant will understand that it is unlikely that it would get same-day turnaround from DTC and can plan accordingly, for instance, by ensuring that it submits its transaction with adequate lead-time.

(iii) Overview of Proposed Rule Change

DTC believes that Participants and other stakeholders benefit from clear information about their rights and obligations relating to DTC-established Stakeholder Deadlines and DTC Processing Times so that they are able to plan and conduct their business and securities transactions more effectively. Recent events, such as the COVID-19 pandemic and market volatility, have emphasized the need for flexibility in times of stress and the importance of transparency with respect to deadlines and timeframes. Accordingly, after reviewing the Service Guides and the OA, DTC is proposing to enhance the transparency around the DTC-established Stakeholder Deadlines and DTC Processing Times that are described in the Service Guides and the OA.

Therefore, DTC is proposing to amend the Service Guides and the OA to clarify that (i) DTC may extend any DTC-established Stakeholder Deadline, including, without limitation, to (x) address operational or other delays that could reasonably affect the ability of DTC, a Participant, or other stakeholder from meeting the DTC-established

⁸ For example, the Settlement Service Guide indicates that at 1:30 p.m. on a settlement day, DTC releases all pending delivery account positions and reverts to default recycle processing. See Settlement Service Guide, *supra* note 5, at 26.

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)(4).

⁵ Each capitalized term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of DTC (the “Rules”), the Canadian Link Service Guide, ClaimConnect Service Guide, Custody Service Guide, Deposits Service Guide, Distributions Service Guide, Redemptions Service Guide, Reorganizations Service Guide, Settlement Service Guide, and Underwriting Service Guide (collectively, the “Service Guides”) and the DTC Operational Arrangements (Necessary for Securities to Become and Remain Eligible for DTC Services) (“Operational Arrangements” or “OA”), available at <http://www.dtcc.com/legal/rules-and-procedures.aspx>.

Stakeholder Deadline or (y) allow DTC time operationally to exercise its existing rights under the Rules and Procedures; and (ii) the DTC Processing Times are standards and not deadlines; actual processing times may vary, based upon the circumstances. For additional transparency, DTC is proposing to clarify that any decision to extend a DTC-established Stakeholder Deadline in one instance does not establish any precedent for future situations that may arise.

In addition, although the Important Legal Information page of the Service Guides and the OA already contain general disclaimers of liability, DTC is proposing to expressly state that DTC disclaims all liability for any losses and/or expenses incurred by a Participant, stakeholder, or any third-party resulting from, relating to, or arising from (i) any action taken by DTC with respect to an extension of a DTC-established Stakeholder Timeframe, (ii) the determination of DTC to decline to take action with respect to a DTC-established Stakeholder Timeframe, and/or (iii) the failure of a Participant, stakeholder or other third-party to meet any deadline, timeframe, cutoff or requirement established by a party other than DTC. DTC believes that this express disclaimer would enhance the understanding of Participants and other stakeholders of their responsibilities in connection with DTC-established Stakeholder Deadlines and possible extensions, which would help them to more effectively assess the risks relating to an inability to meet a DTC-established Stakeholder Deadline and conduct their business accordingly.

(iv) Proposed Rule Change

To effectuate the proposed changes described above, DTC would add the following paragraph near the beginning of each of the Service Guides and the OA:

Note: DTC, as it deems appropriate, may extend any deadline, timeframe, or cutoff established by DTC, including, without limitation, to (i) address operational or other delays that could reasonably affect the ability of DTC, a Participant or other stakeholder from meeting the deadline, timeframe, or cutoff; or (ii) allow DTC time operationally to exercise its existing rights under the Rules and Procedures. In addition, times applicable to DTC are standards and not deadlines; actual processing times may vary, based upon the circumstances. Any action taken by DTC in connection with this paragraph shall not establish a precedent for any situation that may occur in the future (or otherwise bind DTC in any manner).

DTC disclaims all liability for any losses and/or expenses incurred by a Participant, stakeholder or any third-party resulting from, relating to, or arising from (i) any action taken by DTC in connection with this paragraph, (ii) the determination of DTC to decline to take action pursuant to this paragraph, and/or (iii) the failure of a Participant, stakeholder or any third-party to meet any deadline, timeframe, cutoff or requirement established by a party other than DTC.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.⁹

The proposed rule change would amend the Service Guides and the OA to clarify that DTC may extend any DTC-established Stakeholder Deadline, including, without limitation, to (i) address operational or other delays that could reasonably affect the ability of DTC, a Participant or other stakeholder from meeting the DTC-established Stakeholder Deadline; or (ii) allow DTC time operationally to exercise its existing rights under the Rules and Procedures. The proposed rule change would also clarify that the DTC Processing Times set forth in the Service Guides and the OA are standards and not deadlines, and that they may vary based upon the particular circumstances. The proposed rule change would also (i) clarify that any decision by DTC to extend a DTC-established Stakeholder Deadline in one case does not establish any precedent for future situations that may arise, and (ii) emphasize that DTC disclaims all liability for any losses or expenses incurred by a Participant, stakeholder or any third party relating to, or arising from, the above.

Taken together, the proposed amendments to the Service Guides and the OA would enhance Participants' and stakeholders' understanding of their rights and obligations relating to DTC-established Stakeholder Deadlines and DTC Processing Times. By providing this enhanced clarity and transparency, the proposed rule change would help Participants and other stakeholders to appropriately plan and to conduct their business and securities transactions through DTC more effectively, thereby promoting the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.¹⁰

⁹ 15 U.S.C. 78q-1(b)(3)(F).

¹⁰ *Id.*

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe the proposed rule changes described above would impact competition. Rather, DTC believes that the proposed rule changes would simply provide enhanced clarity around the rights and obligations of Participants and other stakeholders with respect to DTC-established Stakeholder Deadlines and DTC Processing Times, and would help them to appropriately plan and to conduct their business and securities transactions through DTC more effectively. As such, DTC believes the proposed rule changes would not have any impact on competition.¹¹

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

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) ¹² of the Act and paragraph (f) ¹³ of Rule 19b-4 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-DTC-2021-009 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

¹¹ 15 U.S.C. 78q-1(b)(3)(I).

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f).

Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-DTC-2021-009. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-DTC-2021-009 and should be submitted on or before July 14, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13103 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92192; File No. SR-BOX-2021-07]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Adopt BOX Rule 7670 To Establish a Virtual Trading Floor on BOX

June 16, 2021.

On April 16, 2021, BOX Exchange LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to establish a virtual trading floor on the Exchange. The proposed rule change was published for comment in the **Federal Register** on May 5, 2021.³

Section 19(b)(2) of the Act⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 19, 2021.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designates August 3, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-BOX-2021-07).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91714 (April 29, 2021), 86 FR 24119.

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13099 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92200; File No. SR-Phlx-2021-36]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Options 7, Section 5

June 16, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 11, 2021, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, Section 5 to adopt an incentive program for Lead Market Makers ("LMMs") and Market Makers in Nasdaq 100 Micro Index ("XND") options.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁴ 17 CFR 200.30-3(a)(12).

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 recently received approval to list index options on XND on a pilot basis, and subsequently began to list XND options on April 15, 2021.³ The Exchange now proposes to amend its Pricing Schedule to adopt a rebate program in order to incentivize LMMs and Market Makers to provide significant liquidity in XND options during the trading day, which, in turn, would provide greater trading opportunities, narrower bid-ask spreads,

and enhanced price discovery for all market participants in XND.

Today, LMMs and Market Makers are subject to certain intra-day electronic quoting obligations on the Exchange.⁴ As further described below, the Exchange proposes to amend the Exchange's Pricing Schedule to provide rebates to any LMM or Market Maker in XND that meet heightened quoting standards during the trading day, which will be specified in new Section 5.B of Options 7.⁵ As proposed, an LMM or Market Maker will be eligible to receive the following additional rebates in all XND series if they meet the following criteria: (i) \$0.03 per contract if the LMM or Market Maker provides continuous electronic quotes during the trading day that meet or exceed the below heightened quoting standards for all XND series with an expiration of 14 days or less, for the corresponding minimum time requirement on average

in a given month based on daily performance; (ii) \$0.01 per contract if the LMM or Market Maker provides continuous electronic quotes during the trading day that meet or exceed the below heightened quoting standards for all XND series with an expiration of 15 day to 60 days, for the corresponding minimum time requirement on average in a given month based on daily performance; and (iii) \$0.01 per contract if the LMM or Market Maker provides continuous electronic quotes during the trading day that meet or exceed the below heightened quoting standards for all XND series with an expiration of 61 days or greater, for the corresponding minimum time requirement on average in a given month based on daily performance. The foregoing rebates may be cumulative such that a qualifying LMM or Market Maker may receive a total rebate of \$0.05 per contract for all XND series.

Minimum time requirement (%)	Premium level	Expiring					
		14 days or less		15 days to 60 days		61 days or greater	
		Width	Size	Width	Size	Width	Size
90	\$0.00–\$1.00	\$0.05	5	\$0.06	5	\$0.10	5
90	\$1.01–\$3.00	0.08	5	0.08	5	0.12	5
90	\$3.01–\$5.00	0.10	5	0.10	5	0.15	5
90	\$5.01–\$10.00	0.45	5	0.50	5	0.60	5
85	\$10.01–\$25.00	1.00	5	1.10	5	1.25	5
85	Greater than \$25.00	2.50	5	3.00	5	3.50	5

In calculating whether an LMM or Market Maker met the heightened quoting standard each month, the Exchange will exclude from the calculation in that month the worst quoting day in XND for the LMM or Market Maker.

As proposed, the above minimum time requirements will apply to each series on an individual basis such that an LMM or Market Maker must meet those requirements separately for each premium level (e.g., a Market Maker must quote a \$0.95 premium XND option at least 90% of the time, separately quote a \$2.00 premium XND option at least 90% of the time, etc. all the way down to the last premium level of greater than \$25 in order to be eligible for a rebate).⁶ An LMM or Market Maker meeting all the minimum time requirements in all premium levels would thus be eligible to receive the applicable rebate (i.e., \$0.03 in the 14

days or less expiration bucket, \$0.01 in the 15–60 days bucket, and/or \$0.01 in the 61 days or greater bucket) if it also meets the specified heightened quoting standards in the applicable expiration bucket, which rebate amount would then apply to all of the LMM's or Market Maker's XND contracts. In other words, an LMM or Market Maker can qualify for any one or combination of the foregoing rebates such that it may receive anywhere between \$0.01 and up to a total of \$0.05 per contract, which would then be applied to all XND contracts.

The following examples further illustrate how the proposed rebate program will work:

Example 1

A Market Maker is meeting the quote width requirement (\$0.06) on a \$0.95 premium XND option 20 days until expiration 93% of the time. The 93% performance would count towards the

15–60 day expiration bucket that could gain the \$0.01 per contract rebate. Six days later, as the XND option is now 14 days until expiration, the Market Maker tightens to quoting \$0.05 wide 91% of the time. The 91% performance would count towards the 14 days or less expiration bucket that could gain the \$0.03 per contract rebate.

Example 2

A Market Maker is meeting the quote width, size and minimum time requirements for all 14 days or less XND options up to a \$25 premium level, but the Market Maker does not hit the 85% minimum time requirement for XND options with a premium greater than \$25. As a result, the Market Maker would not be eligible to receive the \$0.03 per contract rebate for the 14 days or less expiration bucket. However, it could still be eligible to receive the \$0.01 per contract rebates in the other

³ See Securities Exchange Act Release No. 91524 (April 9, 2021), 86 FR 19909 (April 15, 2021) (SR-Phlx-2021-07) ("Adopting Filing"). The Exchange also filed to adopt initial fees for XND options on April 15, 2021. See Securities Exchange Act Release

No. 91696 (April 28, 2021), 86 FR 24109 (May 5, 2021) (SR-Phlx-2021-24).

⁴ See Options 2, Sections 4(c), 5(a), and 5(c).

⁵ In connection with this change, existing Sections 5.B and 5.C of Options 7 will be renumbered to 5.C and 5.D, respectively.

⁶ As noted below, this is different from Cboe Exchange, Inc.'s ("Cboe") LMM incentive program, which also requires LMMs to quote in a specified percentage of all series. See *infra* note 9.

two expiration buckets (15–60 days and 61 days or greater) if they meet all of the corresponding quote width, size and minimum time requirements for all premium levels for each bucket.

LMMs and Market Makers in XND options are not obligated to satisfy the heightened quoting standards described in the table above. Rather, the LMM or Market Maker will only receive a rebate if they satisfy the abovementioned heightened quoting standard. If an LMM or Market Maker does not meet the heightened quoting standard, then it will simply not receive the rebate for that month. The Exchange notes, however, that with respect to quoting obligations, LMMs and Market Makers must still comply with the continuous quoting obligations and other obligations of LMMs and Market Makers described in the Exchange's Rules.⁷ The Exchange believes that the proposed rebates for the additional quoting standards described above will incentivize LMMs and Market Makers to provide significant liquidity in XND options.

As it relates to the proposed exception to the heightened quoting standards described above to exclude the LMM's or Market Maker's worst quoting day in XND in a given month, the Exchange seeks to adopt this exception to provide flexibility for LMMs and Market Makers, which in turn may further encourage those market participants to provide liquidity in XND options. For example, the Exchange notes that there may be certain circumstances, such as where the LMM or Market Maker has a system issue, that may impact their ability to meet the proposed heightened quoting standards for that day, which could result in the LMM or Market Maker no longer being able to satisfy the heightened quoting standard for the remainder of the month. The Exchange believes that the proposed change will further encourage LMMs and Market Makers to continue to quote aggressively in XND options throughout the entire month despite one poor performing day. For example, absent the proposed rule change, if an LMM or Market Maker has a poor performing day early in the month, the market participant may no longer have an incentive to continue to quote at the proposed heightened levels for the remainder of the month as it would know it would no longer be eligible to receive the proposed rebates for that month even if it continued to meet or exceed the prescribed quoting standards. Accordingly, the Exchange believes the proposed rule change would eliminate the potential

disincentive that could occur if one poor performing day prevented an LMM or Market Maker from meeting the proposed heightened quoting standards.

The Exchange notes that the proposed XND incentive program is substantially similar to incentive programs in place at Cboe that offer financial benefits for meeting heightened quoting standards, with certain structural differences.⁸ For instance, the proposed XND incentive program will pay the rebates to the qualifying LMM or Market Maker on a per contract basis, instead of as one monthly payment like Cboe's programs. Furthermore, the proposed rebates may be cumulative such that the qualifying LMM or Market Maker may receive up to \$0.05 per contract in all XND series, as discussed above. The proposed program will also be available to both LMMs and Market Makers in XND whereas Cboe's programs are generally limited to LMMs. In this respect, the Exchange seeks to expand the pool of Market Makers that may provide liquidity in XND, which is ultimately beneficial to the marketplace by facilitating tighter spreads and more trading opportunities, particularly in a newly listed and traded product on the Exchange during the trading day. In addition, while the Exchange will require LMMs and Market Makers to satisfy the proposed heightened quoting standards for a specified percentage of time for XND series, the Exchange will not require LMMs or Market Makers to meet the proposed heightened quoting requirements in a specified percentage of XND series like Cboe's programs.⁹ Otherwise, the proposed heightened quoting standards are similar to the detail and format (specific expiration categories and corresponding premiums, quote widths, and sizes) of the heightened quoting standards currently in place for Cboe's incentive programs.¹⁰

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹² in particular, in that it provides for the equitable allocation of

reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed XND incentive program is reasonable, equitable, and not unfairly discriminatory. The proposed heightened quoting standards and rebate amounts for meeting the heightened quoting standards in XND series are reasonably designed to incentivize an LMM or Market Maker to meet the quoting standards for XND during the trading day, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants, particularly in a newly listed and traded product like XND in order to encourage its growth on the Exchange. The Exchange believes that creating an incentive program in which LMMs and Market Makers must satisfy a heightened quoting standard to receive the rebates is a reasonable way to fortify market quality in XND, especially given XND's new market ecosystem where the Exchange expects lower trading liquidity and trading levels as compared to more established products that generally contain deeper pools of liquidity and are more active.

The Exchange believes that the proposed rebates are set at appropriate levels that are reasonably designed to incentivize LMMs and Market Makers to provide liquid and active markets in XND options to encourage its growth on the Exchange. As stated in the Adopting Filing, the Exchange is seeking to attract a greater source of retail customer business by listing XND options.¹³ Accordingly, the Exchange is proposing to provide a higher rebate in XND series with expirations of 14 days or less as compared to longer-term XND series (*i.e.*, \$0.03 per contract compared to \$0.01 per contract) in order to incentivize significant liquidity in retail XND orders, which would typically be in XND series with shorter expirations and lower premiums. The Exchange also believes that allowing the proposed rebates to be cumulative such that qualifying LMMs and Market Makers could receive a total rebate of up to \$0.05 per contract would encourage a more liquid and active market in all XND series, which will have a beneficial impact on market quality.

The Exchange believes that the proposed heightened quoting standards in XND options are reasonable in that

⁸ See, *e.g.*, Cboe Fees Schedule, "MRUT LMM Incentive Program," "MSCI LMM Incentive Program," "GTH VIX/VIXW LMM Incentive Program," "GTH SPX/SPXW LMM Incentive Program," and "RTH SPESG LMM Incentive Program."

⁹ For example, Cboe's RTH SPESG LMM Incentive Program requires the LMM to meet the specified heightened quoting standards in at least 60% of the series 90% of the time in a given month.

¹⁰ See *supra* note 8.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

¹³ See *supra* note 3.

⁷ See *supra* note 4.

they are similar to the detail and format (specific expiration categories and corresponding premiums, quote widths, and sizes) of the heightened quoting standards currently in place for Cboe's incentive programs.¹⁴ For example, the proposed expiration categories are similar to those for Cboe's MRUT LMM incentive program except the Exchange will not have a separate expiration category for long term options (*i.e.*, 271 days or greater). The Exchange notes that it does not currently list any long term XND options series. The Exchange believes that the proposed premiums and quote widths in the proposed heightened quoting standards for XND LMMs and Market Makers reasonably reflect what the Exchange believes will be typical market characteristics in XND options, given their reduced notional value based on the Nasdaq 100 Index, minimum increments, and target retail base, thus smaller, retail-sized orders. In addition, the Exchange believes that the proposed size requirement of five (5) contracts in the heightened quoting standards is a reasonable balance of the typical market characteristics of an XND order (*i.e.*, smaller, retail-sized orders) and the desire for the Exchange to encourage significant liquidity in XND options. Furthermore, the Exchange believes that the proposed minimum time requirements are set at reasonable levels that would encourage LMMs and Market Makers to contribute to greater liquidity in a newly-listed product like XND.

The Exchange believes the proposed XND incentive program is equitable and not unfairly discriminatory as all LMMs and Market Makers may qualify for this program by meeting the heightened quoting standards described above. In addition, the Exchange believes that it is equitable and not unfairly discriminatory to only offer the proposed incentives to LMMs and Market Makers. LMMs and Market Makers add value through continuous quoting and are subject to additional requirements and obligations (such as continuous quoting obligations) that other market participants are not. Furthermore, by incentivizing LMMs and Market Makers to satisfy the heightened quoting standards in XND series, the proposed changes may increase liquidity and tighter spreads, which can lead to increased volume, thereby benefitting all market participants by providing a robust market, particularly in a newly listed and traded product like XND in order to encourage its growth on the Exchange.

The Exchange believes that the proposed rule change to exclude the LMM's or Market Maker's worst quoting day each month is reasonable because it will encourage those market participants to continue to quote aggressively in XND options throughout the entire month despite an individual poor performing day. As discussed above, there may be days on which an LMM or Market Maker cannot quote aggressively (*e.g.*, the market participant has a system issue) and in certain months, one poor performing day may prevent an LMM or Market Maker from meeting the heightened quoting standard required to receive the rebates under the proposed incentive program. Moreover, in such months where an LMM or Market Maker has a poor performing day, the LMM or Market Maker may be discouraged from quoting aggressively the remainder of the month if it knows it were no longer eligible to receive the rebates that month. This can be especially problematic if a poor performing day occurs early in the month. The Exchange notes that the proposed XND rebate program is to ensure there are sufficient incentives for an LMM or Market Maker to quote at heightened levels in this newly-listed product. Accordingly, the Exchange believes the proposed rule change will encourage LMMs and Market Makers to quote aggressively in a class throughout the entire month (and thereby ensure sufficient liquidity), notwithstanding a poor performing day. The Exchange also notes that its affiliated exchange, Nasdaq ISE, LLC ("ISE") similarly omits a Market Maker's worst quoting day each month under its Market Maker Plus rebate program.¹⁵ Lastly, the Exchange believes the proposed exclusion is equitable and not unfairly discriminatory as it will apply equally to all LMMs and Market Makers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. The proposed XND incentive program is intended to encourage growth in a newly listed and traded product by providing rebates for LMMs and Market Makers that meet or exceed the proposed heightened quoting standards described above. As discussed

above, the Exchange believes that its proposal will incentivize LMMs and Market Makers to provide significant liquidity in XND options during the trading day, which, in turn, would provide greater trading opportunities, narrower bid-ask spreads, and enhanced price discovery for all market participants in XND.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. The Exchange notes that there are other products today that are similarly based on the Nasdaq-100 Index. Specifically, market participants are offered an opportunity to transact in NDX, NDXP, or NQX, or separately execute options overlying QQQ, which offer various notional sizes.¹⁶ Offering these products provides market participants with a variety of choices in selecting the product they desire to utilize to transact in the Nasdaq-100 Index. Furthermore, the Exchange notes that there are other existing investment products that are similar to XND options in that they seek to allow investors to gain broad market exposure through reduced value options.¹⁷ In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁸ and

¹⁶ See *e.g.*, Options 7, Section 5.A for NDX and NDXP pricing. See also ISE Options 7, Section 5.B for NQX pricing. NQX is currently listed only on ISE.

¹⁷ For instance, Cboe offers both MRUT and Mini-SPX ("XSP") options, which are reduced-value options based on broad-based indexes (*i.e.*, the Russell 2000 Index and S&P 500 Index). See Cboe Fees Schedule for MRUT and XSP pricing.

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁴ See *supra* note 8.

¹⁵ See ISE Options 7, Section 3, footnote 5.

subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-Phlx-2021-36 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-Phlx-2021-36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2021-36 and should be submitted on or before July 14, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13105 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, June 24, 2021.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.sec.gov>.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and
Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION:

For further information, please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

Dated: June 17, 2021.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2021-13155 Filed 6-17-21; 11:15 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 5756]

Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 Under the Investment Advisers Act of 1940

June 17, 2021.

I. Background

Section 205(a)(1) of the Investment Advisers Act of 1940 ("Advisers Act") generally prohibits an investment adviser from entering into, extending, renewing, or performing any investment advisory contract that provides for compensation to the adviser based on a share of capital gains on, or capital appreciation of, the funds of a client (also known as performance compensation or performance fees).¹ Section 205(e) authorizes the Securities and Exchange Commission ("Commission") to exempt any advisory contract from the performance fee prohibition if the contract is with any person that the Commission determines does not need the protections of the prohibition, on the basis of certain factors described in that section.² Rule 205-3 under the Advisers Act exempts an investment adviser from the prohibition against charging a client performance fees when the client is a

¹ 15 U.S.C. 80b-5(a)(1).

² Under section 205(e), the Commission may determine that persons do not need the protections of section 205(a)(1) on the basis of such factors as "financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with [section 205]." 15 U.S.C. 80b-5(e).

²⁰ 17 CFR 200.30-3(a)(12).

“qualified client.”³ The rule allows an adviser to charge performance fees if the client has at least a certain dollar amount in assets under management (currently, \$1,000,000) with the adviser immediately after entering into the advisory contract (“assets-under-management test”) or if the adviser reasonably believes, immediately prior to entering into the contract, that the client has a net worth of more than a certain dollar amount (currently, \$2,100,000) (“net worth test”).⁴

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) ⁵ amended section 205(e) of the Advisers Act to provide that, by July 21, 2011 and every five years thereafter, the Commission shall, by order, adjust for the effects of inflation the dollar amount thresholds included in rules issued under section 205(e), rounded to the nearest multiple of \$100,000.⁶ The Commission issued an order to revise the dollar amount thresholds of the assets-under-management and net worth tests (to \$1,000,000 and \$2,000,000, respectively, as discussed above) on July 12, 2011.⁷ Rule 205–3 codifies the threshold amounts revised by the 2011 Order and states that the Commission will issue an order on or about May 1, 2016, and approximately every five years thereafter, adjusting for inflation the dollar amount thresholds of the rule’s assets-under-management and net worth tests based on the Personal Consumption Expenditures Chain-Type Price Index (“PCE Index,” published by the United States Department of Commerce).⁸ On June 14, 2016, the Commission issued an order adjusting for inflation, as appropriate, the dollar amount thresholds of the assets-under-management test and the net worth test

(to \$1,000,000 and \$2,100,000, respectively).⁹

II. Adjustment of Dollar Amount Thresholds

On May 10, 2021, the Commission published a notice of intent to issue an order that would adjust for inflation the dollar amount thresholds of the assets-under-management test and the net worth test.¹⁰ The Commission stated that, based on calculations that take into account the effects of inflation by reference to historic and current levels of the PCE Index, the dollar amount of the assets-under-management test would increase from \$1,000,000 to \$1,100,000, and the dollar amount of the net worth test would increase from \$2,100,000 to \$2,200,000.¹¹ These dollar amounts—which are rounded to the nearest multiple of \$100,000 as required by section 205(e) of the Advisers Act—would reflect inflation from 2016 to the end of 2020.

The Commission’s notice established a deadline of June 4, 2021 for submission of requests for a hearing. No requests for a hearing have been received by the Commission.

III. Effective Date of the Order

This Order is effective as of August 16, 2021. To the extent that contractual relationships are entered into prior to the Order’s effective date, the dollar amount test adjustments in the Order would not generally apply retroactively to such contractual relationships, subject to the transition rules incorporated in rule 205–3.¹²

⁹ See 2016 Order, *supra* footnote 4. The 2016 Order was effective as of August 15, 2016. *Id.* As a result of the 2016 Order, the dollar amount threshold of the net worth test was increased to \$2,100,000, but the dollar amount threshold of the assets-under-management test remained at \$1,000,000. *Id.*

¹⁰ See Performance-Based Investment Advisory Fees, Advisers Act Release No. 5733 (May 10, 2021) [86 FR 26685 (May 17, 2021)]. Because the amount of the Commission’s inflation adjustment calculations are larger than the rounding amount specified under rule 205–3, the dollar amount of both tests would be adjusted as a result of the Commission’s inflation adjustment calculation effected pursuant to the rule.

¹¹ See *id.* at section II.A.

¹² See rule 205–3(c)(1) (“If a registered investment adviser entered into a contract and satisfied the conditions of this [section] that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this [section]; Provided, however, that if a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), the conditions of this [section] in effect at that time will apply with regard to that person or company.”); see also Investment Adviser Performance Compensation, Advisers Act Release No. 3198 (May 10, 2011) [76 FR 27959 (May 13, 2011)], at section II.B.3. The 2011 Order and 2016 Order each applied to contractual relationships

IV. Conclusion

Accordingly, pursuant to section 205(e) of the Advisers Act and section 418 of the Dodd-Frank Act,

It is hereby ordered that, for purposes of rule 205–3(d)(1)(i) under the Advisers Act [17 CFR 275.205–3(d)(1)], a qualified client means a natural person who, or a company that, immediately after entering into the contract has at least \$1,100,000 under the management of the investment adviser; and

It is further ordered that, for purposes of rule 205–3(d)(1)(ii)(A) under the Advisers Act [17 CFR 275.205–3(d)(1)(ii)(A)], a qualified client means a natural person who, or a company that, the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than \$2,200,000.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–13192 Filed 6–22–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92197; File No. SR–ICC–2021–013]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC End-of-Day Price Discovery Policies and Procedures

June 16, 2021.

I. Introduction

On April 23, 2021, ICE Clear Credit LLC (“ICC”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² a proposed rule change to revise and update ICC’s End-of-Day Price Discovery Policies and Procedures (the “Pricing Policy”). The Pricing Policy formalizes ICC’s end-of-day (“EOD”) price discovery process that provides prices for cleared credit default

entered into on or after the effective date and did not apply retroactively to contractual relationships previously in existence. See Investment Adviser Performance Compensation, Advisers Act Release No. 3372 (Feb. 15, 2012) [77 FR 10358 (Feb. 22, 2012)], at section I, n.16; 2016 Order, *supra* footnote 4, at section III.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ The exemption applies to the entrance into, performance, renewal, and extension of advisory contracts. See rule 205–3(a).

⁴ See rule 205–3(d)(1)(i)–(ii); see also Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205–3 under the Investment Advisers Act of 1940, Advisers Act Release No. 4421 (June 14, 2016) [81 FR 39985 (June 20, 2016)] (“2016 Order”). Rule 205–3 includes other definitions of “qualified client” that do not reference specific dollar amount tests. See, e.g., rule 205–3(d)(1)(ii)(B) and rule 205–3(d)(1)(iii).

⁵ Public Law 111–203, 124 Stat. 1376 (2010).

⁶ See section 418 of the Dodd-Frank Act (requiring the Commission to issue an order every five years revising dollar amount tests in a rule that exempts a person or transaction from section 205(a)(1) of the Advisers Act if the dollar amount test was a factor in the Commission’s determination that the persons do not need the protections of that section).

⁷ See Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205–3 under the Investment Advisers Act of 1940, Advisers Act Release No. 3236 (July 12, 2011) [76 FR 41838 (July 15, 2011)] (“2011 Order”). The 2011 Order was effective as of September 19, 2011. *Id.*

⁸ See rule 205–3(e).

swap (“CDS”) contracts based on submissions from ICC’s Clearing Participants.³ The proposed rule change was published for comment in the **Federal Register** on May 6, 2021.⁴ The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

ICC proposes updates related to firm trade obligations and certain clarifications under the Pricing Policy.⁵ As part of ICC’s current EOD price discovery process, ICC Clearing Participants (“CPs”) are required to submit daily EOD prices for cleared CDS instruments related to their open positions at ICC in accordance with the Pricing Policy. To encourage CPs to provide the best possible EOD submissions, ICC selects a subset of the potential trades generated and designates them as firm trades, which ICC then enters CPs into as cleared transactions. ICC selects specific dates on which it can require CPs to execute firm trades (“firm trade days”). For each firm trade day, ICC specifies the instruments that may become firm-trade eligible, subject to certain specified criteria. As described in more detail below, ICC proposes additional criteria in the Pricing Policy for EOD firm trades with the express purpose of maintaining the robustness of the established price discovery process and ensuring that on-market firm trades (*i.e.*, firm trades resulting from price submissions close to EOD levels that reflect market expectations and thus do not provide any value-additive market information) do not incentivize CPs to correct their outlying submissions (*i.e.*, off-market price submissions outside the proposed EOD range).⁶ By subjecting potential trades to its proposed new criteria for designating firm trades, ICC would avoid creating a high number of firm trades around its EOD levels that may unnecessarily introduce operational risks and inefficiencies into ICC’s EOD price discovery process.

Specifically, ICC proposes to amend Section 2.4.1 of the Pricing Policy (Selecting Firm-Trade Days and Firm-

Trade Eligible Instruments) by adding a new subsection (d) (Trade Price Deviation Constraint) to Section 2.4.1. As proposed, new Section 2.4.1.d of the Pricing Policy would incorporate additional criteria that must be met for ICC to generate firm trades, which ICC refers to as the trade price deviation constraint (the “constraint”). In addition to new subsection (d), the proposed rule change would add references to the constraint throughout the existing subsections of Section 2.4.1, specifically in subsection (a) with respect to firm trade days for index instruments, subsection (b) with respect to firm trade days for single name instruments, and subsection (c) with respect to firm trade days for index option instruments. The proposed rule change would describe the constraint in subsection (d) of Section 2.4.1 as follows. Under the proposed constraint, ICC would avoid creating a high number of trades around its EOD levels by not designating potential trades as firm trades if the magnitude of the hypothetical profit/loss is smaller in magnitude than the absolute value of the difference between the EOD level and either the bid price or offer price. To achieve the stated purpose of the constraint, ICC would only designate a potential trade as a firm trade if the trade level fell outside the EOD level plus/minus one half the EOD bid-offer width (“BOW”) for the given instrument. Such constraint would not apply when the potential firm trade is formed by crossing two outlying submission trades.

With respect to credit default index swaptions (“Index Options”), ICC proposes additional language in amended subsection 2.4.1.c (Index Option Firm Trade Days) concerning the designation of a potential trade as a firm trade by subjecting strips of puts and/or calls to the CP open interest and ICC open interest requirements. The Pricing Policy currently incorporates similar open interest requirements for indices and single names. Under the proposed CP open interest requirement in amended subsection 2.4.1.c, for ICC to designate a potential trade as a firm trade, both parties must have a cleared open interest, as of the designated times, in one or more Index Option instrument sharing the same underlying index instrument, expiration date, strike convention, exercise style and transaction type. Under the proposed ICC open interest requirement, ICC would only designate a potential trade in a given Index Option instrument as a firm trade if ICC has a cleared open interest in that instrument.

In addition, ICC proposes several clarifications to the Pricing Policy. In

Section 2.2.2 (Non-Submission Assessments), ICC proposes to abbreviate the term “ICC Board of Managers” to “Board.” In Section 2.6 (CP’s Use of Third-Party Providers), ICC proposes revisions to clarify the circumstances under which a CP may participate in the EOD price discovery process on behalf of another CP. Section 2.6 currently provides that, subject to the prior consent of ICC, a CP may designate another CP to participate in the EOD price discovery process on its behalf. Amended Section 2.6 would remove ICC’s prior consent and specify that a CP “may allow an affiliated CP (CP B) to participate in the EOD price discovery process on its behalf.” In Section 3 (Governance), ICC proposes to memorialize its existing practice by adding a new sentence stating that the Pricing Policy document is subject to review by the Risk Committee and review and approval by the Board at least annually.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.⁷ For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act and Rules 17Ad-22(e)(2)(i) and (v)⁸ and 17Ad-22(e)(6)(iv) thereunder.⁹

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.¹⁰

As noted above, the proposed rule change would amend Section 2.4.1 of the Pricing Policy by adding new subsection (d) to incorporate a new trade price deviation constraint as additional criteria that must be met for the generation of firm trades for each type of cleared CDS instrument at ICC and to amend the existing subsections of

³ Capitalized terms used but not defined herein have the meanings specified in the Pricing Policy.

⁴ Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC End-of-Day Price Discovery Policies and Procedures, Exchange Act Release No. 91733 (April 30, 2021); 86 FR 24425 (May 6, 2021) (SR-ICC-2021-013) (“Notice”).

⁵ The description herein is substantially excerpted from the Notice.

⁶ Notice, 86 FR at 24426.

⁷ 15 U.S.C. 78s(b)(2)(C).

⁸ 17 CFR 240.17Ad-22(e)(2)(i) and (v).

⁹ 17 CFR 240.17Ad-22(e)(6)(iv).

¹⁰ 15 U.S.C. 78q-1(b)(3)(F).

Section 2.4.1 to include references to the constraint where appropriate; namely, index instruments or indices in subsection (a), single name instruments in subsection (b), and Index Options in subsection (c). The Commission believes that by amending its Pricing Policy to include the proposed constraint in subsection (d) as described above, ICC would enhance its ability to maintain the accuracy, integrity, and effectiveness of the EOD price discovery process by not designating potential trades as firm trades if the magnitude of the hypothetical profit/loss is smaller in magnitude than the absolute value of the difference between the EOD level and either the bid price or offer price. This in turn could incentivize CPs to make EOD price submissions that help ICC maintain the robustness of its price discovery process and help ensure that on-market firm trades do not incentivize CPs to correct their outlying submissions. By subjecting potential trades to the proposed constraint, ICC would promote the prompt and accurate clearance and settlement of CDS contracts by avoiding the creation of an unnecessarily high number of firm trades around its EOD levels that could increase operational risks and inefficiencies in ICC's EOD price discovery process.

The Commission also believes that the proposed amendments to subsection 2.4.1.c (Index Option Firm Trade Days), as described above, would ensure that the firm trade obligations for Index Options are subject to similar CP open interest and ICC open interest requirements as those that currently apply to indices and single names. These aspects of the proposed rule change should further enhance the consistency and integrity of ICC's EOD price discovery process across all three types of CDS instruments that ICC clears. Consequently, the Commission believes that all of the proposed changes to Section 2.4.1 should promote the prompt and accurate clearance and settlement of CDS transactions by ICC.

As noted above, ICC proposes other revisions to clarify that a CP may allow an affiliated CP to participate in the EOD price discovery process on its behalf without ICC's prior consent, to memorialize that the Pricing Policy is subject to review by the Risk Committee and review and approval by the Board at least annually, and to include the shorthand reference to the "Board" instead of the longer reference to the ICC Board of Managers in the Pricing Policy document. The Commission finds that these proposed drafting clarifications and improvements would enhance the clarity, transparency, and

readability of the Pricing Policy for ICC management, employees, and CPs that, in turn, should help them understand their respective authorities, rights, and obligations regarding ICC's EOD price discovery process and its role in the clearance and settlement of CDS transactions.

The Commission believes that the proposed changes, taken as a whole, should enhance ICC's ability to manage the overall EOD price discovery process and the risks of clearing CDS instruments, including the calculation and collection of margin requirements that will account for each type of specific instrument as part of its overall risk-based margin system and risk management processes which rely, in part, on the EOD prices submitted by ICC's CPs.¹¹ Moreover, the Commission believes these risks, if mismanaged, could threaten ICC's ability to operate and therefore its ability to clear and settle transactions and safeguard funds. As a result, the Commission believes that these proposed changes should promote ICC's ability to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.

Therefore, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.¹²

B. Consistency With Rule 17Ad-22(e)(2)(i) and (v) Under the Act

Rules 17Ad-22(e)(2)(i) and (v)¹³ require each covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to, among other things, provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility, respectively. As noted above, the proposed amendments to Section 3 (Governance) would memorialize that the Pricing Policy is subject to review by the Risk Committee and review and approval by ICC's Board of Managers at least annually. The Commission believes this aspect of the proposed rule change would improve

¹¹ See SEC Release No. 34-82960 (Mar. 28, 2018), 83 FR 14300, 14302 (Apr. 3, 2018) (SR-ICC-2018-002) (finding improvements to ICC's end-of-day pricing process would improve "ICC's risk management processes related to the end-of-day pricing process, including the calculation and collection of certain margin requirements" and would "promote the prompt and accurate clearance and settlement of the products cleared by ICC, and . . . enhance ICC's ability to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible").

¹² 15 U.S.C. 78q-1(b)(3)(F).

¹³ 17 CFR 240.17Ad-22(e)(2)(i) and (v).

the clarity and transparency of the Pricing Policy document and its governance processes by specifying relevant roles and lines of responsibility within ICC. The Commission believes that the proposed rule change is therefore consistent with Rules 17Ad-22(e)(2)(i) and (v).¹⁴

C. Consistency With Rule 17Ad-22(e)(6)(iv) Under the Act

Rule 17Ad-22(e)(6)(iv)¹⁵ requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. The Commission believes the proposed changes to Section 2.4.1 to incorporate the proposed constraint in the firm trade provisions governing each type of cleared CDS instrument should help ICC manage the quality and quantity of EOD price submissions from CPs by only designating a potential trade as a firm trade if the trade level falls outside the proposed EOD range for the given CDS instrument. This, in turn, should help ICC establish and maintain accurate margin requirements that will account for the risks posed by each type of CDS instrument as part of its overall risk-based margin system and risk management processes.

Further, the proposed changes to subsection 2.4.1.c that would designate a potential trade as a firm trade by subjecting strips of puts and/or calls to both the CP open interest and ICC open interest requirements would help ensure that the firm trade obligations for Index Options are subject to similar open interest requirements as those that currently apply to indices and single names. The Commission believes these proposed changes should help ICC maintain the integrity and effectiveness of its EOD price discovery process for the provision of reliable prices for Index Options, which could, in turn, be used to further enhance ICC's ability to establish and maintain risk-based margin requirements for such instruments which rely, in part, on the EOD prices provided by CPs. The Commission believes that the proposed rule change is therefore consistent with Rule 17Ad-22(e)(6)(iv).¹⁶

¹⁴ 17 CFR 240.17Ad-22(e)(2)(i) and (v).

¹⁵ 17 CFR 240.17Ad-22(e)(6)(iv).

¹⁶ 17 CFR 240.17Ad-22(e)(6)(iv).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act and Rules 17Ad-22(e)(2)(i) and (v) and 17Ad-22(e)(6)(iv) thereunder.¹⁷

It is therefore ordered pursuant to Section 19(b)(2) of the Act¹⁸ that the proposed rule change (SR-ICC-2021-013), be, and hereby is, approved.¹⁹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13102 Filed 6-22-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92190; File No. SR-ISE-2021-13]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Pricing Schedule at Options 7, Section 3, "Regular Order Fees and Rebates" and Section 4, "Complex Order Fees and Rebates"

June 16, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 8, 2021, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 3, "Regular Order Fees and Rebates" and Section 4, "Complex Order Fees and Rebates."

The Exchange originally filed the proposed pricing change on June 1, 2021 (SR-ISE-2021-12). On June 8, 2021, the Exchange withdrew that filing and submitted this filing.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 3, "Regular Order Fees and Rebates" and Section 4, "Complex Order Fees and Rebates." Each change is described below.

Options 7, Section 3 Regular Order Fees and Rebates

Today, the Exchange assesses a Maker Fee of \$0.18 per contract in Select Symbols³ for Market Maker,⁴ Non-Nasdaq ISE Market Maker (FarMM),⁵

³ "Select Symbols" are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program. See Options 7, Section 1.

⁴ This fee applies to Market Maker orders sent to the Exchange by Electronic Access Members. Market Makers that qualify for Market Maker Plus will not pay this fee if they meet the applicable tier thresholds set forth in Options 7, Section 3. Market Makers will instead be assessed fees or rebates based on the applicable tier for which they qualify. See notes 5 and 8 within Options 7, Section 3. Market Maker Plus for Select Symbols is not being amended. The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21).

⁵ A "Non-Nasdaq ISE Market Maker" is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange. See Options 7, Section 1.

Firm Proprietary⁶/Broker-Dealer,⁷ and Professional Customer⁸ orders. Priority Customer⁹ orders are not assessed a Select Symbol Maker Fee.

Further, today, pursuant to Options 7, Section 3, note 10, a Market Maker is not charged a fee or paid a rebate when trading against non-Priority Customer Complex Orders¹⁰ that leg into the regular¹¹ order book. Also, today, pursuant to Options 7, Section 3, note 11, a Market Maker, FarMM, Firm Proprietary/Broker Dealer, and Professional Customer are assessed a \$0.25 per contract fee, instead of the applicable fee or rebate, when trading against Priority Customer Complex Orders that leg into the regular order book. Today, Market Makers that qualify for Market Maker Plus in Select Symbols pay a \$0.15 per contract fee in the symbols for which they qualify for Market Maker Plus when trading against Priority Customer Complex Orders of less than 50 contracts in Select Symbols that leg into the regular order book. Further, Market Makers that qualify for Market Maker Plus in Select Symbols do not pay any fee nor receive any rebate in the symbols for which they qualify for Market Maker Plus when trading against Priority Customer Complex Orders of 50 contracts or more in Select Symbols that leg into the regular order book.

The Exchange proposes to remove rule text from Options 7, Section 3, note 11, which provides that Market Makers that qualify for Market Maker Plus in Select Symbols will pay a \$0.15 per contract fee in symbols for which they

⁶ A "Firm Proprietary" order is an order submitted by a member for its own proprietary account. See Options 7, Section 1.

⁷ A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. See Options 7, Section 1.

⁸ A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer. See Options 7, Section 1.

⁹ A "Priority Customer" is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in ISE Options 1, Section 1(a)(37). Unless otherwise noted, when used in the Pricing Schedule the term "Priority Customer" includes "Retail." A "Retail" order is a Priority Customer order that originates from a natural person, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Options 7, Section 1.

¹⁰ A "Complex Order" is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, as provided in Nasdaq ISE Options 3, Section 14, as well as Stock-Option Orders. See Options 7, Section 1.

¹¹ A "Regular Order" is an order that consists of only a single option series and is not submitted with a stock leg. See Options 7, Section 1.

¹⁷ 17 CFR 240.17Ad-22(e)(6)(iv).

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

qualify for Market Maker Plus when trading against Priority Customer Complex Orders of less than 50 contracts in Select Symbols that leg into the regular order book. Additionally, the Exchange proposes to modify the remainder of note 11 to provide, “Market Makers that qualify for Market Maker Plus in Select Symbols will not pay this fee nor receive any rebate in symbols for which they qualify for Market Maker Plus when trading against Priority Customer Complex Orders leg into the regular order book.”

With the proposed amendments to note 11 of Options 7, Section 3, a Market Maker that qualifies for Market Maker Plus when trading against Priority Customer Complex Orders leg into the regular order book would no longer pay a \$0.15 per contract fee, rather, the Market Maker would pay no fee, nor receive any rebate similar to the manner in which Market Makers are priced today for orders of 50 contracts or more in Select Symbols, when those Market Makers qualify for Market Maker Plus and trade against Priority Customer Complex Orders leg into the regular order book. This proposal would align pricing for Market Makers that qualify for Market Maker Plus when trading against Priority Customer Complex Orders leg into the regular order book, irrespective of the size of the order. Market Makers that do not qualify for Market Maker Plus would continue to pay a \$0.25 per contract fee when trading against Priority Customer Complex Orders that leg into the regular order book similar to other market participants.

The Exchange believes this pricing will continue to incentivize Market Makers to qualify for Market Maker Plus in order to earn the associated rebates for Market Maker Plus and also pay no fees when trading against Priority Customer Complex Orders leg into the regular order book in Select Symbols.

The Exchange also proposes to make a non-substantive amendment to capitalize the term “Complex Order” in current note 10 of Options 7, Section 3.

Options 7, Section 4, Complex Order Fees and Rebates

Currently, Options 7, Section 4 provides a fee structure for Complex Orders that provides rebates to Priority Customer Complex Orders in order to encourage Members to bring that order flow to the Exchange. Specifically, Priority Customer Complex Orders are provided rebates in Select Symbols and

Non-Select Symbols¹² (other than NDX, NQX, and MNX as noted within note 4 of Options 7, Section 4) based on Priority Customer average daily volume (“ADV”).¹³

Today, Options 7, Section 4, note 1 provides, “Rebate provided per contract per leg if the order trades with non-Priority Customer orders in the Complex Order Book. Rebate provided per contract leg in Select Symbols where the largest leg of the Complex Order is under fifty (50) contracts and trades with quotes and orders on the regular order book. No Priority Customer Complex Order rebates will be provided in Select Symbols if any leg of the order that trades with interest on the regular order book is fifty (50) contracts or more. No Priority Customer Complex Order rebates will be provided in Non-Select Symbols if any leg of the order trades with interest on the regular order book, irrespective of order size.”

The Exchange proposes to amend the second sentence in note 1 of Options 7, Section 4 to state, “This rebate will be reduced by \$0.15 per contract in Select Symbols where the largest leg of the complex order is under fifty (50) contracts and trades with quotes and orders on the regular order book.” The proposed amendment to the second sentence of note 1 of Options 7, Section 4, would reduce the current rebate paid in Select Symbols, per contract, when the largest leg of the Complex Order is under fifty contracts and trades with quotes and orders on the regular order book. Today, the Exchange pays no Priority Customer Complex Order rebates in Select Symbols if any leg of the order that trades with interest on the regular order book is fifty contracts or more, nor does the Exchange pay a Priority Customer Complex Order rebate in Non-Select Symbols if any leg of the order trades with interest on the regular order book, irrespective of order size. The Exchange has observed in the past that several market participants have entered larger sized Priority Customer Complex Orders with a leg of fifty or more contracts to earn a rebate. When these Complex Orders do not find a counterparty in the Complex Order Book, the orders may leg into the regular order book where they are typically executed by Market Makers on the individual legs who pay a fee to trade with this order flow.¹⁴ As a result, the

Market Maker’s ability to provide liquidity on the Exchange is adversely affected as they are charged to trade against these larger complex orders when they leg into the regular market and execute against their quotes. For this reason, the Exchange continues to not pay Priority Customer Complex Order rebates in Select Symbols if any leg of the order that trades with interest on the regular order book is fifty contracts or more, including for Select Symbols which do not pay a Priority Customer Complex Order rebate if any leg of the order trades with interest on the regular order book, irrespective of order size.

The Exchange’s proposal to reduce the Select Symbol rebate when the largest leg of the Complex Order is under fifty contracts and trades with quotes and orders on the regular order book, by \$0.15 per contract, is intended to continue to incentivize Members to send order flow to the Exchange despite the reduction. Also, the Exchange will continue to pay Priority Customer rebates for Priority Customer Complex Orders of any size which trades with non-Priority Customer orders in the Complex Order Book, based on the Priority Customer Complex Tier achieved, thereby continuing to incentivize Members to bring Complex Order flow to the Exchange to earn the rebate on their Priority Customer Complex Order volume.

Further, the proposal would close the pricing gap as between Members who receive a Priority Customer rebate, which is being reduced by this proposal, in Select Symbols where the largest leg of the Complex Order is under fifty (50) contracts and trades with quotes and orders on the regular order book as compared to both Members that do not receive a Priority Customer rebate in non-Select Symbols if any leg of the order trades with interest on the regular order book, irrespective of order size, and Members that do not receive a Priority Customer rebate in Select Symbols where the largest leg of the Complex Order is fifty contracts or more and trades with quotes and orders on the regular order book.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁶ in particular, in that it

or in the case of Market Makers that achieve Market Maker Plus status, would earn certain maker rebates instead of paying the \$0.18 per contract maker fee. See Options 7, Section 3, note 5.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4) and (5).

¹² “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. See Options 7, Section 1.

¹³ See tiered rebates within Options 7, Section 4.

¹⁴ For example, a Market Maker providing liquidity on the individual leg would typically pay a maker fee of only \$0.18 per contract for trading with orders originating from the regular order book,

provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to the Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁷

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁸

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such,

the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

Options 7, Section 3 Regular Order Fees and Rebates

The Exchange’s proposal to remove certain rule text from Options 7, Section 3, note 11, and amend the remaining rule text is reasonable as a Market Maker that qualifies for Market Maker Plus when trading against Priority Customer Complex Orders that leg into the regular order book would no longer pay a \$0.15 per contract fee, rather, the Market Maker would pay no fee, nor receive any rebate. This proposal would align the pricing to the manner in which Market Makers are priced today for orders of 50 contracts or more in Select Symbols, when those Market Makers qualify for Market Maker Plus and trade against Priority Customer Complex Orders leg into the regular order book. Specifically, Market Makers that qualify for Market Maker Plus when trading against Priority Customer Complex Orders that leg into the regular order book, would pay no fee, nor receive any rebate, irrespective of the size of the order. The Exchange believes this pricing will continue to incentivize Market Makers to qualify for Market Maker Plus in order to earn the associated rebates for Market Maker Plus and also pay no fees when trading against Priority Customer Complex Orders leg into the regular order book in Select Symbols. Market Makers that do not qualify for Market Maker Plus would continue to pay a \$0.25 per contract fee when trading against Priority Customer Complex Orders that leg into the regular order book similar to other market participants.

The Exchange’s proposal to remove certain rule text from Options 7, Section 3, note 11, and amend the remaining rule text is equitable and not unfairly discriminatory. Market Makers that qualifies for Market Maker Plus when trading against Priority Customer Complex Orders leg into the regular order book would uniformly pay no fee, nor receive any rebate, irrespective of the size of the order. The Exchange will continue to assess a \$0.25 per contract fee to all other non-Priority Customer market participants, including Market Makers that do not qualify for Market Maker Plus, when trading against Priority Customer Complex Orders that leg into the regular order book. The Exchange believes that it is not unfairly discriminatory to not assess Market Makers a fee if they qualify for Market Maker Plus because those Market Makers are paid rebates within the

Market Maker Plus Program for adding value for quoting at the NBBO for a significant percentage of time. Further, all Market Makers are subject to the same qualification criteria for Market Maker Plus.

The Exchange’s proposal to capitalize the term “Complex Order” in current note 10 of Options 7, Section 3 is non-substantive.

Options 7, Section 4, Complex Order Fees and Rebates

The Exchange’s proposal to amend the second sentence in note 1 of Options 7, Section 4 to state, “This rebate will be reduced by \$0.15 per contract in Select Symbols where the largest leg of the complex order is under fifty (50) contracts and trades with quotes and orders on the regular order book,” is reasonable. The proposed amendment to note 1 of Options 7, Section 4, would reduce the current rebate paid in Select Symbols, per contract, when the largest leg of the Complex Order is under fifty contracts and trades with quotes and orders on the regular order book. Overall, the Exchange believes that the Priority Customer Complex Order rebate program, as modified, is reasonable because the program is optional and all Members can choose to participate or not. The Exchange’s proposal to reduce the Select Symbol rebate when the largest leg of the Complex Order is under fifty contracts and trades with quotes and orders on the regular order book, by \$0.15 per contract, is intended to continue to incentivize Members to send order flow to the Exchange despite the reduction. Also, the Exchange will continue to pay Priority Customer rebates for Priority Customer Complex Orders of any size which trades with non-Priority Customer orders in the Complex Order Book, based on the Priority Customer Complex Tier achieved, thereby continuing to incentivize Members to bring Complex Order flow to the Exchange to earn the rebate on their Priority Customer Complex Order volume. Further, the proposal would close the pricing gap as between Members who receive a Priority Customer rebate, which is being reduced by this proposal, in Select Symbols where the largest leg of the Complex Order is under fifty (50) contracts and trades with quotes and orders on the regular order book as compared to both Members that do not receive a Priority Customer rebate in non-Select Symbols if any leg of the order trades with interest on the regular order book, irrespective of order size, and Members that do not receive a Priority Customer rebate in Select Symbols where the largest leg of the

¹⁷ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

¹⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Complex Order is fifty contracts or more and trades with quotes and orders on the regular order book. This fee remains competitive with other options markets.¹⁹

The Exchange's proposal to amend the second sentence in note 1 of Options 7, Section 4 to state, "This rebate will be reduced by \$0.15 per contract in Select Symbols where the largest leg of the complex order is under fifty (50) contracts and trades with quotes and orders on the regular order book," is equitable and not unfairly discriminatory. The Exchange will continue to uniformly pay rebates to Priority Customer Complex Orders trading with non-Priority Customer orders in the Complex Order Book, regardless of size, based on the Priority Customer Complex Tier achieved. Further, the Exchange would uniformly pay a reduced rebate (reduced by \$0.15 per contract) in Select Symbols where the largest leg of the complex order is under fifty contracts and trades with quotes and orders on the regular order book.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the

Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Options 7, Section 3 Regular Order Fees and Rebates

The Exchange's proposal to remove certain rule text from Options 7, Section 3, note 11, and amend the remaining rule text does not impose an undue burden on competition. Market Makers that qualifies for Market Maker Plus when trading against Priority Customer Complex Orders leg into the regular order book would uniformly pay no fee, nor receive any rebate, irrespective of the size of the order. The Exchange will continue to assess a \$0.25 per contract fee to all other non-Priority Customer market participants, including Market Makers that do not qualify for Market Maker Plus, when trading against Priority Customer Complex Orders that leg into the regular order book. Today, Market Makers that qualify for Market Maker Plus are paid rebates based on their tier qualification for adding value for quoting at the NBBO for a significant percentage of time. All Market Makers are subject to the same qualification criteria for Market Maker Plus.

The Exchange's proposal to capitalize the term "Complex Order" in current note 10 of Options 7, Section 3 is non-substantive.

Options 7, Section 4, Complex Order Fees and Rebates

The Exchange's proposal to amend the second sentence in note 1 of Options 7, Section 4 to state, "This rebate will be reduced by \$0.15 per contract in Select Symbols where the largest leg of the complex order is under fifty (50) contracts and trades with quotes and orders on the regular order book," does not impose an undue burden on competition. The Exchange uniformly pay rebates to Priority Customer Complex Orders trading with non-Priority Customer orders in the Complex Order Book, regardless of size, based on the Priority Customer Complex Tier achieved and will continue to pay rebates. Further, the Exchange would uniformly pay a reduced rebate (reduced by \$0.15 per contract) in Select Symbols where the largest leg of the complex order is under fifty contracts and trades with quotes and orders on the regular order book.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²⁰ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ISE-2021-13 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-ISE-2021-13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE,

¹⁹ MIAX Emerald, LLC's ("Emerald") Pricing Schedule provides that Priority Customer Complex Orders contra to Priority Customer Complex Orders are neither charged nor rebated for Penny and Non-Penny Classes. Priority Customer Complex Orders that leg into the Simple book are neither charged nor rebated. See Emerald's Pricing Schedule.

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2021-13 and should be submitted on or before July 14, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13098 Filed 6-22-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92193; File No. SR-NYSE-2020-105]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Revise Rules 46 and 46A To Permit the Appointment of Trading Officials

June 16, 2021.

I. Introduction

On December 15, 2020, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rules 46 and 46A, and other related rules, to provide for the appointment of Trading Officials. The proposed rule change was published for comment in the **Federal Register** on December 30, 2020.³

On February 9, 2020, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the

proposed rule change, extending the date for Commission action until March 30, 2021.⁴ On March 25, 2021, the Exchange submitted Amendment No. 1 to the proposed rule change.⁵

On March 30, 2021, the Commission published notice of Amendment No. 1 and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁶ The Commission has received one comment on the proposed rule change.⁷ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The Exchange proposes to eliminate NYSE member⁸ and non-member employee Floor Officials⁹ and transition the related duties to the newly created position of Trading Official, which would be filled by Exchange employees appointed by the NYSE CEO or his or her designee. In order to effectuate this proposed rule change, the Exchange would: (1) Delete current NYSE Rules 46 and 46A, (2) replace those rules with new NYSE Rule 46, which would define Trading Officials and provide for their appointment, and (3) make conforming changes to other Exchange rules related to the duties and responsibilities of Trading Officials. As a result of this proposal, the various seniority-based gradations of Floor Official would be eliminated,¹⁰ and the Floor-related

functions that are currently delegated by Exchange Rules to member Floor Officials and Staff Governors would be performed only by Trading Officials. Only Exchange employees, not active Exchange members, would be eligible to serve as Trading Officials.

The Exchange anticipates that the current Staff Governors, who are Exchange employees, would be appointed as Trading Officials. According to the Exchange, Trading Officials, like current Staff Governors, would be appointed based on experience and necessary business and rule knowledge that would enable them to participate in and supervise various trading situations on the Trading Floor,¹¹ and the Exchange would train and supervise them.¹² In addition, Trading Officials, like the current Staff Governors, would report to the Head of Equities. The Exchange states that this reporting structure is appropriate because Trading Officials, like Staff Governors, will supervise trading on the Exchange and will not have any regulatory role or responsibility.¹³

The Exchange is also proposing certain technical and conforming changes to NYSE Rules 7.35A, 7.35B, 18(d), 37, 47, 75, 91.50, 93(b), 103.10, 103A, 103B(G), 104, 112(a)(i), 124(e), 128B.10, 308(g), and 903(d)(ii), which relate to the duties of Trading Officials and Floor supervision. Additionally, the Exchange proposes to amend NYSE Listed Company Manual Section 202.04.

- NYSE Rule 7.35A (DMM-Facilitated Core Open and Trading Halt Auctions) sets forth the responsibility of designated market makers (“DMMs”) to ensure that registered securities open as close to the beginning of Core Trading Hours as possible or reopen at the end of the halt or pause.

- Subsection (a)(4) provides for Floor Official participation in the opening and reopening process to provide an impartial professional assessment of unusual situations, as well as to provide guidance with respect to pricing when a significant disparity in supply and demand exists. The rule also contemplates DMM consultations with Floor Officials under certain specific circumstances. References to Floor Official in NYSE Rule 7.35A(a)(4) and

⁴ See Securities Exchange Act Release No. 91084 (Feb. 9, 2020), 86 FR 9545 (Feb. 16, 2021).

⁵ Amendment No. 1 is available on the Commission’s website at <https://www.sec.gov/comments/sr-nyse-2020-105/srnyse2020105-8545367-230641.pdf>.

⁶ See Securities Exchange Act Release No. 91442 (Mar. 30, 2021), 86 FR 17658 (Apr. 5, 2021) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings (“OIP”)).

⁷ See Letter from David De Gregorio, Associate General Counsel, New York Stock Exchange to Vanessa Countryman, Secretary, Office of the Secretary, Commission (May 10, 2021) (“OIP Response Letter”).

⁸ NYSE Rule 2(a) states that the term “member,” when referring to a natural person, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Exchange Trading Floor or any facility thereof.

⁹ NYSE Rule 46 (Floor Officials—Appointment) and NYSE Rule 46A (Executive Floor Governors) currently set forth the process for the Exchange to appoint active NYSE members as Floor Officials. In addition, Rule 46 permits the Exchange to appoint qualified employees to act as Floor Governors.

¹⁰ The title “Floor Official” includes a broad category of titles that include, in order of increasing seniority, Floor Officials, Senior Floor Officials, Executive Floor Officials, Floor Governors, and Executive Floor Governors. See NYSE Rules 46 and 46A (defining Floor Official, Floor Governor, Executive Floor Official, Senior Floor Official, and Executive Floor Governor).

¹¹ The term “Trading Floor” is defined in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the “Main Room” and the “Buttonwood Room.”

¹² Currently, Floor Officials are appointed by the Board annually and must complete a mandatory education program and pass a qualifications exam. See NYSE Rules 46 and 46A.

¹³ Regulatory employees are not permitted to be Staff Governors. See NYSE Rule 46.10.

²¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90776 (Dec. 22, 2020), 85 FR 86625 (Dec. 30, 2020) (“Notice”).

(a)(5) would be replaced with Trading Official.

- NYSE Rule 7.35A(d) governs pre-opening indications. Subsection (d)(4) describes the procedures for publishing pre-opening indications and specifies when publication of a pre-opening indication requires supervision and approval of a Floor Governor.

References to Floor Governor in NYSE Rule 7.35A(d)(4)(A) and (F)(i) would be replaced with references to Trading Official.

- NYSE Rule 7.35B (DMM-Facilitated Closing Auctions) describes the responsibility of each DMM to ensure that registered securities close as soon after the end of Core Trading Hours as possible.

- NYSE Rule 7.35B(a)(1)(C) provides that electronically-entered Floor Broker Interest cannot be reduced in size or replaced, except that DMMs can accept a full cancellation of electronically-entered Floor Broker Interest to correct a Legitimate Error subject to Floor Official approval. Floor Official would be replaced with Trading Official in NYSE Rule 7.35B(a)(1).¹⁴

- NYSE Rule 7.35B(d) governs closing imbalances. Subsection (d)(1)(A) describes the circumstances in which a DMM may disseminate a Regulatory Closing Imbalance with prior Floor Official approval. Subsection (d)(2) provides that DMMs may disseminate a Manual Closing Imbalance only with prior Floor Official approval beginning one hour before the scheduled end of Core Trading Hours up to the Closing Auction Imbalance Freeze Time. In both subsections, references to Floor Official would be replaced with references to Trading Official.

- NYSE Rule 7.35B(j) governs temporary rule suspensions. Subsection (j)(3) provides that a determination to declare a temporary suspension as well as any entry or cancellation of orders or closing of a security under subsection (j)(2) must be supervised and approved by an Executive Floor Governor and supervised by an Exchange Officer. The Exchange proposes that these determinations must be supervised and approved by a Trading Official.

- NYSE Rule 18(d) (Compensation in Relation to Exchange System Failure) sets forth the process for member organizations to seek reimbursement for losses resulting from system failures. Subsection (d) establishes a Compensation Review Panel consisting of three Floor Governors and three Exchange employees to determine the eligibility of a claim for payment. Since

the proposed elimination of Floor Governors would leave Exchange employees as the sole members of the Compensation Review Panel, the Exchange proposes to eliminate the Compensation Review Panel. The proposed rule would accordingly provide that the Exchange will review claims submitted pursuant to the rule and determine the eligibility of a claim for payment.

- NYSE Rule 37 (Visitors) provides that visitors shall not be admitted to the Floor except by permission of an Exchange officer, Senior Floor Official, Executive Floor Official, Floor Governor, or Executive Floor Governor. The Exchange proposes that admission of visitors to the Floor be by permission of the Exchange.

- As noted above, NYSE Rules 46 and 46A would be deleted in their entirety. The heading of proposed NYSE Rule 46 would be “Trading Officials.”

- Under NYSE Rule 47 (Floor Officials—Unusual Situations), Floor Officials have the power to supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers, or transactions on the Floor. References to Floor Official would be changed to Trading Officials and the heading would be changed to “Unusual Situations on the Floor.” Current NYSE Rule 49 would become NYSE Rule 48.

- NYSE Rule 75 (Disputes as to Bids and Offers) mandates that disputes arising on bids or offers that are not settled by agreement between the interested members shall be settled by a Floor Official. The Exchange proposes that disputes arising on bids or offers be settled by a Trading Official and would amend the rule text and Supplementary Material .10 accordingly. The rule currently provides that, if both parties to a dispute involving either a monetary difference of \$10,000 or more, or a questioned trade, the matter may be referred for resolution to a panel of three Floor Governors, Senior Floor Officials, or Executive Floor Officials, or any combination thereof (“3 Floor Official Panel”), whose decision shall be binding on the parties. As an alternative to the 3 Floor Official Panel under the current rule, members may proceed to resolve a dispute through long-standing arbitration procedures established under the Exchange’s rules. The Exchange proposes to eliminate the 3 Floor Official Panel. Disputes involving either a monetary difference of \$10,000 or more, or a questioned trade, would thus be resolved exclusively through arbitration.

- NYSE Rule 91.50 (Taking or Supplying Securities Named in Order)

provides that if there is a continued pattern of rejection of a DMM’s principal transactions, a Floor Official may be called upon and require the broker to review his actions. Floor Official would be changed to Trading Official in NYSE Rule 91.50.

- NYSE Rule 93(b) (Trading for Joint Account) provides that no member while on the Floor shall initiate the purchase or sale on the Exchange of a stock for any account in which the member, the member’s member organization, or any other member or allied member therein is directly or indirectly interested with any person other than such member organization or any other member or allied member therein, without the prior approval of a Floor Official. The reference to Floor Official would be changed to Trading Official.

- NYSE Rule 103.10 (Registration and Capital Requirements of DMMs and DMM Units) governs the temporary reallocation of securities and provides that the Chief Regulatory Officer of the Exchange (“CRO”), or his or her designee, and two non-DMM Executive Floor Governors (or, if only one or no non-DMM Executive Floor Governors is present on the Floor, the most senior non-DMM Floor Governor or Governors based on length of consecutive service as a Floor Governor at the time of any action covered by this rule), acting by a majority, shall have the power to reallocate temporarily any security on an emergency basis whenever such reallocation would be in the public interest. The Exchange proposes that only the CRO or his or her designee would have the power to reallocate temporarily any security on an emergency basis. According to the Exchange, the proposed rule reflects the current process whereby determinations to temporarily reallocate securities in the public interest are determined by the CRO and the most senior and experienced members of the Floor community. In the absence of those senior Floor member representatives, the Exchange states that determinations involving the public interest should be made exclusively by the CRO. The Exchange states that, given that reallocating securities in the public interest largely raise regulatory concerns, such determinations are best left to regulatory staff without the involvement of Trading Officials.

- NYSE Rule 103A (Member Education) provides for the Exchange to develop procedures and standards for qualification and performance of members active on the Floor of the Exchange. Currently, member Floor Officials are required to complete

¹⁴ The Exchange has separately proposed to delete NYSE Rule 7.35B(a)(1)(C).

educational modules, while Executive Floor Governors are exempt from this requirement. Under the proposal, Trading Officials, like Executive Floor Governors, would not be required to complete educational modules, and the rule text related to this requirement would be eliminated. The Exchange also proposes the non-substantive change of deleting the superfluous “(I)” at the beginning of the rule.

- NYSE Rule 103B(G) (Security Allocation and Reallocation) describes the Exchange’s allocation freeze policy and provides that, following allocation probation, a second six-month period will begin during which a DMM unit may apply for new listings, provided that the unit demonstrates relevant efforts taken to resolve the circumstances that triggered the allocation prohibition. Currently, the determination as to whether a unit may apply for new listings is made by Exchange regulatory staff in consultation with the Executive Floor Governors, the most senior and experienced Floor Officials. The Exchange proposes that regulatory staff continue to make these determinations under the rule. According to the Exchange, it is not proposing that Regulatory staff consult with Trading Officials because Regulatory staff do not need the input or involvement of business-side staff to make these determinations.

- NYSE Rule 104 (Dealings and Responsibilities of DMMs) governs dealings and responsibilities of DMMs. Subsection (i) provides for temporary DMMs and permits a Floor Governor to authorize a member of the Exchange who is not registered as a DMM in an Exchange-listed stock or stocks, to act as a temporary DMM under specific circumstances. The Exchange proposes that Trading Officials would perform this function under the amended rule.

- NYSE Rule 112(a)(i) (Orders initiated “Off the Floor”) provides that all orders in stocks for the account of a member organization; any member, principal executive, approved person, officer, or employee of that organization; or a discretionary account serviced by the member or member organization must be sent to the Floor through a clearing firm’s order room or other facilities regularly used for transmission of public customers’ orders to the Floor, except for orders, among others, when a Floor Official expressly invites a member or members to participate in a difficult market situation. The Exchange would replace Trading Official for Floor Official in NYSE Rule 112(a)(i).

- NYSE Rule 124(e) (Midday Auction) provides that, when there is a

significant imbalance in a Midday Auction Stock at the end of the Midday Auction Pause, the Midday Auction Pause may be converted to an order imbalance halt with the approval of a Floor Governor or two Floor Officials. The Exchange proposes that this approval would be given by a Trading Official.

- NYSE Rule 128B (Publication of Changes, Corrections, Cancellations or Omissions and Verification of Transactions) governs changes and corrections to the Consolidated Tape.

- NYSE Rule 128B.10 (Publication on the tape or in the “sales sheet”) provides that publication of a change or a correction in a transaction which previously appeared on the tape may be made on the tape on the day of the transaction, provided that both buying and selling members or member organizations agree to the change in the transaction(s) and receive approval from a Floor Governor, Executive Floor Official, Senior Floor Official, or Executive Floor Governor. In the event such publication is not made on the tape on the day of the transaction, it may be published on the tape at least ten minutes prior to the opening of business on the following business day or in the sales sheet within three business days of the transaction with the approval of both the buying and selling members and a Floor Official, provided the price of the transaction does not affect the high, low, opening, or closing price of the security on the day of the transaction. The Exchange proposes that Trading Officials provide the approvals required under NYSE Rule 128B.10.

- NYSE Rule 128B.13 (Other errors) provides that a correction in the amount of a transaction reported erroneously to the tape by a party to the transaction may be published on the tape on the day of the transaction, on the tape at least ten minutes prior to the opening on the following business day, or on the “sales sheet” within three business days of the transaction with the approval of a Floor Governor, Executive Floor Official, Senior Floor Official, or Executive Floor Governor. The Exchange proposes that Trading Officials provide the approvals required under NYSE Rule 128B.13.

- NYSE Rule 308(g) (Acceptability Proceedings) provides that any person whose application has been disapproved by an Acceptability Committee, or any member of the Board of Directors of the Exchange, any member of the Committee for Review (“CFR”), any Executive Floor Governor, and the Division of the Exchange initiating the proceedings, may require a review by the Board of any

determination of an Acceptability Committee. The Exchange proposes to delete Executive Floor Governors from the rule. The Exchange states that the proposed change would not affect the procedural safeguards of the call for review process since there would still be interested parties that could call a matter for Board review. Specifically, directors and members of the CFR, including the person whose application was disapproved, would continue to be able to call disapproved membership applications for review, thereby, according to the Exchange, ensuring the independence, integrity, and fairness of the membership process. The Exchange states that Trading Officials, who are not members and have no role in the member application process, should not have the ability to call matters involving membership applications for review.

- NYSE Rule 903(d)(ii) (Off-Hours Transactions) provides that a closing price order to buy (sell) a security for the account of the DMM registered in such security and approved by a Floor Official, coupled with a closing price order to sell (buy) to offset all or part of a market-on-close imbalance in the stock prior to the close, shall be executed upon entry. The Exchange proposes that a Trading Official would provide the required approval under the rule.

- NYSE Rule 906 (Impact of Trading Halts on Off-Hours Trading) provides that a closing price order to buy (sell) a security for the account of the DMM registered in that security and approved by a Floor Official, coupled with a closing price order to sell (buy) to offset all or part of any market-on-close imbalance in the stock prior to the close, shall not be so canceled or precluded from entry as result of corporate developments during the Off-Hours Trading Session. The Exchange proposes that a Trading Official would provide the required approval under the rule.

- Finally, NYSE Listed Company Manual Section 202.04 (Exchange Market Surveillance) provides that a listed issue may be placed under special initial margin and capital requirements, which indicates a determination by the Exchange’s Floor Officials that the market in the issue has assumed a speculative tenor and has become volatile due to the influence of credit, which, if ignored, may lead to unfair and disorderly trading. The reference to Floor Officials would be changed to a reference to Trading Officials.

III. NYSE’s OIP Response Letter

On May 10, 2021, the NYSE submitted a response to the questions in

the Commission's OIP.¹⁵ Specifically, the Exchange responded to the questions in the OIP as to whether: (1) The proposed rule change raised issues related to fair representation of member firms in the administration of the Exchange's affairs; (2) permitting only Exchange employees to be Trading Officials would create or alter conflicts of interest, if any, faced by Trading Officials in performing their duties; (3) mandatory training of Trading Officials should be required; and (4) employees of member firms could have relevant experience or knowledge that is important for performing the duties of a Trading Official.¹⁶

The Exchange states that it does not believe that the fair representation requirement of Section 6(b)(3) of the Act is implicated by this proposed rule change because Section 6(b)(3) of the Act is primarily concerned with member participation in the governance of a national securities exchange and because the members of the Exchange are represented on and participate on the Exchange's Board and its committees.¹⁷ The Exchange further states that it is not required to delegate the authority to supervise and regulate certain trading activity to its members and that member Floor Officials are a unique feature of the Exchange, not replicated on other equities exchanges.¹⁸ Further, the Exchange states that its affiliates, NYSE Arca and NYSE American, currently have exchange employees who are designated as Trading Officials and who fulfill a role similar to that of the proposed NYSE Trading Officials, as well as to that of its current Floor Officials.¹⁹ Accordingly, the Exchange states that it does not believe that the elimination of member Floor Officials from the delegated responsibilities in the Exchange's marketplace raises any fair representation issues or diminishes the fair representation of members in the administration of the Exchange's affairs.²⁰

With respect to potential conflicts of interest, the Exchange states that it does not believe that potential conflict of interests would either be created or altered by this proposed rule change because only Exchange employees would be Trading Officials.²¹ The Exchange states that employee-only Trading Officials are not novel and have

been part of the structure of the options markets for many years.²² In addition, the Exchange states that, as a practical matter, the current Staff Governors, who already perform the functions of Floor Officials, would become the new Trading Officials and would be performing the same delegated functions in the same fashion under the Exchange's rules as they currently do as Floor Officials.²³ Thus, according to the Exchange, although their titles would change, the Staff Governors would be performing the same functions and the Exchange's supervisory procedures should continue to reasonably ensure that Trading Officials exercise the same level of competence and professionalism, including making impartial assessments and avoiding actual and apparent conflicts of interest.²⁴ In addition, the Exchange states that employee-only Trading Officials should reduce the potential for conflicts of interest because they would not be affiliated with a competing broker-dealer business on the Floor.²⁵ The Exchange also states that it has sought to mitigate potential conflicts of interest by proposing to remove Trading Official involvement from certain situations in which Floor Officials currently have a role under Exchange rules.²⁶ For instance, proposed Trading Officials would not be involved in determinations to reallocate securities under amended NYSE Rules 103.10 and 103B(G) or in resolving matters involving a dispute involving either a monetary difference of \$10,000 or more or a questioned trade under amended NYSE Rule 75.²⁷

With regard to mandatory training for Trading Officials, the Exchange states that it is obligated to comply with and enforce its rules and securities laws, and that in order to fulfill this obligation it has an active employee supervision and training program already in place.²⁸ Further, the Exchange states that the current mandatory training for Floor Officials was developed specifically for Floor Officials when they were exclusively Floor members and prior to the inclusion of Staff Governors.²⁹ The Exchange explains that it currently provides its Staff Governors training and updates on rule changes and changes in Floor-related trading technology and that the same would be done for Trading

Officials.³⁰ Thus, the Exchange does not believe that a separate mandatory educational program for a subset of its employees (*i.e.*, Trading Officials) is necessary.³¹

Finally, the Exchange acknowledges that members may have relevant experience or knowledge that is important for performing the duties of a Trading Official.³² The Exchange states that it is, in fact, because of their relevant experience or knowledge that member employees have been hired by the Exchange as Staff Governors, and the Exchange expects to continue to benefit from the experience of member employees as it hires and trains Trading Officials.³³ The Exchange states that it does not, however, believe that the best way to utilize the knowledge and experience of Floor members is to require the retention of member Floor Officials in their current form.³⁴

IV. Discussion and Commission Findings

After careful review, the Commission is approving the proposed rule change, as modified by Amendment No. 1, for the reasons discussed below.³⁵ The Commission finds that the proposed rule change, as modified, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, including Section 6(b)(3) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange assure a fair representation of its members in the administration of its affairs,³⁶ and Section 6(b)(5) of the Exchange Act, which requires, among other things, 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, and that they are not designed to permit

¹⁵ See note 7, *supra*.

¹⁶ See OIP, 86 FR at 17633; see also OIP Response Letter, *supra* note 7, at 2–3.

¹⁷ See OIP Response Letter, *supra* note 7, at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 4–5.

²⁸ *Id.* at 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 4.

³² *Id.* at 5.

³³ *Id.*

³⁴ *Id.*

³⁵ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁶ 15 U.S.C. 78f(b)(3).

unfair discrimination between customers, issuers, brokers, or dealers.³⁷

The Commission finds that, because the proposed rule change will not diminish the role that member firms will continue to play in the governance of the Exchange, and because having Trading Officials who are exclusively Exchange employees would be consistent with the Commission-approved rules of other national securities exchanges, the proposed rule change is consistent with Section 6(b)(3) of the Act.³⁸

The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act. The Commission finds that the proposed rule change is reasonably designed to supervise and review trading on the Floor while ensuring that qualified Exchange-trained and supervised staff continue to perform oversight to the marketplace on a day-to-day basis as prescribed by Exchange rules and consistent with the Exchange's obligations under the Act. The Commission also finds that the proposed rule change reasonably addresses potential conflicts of interest faced by Trading Officials by providing for objective assessments by professional staff who do not conduct a competing broker-dealer business on the Floor and by removing Trading Officials from involvement in certain situations, including disputes with a value of \$10,000 or more. Additionally, the Commission finds that it is reasonable for the Exchange to hire, train, and supervise the Trading Officials in the manner that has been established for Staff Governors since, notwithstanding the change of title, the duties and responsibility will remain largely the same. Further, because the primary role of the Trading Official will be to supervise trading on the Exchange, the Commission also finds it is appropriate for Trading Officials to report to NYSE's Head of Equities. For these reasons, the Commission finds that the proposed rule change consistent with the requirements of Section 6(b)(5) of the Act.³⁹

Finally, the Commission finds that the changes to NYSE Rules 7.35A, 7.35B, 18(d), 37, 47, 75, 91.50, 93(b), 103.10, 103A, 103B(G), 104, 112(a)(i), 124(e), 128B.10, 308(g), 903(d)(ii), and NYSE Listed Company Manual Section 202.04 are of a conforming and technical nature designed to remove references to Floor Officials and clarify, as necessary, how the scope of the Trading Official's duties

differs from that of the Floor Official, and that these changes are, therefore, consistent with Section 6(b)(5) of the Act.⁴⁰

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and in particular Section 6(b)(3) and Section 6(b)(5) because it does not impair the fair representation of member firms in the governance of the exchange, and because it is reasonably designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁴¹ that the proposed rule change SR–NYSE–2020–105, as modified by Amendment No. 1, is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–13100 Filed 6–22–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92199; File Nos. SR–CBOE–2021–023, SR–CboeBYX–2021–009, SR–CboeBZX–2021–028, SR–CboeEDGA–2021–009, SR–CboeEDGX–2021–021, SR–C2–2021–007]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe C2 Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Changes To Amend the Sixth Amended and Restated Bylaws of Cboe Global Markets, Inc. To Implement Proxy Access

June 16, 2021.

On April 16, 2021, Cboe Exchange, Inc., Cboe BYX Exchange, Inc., Cboe

BZX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc., and on April 26, 2021, Cboe C2 Exchange, Inc., each filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to amend the Sixth Amended and Restated Bylaws of their parent company, Cboe Global Markets, Inc., to implement proxy access. The proposed rule changes were published for comment in the **Federal Register** on May 5, 2021.³ The Commission has received no comment letters on the proposed rule changes.

Section 19(b)(2) of the Act⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the Notices for these proposed rule changes is June 19, 2021. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule changes so that it has sufficient time to consider the proposed rule changes. Accordingly, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designates August 3, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule changes (File Nos. SR–CBOE–2021–023, SR–CboeBYX–2021–009, SR–CboeBZX–2021–028, SR–CboeEDGA–2021–009, SR–CboeEDGX–2021–021, SR–C2–2021–007).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release Nos. 91728 (April 29, 2021), 86 FR 24052 (SR–CBOE–2021–023); 91729 (April 29, 2021), 86 FR 24059 (SR–CboeBYX–2021–009); 91727 (April 29, 2021), 86 FR 24083 (SR–CboeBZX–2021–028); 91725 (April 29, 2021), 86 FR 24076 (SR–CboeEDGA–2021–009); 91724 (April 29, 2021), 86 FR 24044 (SR–CboeEDGX–2021–021); 91732 (April 29, 2021), 86 FR 24125 (SR–C2–2021–007) (collectively, “Notices”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30–3(a)(31).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 15 U.S.C. 78f(b)(5).

⁴⁰ *Id.*

⁴¹ 15 U.S.C. 78s(b)(2).

⁴² 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13104 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34302; 812-15210]

Nationwide Mutual Funds, et al.

June 16, 2021.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from Section 15(c) of the Act.

APPLICANTS: Nationwide Mutual Funds and Nationwide Variable Insurance Trust, each of which is a registered open-end investment company that is organized as a Delaware statutory trust (each, a "Trust" and together, the "Trusts") and that may offer one or more series of shares (each a "Series"), and Nationwide Fund Advisors (the "Adviser"), a Delaware business trust registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"), that serves as an investment adviser to each Trust (together with the Trusts and the Series, the "Applicants").

SUMMARY OF APPLICATION: The requested exemption would permit a Trust's board of trustees (the "Board") to approve new sub-advisory agreements and material amendments to existing sub-advisory agreements for the Subadvised Series (as defined below), without complying with the in-person meeting requirement of Section 15(c) of the Act.

FILING DATES: The application was filed on March 22, 2021.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretaries-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on July 12, 2021, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's

interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretaries-Office@sec.gov*. Applicants: Amy E. Haid, Esq., by email to *haida@nationwide.com*.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, at (202) 551-3038, or Trace W. Rakestraw, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number or an Applicant using the "Company" name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

I. Requested Exemptive Relief

1. Applicants request an exemption from Section 15(c) of the Act to permit the Board,¹ including the Independent Board Members,² to approve an agreement (each a "Sub-Advisory Agreement") pursuant to which a sub-adviser manages all or a portion of the assets of one or more of the Series, or a material amendment thereof (a "Sub-Adviser Change"), without complying with the in-person meeting requirement of Section 15(c).³ Under the requested relief, the Independent Board Members could instead approve a Sub-Adviser Change at a meeting at which members of the Board participate by any means of communication that allows them to hear each other simultaneously during the meeting.

2. Applicants request that the relief apply to Applicants, as well as to any future series of the Trusts and any other existing or future registered open-end management investment company or Series thereof that intends to rely on the requested order in the future and that: (i) Is advised by the Adviser;⁴ (ii) uses

¹ The term "Board" also includes the board of trustees or directors of a future Subadvised Series (as defined below).

² The term "Independent Board Members" means the members of the Board who are not parties to the Sub-Advisory Agreement (as defined below), or "interested persons," as defined in Section 2(a)(19) of the Act, of any such party.

³ Applicants do not request relief that would permit the Board and the Independent Board Members to approve renewals of Sub-Advisory Agreements at non-in-person meetings.

⁴ The term "Adviser" includes (i) the Adviser or its successors, and (ii) any entity controlling, controlled by or under common control with, the Adviser or its successors. For the purposes of the requested order, "successor" is limited to an entity

the multi-manager structure described in the application; and (iii) complies with the terms and conditions of the application (each, a "Subadvised Series").⁵

II. Management of the Subadvised Series

3. The Adviser will serve as the investment adviser to each Subadvised Series pursuant to an investment advisory agreement with a Trust (each an "Investment Management Agreement"). The Adviser, subject to the oversight of the Board, will provide continuous investment management services to each Subadvised Series. Applicants are not seeking an exemption from the Act with respect to the Investment Management Agreements.

4. Applicants state that the Subadvised Series may seek to provide exposure to multiple strategies across various asset classes, thus allowing investors to more easily access such strategies without the additional transaction costs and administrative burdens of investing in multiple funds to seek to achieve comparable exposures.

5. To that end, the Adviser may achieve its desired exposures to specific strategies by allocating discrete portions of the Subadvised Series' assets to various sub-advisers. Consistent with the terms of each Investment Management Agreement and subject to the Board's approval,⁶ the Adviser would delegate management of all or a portion of the assets of a Subadvised Series to a sub-adviser.⁷ Each sub-adviser would be an "investment adviser" to the Subadvised Series within the meaning of Section 2(a)(20)

or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

⁵ The term "Subadvised Series" also includes a wholly-owned subsidiary, as defined in the Act, of a Subadvised Series (each a "Subsidiary") and the term "sub-adviser" includes any sub-adviser to a Subsidiary. All registered open-end investment companies that intend to rely on the requested order are named as Applicants. Any entity that relies on the requested order will do so only in accordance with the terms and conditions contained in the application.

⁶ A Sub-Advisory Agreement may also be subject to approval by a Subadvised Series' shareholders. Applicants currently rely on a multi-manager exemptive order to enter into and materially amend Sub-Advisory Agreements without obtaining shareholder approval. See *Nationwide Investing Foundation, et al.*, Investment Company Act Release Nos. 23104 (Apr. 6, 1998) (notice) and 23133 (Apr. 28, 1998) (order).

⁷ A sub-adviser may manage the assets of a Subadvised Series directly or provide the Adviser with model portfolio or investment recommendation(s) that would be utilized in connection with the management of a Subadvised Series.

of the Act.⁸ The Adviser would retain overall responsibility for the management and investment of the assets of each Subadvised Series.

III. Applicable Law

6. Section 15(c) of the Act prohibits a registered investment company having a board from entering into, renewing or performing any contract or agreement whereby a person undertakes regularly to act as an investment adviser (including a sub-adviser) to the investment company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of the investment company's board members who are not parties to such contract or agreement, or interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval.

7. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets this standard for the reasons discussed below.

IV. Arguments in Support of the Requested Relief

8. Applicants assert that boards of registered investment companies, including the Board, typically hold in-person meetings on a quarterly basis. Applicants state that during the three to four month period between board meeting dates, market conditions may change or investment opportunities may arise such that the Adviser may wish to make a Sub-Adviser Change. Applicants also state that at these moments it may be impractical and costly to hold an additional in-person Board meeting, especially given the geographic diversity of Board members and the additional cost of holding in-person meetings.

9. As a result, Applicants believe that the requested relief would allow the Subadvised Series to operate more efficiently. In particular, Applicants assert that without the delay inherent in holding in-person Board meetings (and the attendant difficulty of obtaining the necessary quorum for, and the additional costs of, an unscheduled in-

person Board meeting), the Subadvised Series would be able to act more quickly and with less expense to add or replace sub-advisers when the Board and the Adviser believe that a Sub-Adviser Change would benefit the Subadvised Series.

10. Applicants also note that the in-person meeting requirement in Section 15(c) of the Act was designed to prohibit absentee approval of advisory agreements. Applicants state that condition 1 to the requested relief is designed to avoid such absentee approval by requiring that the Board approve a Sub-Adviser Change at a meeting where all participating Board members can hear each other and be heard by each other during the meeting.⁹

11. Applicants, moreover, represent that the Board would conduct any such non-in-person consideration of a Sub-Advisory Agreement in accordance with its typical process for approving Sub-Advisory Agreements. Consistent with Section 15(c) of the Act, the Board would request and evaluate such information as may reasonably be necessary to evaluate the terms of any Sub-Advisory Agreement, and the Adviser and sub-adviser would provide such information.

12. Finally, Applicants note that if one or more Board members request that a Sub-Adviser Change be considered in-person, then the Board would not be able to rely on the relief and would have to consider the Sub-Adviser Change at an in-person meeting.

V. Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Independent Board Members will approve a Sub-Adviser Change at a non-in-person meeting in which Board members may participate by any means of communication that allows those Board members participating to hear each other simultaneously during the meeting.

2. Management will represent that the materials provided to the Board for the non-in-person meeting include the same information the Board would have received if a Sub-Adviser Change were sought at an in-person Board meeting.

3. The notice of the non-in-person meeting will explain the need for considering the Sub-Adviser Change at

a non-in-person meeting. Once notice of the non-in-person meeting to consider a Sub-Adviser Change is sent, Board members will be given the opportunity to object to considering the Sub-Adviser Change at a non-in-person Board meeting. If a Board member requests that the Sub-Adviser Change be considered in-person, the Board will consider the Sub-Adviser Change at an in-person meeting, unless such request is rescinded.

4. A Subadvised Series' ability to rely on the requested relief will be disclosed in the Subadvised Series' registration statement.

5. In the event that the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-13116 Filed 6-22-21; 8:45 am]

BILLING CODE 8011-01-P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA-2021-0020]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104-13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Comments: <https://www.reginfo.gov/public/do/PRAMain>. Submit your comments online referencing Docket ID Number [SSA-2021-0020].

⁸ Each sub-adviser would be registered with the Commission as an investment adviser under the Advisers Act or not subject to such registration.

⁹ Applicants state that technology that includes visual capabilities will be used unless unanticipated circumstances arise. Applicants also state that the Board could not rely upon the relief to approve a Sub-Advisory Agreement by written consent or another form of absentee approval by the Board.

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410-966-2830, Email address: OR.Reports.Clearance@ssa.gov.

Or you may submit your comments online through <https://www.reginfo.gov/public/do/PRAMain>, referencing Docket ID Number [SSA-2021-0020].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than August 23, 2021. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Continuation of Supplemental Security Income Payments for the

Temporarily Institutionalized—Certification of Period and Need to Maintain Home—20 CFR 416.212(b)(1)—0960-0516. When Supplemental Security Income (SSI) recipients: (1) Enter a public institution; or (2) enter a private medical treatment facility with Medicaid paying more than 50 percent of expenses, SSA reduces recipients' SSI payments to a nominal sum. However, if this institutionalization is temporary (defined as a maximum of three months), SSA may waive the reduction. Before SSA can waive the SSI payment reduction, the agency must receive the following documentation: (1) A physician's certification stating the SSI recipient will only be institutionalized for a maximum of three months; and (2) certification from the recipient, the

recipient's family, or friends, confirming the recipient needs SSI payments to maintain the living arrangements to which the individual will return post-institutionalization. To obtain this information, SSA employees contact the recipient (or a knowledgeable source) to collect the required physician's certification and the statement of need. SSA does not require any specific format for these items, so long as we obtain the necessary attestations. The respondents are SSI recipients, their family or friends, as well as physicians or hospital staff members who treat the SSI recipient.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
Statement from other Respondents	26,793	1	5	2,233	* \$10.95	** \$24,451
Physician's Certifications	26,793	1	5	2,233	* 41.30	** 92,223
Totals	53,586	.....	.....	4,466	.....	** 116,674

*We based these figures on the average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>), and the average Healthcare Practitioners and Technical Occupations hourly wages, as reported by Bureau of Labor Statistics data (<https://www.bls.gov/oes/current/oes290000.htm>).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Financial Disclosure for Civil Monetary Penalty (CMP) Debt—20 CFR 498—0960-0776. When SSA imposes a CMP on individuals for various fraudulent conduct related to SSA-administrated programs, those individuals may request to pay the CMP through benefit withholding, or an

installment agreement. To negotiate a monthly payment amount, fair to both the individual and the agency, SSA needs financial information from the individual. SSA uses Form SSA-640, to obtain the information necessary to determine a monthly installment repayment rate for individuals owing a

CMP. The respondents are recipients of Social Security benefits and non-entitled individuals who must repay a CMP to the agency and choose to do so using an installment plan.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA-640	10	1	120	20	* \$19.01	** 24	*** \$456

*We based this figure on averaging both the average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>), and the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm).

** We based this figure on the average FY 2021 wait times for field offices, based on SSA's current management information data.

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments,

we must receive them no later than July 23, 2021. Individuals can obtain copies of these OMB clearance packages by writing to OR.Reports.Clearance@ssa.gov.

1. Application for Mother's or Father's Insurance Benefits—20 CFR 404.339-404.342, 20 CFR 404.601-404.603—

0960-0003. Section 202(g) of the Social Security Act (Act) provides for the payment of monthly benefits to the widow or widower of an insured individual if the surviving spouse is caring for the deceased worker's child (who is entitled to Social Security

benefits). SSA uses the information on Form SSA-5-BK to determine an individual's eligibility for mother's or father's insurance benefits. The

respondents are individuals caring for a child of the deceased worker who is applying for mother's or father's insurance benefits under the Old Age,

Survivors, and Disability Insurance (OASDI) program.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA-5-BK (Paper)	28	1	15	7	* \$27.07	.....	*** \$189
SSA-5 MCS Interview	23,123	1	15	5,781	* 27.07	** 24	*** 406,862
Totals	23,151	.....	.....	5,788	.....	.....	*** 407,051

* We based this figure on average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm#00-0000).

** We based this figure on the average FY 2021 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Claim for Amounts Due in the Case of a Deceased Beneficiary—20 CFR 404.503(b)—0960-0101. Section 204(d) of the Act provides that if an individual dies before payment under Title II is complete, or before a Medicare premium refund is due, SSA will pay the amount due (including the amount of any check not negotiated) to people who meet specified qualifications under an order of priority. When a Social Security payment, or Medicare premium, was

due to a deceased beneficiary at the time of death, and there is insufficient information in the file to identify the people entitled to the payment, or their addresses, SSA asks the surviving spouse, next of kin, or legal representative of the estate to complete Form SSA-1724. SSA collects the information when a surviving child(ren), parent(s), or spouse is not already entitled to a monthly benefit on the same earnings record, or is not filing

for a lump-sum death payment as a former spouse. SSA uses the information Form SSA-1724 provides to ensure proper payment of an underpayment due to a deceased beneficiary. The respondents are applicants for Title II underpayments or Medicare premium refunds owed to deceased beneficiaries.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA-1724	250,000	1	10	41,667	* \$27.07	** 24	*** \$3,834,926

* We based this figure on average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm#00-0000).

** We based this figure on the average FY 2021 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. Claimant's Recent Medical Treatment—20 CFR 404.1512 and 416.912—0960-0292. When Disability Determinations Services (DDS) deny a claim at the reconsideration level, the claimant has a right to request a hearing before a judge. For the hearing, SSA asks the claimant to complete and return the HA-4631 if the claimant's file does not reflect a current, complete medical history as the claimant

proceeds through the appeals process. A judge must obtain the information to update and complete the record and to verify the accuracy of the information. Through this process, the judge can ascertain whether the claimant's situation has changed. The judge and hearing office staff use the response to make arrangements for consultative examination(s) and the attendance of an expert witness(es), if appropriate.

During the hearing, the judge offers any completed questionnaires as exhibits and may use them to: (1) Refresh the claimant's memory, and (2) shape their questions. The respondents are claimant's requesting hearings on entitlement to OASDI benefits or SSI payments.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
HA-4631—PDF/paper version	53,200	1	10	8,867	* \$10.95	** 24	*** \$330,110
Electronic Records Express Submissions	136,800	1	10	22,800	* 27.07	.....	*** 617,196
Totals	190,000	.....	.....	31,667	.....	.....	*** 947,306

* We based these figures on the average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>), and the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm#00-0000).

** We based this figure on the average FY 2021 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

4. *Request for Reconsideration—Disability Cessation—20 CFR 404.909, 404.1597(b), 416.995, & 416.1409—0960–0349.* When SSA determines that claimants' disabilities medically improved; ceased; or are no longer sufficiently disabling, these claimants may ask SSA to reconsider that determination. SSA uses Form SSA–789

to arrange for a hearing or to prepare a decision based on the evidence of record. Specifically, claimants or their representatives use Form SSA–789 to: (1) Ask SSA to reconsider a determination; (2) indicate if they wish to appear at a disability hearing; (3) submit any additional information or evidence for use in the reconsidered

determination; and (4) indicate if they will need an interpreter for the hearing. The respondents are disability claimants for Social Security benefits or SSI payments who wish to appeal an unfavorable disability cessation determination.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars)*	Total annual opportunity cost (dollars)**
SSA–789	49,000	1	13	10,617	*\$10.95	**\$116,256

* We based this figure on average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

5. *Waiver of Right to Appear—Disability Hearing—20 CFR 404.913–404.914, 404.916(b)(5), 416.1413–416.1414, 416.1416(b)(5)—0960–0534.* Claimants for Social Security disability payments or their representatives can use Form SSA–773–U4 to waive their

right to appear at a disability hearing. The disability hearing officer uses the signed form as a basis for not holding a hearing, and for preparing a written decision on the claimant's request for disability payments based solely on the evidence of record. The respondents are

disability claimants for Social Security benefits or SSI payments, or their representatives, who wish to waive their right to appear at a disability hearing.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars)*	Average wait time in field office (minutes)**	Total annual opportunity cost (dollars)***
SSA–773–U4	200	1	3	10	*\$10.95	** 24	***\$986

* We based this figure on average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>).

** We based this figure on the average FY 2021 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

6. *Prohibition of Payment of SSI Benefits to Fugitive Felons and Parole/Probation Violators—20 CFR 416.708(o)—0960–0617.* Section 1611(e)(4) of the Act precludes eligibility for SSI payments for certain fugitives and probation or parole violators. Our regulation at 20 CFR 416.708(o) requires individuals applying for or receiving SSI to report to SSA that: (1) They are fleeing to avoid prosecution for a crime; (2) they are fleeing to avoid custody or confinement

after conviction of a crime; or (3) they are violating a condition of probation or parole. In addition, due to the implementation of the *Martinez v. Astrue* and *Clark v. Astrue* cases, we changed our policy to deny eligibility or suspend payments for three fleeing codes. We use the information we receive to determine eligibility on an initial claim for SSI payments or a redetermination of existing recipients. The collection is mandatory to ensure that an applicant or recipient does not

have a warrant for one of the three fleeing codes. If the respondent has a warrant for one of the three fleeing codes, SSA uses this information to deny payments. The respondents are SSI applicants and recipients, or their representative payees, who are reporting their status as a fugitive felon or probation or parole violator.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars)*	Total annual opportunity cost (dollars)**
Fugitive Felon and Parole or Probation Violation screens within the SSI Claims System	1,000	1	1	17	*\$27.07	**\$460

* We based this figure on average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm#00-0000).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

7. *Social Security Number Verification Services—20 CFR 401.45—0960–0660.* Internal Revenue Service regulations require employers to provide wage and tax data to SSA using Form W–2, or its electronic equivalent. As part of this process, the employer must furnish the employee's name and Social Security number (SSN). In

addition, the employee's name and SSN must match SSA's records for SSA to post earnings to the employee's earnings record, which SSA maintains. SSA offers the Social Security Number Verification Service (SSNVS), which allows employers to verify the reported names and SSNs of their employees match those in SSA's records. SSNVS is

a cost-free method for employers to verify employee information via the internet. The respondents are employers who need to verify SSN data using SSA's records.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSNVS	44,891	60	2,693,460	5	224,455	*\$38.23	**\$8,580,915

* We based this figure on the average hourly wage for Accountants and Auditors, as reported by the U.S. Bureau of Labor Statistics data (<https://www.bls.gov/oes/current/oes132011.htm>).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: June 17, 2021.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2021–13144 Filed 6–22–21; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0057]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Office of Personnel Management (OPM). This matching agreement (agreement) sets forth the terms, conditions, and safeguards under which OPM will disclose civil service benefit and payment data to SSA. SSA is legally required to offset specific benefits by a percentage of civil service benefits received (Spousal and Survivors benefits, Supplemental Security Income (SSI) benefits, and Retirement and Disability Insurance Benefits are offset by a percentage of the recipients' Federal Government pension benefits). SSA administers the Old Age, Survivors, Disability Insurance (OASDI), SSI, and Special Veterans' Benefits (SVB) programs. SSA will use the match results under this agreement to meet its civil service benefit offset obligations. Appendices A, B, C, and D of this agreement contain specific information on the matching programs that SSA will conduct under this agreement. SSA's Office of the Chief Actuary (OCA) will also use OPM's data for statistical and

research purposes in tracking the size of, and impact on, subpopulations of government annuitants affected by the Government Pension Offset (GPO), the Windfall Elimination Provision (WEP), and in cost estimates of proposals to change the two provisions.

DATES: The deadline to submit comments on the proposed matching program is July 23, 2021. The matching program will be applicable on September 11, 2021, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2020–0057 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the *Search* function to find docket number SSA–2020–0057 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission

manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966–0869.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing Matthew.Ramsey@ssa.gov. Comments are also available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov>, or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Andrea Huseth, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore MD 21235–6401, at telephone: (410) 966–5855, or emailing Andrea.Huseth@ssa.gov.

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies

SSA and OPM.

Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity for SSI purposes is section 1631(e)(1)(B) and (f) of the Social Security Act (Act) (42 U.S.C. 1383(e)(1)(B) and (f)), and for SVB purposes, is section 806 of the Act (42 U.S.C. 1006). The legal authority for SSA to conduct this matching activity

for OASDI includes Section 224 of the Act (42 U.S.C. 424a), which provides for the reduction of Social Security disability benefits when the disabled worker is also entitled to a Public Disability Benefit (PDB). Also, Section 215a(7)(A) of the Act (42 U.S.C. 415) requires a modification to the computation formula reducing the Primary Insurance Amount of a retired and disabled worker entitled to a pension from employment not covered under Social Security. Section 202k(5)(A) (42 U.S.C. 402) provides for the reduction of spouse's and survivor's benefits by a percentage of a pension received based on work not covered by Social Security.

Section 1631(f) of the Act (42 U.S.C. 1383(f)) requires Federal agencies to furnish SSA with information necessary to verify eligibility. Section 224(h)(1) of the Act (42 U.S.C. 424a(h)(1)) requires any Federal agency to provide SSA with information in its possession that SSA may require for the purposes of making a timely determination of the amount of reduction under section 224 of the Act (42 U.S.C. 424a).

Purpose(s)

This agreement sets forth the terms, conditions, and safeguards under which OPM will disclose civil service benefit and payment data to SSA. SSA is legally required to offset specific benefits by a percentage of civil service benefits received (Spousal and Survivors benefits, SSI benefits, and Retirement and Disability Insurance Benefits are offset by a percentage of the recipients' Federal Government pension benefits). SSA administers the OASDI, SSI, and SVB programs. SSA will use the match results under this agreement to meet its civil service benefit offset obligations. Appendices A, B, C, and D of this agreement contain specific information on the matching programs that SSA will conduct under this agreement. SSA's OCA will also use OPM's data for statistical and research purposes in tracking the size of, and impact on, subpopulations of government annuitants affected by the GPO, the WEP, and in cost estimates of proposals to change the two provisions.

Categories of Individuals

The individuals whose information is involved in this matching program are those individuals who are receiving civil service benefits and payments, and either Spousal and Survivors benefits, SSI or SVB benefits, or Retirement and Disability Insurance benefits.

Categories of Records

OPM will provide SSA with an electronic file containing civil service benefit and payment data from the annuity and survivor master file. Each month, OPM will provide SSA with an electronic file that will include updated payment information for new civil service annuitants and annuitants whose civil service annuity has changed. This monthly file contains approximately 25,000 records. OPM will provide SSA with the entire master annuity file of approximately 2.7 million records once yearly for the month of the civil service cost-of-living allowance. OPM will furnish SSA with the following civil service benefit and payment data: Payment status code; prefix; name; Social Security number (SSN); Social Security verification code; date of birth; award date; civil service claim number; first potential month and year of eligibility; date of eligibility indicator; first month, day, and year of entitlement; disability indicator; Federal Insurance Contributions Act covered months indicator; total service months; amount of current gross civil service benefits; effective date (month, day, and year) of civil service amount; SSNs for disabled children; retroactive payments; date of death; payments that are currently coded 'special pay'; OPM code that indicates OPM used pre-1957 military service in the benefit computations; actual military service dates that OPM used in computing the OPM pension amount; OPM code for voluntary contributions; amount of the pension from voluntary contributions; months of employment after 1956 not covered by Social Security that are used to determine the pension; period of employment upon which pension is based; and Federal Employees Retirement System transfer case data.

SSA will attempt to verify the SSNs furnished by OPM using the SSA Enumeration System database and the individuals' name, date of birth, and SSN. SSA will only use verified SSNs in the matches with its systems of records (SOR). SSA will match the SSN-verified OPM data against the Supplemental Security Record or Master Beneficiary Record to identify: SSI/SVB recipients who are also receiving a civil service pension; individuals who may be subject to PDB offset; and beneficiaries subject to a Federal pension offset.

System(s) of Records

OPM will provide SSA with electronic files from the OPM SOR published as OPM/Central-1 (Civil Service Retirement and Insurance

Records) at 73 FR 15013 (March 20, 2008), as amended at 80 FR 74815 (November 30, 2015). SSA will conduct the match using the individual's SSN, name, and date of birth on both the OPM file and SSA's databases covered under the following SSA SORs: The Master Files of Social Security Number (SSN) Holders and SSN Applications (Enumeration System), 60-0058, as published at 75 FR 82121 (December 29, 2010), as amended at 78 FR 40542 (July 5, 2013), 79 FR 8780 (February 13, 2014), 83 FR 31250-31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018); the Master Beneficiary Record (MBR), 60-0090, as published at 71 FR 1826 (January 11, 2006), as amended at 72 FR 69723 (December 10, 2007), 78 FR 40542 (July 5, 2013), 83 FR 31250-31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018); and the Supplemental Security Income Record and Special Veterans Benefits (SSR/SVB), 60-0103, as published at 71 FR 1830 (January 11, 2006), as amended at 72 FR 69723 (December 10, 2007), 83 FR 31250-31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018).

[FR Doc. 2021-13137 Filed 6-22-21; 8:45 am]

BILLING CODE 4191-02-P

DEPARTMENT OF STATE

[Public Notice: 11449]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Paintings, Politics and the Monuments Men: The Berlin Masterpieces in America" Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition "Paintings, Politics and the Monuments Men: The Berlin Masterpieces in America" at the Cincinnati Art Museum, Cincinnati, Ohio, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6471; email: section2459@state.gov). The mailing address is U.S. Department of State,

L/PD, SA-5, Suite 5H03, Washington, DC 20522-0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236-3 of August 28, 2000.

Matthew R. Lussenhop,

Acting Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2021-13363 Filed 6-22-21; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2021-0014]

Qualification of Drivers; Exemption Applications; Hearing

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

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 18 individuals for an exemption from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions would enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: Comments must be received on or before July 23, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-2021-0014 using any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov/, insert the docket number, FMCSA-2021-0014, in the keyword box, and click "Search." Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.

- **Mail:** Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- **Hand Delivery:** West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.

- **Fax:** (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcamedical@dot.gov, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2021-0014), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to www.regulations.gov/docket?D=FMCSA-2021-0014. Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number, FMCSA-2021-0014, in the keyword box, and click "Search." Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, and click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.transportation.gov/privacy.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 18 individuals listed in this notice have requested an exemption from the hearing requirement in 49 CFR 391.41(b)(11). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a

hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

On February 1, 2013, FMCSA announced in a Notice of Final Disposition titled, “Qualification of Drivers; Application for Exemptions; National Association of the Deaf,” (78 FR 7479), its decision to grant requests from 40 individuals for exemptions from the Agency’s physical qualification standard concerning hearing for interstate CMV drivers. Since that time the Agency has published additional notices granting requests from hard of hearing and deaf individuals for exemptions from the Agency’s physical qualification standard concerning hearing for interstate CMV drivers.

III. Qualifications of Applicants

Chris Anderson

Mr. Anderson, 44, holds a class B license in Texas.

Milca Ceballos

Ms. Ceballos, 34, holds a class C license in Texas.

Eleazar Contreras

Mr. Contreras, 25, holds a class D license in Illinois.

Mark Howard

Mr. Howard, 59, holds a class D license in New York.

Michael Hoyt

Mr. Hoyt, 32, holds a regular operator’s license in Washington.

Pete Kujawa

Mr. Kujawa, 29, holds a class DM license in Wisconsin.

Richard Kujawa, Jr.

Mr. Kujawa, Jr., 35, holds a class D license in Wisconsin.

Tia Matthews

Ms. Matthews, 45, holds a class C license in Nevada.

Jess McMahon

Mr. McMahon, 24, holds a class A license in Iowa.

John Mark Mitchell

Mr. Mitchell, 34, holds a class C license in California.

Joshua Moore

Mr. Moore, 42, holds a class C license in Texas.

Richard Palfrey

Mr. Palfrey, 65, holds a class A license in Florida.

Jonas Pittman

Mr. Pittman, 44, holds a class A license in North Carolina.

Leroy Raine

Mr. Raine, 22, holds a class D license in Alabama.

Troy Rolland

Mr. Rolland, 60, holds a class AM license in Texas.

Shannon Schoenecker

Mr. Schoenecker, 52, holds a class A license in Kansas.

Brandon Tucker

Mr. Tucker, 50, holds a class CM license in Pennsylvania.

Jeremy Westmoreland

Mr. Westmoreland, 43, holds a class DM license in South Carolina.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021–13129 Filed 6–22–21; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0712]

Agency Information Collection Activity Under OMB Review: Survey of Healthcare Experiences of Patients (SHEP)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of

Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Refer to “OMB Control No. 2900–0712.”

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0712” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Survey of Healthcare Experiences of Patients (SHEP).

OMB Control Number: 2900–0712.

Type of Review: Reinstatement of a previously approved collection.

Abstract: Survey of Healthcare Experience of Patients (SHEP) has been developed to measure patient satisfaction in the Veterans Health Administration and has been in use in its present form since 2008. The mission of VHA is to provide high quality medical care to eligible veterans. Executive Order 12862, dated September 11, 1993, called for the establishment and implementation of customer service standards, and for agencies to “survey customers to determine the kind and quality of services they want and their level of satisfaction with current services.” Further emphasized by the Executive Order 13571 on “Streamlining Service Delivery and Improving Customer Service,” issued on April 27, 2011, VA must work continuously to ensure that their programs are effective and meet their customers’ needs. To this end, VA is always seeking new and innovative ways to ensure the highest levels of customer satisfaction. The following is a list of the current SHEP surveys.

- 10–1465–1: SHEP Inpatient Long Form
- 10–1465–2: SHEP Inpatient Short Form
- 10–1465–3: Ambulatory Care Long Form
- 10–1465–4: Ambulatory Care Short Form
- 10–1465–5: Patient Centered Medical Home Short Form
- 10–1465–6: Patient Centered Medical Home Long Form
- 10–1465–7: Home Health Care Survey Long

Form
 10-1465-8: In-Center Hemodialysis Care
 Long Form
 10-1465-9: Specialty Care Survey
 10-1465-10: VA Community Care Survey

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 86 FR 64 on April 6, 2021, pages 17891 and 17892.

Affected Public: Individuals and households.

Estimated Annual Burden: Total Hours = 176,640.

10-1465-1—160 hours.
 10-1465-2—18,000 hours.
 10-1465-3—160 hours.
 10-1465-4—120 hours.
 10-1465-5—48,000 hours.
 10-1465-6—8,000 hours.
 10-1465-7—80 hours.
 10-1465-8—120 hours.
 10-1465-9—30,000 hours.
 10-1465-10—72,000 hours.

Estimated Average Burden per Respondent:

10-1465-1—20 minutes.
 10-1465-2—15 minutes.
 10-1465-3—20 minutes.
 10-1465-4—15 minutes.
 10-1465-5—10 minutes.
 10-1465-6—20 minutes.
 10-1465-7—10 minutes.
 10-1465-8—15 minutes.
 10-1465-9—15 minutes.
 10-1465-10—15 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents:
 Total Number of Respondents = 794,400.

10-1465-1—480.
 10-1465-2—72,000.
 10-1465-3—480.
 10-1465-4—480.
 10-1465-5—288,000.
 10-1465-6—24,000.
 10-1465-7—480.
 10-1465-8—480.
 10-1465-9—120,000.
 10-1465-10—288,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021-13142 Filed 6-22-21; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA), Veterans Health Administration (VHA).

ACTION: Notice of a modified system of records.

SUMMARY: As required by the Privacy Act of 1974, notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled, “Veteran, Patient, Employee, and Volunteer Research and Development Project Records—VA” (34VA12) as set forth in the **Federal Register**. VA is amending the system of records by revising the System Number; System Manager; Purpose of the System; Categories of Individuals Covered by the System; Categories of Records in the System; Record Source Categories; Routine Uses of Records Maintained in the System; Policies and Practices for Storage of Records; Policies and Practices for Retention and Disposal of Records; Physical, Procedural and Administrative Safeguards; Record Access Procedure; and Notification Procedure. VA is republishing the system notice in its entirety.

DATES: Comments on this amended system of records must be received no later than July 23, 2021. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by the VA, the modified system of records will become effective a minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted through www.Regulations.gov or mailed to VA Privacy Service, 810 Vermont Avenue NW, (005R1A), Washington, DC 20420. Comments should indicate that they are submitted in response to “Veteran, Patient, Employee, and Volunteer Research and Development Project Records—VA” (34VA12). Comments received will be available at regulations.gov for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Stephania Griffin, Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420; telephone (704) 245-2492 (Note: not a toll-free number).

SUPPLEMENTARY INFORMATION: The System Number is being updated from 34VA12 to 34VA10 to reflect the current VHA organizational routing symbol.

The System Manager and Notification Procedure are being updated to replace, “Director of Operations Research and Development (12)” with Director of Office of Research Protections, Policy and Education, Office of Research and Development, Telephone number (202) 443-5681 (Note: this is not a toll-free number).

The Purpose is being amended to include that records may also be used for data analysis in order to answer a specific question and obtain generalizable knowledge and increased understanding of a topic or issue.

Categories of Individuals Covered by the System is being amended to include volunteers as a caregiver, non-patient/non-Veterans, and VA research subjects.

Categories of Records in the System is being amended to remove research support related to the invention. This section will include item 13) a contracted research review system. This section will also include other research information management system reports contain compliance information involving research projects conduct, support and oversight.

The Record Source Categories is being amended to include Information technology (IT) systems or databases and non-subjects.

The Routine Uses of Records Maintained in the System is being amended to remove scrambled Social Security number in Routine uses #2 and #5.

The language in Routine Use #14 is being updated. It previously stated that disclosure of the records to the Department of Justice (DoJ) is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. This routine use will now state that VA may disclose information to the Department of Justice (DoJ), or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when:

- (a) VA or any component thereof;
- (b) Any VA employee in his or her official capacity;

(c) Any VA employee in his or her official capacity where DoJ has agreed to represent the employee; or

(d) The United States, where VA determines that litigation is likely to affect the agency or any of its components,

is a party to such proceedings or has an interest in such proceedings, and VA determines that use of such records is relevant and necessary to the proceedings, provided, however, that in each case VA determines the disclosure is compatible with the purpose for which the records were collected. If the disclosure is in response to a subpoena, summons, investigative demand, or similar legal process, the request must meet the requirements for a qualifying law enforcement request under the Privacy Act, 5 U.S.C. 552a(b)(7), or an order from a court of competent jurisdiction under 552a(b)(11).

Routine Use #18 has been updated by clarifying the language to state, "VA may disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that there has been a breach of the system of records; (2) VA has determined that as a result of the suspected or confirmed breach there is a risk to individuals, VA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, or persons is reasonably necessary to assist in connection with VA efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm."

Routine use #20 is being added to state, "VA may disclose information from this system of records to another Federal agency or Federal entity, when VA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach."

Policies and Practices for Storage of Records is being updated to include (6) Web based cloud storage systems and (7) Recordings (audio and video).

Policies and Practices for Retention and Disposal of Records is being updated to remove "records contained in this system have not been categorized in a record control schedule (RCS), will be kept indefinitely until such time as

they are. The records may not be destroyed until VA obtains an approved records disposition authority from the Archivist of the United States." This section is updated to state that Records are scheduled in accordance with RCS 10-1, 8300.6, temporary disposition; cutoff at the end of the fiscal year after completion of the research project. Destroy six (6) years after cutoff. May retain longer if required by other Federal regulations or the European General Data Protection regulations.

The Physical, Procedural and Administrative Safeguards section is being updated to state that access to automated information systems are protected by an approved form of two factor authentication and communications are encrypted at rest and in transit.

The Record Access Procedure is being amended to include research project submissions or participation in research projects may visit the VA location where the records were initially generated.

The Report of Intent to Amend a System of Records Notice and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by the Privacy Act and guidelines issued by OMB, December 12, 2000.

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Dominic A. Cussatt, Acting Assistant Secretary of Information and Technology and Chief Information Officer, approved this document on May 14, 2021 for publication.

Dated: June 17, 2021.

Amy L. Rose,

Program Analyst, VA Privacy Service, Office of Information Security, Office of Information and Technology, Department of Veterans Affairs.

SYSTEM NAME AND NUMBER:

Veteran, Patient, Employee, and Volunteer Research and Development Project Records—VA (34VA10).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at each VA health care facility where the research

project was conducted, at VA facilities where research administration or oversight activities occur, and at VA Central Office (VACO). Address locations are listed in VA Appendix 1 of the biennial Privacy Act Issuance publication. In addition, records are maintained at contractor and fieldwork sites as studies are developed, data collected, and reports written. A list of locations where individually identifiable data is currently located is available from the System Manager.

SYSTEM MANAGER(S):

Dr. Molly Klote, Director of Office of Research Protections, Policy and Education, Office of Research and Development, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420. Telephone number (202) 443-5681 (Note: this is not a toll-free number).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, Section 7301.

PURPOSE(S) OF THE SYSTEM:

The records and information may be used to determine eligibility for research funding, to determine handling of intellectual properties, to manage proposed and/or approved research endeavors, and to evaluate the research and development program. The records may also be used for data analysis in order to answer a specific question and obtain generalizable knowledge and increased understanding of a topic or issue.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals will be covered by this system: (1) Veterans; (2) patients; (3) employees; (4) volunteers (e.g., caregivers, non-patient/non-Veterans, VA research subjects) in research projects being performed by VA, by a VA contractor or by another Federal agency in conjunction with VA; (5) members of research committee or subcommittees; and (6) research and development investigators and research and development employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records, or information contained in records, vary according to the specific research involved or research related activity involved and may include: (1) Research on biomedical, prosthetic and health care services; (2) research stressing spinal cord injuries and diseases and other disabilities that tend to result in paralysis of the lower extremities; and (3) morbidity and mortality studies on former prisoners of

war; (4) research related to injuries sustained while on active duty military service such as traumatic amputations, traumatic brain injury, and burns; (5) electronic or other databases containing research information developed during a research project(s) or for future research; (6) research information management systems such as the Research and Development Information System (RDIS); (7) copies of medical records of research participants; (8) merit review of the research projects; (9) review and evaluation of proposed research; (10) continuing review and oversight of ongoing research; (11) evaluations performed by research committees; (12) a review and evaluation of the research and development investigators and of the participants in the program; and (13) a contracted research review system. The review and evaluation information concerning the research and development investigators may include personal and educational background information as well as specific information concerning the type of research conducted. Invention records contain: A certification page, describing the place, time, research support related to the invention and co-inventors; Technology Transfer Program Invention Evaluation Sheet Internal or External Invention Assessment reports; Research and Development Information System (RDIS) reports or other research information management system reports contain compliance information involving research projects conduct, support and oversight; Correspondence; and the Office of General Counsel Letter of Determination.

RECORD SOURCE CATEGORIES:

(1) Patients and patient records, (2) employees and volunteers, (3) other Federal agencies, (4) National Institutes of Health, (5) Centers for Disease Control (Atlanta, Georgia), (6) individual Veterans, (7) other VA systems of records and IT systems or databases, (8) research and development investigators, (9) research and development databases, and (10) non-subjects.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by 45 CFR parts 160 and 164, *i.e.*, individually-identifiable health information, and 38 U.S.C. 7332; *i.e.*, medical treatment information related to drug abuse, alcoholism or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that

information cannot be disclosed under a routine use unless there is also specific statutory authority in 38 U.S.C. 7332 and regulatory authority in 45 CFR parts 160 and 164 permitting disclosure.

1. Transfer of statistical and other data to Federal, State, and local government agencies and national health organizations to assist in the development of programs.

2. VA may disclose any information in this system, except the names, home addresses, and Social Security number of Veterans and their dependents, which is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose the names and Social Security number addresses of Veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto unless a Certificate of Confidentiality has been issued for the research by the National Institutes of Health under section 301(d) of the Public Health Service Act (42 U.S.C. 241(d)).

3. VA may disclose information to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

4. VA may disclose information to National Archives and Records Administration (NARA) in records management inspections conducted under 44 U.S.C. 2904 and 2906, or other functions authorized by laws and policies governing NARA operations and VA records management responsibilities.

5. VA may disclose information from this system to epidemiological and other research facilities approved by the Under Secretary for Health for research purposes determined to be necessary and proper, provided that the names and addresses of Veterans and their dependents will not be disclosed unless those names and addresses are first provided to VA by the facilities making the request.

6. VA may disclose the names and address (of present or former members

of the armed services or their beneficiaries: (1) To a nonprofit organization if the release is directly connected with the conduct of programs and the utilization of benefits under Title 38, and (2) to any criminal or civil law enforcement governmental agency or instrumentality charged under applicable law with the protection of the public health or safety, if a qualified representative of such organization, agency, or instrumentality has made a written request that such names or addresses be provided for a purpose authorized by law; provided that the records will not be used for any purpose other than that stated in the request and that organization, agency, or instrumentality is aware of the penalty provision of 38 U.S.C. 5701(f).

7. In order to conduct VA research, names, addresses, and Social Security numbers may be disclosed to other Federal and state agencies for the purpose of the Federal or state agency disclosing information on the individuals back to VA.

8. Upon request for research project data from VA approved research, the following information will be released to the general public, including governmental and non-governmental agencies and commercial organizations: Project title and number; name and educational degree of principal investigator unless the release of this information would place the investigator at risk (physical, professional, *etc.*); VHA medical center location; type (initial, progress, or final) and date of last report; name and educational degree of associate investigators unless the release of this information would place the investigator at risk (physical, professional, *etc.*); project abstract if the project is ongoing, and project summary if the project has been completed. In addition, upon specific request, keywords and indexing codes will be included for each project.

9. Upon request for information regarding VA employees conducting research, the following information will be released to the general public, including governmental agencies and commercial organizations: Name and educational degree of investigator; VHA title; academic affiliation and title; hospital service; primary and secondary specialty areas and subspecialty unless the release of this information would place the investigator at risk (physical, professional, *etc.*)

10. VA may disclose information to a Federal agency, a state or local government licensing board, the Federation of State Medical Boards, or a similar non-governmental entity that

maintains records concerning individuals' employment histories or concerning the issuance, retention, or revocation of licenses, certifications, or registration necessary to practice an occupation, profession, or specialty, to inform such non-governmental entities about the health care practices of a terminated, resigned, or retired health care employee whose professional health care activity so significantly failed to conform to generally accepted standards of professional medical practice as to raise reasonable concern for the health and safety of patients in the private sector or from another Federal Agency. These records may also be disclosed as part of an ongoing computer matching program to accomplish these purposes.

11. VA may disclose information to the National Practitioner Data Bank at the time of hiring or clinical privileging/re-privileging of health care practitioners, and other times as deemed necessary by VA, in order for VA to obtain information relevant to a Department decision concerning the hiring, privileging/re-privileging, retention, or termination of the applicant or employee.

12. VA may disclose information to the National Practitioner Data Bank or a State Licensing Board in the state in which a practitioner is licensed, in which the VA facility is located, or in which an act or omission occurred upon which a medical malpractice claim was based when VA reports information concerning: (1) Any payment for the benefit of a physician, dentist, or other licensed health care practitioner that was made as the result of a settlement or judgment of a claim of medical malpractice, if an appropriate determination is made in accordance with Department policy that payment was related to substandard care, professional incompetence, or professional misconduct on the part of the individual; (2) a final decision that relates to possible incompetence or improper professional conduct that adversely affects the clinical privileges of a physician or dentist for a period longer than 30 days; or (3) the acceptance of the surrender of clinical privileges or any restriction of such privileges by a physician or dentist, either while under investigation by the health care entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding. These records may also be disclosed as part of a computer matching program to accomplish these purposes.

13. Information concerning individuals who have submitted

research program proposals for funding, including the investigator's name, Social Security number, research qualifications and the investigator's research proposal, may be disclosed to qualified reviewers for their opinion and evaluation of the applicants and their proposals as part of the application review process.

14. VA may disclose information to the Department of Justice (DoJ), or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when:

(e) VA or any component thereof;

(f) Any VA employee in his or her official capacity;

(g) Any VA employee in his or her official capacity where DoJ has agreed to represent the employee; or

(h) The United States, where VA determines that litigation is likely to affect the agency or any of its components,

is a party to such proceedings or has an interest in such proceedings, and VA determines that use of such records is relevant and necessary to the proceedings, provided, however, that in each case VA determines the disclosure is compatible with the purpose for which the records were collected. If the disclosure is in response to a subpoena, summons, investigative demand, or similar legal process, the request must meet the requirements for a qualifying law enforcement request under the Privacy Act, 5 U.S.C. 552a(b)(7), or an order from a court of competent jurisdiction under 552a(b)(11).

15. Any invention information in this system may be disclosed to affiliated intellectual property partners to aid in the possible use, interest in, or ownership rights in VA intellectual property.

16. VA may disclose information concerning merit review of proposals submitted by an individual to the individual except that information concerning a third party, such as the name or other identifying information about the qualified reviewer of the proposal.

17. VA may disclose to other Federal agencies to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

18. VA may disclose any information or records to appropriate agencies, entities, and persons when: (1) VA suspects or has confirmed that there has been a breach of the system of records; (2) VA has determined that as a result of the suspected or confirmed breach there is a risk to individuals, VA (including its information systems,

programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, or persons is reasonably necessary to assist in connection with VA efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

19. VA may disclose information to contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for VA, when reasonably necessary to accomplish an agency function related to the records.

20. VA may disclose information from this system to another Federal agency or Federal entity, when VA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Reports of all transactions dealing with data will be used within VA and will not be provided to any consumer-reporting agency.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

(1) Paper documents, (2) microscope slides, (3) magnetic tape or disk or other electronic media, (4) photographs, (5) microfilm, (6) web based cloud storage systems, and (7) recordings (audio and video).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by individual identifiers and indexed by a specific project site or location, project number, or under the name of the research or development investigator.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are scheduled in accordance with RCS 10-1, 8300.6, temporary disposition; cutoff at the end of the fiscal year after completion of the research project. Destroy six (6) years after cutoff. May retain longer if required by other Federal regulations or the European General Data Protection regulations. (DAA-0015-2015-0004, item 0032)

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

This list of safeguards furnished in this System of Record is not an exclusive list of measures that has been, or will be, taken to protect individually identifiable information. VHA will maintain the data in compliance with applicable VA security policy directives that specify the standards that will be applied to protect sensitive personal information. Physical Security: Access to VA working space and medical record storage areas is restricted to VA employees on a "need to know" basis.

Generally, VA file areas are locked after normal duty hours and protected from outside access by the Federal Protective Service. Employee file records and file records of public figures or otherwise sensitive medical record files are stored in separate locked files. Access to automated information systems are protected by an approved form of two factor authentication and communications are encrypted at rest and in transit. Strict control measures

are enforced to ensure that disclosure is limited to a "need to know" basis.

Access to a contractor's records and their system of computers used with the particular project are available to authorized personnel only. Records on investigators stored on automated storage media are accessible by authorized VA personnel via VA computers or computer systems. They are required to take annual VA mandatory data privacy and security training. Security complies with applicable Federal Information Processing Standards (FIPS) issued by the National Institute of Standards and Technology (NIST). Contractors and their subcontractors who access the data are required to maintain the same level of security as VA staff.

RECORD ACCESS PROCEDURE:

Individuals seeking information regarding access to and contesting of records in this system related to research project submissions or participation in research projects may

write, call or visit the VA location where the records were initially generated.

CONTESTING RECORD PROCEDURES:

(See Record Access Procedures above.)

NOTIFICATION PROCEDURE:

Interested persons should write to: Director of Office of Research Protections, Policy and Education, Office of Research and Development, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420. All inquiries must reasonably identify the project and site location; date of project and team leader.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Last full publication provided in 75 FR 29818.

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Part II

Consumer Product Safety Commission

16 CFR Parts 1112, 1130, and 1236

Safety Standard for Infant Sleep Products; Final Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Parts 1112, 1130, and 1236

[CPSC Docket No. 2017–0020]

Safety Standard for Infant Sleep Products

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: Pursuant to the Consumer Product Safety Improvement Act of 2008 (CPSIA), the U.S. Consumer Product Safety Commission (CPSC) is issuing this final rule establishing a safety standard for infant sleep products, which are products marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not subject to any of CPSC's mandatory standards for infant sleep. CPSC is also finalizing an amendment to its regulations regarding third party conformity assessment bodies, to include the safety standard for infant sleep products in the list of notices of requirements (NORs) and an amendment to the consumer registration rule, to identify infant sleep products as a durable infant or toddler product subject to consumer registration requirements, as a subcategory of bassinets and cradles.

DATES: This rule is effective June 23, 2022. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of June 23, 2022.

FOR FURTHER INFORMATION CONTACT: Keysha Walker, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: 301–504–6820; email: kwalker@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority and Background

A. Statutory Authority

Section 104(b) of the CPSIA, 15 U.S.C. 2056a(b), requires the Commission to: (1) Consult with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, to examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products (15 U.S.C. 2056a(b)(1)(A)); and (2) promulgate, in accordance with 5 U.S.C. 553, consumer product safety standards that are substantially the same as such voluntary standards, or are more stringent than such voluntary standards if the Commission determines that more stringent standards would further

reduce the risk of injury associated with such products. 15 U.S.C. 2056a(b)(1)(B). Additionally, section 104(b)(2) of the CPSIA directs the Commission to periodically review and revise the standards set forth under this subsection, to ensure that such standards provide the highest level of safety for such products that is feasible.

Section 104(d) of the CPSIA requires manufacturers of durable infant or toddler products to establish consumer registration card programs that comply with CPSC's implementing rule, 16 CFR part 1130. Additionally, under section 14 of the CPSA, children's products (such as durable infant or toddler products) must comply with testing and certification requirements that CPSC implemented through 16 CFR parts 1107, 1109, and 1110. Section 104(f)(1) of the CPSIA states that a “durable infant or toddler product” is a “durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years.” *Id.* 2056a(f)(1). Section 104(f)(2) of the CPSIA provides a non-exhaustive list of categories of products that are durable infant or toddler products, such as cribs, toddler beds, and bassinets and cradles. *Id.* 2056a(f)(2). The Commission's consumer registration rule at 16 CFR 1130.2(a) defines a “durable infant or toddler product” as:

DEFINITION OF DURABLE INFANT OR TODDLER PRODUCT means the following products intended for use, or that may be reasonably expected to be used, by children under the age of 5 years. The listed product categories are further defined in the applicable standards that the Commission issues under section 104(b) of the Consumer Product Safety Improvement Act of 2008, and include products that are combinations of [17 listed] product categories. . . .

B. Infant Sleep Products Are Durable Infant or Toddler Products

This rule establishes a category of products called “infant sleep products,” which are all products marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not already subject to a mandatory CPSC sleep standard. The product category “infant sleep products” is not included in the statutory list of products in section 104(f)(2) of the CPSIA. However, similar sleep products, such as bassinets and cradles, and cribs, are listed in the statute; and the Commission has the authority to add product categories to the statutory list. The Commission adds product categories to the list of “durable infant or toddler products” through a rulemaking to amend 16 CFR 1130.2, the Commission's rule requiring durable

infant or toddler products to meet consumer registration rule requirements. All durable infant or toddler products identified in § 1130.2 must meet the product registration card requirement; and because rules issued under section 104 of the CPSIA are children's product safety rules, these products must also meet the third-party testing and certification requirements in section 14 of the CPSA, and implemented by the Commission in 16 CFR parts 1107, 1109, and 1110.

CPSC issued a notice of proposed rulemaking in 2017 (the 2017 NPR), proposing to categorize infant inclined sleep products as a “durable infant or toddler product” under section 104 of the CPSIA, as a subset of the bassinet and cradle category. 82 FR 16963, 16969–70 (Apr. 7, 2017). In 2019, CPSC issued a supplemental notice of proposed rulemaking (the 2019 SNPR), proposing to identify an “infant sleep product,” a broader category of infant sleep, as a durable infant or toddler product under section 104(f) of the CPSIA, also as a subcategory of bassinets and cradles. 84 FR 60949, 60957 (Nov. 12, 2019). The 2019 SNPR proposed to remove the term “inclined” from the proposed mandatory standard, which included removing the term “inclined” from the title, scope, introduction, and definitions of ASTM F3118–17a, and to include within the rule, instead: “any infant sleep product not currently covered by another mandatory rule for infant sleep products: Bassinets/cradles, cribs (full-size and non-full-size), play yards, and bedside sleepers.” 84 FR at 60951. Accordingly, the 2019 SNPR proposed that the scope of the rule include two types of sleep products that are currently unregulated by CPSC under any mandatory standard, including inclined sleep products, meaning infant sleep products with a sleep surface angle greater than 10 degrees from horizontal, and flat (non-inclined) sleep products, meaning infant sleep products with a sleep surface angle equal to or less than 10 degrees.

For this final rule, CPSC will finalize the definition of an “infant sleep product” as a durable infant or toddler product, a category of products that is a subset of the bassinet and cradle standard, consistent with the 2019 SNPR. The final rule defines an “infant sleep product” as “a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age,” and that is not already subject to one of CPSC's mandatory standards for infant sleep:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles
- 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs
- 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs
- 16 CFR part 1221—Safety Standard for Play Yards, or
- 16 CFR part 1222—Safety Standard for Bedside Sleepers.

As defined in the final rule, an “infant sleep product” meets the definition of a “durable infant or toddler product” because the products are intended for infants up to 5 months old, and the products are “intended for use,” and “reasonably expected to be used,” by children under 5 years old. Moreover, products marketed or intended as a sleeping accommodation for an infant are similar to the products for infant sleep that are already included in the statutory list of durable infant or toddler products, such as cribs and bassinets and cradles. We also note that “infant sleep products” are further defined in the final rule, as provided in part 1130. Accordingly, adding “infant sleep products” as a durable infant or toddler product is consistent with the Commission’s approach of adding a durable infant or toddler product category that has a mandatory standard to the list of products in part 1130, to clarify that these products must meet the consumer registration rule, and the third-party testing and certification requirements for children’s product safety rules.

C. Consultation Regarding the Effectiveness of the Voluntary Standard

To meet the first requirement in section 104(b) of the CPSIA that the Commission consult with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts to examine and assess the effectiveness of the relevant voluntary standards, CPSC staff regularly participates in the juvenile products subcommittee meetings of ASTM International (ASTM). Staff’s participation in ASTM’s voluntary standards process includes providing anonymized incident data, participating in meetings to assess the ability of a voluntary standard to address the incident data, and working through the ASTM process to develop performance and labeling requirements to address identified hazards. Staff also comments or votes on certain ASTM ballots to revise voluntary standards. ASTM subcommittees consist of members who

represent producers, users, consumers, government, and academia.¹

In 2011, ASTM began work on a new standard for infant inclined sleep products. Development of this new ASTM standard for infant inclined sleep products, F3118, arose from efforts to update the voluntary standard for bassinets and cradles. Accordingly, staff’s consultation process for the inclined sleep product rulemaking commenced in approximately 2011, when ASTM, with CPSC’s concurrence, decided to separate hammocks and other inclined sleep products from the development of the bassinet standard, ASTM F2194, to develop a new voluntary standard that would specifically address the characteristics of inclined sleep products. For example, the bassinet standard requires a sleep surface angle of 10 degrees or less, and inclined products have a sleep angle greater than 10 degrees. Since then, staff has been actively participating in developing the voluntary standard for infant inclined sleep products.

In addition to working on ASTM’s inclined sleep standard, staff also has been working with the ASTM subcommittee developing the bassinet standard since before 2011, and to this day, continues to provide incident data and participate in task group and subcommittee meetings, including meetings and ASTM ballots involving the currently unregulated flat sleep products within the scope of this final rule.

Sections V.A.3 and V.B.2 of this preamble contain additional information about CPSC staff’s work on the products within the scope of the final rule, both inclined and flat sleep products, through the ASTM standards development process for the bassinet and cradle standard, the infant inclined sleep standard, and a new, unpublished standard for in-bed sleepers.

D. 2017 NPR and 2019 Termination Notice

When staff began working on the mandatory standard for bassinets and cradles, and participating with the ASTM standards development subcommittee, staff considered whether infant hammocks and other inclined sleep products should fall within the scope of the bassinet and cradle standard. Because the bassinets and cradles voluntary standard did not address products on the market that had a sleep incline greater than 10 degrees, the Commission directed staff to initiate a separate rulemaking effort for infant

hammocks and other inclined sleep products, to address the characteristics of inclined products. Accordingly, the infant inclined sleep products safety standard was an outgrowth of the bassinet and cradle standard, intended to address products with an incline greater than 10 degrees from horizontal.

In approximately 2011, at the time CPSC separated infant inclined sleep products from the bassinets and cradles standard, ASTM simultaneously began work on developing a voluntary standard for infant inclined sleep products. ASTM published the resulting infant inclined sleep products standard in May 2015, and updated the standard twice in 2016, and twice in 2017. ASTM’s latest standard for this product category is designated, ASTM F3118–17a, *Standard Consumer Safety Specification for Infant Inclined Sleep Products* (ASTM F3118–17a).

CPSC’s 2017 NPR proposed a mandatory standard for infant inclined sleep products, incorporating by reference the then-current voluntary standard, ASTM F3118–17, with a modification to the standard’s definition of “accessory.” 82 FR 16964 (April 7, 2017). The 2017 NPR for infant inclined sleep products, which included hammocks, discussed 14 fatal incidents related to infant inclined sleep products, which were reported to have occurred between January 1, 2005 and September 30, 2016. The 2017 NPR indicated that ASTM F3118–17 addressed the primary hazard patterns CPSC identified in the 657 incidents (including 14 deaths), except for the definition of “accessory,” which was defined too narrowly to address potential hazards. Specifically, the 2017 NPR proposed that CPSC’s standard would not include the term “rigid frame” in the definition of “accessory inclined sleep product” in section 3.1.1 of ASTM F3118–17, broadening the definition to encompass a new product that did not have a rigid frame. *Id.* at 16968–69, and 16975. The Commission concluded that for the mandatory standard, more stringent requirements were necessary to further reduce the risk of injury associated with infant inclined sleep products relating to the use of an inclined sleep product accessory. *Id.* at 16967.

As the 2017 NPR explained, durable infant or toddler products are children’s products that must be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a); 82 FR at 16969. Certification must be based on testing conducted by a CPSC-accepted third party conformity assessment body (test laboratory). 15 U.S.C. 2063(a)(2). CPSC must publish an

¹ ASTM International website: www.astm.org. “About ASTM International.”

NOR for the accreditation of test laboratories to assess a product's conformity with a children's product safety rule. The 2017 NPR proposed that if issued as a final rule, the new *Safety Standard for Infant Inclined Sleep Products*, to be codified at 16 CFR part 1236, would be added to the list of NORs for children's product safety rules in 16 CFR part 1112, so that test laboratories applying for CPSC acceptance could seek accreditation to test inclined sleep products. 82 FR at 16969. The 2017 NPR also proposed to amend 16 CFR part 1130, the Commission's requirements for consumer registration for durable infant or toddler products, to amend the definition of "durable infant or toddler product" to clarify that infant inclined sleep products fall within the term, and are subject to the consumer registration card requirements. *Id.* at 16969–70.

On June 12, 2019, CPSC staff submitted a briefing package and a draft **Federal Register** notice to the Commission, recommending that the Commission terminate the 2017 NPR. Staff recommended terminating the 2017 NPR because, since issuing the 2017 NPR, CPSC had received reports of 42 additional fatalities associated with rocker-like inclined sleep products, and because the Commission had issued additional safety alerts and recalls involving infant inclined sleep products. To date, the Commission has not voted on the notice to terminate the 2017 NPR.

E. 2019 SNPR

On October 16, 2019, staff provided the Commission with a briefing package recommending that instead of terminating the 2017 NPR, the Commission issue an SNPR. During the development of Staff's 2019 SNPR Briefing Package, staff received reports of 451 new incidents; 59 were deaths that occurred in infant inclined sleep products. Commission staff contracted with Dr. Erin Mannen, Ph.D., a mechanical engineer with a biomechanics specialization, to conduct infant testing to evaluate the design of inclined sleep products. Tab B of the Staff's 2019 SNPR Briefing Package contains Dr. Mannen's study, *Biomechanical Analysis of Inclined Sleep* (Mannen Study).²

² The October 16, 2019, Staff Briefing Package: Draft Supplemental Notice of Proposed Rulemaking for Infant Sleep Products under the Danny Keysar Child Product Safety Notification Act (Staff's SNPR Briefing Package) is available at: https://www.cpsc.gov/s3fs-public/SupplementalNoticeofProposedRulemakingforInfantSleepProducts_10_16_2019.pdf?TPVAjZEQcz9x9sKeEGltm4LskkonnxUWw.

The Commission published an SNPR on November 12, 2019. 84 FR 60949. The 2019 SNPR proposed to issue a standard for "infant sleep products," meaning products that (1) provide sleeping accommodations for infants and (2) are not currently subject to a CPSC mandatory standard for infant sleep: Bassinets/cradles, cribs (full-size and non-full size), play yards, and bedside sleepers (collectively, CPSC sleep standards). The 2019 SNPR proposed to incorporate by reference ASTM F 3118–17a, with modifications to require that for each infant sleep product: (1) The seat back angle intended for sleep must be equal to or less than 10 degrees from horizontal, and (2) must meet the requirements for a bassinet and cradle in the standard at 16 CFR part 1218. 84 FR at 60956. The Commission also proposed to amend the consumer registration rule to identify "infant sleep products" as a category of durable infant or toddler products under section 104(f) of the CPSIA, and proposed to amend the regulation at 16 CFR part 1112, to add infant sleep products to the list of products that require third-party testing. *Id.* at 60957.

F. Overview of the Final Rule

For the final rule, the Commission is finalizing the requirements largely as proposed in the 2019 SNPR. The final rule incorporates by reference the voluntary standard, ASTM F3118–17a, *Standard Consumer Safety Specification for Infant Inclined Sleep Products*, with modifications to the introduction, scope, performance, and testing requirements, to further reduce the risk of injury associated with infant sleep products, both flat and inclined. The final rule requires that "infant sleep products," defined as products marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not covered by a CPSC sleep standard, be tested to confirm the seat back/sleep surface angle is 10 degrees or less from horizontal, and meet the requirements of 16 CFR part 1218, *Safety Standard for Bassinets and Cradles*, including conforming to the definition of a "bassinet/cradle." The scope of the final rule is also consistent with this definition of an "infant sleep product." The final rule specifies CPSC's sleep standards as:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles
- 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs
- 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs
- 16 CFR part 1221—Safety Standard for Play Yards, or

- 16 CFR part 1222—Safety Standard for Bedside Sleepers.

Products intended for sleep that already conform to a CPSC sleep standard in this list are not within the scope of the final rule.

The scope of the final rule, and the definition of "infant sleep product," are purposely broader than the scope of the bassinet and cradle standard, and the definition of a "bassinet/cradle," to capture within the scope of the final rule all products marketed for infant sleep for infants up to 5 months old that are not covered by a CPSC sleep standard; those that are currently on the market, and any future products developed for this age group. CPSC's intent is to set a baseline of safety for infant sleep products so that all of these products must, at a minimum, meet the performance and labeling requirements in 16 CFR part 1218, including conforming to the definition of a "bassinet/cradle," and being tested and certified as meeting these requirements.

Based on the Commission's review of inclined and flat sleep product incident data, and consideration of the comments on the 2017 NPR and the 2019 SNPR, the Commission is finalizing the requirements as proposed in the 2019 SNPR, with the following clarifications in the:

1. Scope of the final rule, 16 CFR 1236.1, by removing the examples of infant inclined sleep products, and aligning the scope of the rule to be consistent with the definition of "infant sleep product," to avoid confusion about the scope of the rule, which includes inclined and flat products;

2. Introduction of ASTM F3118–17a, by explaining more clearly that both inclined and flat sleep products fall within the definition of an "infant sleep product," and that the purpose of the rule is to reduce deaths associated with known infant sleep hazards, including, but not limited to, seat back or sleep surface angles that are greater than 10 degrees from horizontal;

3. Scope of ASTM F3118–17a, by revising section 1.3 to explain more clearly that inclined and flat products fall within the scope of the rule, and that products subject to the rule are infant sleep products that do not already meet a mandatory standard for a product intended for infant sleep. Consistent with the 2019 SNPR, revised section 1.3 lists existing infant sleep standards, but the final rule lists the five CPSC sleep standards with a reference to the ASTM standard incorporated by reference in each mandatory standard;

4. Scope of ASTM F3118–17a, by adding a new section 1.3.2 stating that

crib mattresses that meet the voluntary standard for crib mattresses, ASTM F2933, are not included within the scope of the rule. The final rule does not cover a crib mattress because a crib mattress is not used by itself, and instead, is used as the sleep surface in a crib, a product that already must conform to a CPSC sleep standard;

5. Referenced documents in ASTM F3118–17a, by revising section 2.1 to add the voluntary standard for crib mattresses, ASTM F2933;

6. Definition of “infant sleep product” in ASTM F3118–17a, by revising section 3.1.7 to remove the phrases “freestanding” and “generally supported by a stationary or rocker base” from the definition, to not inadvertently exclude certain infant sleep products from the scope of the rule, such as those that may not initially have a base, or may be sold as an attachment to another product. Additionally, we revised the age limit in this definition from “approximately 5 months of age” by removing the term “approximately.” This revision is intended to reduce confusion about which products fall within the scope of the rule, and to clarify that any infant sleep product marketed or intended for an infant up to 5 months of age, and that is not already covered by a CPSC sleep standard, falls within the scope of the final rule;

7. Definitions in ASTM F3118–17a, by revising section 3.1 to remove the definitions for “accessory inclined sleep product,” “compact inclined sleep product,” and “newborn inclined sleep product,” to simplify the regulation text, because these definitions are unnecessary based on the other modifications made to ASTM F3118–17a in the final rule, and because these products are subsumed within the definition of an “infant sleep product,” and the final rule does not contain any unique requirements for these products;³

8. Requirements in ASTM F3118–17a, by revising section 6.9 to remove separate “Maximum Seat Back Angle” tests for three product types (accessory, compact, and newborn), and leaving only the test for “infant sleep products,” because all products fall within the definition of an “infant sleep product” in the final rule, and because this test is the same for all products;

9. Requirements in ASTM F3118–17a, by revising section 6.9 and 6.9.1 to more accurately describe the name of the test by clarifying that the seat back angle

also refers to a “sleep surface angle.” This revision is intended to reduce confusion, because flat sleep surfaces do not have a seat back; and

10. Requirements in ASTM F3118–17a, by revising section 6.9.3 to remove the references to accessory, compact, and newborn sleep products, and to state that infant sleep products must meet the requirements of 16 CFR part 1218, Safety Standard for Bassinets and Cradles, including conforming to the definition of a bassinet/cradle. This revision is intended to streamline the regulation text to reduce confusion, and to add a specific requirement to meet the definition of a bassinet, which clarifies that infant sleep products must have a stand to meet the performance and labeling requirements in part 1218.

The Commission is also finalizing the amendment to part 1112, to include “infant sleep products” in the list of children’s product safety rules for which CPSC has issued NORs, as well as the amendment to part 1130, to identify “infant sleep products” specifically as a subcategory of bassinets and cradles.

This final rule is based on information and analysis provided in Staff’s Final Rule Briefing Package, submitted to the Commission on May 12, 2021, which can be found on the Commission’s website at: https://www.cpsc.gov/s3fs-public/FinalRuleSafetyStandardforInfantSleepProducts.pdf?7s3LjLkZ4Vm_0GWP2.vstoEzBylG8xg.

II. Product Description

A. Scope of Products Within the Final Rule

The scope of products covered by the 2017 NPR tracked the scope of ASTM F3118–17, covering “a free standing product with an inclined sleep surface primarily intended and marketed to provide sleeping accommodations for an infant up to 5 months old or when the infant begins to roll over or pull up on sides, whichever comes first.” The scope of products covered by the 2019 SNPR broadened from the 2017 NPR, proposing to incorporate by reference ASTM F3118–17a with substantial modifications, including revisions in the scope of the standard, section 1.3, to remove the term “inclined,” and to include any infant sleep product not currently covered by another CPSC mandatory rule for a product intended for infant sleep: Bassinets/cradles, cribs (full-size and non-full-size), play yards, and bedside sleepers. 84 FR at 60951.

For the final rule, the scope of products that fall within the rule is consistent with the 2019 SNPR, and includes all of the inclined sleep

products in the 2017 NPR, plus additional products marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not currently covered by any of the five CPSC sleep standards. Accordingly, as proposed in the 2019 SNPR, the final rule includes the currently unregulated inclined sleep products, such as frame-type inclined sleep products, hammocks, compact inclined sleep products, and accessory inclined sleep products (collectively, inclined sleep products). The final rule also includes the currently unregulated non-inclined, flat, infant sleep products, which means products with a seat back or sleep surface angle that is already 10 degrees or less from horizontal (*i.e.*, baby boxes, in-bed sleepers, baby nests and pods, rigid-sided and rigid-framed compact bassinets without a stand or legs, various designs of “travel bassinets” with soft padded or mesh sides, and baby tents (collectively, flat sleep products)). 84 FR at 60951. Tabs C and E of Staff’s Final Rule Briefing Package contain additional information and characteristics, as well as pictures of the infant sleep products subject to the final rule.

B. Products Excluded From the Scope of the Final Rule

Consistent with the 2019 SNPR, for the final rule, products with inclined or adjustable seat back positions that are covered by other CPSC standards, such as infant bouncer seats, strollers, hand-held carriers, frame carriers, and infant swings, are excluded from the scope of the ASTM infant inclined sleeper standard, and they are also excluded from the scope of the final rule, unless the product is specifically marketed for infant sleep for an infant up to 5 months of age. *Id.* at 60951–52. If a product’s packaging, marketing materials, inserts, or instructions indicate that the product is for sleep, or includes pictures of sleeping infants, then CPSC will consider the product to be marketed for sleep.

Products that are already compliant with another CPSC sleep standard, such as the bassinet standard (16 CFR part 1218), or the crib standard (16 CFR part 1219), are excluded from the scope of the final rule. Sleep wedge pillows and sleep positioners are out of scope for the final rule, and may be covered by Food and Drug Administration (FDA) regulations as medical devices, if they are marketed to treat a medical condition, such as acid reflux. Infant pillows are also out of scope for the final rule, and these products are subject to 16 CFR § 1500.18, “Banned toys and other banned articles intended for use

³ Note that in the 2019 SNPR the Commission proposed to revise these terms by removing the word “inclined.”

by children.” Hammocks intended as photo props are out of scope for the final rule. Hammock accessories intended for shopping carts are also not in scope, as those products are not intended for infant sleep. Bath chairs with inclined backs are out of scope, as they are covered by another standard and are not intended for infant sleep. Pet beds, toy hammocks, and play tents labeled for children over 5 months are out of scope of the final rule. Loungers, floor chairs, and rockers are out of scope of the final rule, unless they are marketed for infant sleep on the product itself or its packaging, marketing materials, inserts, or instructions, or the product is advertised with pictures of sleeping infants.

Finally, in response to a comment on the 2019 SNPR, the Commission specifically is excluding from the scope of the final rule crib mattresses that fall within the scope of the voluntary standard for crib mattresses, ASTM F2933. A crib mattress, alone, does not meet the definition of an “infant sleep product,” and is always used in conjunction with a sleep product, such as a crib or play yard, that falls within one of CPSC’s sleep standards. The Commission issued a notice of proposed rulemaking for crib mattresses in 2020, and intends to finalize a separate rule later this fiscal year, providing performance and labeling requirements for crib mattresses, based on ASTM F2933.

C. Market Description⁴

Infant sleep products covered by this rule may be purchased at general retailers, online retailers, mattress and bedding stores, and baby specialty stores. At least 60 small U.S.-based manufacturers and importers are in this market, as well as five large domestic companies, and dozens of foreign companies, some that ship these items directly to customers in the United States via online marketplaces. More than a thousand home-based manufacturers, hundreds based in the United States, sell soft-sided baby nests and pods, in-bed sleepers, and infant hammocks directly to consumers via online marketplaces and as third-party sellers via major retailers’ websites. We estimate total sales in this market at more than \$125 million per year, to at least a third of U.S. households with newborns.

Products within the scope of the final rule compete with products for infant sleep that are compliant with one of

CPSC’s sleep standards and with other small, portable products that are not marketed for sleep. One goal of the final rule is to make it clearer to consumers which products are certified as compliant with a CPSC sleep standard, regardless of the product name or advertising.

The proliferation of physically different products with similar names (particularly “bassinets”), the many suppliers in the market, and new product types each season, reflect a competitive market for innovative sleep products. New sleep products are marketed as filling a need for a small, portable sleeping or napping space. Many items are also marketed specifically to facilitate bed-sharing.⁵ In addition to the marketing as secondary sleeping options, some of these compact and relatively inexpensive sleep products are also marketed as primary sleep spaces for families with limited living space and budget. Baby boxes, in-bed sleepers, and hammocks, in particular, are marketed as primary sleep spaces for babies.

CPSC did not find any evidence that consumer demand for compact, inexpensive, and portable sleep spaces cannot be met by products compliant with an existing CPSC sleep standard. Many small bassinets that are compliant with CPSC’s bassinet standard sell for \$50 to \$75 and have a footprint similar to the flat sleep products covered by this rule. As for bed-sharing, bedside sleepers retail for as little as \$100. Cradles compliant with the bassinet and cradle standard have a swinging function similar to a hammock with a frame, often at a lower retail price. Innovative products compliant with the existing CPSC sleep standards have been introduced in recent years, including small, foldable play yards, oval cribs and bassinets, bassinets that are attached to an adult chair, bassinets with rocking functions, and bedside sleepers with a rocking base.

1. Inclined Sleep Products

The 2019 SNPR described four types of inclined sleep products within the scope of the rule: Frame-type inclined sleep products, hammocks, compact inclined sleep products, and accessory inclined sleep products. 84 FR at 60951. We update the market for these products below, grouping frame-type, compact, and accessory inclined products into one category, and hammocks into another category.

(a) Hard-Frame Inclined Sleepers, Compact Foam Inclined Sleepers, and Play Yard Accessories

Freestanding, inclined hard-frame sleepers retail for \$40 to \$120, depending on brand and features, such as attached toys, fabric coverings, battery-operated sounds, and adjustable positions. Compact foam inclined sleepers retail for about \$100. Hard-frame inclined play yard accessories are not sold separately; they are included in the price of the play yard.

In recent years, sales of inclined sleepers have totaled at least 722,000 units per year.⁶ The sales of these products alone total nearly a quarter of all households with newborn infants, given that just under 3.8 million live births occurred in the United States in 2018.⁷ Additionally, more than 4,000 adoptions from foreign countries occurred, but most of those infants were at least 1-year-olds by the time the adoption was finalized.⁸ We assume that some of the market for inclined sleepers has shifted to other flat sleep product categories covered by this rule, or shifted to small portable sleep products compliant with existing CPSC sleep standards. Since the CPSC published the NPR in 2017, some inclined sleep products have been recalled or otherwise removed from the market. However, although reselling recalled products is prohibited, discontinued items sold on the secondary market that have not been recalled, as well as non-recalled physically similar products sold by small companies, are still available.

(b) Baby Hammocks

Hammocks range in price from about \$50 for a simple fabric hammock without a frame, to more than \$300 for a hammock with a wooden or metal stand. Crib hammocks, which are intended to attach to cribs or play yards of any brand, retail for about \$50 to \$100.

Baby hammocks are widely available from small domestic companies, importers, and home-based sellers. The websites of several major general retailers sell these items from third-party sellers. Hammocks are made of a variety of fabrics and may include padded sides or bottoms. They may come without a frame, or with a wooden

⁶ The recalled inclined products alone had sales of nearly 6.5 million from May 2010 to August 2019. Assuming that the recalled products represented most of the market, 6.5 million divided by 9 years is 722,000.

⁷ <https://www.cdc.gov/nchs/nvss/births.htm>.

⁸ https://travel.state.gov/content/travel/en/Inter-country-Adoption/adopt_ref/adoption-statistics-esri.html.

⁴ Tab E of Staff’s Final Rule Briefing Package contains CPSC staff’s analysis of the market for infant sleep products.

⁵ Tab D of Staff’s Final Rule Briefing Package contains CPSC staff’s analysis of the hazards associated with bed-sharing.

or metal stand. Some items are solid fabric, while others are mesh or crochet. The market is fragmented, and all of the sellers in the United States are small companies, although some sellers are importers of items made by large foreign companies. The large number of sellers, including at least one company that sells only baby hammocks, and dozens of home-based sellers, suggests that thousands of baby hammocks are sold each year.

2. Flat Sleep Products

(a) Flat Sleep Surface, Soft-Sided Products

The flat sleep surface, soft-sided products that are not covered by a CPSC sleep standard include baby pods or baby nests, which are marketed for use on a hard surface or as in-bed sleepers, and soft-sided “bassinets.” Some soft-sided products are marketed for use inside a crib or bassinet. Some sleep products are marketed as portable or travel infant beds. The flat infant sleep products currently not covered by any voluntary or mandatory sleep standard, but would be regulated under the final rule, include:

- Baby pods and baby nests—These products have a soft floor, usually padded in some way, with low soft fabric or mesh sides, resembling a small pet bed. They can be rectangular, oval, or figure 8-shaped. Some come with a wedge pillow. They are sometimes marketed as suitable for use inside a crib or play yard.
- Soft-sided “travel bassinets” or “travel beds”—These products can have either a soft or semi-rigid floor. Some products come with straps and zippers so that they can be rolled up and carried like a backpack when not in use. Some are marketed as “3-in-1” products that can also be used as a changing mat and include pockets for diapers. Some products have a “cocoon” design, with a soft padded top, intended to cover the body of the occupant.
- Hand-held carriers marketed for sleep—These products are marketed as both a hand-held carrier and a (soft) bassinet, suitable for napping or sleeping.
- In-bed sleepers—These products have low, soft sides and a soft floor, specifically intended and marketed for bed-sharing.

Play yard accessories have mesh or fabric sides that attach to the rails of the play yard and are marketed for infant sleep, including “napping”; and they would not fall within the scope of the rule if they are already compliant with

the bassinet standard. Items marketed as changing pads are not considered to be infant sleep products.

The prices for baby nests, baby pods, and in-bed sleepers range from about \$40 to \$200, with the lower-priced items tending to come from home-based manufacturers and foreign direct shippers, and the more expensive items coming from larger U.S. companies. Smaller products intended only for infants up to 5 months of age also tend to be cheaper than larger products intended for children up to 2 years old. The various soft-sided travel bassinets and “travel beds,” some that fold up into a backpack, have a similar price range. At least 30 small businesses, mostly importers, sell the soft-sided flat sleep surface products.⁹ Dozens of foreign companies ship these sleep products directly to U.S. customers via U.S. Internet retailers, and there are more than 1,000 home-based sellers of baby pods and baby nests.

The estimated annual sales of in-bed sleepers alone are 1 million units,¹⁰ based on public comment and staff analysis. The Durable Nursery Products Exposure survey (DNPEs) indicated that 38 percent of parents slept with their child under 1 year of age at least once a week, with 18 percent indicating they sleep with their child under 1 year of age every night. The CDC similarly found¹¹ that 24.4 percent of parents bed-shared with their infant “often or always” and 37 percent indicated they bed-shared “rarely or sometimes.” If parents who regularly sleep with their infants commonly purchase or make a soft-sided baby nest or other type of in-bed sleeper, then these products could be owned by 25 percent of households with newborns, representing about 1 million units sold per year, which is consistent with the estimate from a public comment on the 2019 SNPR.

(b) Flat Sleep Surface, Rigid-Sided and Rigid-Framed Compact Bassinets, Travel Bassinets, and Similar Products

This infant sleep product category includes flat sleep surface, free-standing products that resemble a bassinet without a stand or legs. Baby boxes and

other rigid-sided products without a stand are marketed for infant sleep, sometimes as “compact” or “travel” bassinets. Some compact bassinets have mesh sides with a rigid metal or plastic frame. Larger rigid-sided items that comply with the play yard standard, and play yard accessories that are compliant with the bassinet standard, are out of scope for the final rule. Most flat sleep surface, rigid-sided products are rectangular, but oval and round ones are also available. As noted, some flat, soft-sided items are also marketed as “travel” bassinets. The term “bassinet” is used in product names for rigid-sided items with a stand that meet CPSC’s bassinet standard, but the term is also used in product names of flat and inclined items without a stand, some with low and soft padded sides, which do not meet the bassinet standard. The final rule addresses this issue, and, in part, is intended to make it clearer to consumers which products are safe for infant sleep, regardless of the product name.

Rigid-sided and rigid-framed compact bassinets and travel bassinets typically sell for about \$50 to \$150, which is comparable to the lower end of the price range of bassinets that comply with the bassinet standard. Retail prices for baby boxes start at about \$50 to \$75, depending on the brand and decorative design, although some are sold only as part of a \$300, or more, bundle with clothes, diapers, and other baby items. Baby boxes were given away for free by some state governments and hospitals, so the cost to the consumer was \$0, although those organizations purchased them from a small domestic company that is no longer offering them. Play yard accessories are not priced or sold separately; rather, they are included in the price of the play yard.

Products in this category have a variety of names. Several small domestic manufacturers and small importers, as well as large domestic and foreign companies, sell small, rigid-sided or rigid-framed products that resemble a bassinet without a stand as “compact,” “portable,” or “travel” bassinets, or as infant “travel beds.” About a dozen sellers ship these products from the United States, and a few foreign companies sell through internet marketplaces. The presence of several large domestic and foreign companies in this market, as well as introductions of innovative products each year, indicate that a strong consumer demand for these products. CPSC believes it likely that some of the demand for inclined rigid-sided products has shifted to this market sector. Unlike the soft-sided products,

⁹ This number is approximate, as the proliferation of internet retailing allows importers to enter and exit the market quickly, and to switch their product line based on demand.

¹⁰ A public comment on the SNPR estimated the annual sales of “in-bed sleep products” at 500,000 to 1.5 million units, which is consistent with the estimates in the DNPEs and from CDC on prevalence of bed-sharing.

¹¹ Bombard JM, Kortsmitt K, Warner L, et al., Vital Signs: Trends and Disparities in Infant Safe Sleep Practices—United States, 2009–2015. *MMWR Morb Mortal Wkly Rep* 2018;67:39–46. DOI: <http://dx.doi.org/10.15585/mmwr.mm6701e1>.

this sector does not have many home-based businesses or foreign direct shippers.

Baby boxes are a sub-type of compact bassinet that are made of cardboard. They are sold in the United States by two small domestic companies and one foreign company and can also be purchased directly from several foreign companies. The sales are relatively small; estimated at under 20,000 per year.¹² This means that less than 1 percent of households with newborns purchase these items. Baby boxes are sometimes marketed as “Finnish” baby boxes, because the government of Finland provides new parents with a baby box or cash equivalent. As noted, in the past, some state and local hospitals gave away baby boxes to new parents or made them widely available through social service agencies.¹³ Like other compact bassinets, baby boxes are marketed as a primary sleep environment for newborns.

(c) Baby Tents

Baby tents, which are a small mesh or solid fabric products with a fabric floor are marketed for sun protection, play, and baby sleep. They are sometimes marketed as a combination of tent and “travel bed” or “travel bassinet.” Some baby tents come with flaps, covers, or shades so that the baby can sleep in darkness. Some products come with poles or stakes to fasten the tent to the ground or in the sand at the beach. Some tents have a shallow fillable pool/sandbox in the bottom, which indicates they are not intended primarily for sleep, but rather, for play.

Baby tents retail for about \$20 to \$75; larger and more expensive tents are available, but they are marketed for older children. Baby tents are offered for sale on major internet general retailer websites and in general retail stores by about a dozen small importers and a few large companies. Dozens of foreign companies ship these baby tents directly to U.S. customers via U.S. Internet retailers; the majority of suppliers in this category are foreign direct shippers. Baby tents are marketed as a specialty item for outdoor use, particularly beach trips or camping, to shade the baby from sun and provide a place for playing and sleeping. Indoor “play” tents are also marketed for sleep, but those products are mostly marketed for children over 3 years of age. Indoor play yards with tent-like covers are in the scope of the play yard standard. Although baby tents

are a relatively niche product, compared to some of the other types of sleepers, there appears to be sufficient demand for baby tents to support the market presence of dozens of companies, including a few large companies selling a variety of other baby products.

III. Incident Data and Hazard Patterns

A. Inclined Sleep Products

1. Incident Data

The 2017 NPR discussed 14 fatal incidents related to inclined sleep products, which were reported to have occurred between January 1, 2005 and September 30, 2016. Eight of the 14 deaths involved rocker-like inclined sleep products; in three cases, the unstrapped decedent was found to have rolled over into a facedown position. Two additional cases also reported a rollover into a facedown position, but the reports did not include any information about the use of a restraint. CPSC had little information about the cause or manner of the three remaining deaths. The 2017 NPR recognized that reporting was ongoing and that the number of reported fatalities could change. 82 FR at 16965–66.

The 2019 SNPR updated fatal and nonfatal incident reports associated with the use of an inclined sleep product. At the time of the 2019 SNPR, CPSC was aware of 451 incidents (59 fatal and 392 nonfatal) related to inclined sleep products that occurred from January 1, 2005 through June 30, 2019, and reported between October 1, 2016 and June 30, 2019. This count included incidents reported after the reporting end date stated in the 2017 NPR. Forty-three percent of the incident reports (196 out of 451) were based solely on information from manufacturers/retailers. Various sources, such as hotlines, internet reports, newspaper clippings, medical examiners, and other state/local authorities provided the remaining incident reports to CPSC. 84 FR at 60952–53. Tab A of the October 16, 2019 Staff SNPR Briefing Package describes the incident data and the hazard patterns associated with infant inclined sleep products at the time of the SNPR.

For the final rule, the Directorate for Epidemiology staff, Tab B of Staff’s Final Rule Briefing Package, describes 71 new incident reports associated with inclined sleep products since the 2019 SNPR. Of the 71 new reported incidents, 10 are fatalities; among the remaining 61 nonfatal incidents, 17 reported an injury. Reporting is ongoing, and therefore, the number of reported fatalities, nonfatal injuries, and non-

injury incidents may change in the future.

(a) Fatalities

Since the 2019 SNPR, the Commission is aware of 10 fatalities associated with the use of an inclined sleep product that reportedly occurred during the period from January 1, 2019 through December 31, 2020.

- Three of the 10 fatal reports describe infants placed supine (on their back) in a rocker-like sleeper product, but who ended up rolling over, fully or partially, resulting in suffocations or positional asphyxiations. Staff does not know whether a restraint was used in any of these cases. All three decedents were 3- or 4-month-old infants.

- One report describes a fatality involving a foam-type reclined infant seat. The seat was placed on an adult bed, where the parents were also asleep. The seat was found tipped over on the floor, with the 4-month-old decedent found underneath the seat.

- One incident reports a fatality of a 3-month-old infant, found supine in an infant rocker-like product (in the same position as originally placed) with a blanket covering the infant’s face.

- Five remaining fatality reports provide very little information on the incidents. Lack of any information on the circumstances leading up to the death does not allow CPSC staff to classify these deaths. Of the known ages, the decedents ranged in age from 1 to 6 months old.

(b) Nonfatal Incidents

Since the 2019 SNPR, the Commission has received reports of 61 nonfatal incidents associated with the use of an inclined sleep product that occurred between January 1, 2019 and December 31, 2020. Among these 61 reports, 17 reports involved an injury. We describe the severity of the 17 injuries below:

- Four infants required hospital admission. Three of the hospitalizations were for respiratory problems due to mold on the sleep product, and one was for treatment of injuries from a fall when an accessory-type product collapsed.

- Three infants were treated and released from emergency departments. Those infants were treated for respiratory problems from exposure to mold or for fall injuries.

- Ten infants required other medical care, mostly for *plagiocephaly* (flat head syndrome), *torticollis* (twisted neck syndrome), or both conditions, which were associated with prolonged use of inclined sleep products; two of the 10

¹² A public comment estimated 2018 sales from two of the three U.S. baby box companies at more than 10,000.

¹³ Similar programs now offer free cribs or play yards.

infants suffered minor bumps/bruises due to falls or near falls.

The remaining 44 incidents reported no injuries, or provided no information about any injury. However, many of the descriptions indicated the potential for a serious injury, or even death. Thirty-four percent of the incidents involved infants 0 to 5 months of age, and 9 percent involved infants 6 months to 12 months of age. CPSC does not know the infant's age in 58 percent of the incidents.

2. Hazard Patterns

The 2017 NPR identified nine hazard patterns among the 657 reported incidents associated with inclined sleep products. These hazard patterns included: Design issues, lack of structural integrity, inadequate restraints, electrical issues, non-product-related or unknown issues, difficulty with correct positioning, miscellaneous product-related issues, unspecified falls, and consumer comments. 82 FR at 16965–66.

For the 2019 SNPR, CPSC staff considered all 451 reported incidents (59 fatal and 392 nonfatal) to identify hazard patterns associated with inclined sleep products; and staff described the variety of sleep products considered, such as: Hammocks, which are suspended in air, seat-like products meant to be placed on a floor level (yet incident reports indicate these products often were not placed on floor level), and products that sit on top of larger nursery products as attachments. CPSC staff identified eight hazard patterns among 451 reported incidents in the 2019 SNPR, which differed, depending on which product was involved, and how the product was being used: Design issues, electrical issues, consumer comments, undetermined issues (due to confounding information), structural integrity issues, other product-related issues, infant placement issues, and insufficient information. Staff's identified hazard pattern categories were very similar between the 2017 NPR and the 2019 SNPR. 84 FR at 60952–53.

For the final rule, staff again reports that the staff-identified hazard

categories for inclined sleep products are very similar to those identified in the 2019 SNPR. Following a CPSC-issued safety recall on inclined sleep products in April 2019, staff observed a surge of reports related to the recall; these reports are combined with other consumer comments in the hazard categories. Staff identified the following hazard patterns among the 71 reported incidents (10 fatal and 61 nonfatal) associated with the use of infant inclined sleep products. The categories are presented in descending order of frequency:

(a) *Consumer comments*: Thirty-one of the 71 reported incidents (44 percent) fall into this category. The reports consist of consumer comments/observations of perceived safety hazards, complaints about unauthorized sale of infant inclined sleep products, or inquiries regarding the April 2019 safety recall on inclined sleep products. Although one complaint describes a minor injury incident, none of the remaining reports indicate that an incident actually occurred.

(b) *Design* of the inclined sleep product: Twenty-four of the 71 reported incidents (34 percent) fall into this category.

(i) Ten incidents report that infants rolled over—fully or partially—from their original supine (on their back) position. Although a few of the infants were strapped into the product, for others, whether a restraint was used is unreported. Reports describe infants as young as 1 month of age rolling over. Some parents/caregivers, who witnessed and reported some of the nonfatal incidents, were able to rescue distressed infants quickly; some of the other infants died due to suffocation or asphyxiation.

(ii) One infant stopped breathing temporarily, due to difficulty positioning his head correctly.

(iii) Eight incidents report that infants developed physical deformations, such as *plagiocephaly* (flat head syndrome) and/or *torticollis* (twisted neck syndrome), from extended product use.

(iv) According to five reported incidents, infants developed respiratory

ailments due to the growth of mold on the product.

The design category includes three deaths, three hospitalizations, one ED visit, and eight non-hospitalized, non-ED injuries.

(c) *Other product-related* issues: Four of the 71 incidents (6 percent) report other product-related issues, such as instability (posed by products that have completely or nearly flipped over) or lock/latch problem (*i.e.*, the sleep surface failed to remain in position during use). One of the three instability incidents was a fatality that occurred when a foam-type reclined seat tipped over and fell from the adult bed to the floor, trapping the decedent underneath. No injury is reported in this category.

(d) *Lack of structural integrity*: Three of the 71 incidents (4 percent) report components breaking, such as the rail, hardware, or other unspecified part. This category includes one hospitalization and one non-ED-treated injury due to a fall.

(e) *Electrical* issue: One of the 71 incidents (1 percent) describes an odor emanating from the product after a short period of use indicative of overheating; further investigation revealed molten plastic inside. No injury is reported.

(f) *Non-product-related* issues: One of the 71 incidents (1 percent) reports a fatality in an unsafe sleep environment. A 3-month-old was placed supine (on their back) in an infant rocker-like product with a blanket covering the face; the decedent was found in the same position, with the blanket still covering the face.

(g) *Insufficient information*: Seven of the 71 incident reports (10 percent) contain insufficient information for staff to categorize them accurately. For five deaths, staff has no information on the circumstances of the deaths. Reports for two injuries in this category describe unspecified falls treated in hospital EDs, with no information on restraint usage.

Table 1 presents the distribution of the 71 reported incidents by hazard patterns and severity of incidents.

TABLE 1—HAZARD PATTERNS AND INCIDENT SEVERITY ASSOCIATED WITH INFANT INCLINED PRODUCTS 2019–2020 INCIDENTS

[Reported since 2019 SNPR]

Issues	Total incidents		Deaths		Injuries	
	Count	Percentage	Count	Percentage	Count	Percentage
Product-Related	63	89	4	40	15	88
<i>Comments/Concerns</i>	31	44	.....	.....	1	6
<i>Design</i>	24	34	3	30	12	71
<i>Other Product-Related</i>	4	6	1	10	.....	.....
<i>Structural Integrity</i>	3	4	.....	.....	2	12

TABLE 1—HAZARD PATTERNS AND INCIDENT SEVERITY ASSOCIATED WITH INFANT INCLINED PRODUCTS 2019–2020
INCIDENTS—Continued
[Reported since 2019 SNPR]

Issues	Total incidents		Deaths		Injuries	
	Count	Percentage	Count	Percentage	Count	Percentage
<i>Electrical</i>	1	1	.....	.....	.....	.....
Non-Product-Related	1	1	1	10	.....	.....
<i>Unsafe Sleep Environment</i>	1	1	1	10	.....	.....
Insufficient Information	7	10	5	50	2	12
Total	71	100	10	100	17	100

Source: CPSC epidemiological databases CPSRMS and NEISS. Percentages may not add to sub-totals and totals due to rounding.

B. Flat Sleep Products

In response to the 2019 SNPR, the Commission received public comments regarding the safety of non-inclined sleep products, or flat sleep products, that do not fall within an existing CPSC sleep standard or a voluntary standard that are available in the marketplace. Staff completed a review of CPSC's epidemiological databases, CPSRMS and NEISS, to respond to these comments and concerns.

Flat sleep products include: In-bed sleepers, baskets (that can function as hand-held carriers as well), baby boxes, compact bassinets (most of which are portable for travel), and baby tents. Based on the descriptions in the incident reports received, some have soft, puffy sides along the sleep area perimeter; others have semi-rigid sides, with mesh or soft-padded sidewalls held in place by tubular structures along the perimeter. Baby boxes have cardboard walls, while baby tents have flexible wires which provide structural support for fabric/mesh tent walls. All

of these non-inclined sleep products are flat and come with mattress pads. Some products have short legs; many can sit on the floor or can be used on a bed or a couch. The data show that some products were placed inside a standard-sized crib, play yard, or bassinet.

For the final rule, we characterize the number of deaths and injuries and the types of hazards related to flat sleep products. CPSC's characterizations are based on anecdotal incident reports received by the Commission. The number of emergency department (ED)-treated injuries associated with flat sleep products, for the covered time frame, is insufficient to derive any reportable national estimates.¹⁴ Accordingly, we do not present injury estimates here, but include ED-treated injuries in the total count of reported incidents. Moreover, reporting is ongoing and staff considers 2019–2020 data incomplete, so the number of reported fatalities, nonfatal injuries, and non-injury incidents reported here may change in the future.¹⁵

1. Incident Data

CPSC staff received a total of 183 incident reports related to flat sleep products available in the marketplace. These incidents reported a date of occurrence between January 1, 2019 and December 31, 2020. Manufacturer and retailer reports submitted through CPSC's "Retailer Reporting Program" serve as the *only* source of information for 73 percent (133 out of 183) of the incidents. Of the 183 reported incidents, 11 are fatalities. Among the remaining 172 nonfatal incidents, 16 reported an injury. Additionally, staff's flat sleep product data search was limited to children age 12 months or under, because that is typically the manufacturer-recommended use age for these products. One hundred and fifteen incident reports provided the victim's age; among them, 24 involved a fatality or injury. Table 2 provides the age breakdown among the 183 incident reports.

TABLE 2—AGE DISTRIBUTION IN FLAT SLEEP PRODUCTS-RELATED INCIDENTS IN 2019–2020

Age of child	All incidents		Injuries and fatalities	
	Frequency	Percentage	Frequency	Percentage
Unreported *	68	37	3	11
One–Five Months	89	49	19	70
Six–Eight Months	18	10	4	15
Nine–Twelve Months	8	4	1	4
Total	183	100	27	100

Source: CPSC epidemiological databases CPSRMS and NEISS.

* Age may be "unreported" under two circumstances: age was unknown, or age was not reported, because the incident involved no injury.

(a) Fatalities

The Commission is aware of 11 fatalities associated with the use of a flat sleep product, meaning flat sleep

surface products marketed for infant sleep that are not currently within the scope of an existing CPSC sleep standard or a voluntary standard,

reported to have occurred during the period of January 1, 2019 through December 31, 2020. Seven of the 11

¹⁴ According to the NEISS publication criteria, an estimate must be 1,200 or greater, the sample size must be 20 or greater, and the coefficient of variation must be 33 percent or smaller.

¹⁵ In the reports received by CPSC, consumers referred to flat sleep products as "cribs," "bassinets," "cosleepers," "cribettes," "nests," "pads," or "positioners." Because of the variety of terms used by consumers to describe these

products—often unfamiliar to CPSC staff—staff's data search for this analysis was challenging, and staff believes it is possible that some relevant reports may have been missed.

fatality reports describe a suffocation death, as follows:

- A 1-month-old was found partially rolled over onto their side in a soft-sided compact bassinet/travel bed.
- A 2-month-old infant was found completely rolled over the edge of an in-bed sleeper.
- A 2-month-old was placed in an in-bed sleeper, in a prone position, stomach down, with his face turned to one side; he was discovered with part of his body outside the sleeper, face down into a blanket.
- A 2-month-old infant was put into a compact bassinet/travel bed placed on top of an adult bed, with one side of the compact bassinet/travel bed leaning against the wall. According to the official report, the combination of the travel bed's non-reinforced flexible bottom, along with the soft surface of the adult bed, allowed the infant to sink; he was found trapped between the bed and the wall.
- A 3-month-old, in a handheld basket that was placed on an adult bed, was found completely rolled over from her original supine position.
- A 4-month-old was placed on his back in an in-bed sleeper that was placed inside a standard bassinet; the infant was discovered in a prone position deceased.
- A 7-month-old was wrapped in a blanket and placed supine in an in-bed sleeper. The infant was found deceased, having rolled over into a prone position. The remaining four fatalities are as follows:
- A 1-month-old was placed in an in-bed sleeper inside a play yard. The official reports describe the decedent as having suffocated on the puffy sides of the sleeper or becoming entrapped somehow, suffering positional asphyxia.
- A 7-month-old was placed in an in-bed sleeper for a nap. According to official reports, at some point, the infant got to the edge of the adult bed and became entrapped between the footboard and the mattress of the adult bed and died of positional asphyxia.
- Official reports deemed the cause and manner of death for two additional fatalities as undetermined. Both decedents were 1-month-olds, one placed in a basket, while the other was in an in-bed sleeper.

(b) Nonfatalities

From among the 172 nonfatal reports, CPSC identified 16 injury reports associated with the use of flat sleep products that occurred between January 1, 2019 and December 31, 2020. We describe the severity of the injury type among the 16 injuries below:

- Two infants required hospital admission. An 8-day-old infant suffered unspecified breathing difficulties; another 2-month-old infant fell out of an in-bed sleeper and suffered head injuries when a sibling jumped onto the couch where the in-bed sleeper was situated.
- Ten infants, ranging in age from 1 month to 9 months, required emergency department (ED) visits after falling out of the sleeper product. For most cases, the sequence of events leading to each fall was unreported. In two cases, the infant fell while being transported in the sleeper; and in another case, the sleeper slipped off of the adult bed on which it was placed. The injuries included head injuries, such as a skull fracture, closed-head injury, and head contusion, or other injuries, such as face abrasion and knee contusion.
- Four other injury incidents reported an allergic reaction; a mold-related breathing difficulty episode; laceration of the nose on the rough mesh wall surface on the sleeper; and a fall when a sibling pulled on the sleeper, causing it to flip over. One of these infants required repeated visits to a medical professional, but the level of care the other infants received was unspecified. The remaining 156 incidents reported no injuries, or provided no information about any injury. However, many of the descriptions were similar to incidents in which a serious injury or death occurred. Therefore, CPSC staff indicated the potential for a serious injury or even death. Forty-nine percent of the incidents involved infants 0 to 5 months of age, and 4 percent involved infants 6 to 12 months of age. The age was unknown in 37 percent of the incidents.

2. Hazard Patterns

Similar to the inclined sleep products, the hazard patterns reported for the flat sleep products varied according to the type and usage pattern of the product. Many of the products are new in the marketplace, and consumers and safety advocates expressed concern about their safety. Staff identified the hazard patterns among the 183 reported incidents (11 fatal and 172 nonfatal) associated with the use of these flat sleep products. We present the staff-identified hazard patterns below in descending order of frequency among the reports.

(a) *Lock/Latch problems*: One hundred and fifteen of the 183 reports (63 percent) fall in this category. All but one of these reports pertain to different models of a particular stand-alone compact bassinet. The locking/latching mechanism that controls the opening/

closing of the cover on the product failed. Some reports describe that the inability of the cover to open completely results in the product not lying flat. The single report about a different product describes a foldable sleeper not remaining flat; the unit reportedly folds up while the baby is in the product. None of the reports mention any injuries.

(b) *Comments/Concerns*: Twenty-nine of the 183 reports (16 percent) expressed consumers' or safety advocates' concerns about the perceived safety hazard of a product, non-compliance with the relevant standard(s) for which a product is being labeled, and/or misleading marketing statements about a product. None of the reports indicate that an incident actually occurred.

(c) *Falls/Containment issues*: Twelve of the 183 incidents (7 percent) report an infant falling out of the product or an infant not being kept contained within the product. Examples include infants rolling out of a sleeper onto an adult bed and then onto floor; an infant falling out of a sleeper when a sibling jumped onto the couch containing the sleeper; an infant crawling/rolling (unwitnessed) out of a sleeper and getting entrapped between an adult bed frame and mattress. This category includes one death, one hospital admission, and nine ED visits.

(d) *Instability issues*: Twelve of the 183 reported incidents (7 percent) describe problems with the product not remaining stable. The incident reports describe some products with legs lifting up higher or leaning on one side; other products have slipped off or flipped over from the adult beds/couches on which they were resting. This category includes two reported injuries, one involving an ED visit.

(e) *Asphyxiation/Suffocation hazard*: Nine of the 183 incidents (5 percent) fall into this category. The products were compact bassinets/travel beds, baskets, as well as in-bed sleepers, one being used inside a standard bassinet and another, inside a play yard. All but one of the infants had rolled over from their initial position—either fully or partially; positional information is not available for one infant. Eight of the incidents were fatalities due to suffocation or positional asphyxia; one was a near-suffocation episode, with a parent nearby to rescue the infant.

(f) *Miscellaneous product-related issues*: Three of the 183 incident reports (2 percent) are about mold or quality of the product material. Two of the three products were in-bed sleepers, and the third was a compact bassinet/travel bed. All three report an injury.

(g) *Undetermined issues*: In three of the 183 incident reports (2 percent), staff could not definitively identify the issue involved. Two of the incidents were fatalities; in both cases, CPSC Field investigation reports indicate that the cause of death is undetermined. The third incident resulted in a hospitalization due to unspecified breathing difficulties suffered by the infant.

C. Safety Alerts, Press Releases, and Product Recalls

The Commission issued two safety alerts involving infant inclined sleep products. A May 31, 2018 safety alert¹⁶ advised of infant rollover deaths in inclined sleep products, and reminded caregivers to always use restraints and to stop using the product as soon as an infant can roll over. An April 5, 2019 safety alert¹⁷ advised consumers to stop using the inclined sleep product when an infant reaches 3 months of age, or as soon as an infant exhibits rollover capabilities. Since issuing the 2019 SNPR, the Commission issued two press releases regarding infant inclined sleep products. A January 16, 2020 press release warned the public about the risk of suffocation associated with the Summer Infant SwaddleMe By Your Bed Sleeper, an infant inclined sleeper. The release advised consumers to stop using the product immediately.¹⁸ An October 31, 2020 press release warned consumers that infant inclined sleep products were not safe for infant sleep based on the results of the Mannen Study, and advised caregivers to stop using infant sleep products with an inclined seat back of more than 10 degrees.¹⁹

The Commission also conducted numerous recalls involving infant

inclined sleep products. The 2019 SNPR stated that from May 10, 2000 to August 20, 2019, CPSC conducted 13 consumer-level recalls involving infant inclined sleep products. 84 FR at 60953–54. CPSC conducted recalls in response to hazards involving strangulation, suffocation, falls, structural stability, entrapment, exposure to mold, and death. Six recalls involved infant hammocks, six recalls involved infant inclined sleep products, and one recall involved an infant inclined sleep accessory included with a play yard. *Id.* Tab G in the October 2019 Staff SNPR Briefing Package contains a detailed chart outlining recalls involving infant inclined sleep products up through August 20, 2019.

Since the issuance of the 2019 SNPR, CPSC conducted six additional recalls for a suffocation hazard involving infant inclined sleep products. These six recalls affected approximately 268,300 units. Tab F of Staff's Final Rule Briefing Package contains a chart outlining these recalls. CPSC did not conduct any recalls for flat sleep products from August 2019 through January 2021.

IV. Overview of CPSC Sleep Standards

The final rule would require that any “infant sleep product,” defined as a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months old, and that is not already subject to one of CPSC’s mandatory standards for infant sleep, must meet the requirements of the mandatory standard for bassinets and cradles, 16 CFR part 1218, *Safety Standard for Bassinets and Cradles*, including conforming to the definition of a “bassinet/cradle.” Currently, the five mandatory CPSC sleep standards are:²⁰

- 16 CFR part 1218—*Safety Standard for Bassinets and Cradles*
- 16 CFR part 1219—*Safety Standard for Full-Size Baby Cribs*
- 16 CFR part 1220—*Safety Standards for Non-Full-Size Baby Cribs*
- 16 CFR part 1221—*Safety Standards for Play Yards*, and

- 16 CFR part 1222—*Safety Standard for Bedside Sleepers*.

The Commission considers products that fall within the scope of a CPSC sleep standard to generally follow safe sleep principles. Additionally, caregivers can expect that regulated products intended for infant sleep are tested for compliance to the applicable standard, as well as to any other applicable CPSC rule, such as lead in paint and lead content. Pursuant to section 14 of the CPSA, products within the scope of a children’s product safety rule, which includes all of CPSC’s sleep standards, must be tested for compliance to the standard by a CPSC-accepted third party laboratory, and such compliance must be certified by the manufacturer or importer of the product. Staff regularly participates in ASTM subcommittees for these products, and routinely updates incident data associated with regulated products, to address identified hazards through the ASTM process. If a voluntary standard that has been adopted by the Commission is revised to address identified hazards, section 104(b)(4)(B) of the CPSIA provides an update process, whereby the revised voluntary standard becomes the new mandatory standard.²¹ Additionally, section 104(b)(2) of the CPSIA requires the Commission to periodically review and revise rules issued under section 104, to ensure that such rules provide the highest level of safety for such products that is feasible. Table 3 summarizes CPSC sleep standards applicable to regulated infant sleep products.

¹⁶ <https://www.cpsc.gov/content/cpsc-consumer-alert-caregivers-urged-to-use-restraints-with-inclined-sleep-products>.

¹⁷ <https://www.cpsc.gov/Newsroom/News-Releases/2019/CPSC-ALERT-CPSC-and-Fisher-Price-Warn-Consumers-About-Fisher-Price-Rock-N-Play-Due-to-Reports-of-Death-When-Infants-Roll-Over-in-the-Product>.

¹⁸ <https://www.cpsc.gov/Newsroom/News-Releases/2020/CPSC-Warns-Consumers-to-Stop-Using-Summer-Infant-USA-Inc-s-SwaddleMe-By-Your-Bed-Sleeper>.

¹⁹ <https://www.cpsc.gov/Newsroom/News-Releases/2020/CPSC-Cautions-Consumers-Not-to-Use-Inclined-Infant-Sleep-Products>.

²⁰ Tab E of Staff’s Final Rule Briefing Package contains a description of each CPSC sleep standard and the associated voluntary standard the rule is based upon.

²¹ Under section 104(b)(4)(B) of the CPSIA, the organization must notify the Commission of a revised voluntary standard, and the revised standard becomes a consumer product safety standard issued by the Commission unless within 90 days after notification, the Commission determines that the revised standard does not improve the safety of the consumer product covered by the standard, and the Commission is retaining the existing consumer product safety standard. The revised voluntary standard will become the mandatory standard, effective 180 days after the Commission received notification of the revision (or a later date specified by the Commission in the *Federal Register*). 15 U.S.C. 2056a(b)(4)(B).

TABLE 3—REGULATED INFANT SLEEP PRODUCTS AND APPLICABLE STANDARDS

Product	Voluntary standard	Mandatory standard
Bassinet/Cradle	ASTM F2194–16 ²²	16 CFR 1218.
Full-Size Crib	ASTM F1169–19	16 CFR 1219.
Non-Full-Size Crib	ASTM F406–19	16 CFR 1220.
Play Yard	ASTM F406–19	16 CFR 1221.
Bedside Sleeper	ASTM F2906–13	16 CFR 1222.

Some products currently marketed or intended for infant sleep are not regulated by one of the five existing CPSC sleep standards. Additionally, new products continue to enter the market for infant sleep, but some are also not within the scope of an existing CPSC sleep standard. Such products may not follow safe sleep principles, and are not tested for compliance to a CPSC sleep standard. These unregulated sleep products collectively include products such as: Infant inclined sleep products, in-bed sleepers, baby boxes, compact/travel bassinets without handles or handholds, and infant travel tents. Hand-held bassinet/cradles are regulated as part of 16 CFR part 1225, *Safety Standard for Hand-Held Infant Carriers*, but part 1225 does not address hazards associated with infant sleep. Accordingly, hand-held carriers are unregulated if marketed or intended for infant sleep.

The final rule seeks to address hazards associated with infant sleep products, both inclined and flat. Products that already meet a CPSC sleep standard are, by definition, outside the scope of the rule. The final rule addresses hazards associated with infant sleep products by requiring them to meet the requirements of the bassinet and cradle standard, 16 CFR part 1218, including conforming to the definition of a “bassinet/cradle.”

V. Voluntary Standards Overview—ASTM F3118 and ASTM F2194

A. Infant Inclined Sleep Products—ASTM F3118

1. History

As a result of incidents associated with the use of inclined sleep products, the Commission directed CPSC staff to work with ASTM to develop voluntary

requirements to address the hazard patterns related to the use of inclined sleep products. ASTM first approved ASTM F3118 on April 1, 2015, and published it in May 2015. Through the ASTM process, CPSC staff consulted with manufacturers, retailers, trade organizations, laboratories, consumer advocacy groups, consultants, and members of the public. The current standard, ASTM F3118–17a, was approved on September 1, 2017, and published in October 2017. This is the fourth revision of the standard since it was first published in May 2015. ASTM F3118–17a states that it is intended to address hazards from falls, positional asphyxiation, and obstruction of nose and mouth by bedding.

2. Description

The 2017 NPR described the key provisions of ASTM F3118–17, including: Scope, terminology, general requirements, performance requirements, test methods, marking and labeling, and instructional literature. 82 FR at 16967. The 2019 SNPR proposed to incorporate by reference the most recent version of the voluntary standard, ASTM F3118–17a, which is substantially the same as ASTM F3118–17, except that the “accessory” definition was updated to match the modification recommended in the 2017 NPR. Like the previous version, ASTM F3118–17a describes the scope of the voluntary standard, defines terms for various types of infant inclined sleep products, and sets out requirements for performance (such as for structural integrity and stability) and for warnings and instructions. As discussed elsewhere in this preamble, CPSC’s final rule makes substantial modifications to ASTM F3118–17a.

3. CPSC Staff’s Work Within the ASTM Process

CPSC staff’s work on the infant inclined sleep product voluntary standard arose from staff’s work through the ASTM process on the voluntary standard for bassinets and cradles in approximately 2011, in preparation for a proposed rule on bassinets and cradles. ASTM began developing the infant inclined sleep products voluntary

standard to address hammocks and inclined sleep products, whose product characteristics at that time did not appear to align with bassinets, because the bassinets standard requires a sleep surface of 10 degrees or less, while the inclined product category at that time included products with an incline of 10 to 30 degrees. Staff has been actively participating in the development of the voluntary standard for inclined sleep products since then.

CPSC staff participated in the ASTM process by attending meetings,²³ working on task groups, commenting on ballots,²⁴ and providing incident data. CPSC staff provided incident data and hazard pattern analysis associated with inclined sleep products for the 2017 NPR and the 2019 SNPR, and updated this information in this final rule preamble. Additionally, staff last provided ASTM with incident data associated with inclined sleep products in May 2018.

Since the SNPR published on November 12, 2019, ASTM has not updated ASTM F3118–17a to address hazards associated with inclined products. Staff’s SNPR Briefing Package was posted on the Commission’s website on October 16, 2019, before ASTM held fall meetings on voluntary standards for juvenile products, and before the Commission voted on the SNPR, so that ASTM members and other stakeholders could review the package, including the Mannen Study, before the ASTM meetings, and so that staff could discuss the package and the Mannen Study with ASTM members. The ASTM Agenda for Infant Inclined Sleep Products meeting that occurred on October 21, 2019, included a link to Staff’s SNPR Briefing Package. CPSC staff discussed the 2019 SNPR Briefing

²² CPSC’s mandatory standard, 16 CFR part 1218, *Safety Standard for Bassinets and Cradles*, incorporates by reference ASTM F2194–13, *Standard Consumer Safety Specification for Bassinets and Cradles*, with modifications to make the standard more stringent. In 2016, ASTM revised the voluntary standard to include the modifications set forth in the mandatory standard. Accordingly, ASTM F2194–16²² is substantially similar to the mandatory standard, and we assess this version of the voluntary standard in this preamble, to simplify our analysis.

²³ Meeting logs detailing CPSC’s work with ASTM on the infant inclined sleep product voluntary standard can be found here: https://www.cpsc.gov/Newsroom/FOIA/ReportList?field_nfr_date_value%5Bvalue%5D%5Bmonth%5D=&field_nfr_date_value_1%5Bvalue%5D%5Byear%5D=&field_nfr_type_value=meeting&title=incline&=Apply.

²⁴ CPSC staff’s correspondence with ASTM since issuing the 2017 NPR regarding these products can be found on www.regulations.gov under supporting materials: <https://www.regulations.gov/docket/CPSC-2017-0020/document?documentTypes=Supporting%20%26%20Related%20Material>.

Package at the ASTM meetings in October 2019, including the ASTM subcommittees for infant inclined sleep products, in-bed sleepers, and bassinets, discussing the Mannen Study findings, as well as addressing the fact that flat sleep products were covered by the SNPR. Dr. Mannen attended the subcommittee meeting for infant inclined sleep products via telephone, to discuss the Mannen Study and to answer questions.

After the SNPR published in the **Federal Register** on November 12, 2019, CPSC staff urged the ASTM subcommittee for ASTM F3118 to meet and discuss how to address issues presented in the 2019 SNPR. However, the F3118 subcommittee did not meet again until August 26, 2020, following a July 16, 2020 letter from CPSC staff.²⁵ After staff's letter, the ASTM F3118 subcommittee established a task group to revise the infant inclined sleep standard's title, introduction, and scope, to be more in line with the proposal in the 2019 SNPR. In December 2020, the ASTM subcommittee introduced ballot F15–18 (20–1) to change the standard's title, introduction, and scope to include all infant sleep products (and not just inclined sleep products). The ballot sought to:

- Remove the word “inclined” throughout the standard.
- Include in the scope, products intended for infants up to 12 months old.
- Include in the scope, products marketed or intended to provide sleeping accommodations.
- Change the scope to include all infant sleep products that do not fall within the scope of an existing infant sleep product standard:
 - Full-Sized Cribs (F1169)
 - Bassinets (F2194)
 - Bedside Sleepers (F2906)
 - Non-Full-Size Cribs/Play Yards (F406)
- Exempt crib mattresses from the scope of the standard.
- Limit the sleep surface in all positions to be 10 degrees or less.

However, in January 2021, the ballot did not pass due to six negative votes. The negative votes objected to a variety of different aspects of the ballot, including four broad categories:

1. That the proposal would discourage innovation and be too broad;
2. That the ballot appeared to allow products that fall under other sleep standards to opt to meet ASTM F3118 instead;

3. That the voter could not support changing the title, introduction, and scope without seeing the underlying requirements; and

4. Editorial comments.

The ASTM F3118 subcommittee discussed the ballot results at a meeting on January 27, 2021. During this meeting, ASTM members disagreed on the intent and consequences of changes to the voluntary standard, and the meeting ended without a consensus on a path forward. However, CPSC staff participates on an ASTM task group to review safe sleep requirements across infant sleep product standards (the comparison task group), and reports that this task group has met at least four times since the January 27, 2021 meeting. Based on the ballot results and the discussions in these ASTM meetings, staff advises that it is unlikely that ASTM will be able to move forward with changes to ASTM F3118 that address safe sleep requirements in the near term.²⁶

Recently, on April 22, 2021, at an ASTM task group meeting on the title, introduction, and scope of the voluntary standard, task group members discussed balloting the proposed regulatory text in the 2019 SNPR for the voluntary standard, to prevent the sale of infant inclined sleep products that purport to certify to ASTM F3118–17a, meaning products with an incline above 10 degrees, while ASTM works to revise the voluntary standard to be more in line with the 2019 SNPR. However, the task group does not plan to ballot the 2019 SNPR requirement that infant sleep products meet the requirements of the bassinet standard, because ASTM is working to create minimum safe sleep requirements in a revised ASTM F3118 standard. Staff is participating in this effort as well, but staff has advised the task group that staff's expertise does not suggest that requirements that are different and less stringent than the requirements in the bassinet standard will adequately address the risk of injury associated with infant sleep products. Additionally, staff's conclusion that the Safety Standard for Bassinets and Cradles contains the

minimum safe sleep requirements for these products is supported by the assessment presented in Staff's Final Rule Briefing Package and in this final rule.

B. Bassinets and Cradles—ASTM F3194

1. History and Description

The voluntary standard for bassinets and cradles, ASTM F2194, was first approved and published by ASTM in 2002, as ASTM 2194, *Standard Consumer Safety Specification for Bassinets and Cradles*. The voluntary standard was revised several times between 2002 and CPSC's promulgation of a mandatory standard for bassinets in 2013. CPSC's mandatory standard for bassinets and cradles, codified at 16 CFR part 1218, incorporates by reference ASTM F2194–13, with the following modifications to the voluntary standard:

1. Clarify the scope of the standard to include multi-mode products in which a mode meets the definition of a “bassinet/cradle” (seat incline is 10 degrees or less from horizontal)

2. Modify the stability test procedure to require the use of a newborn CAMI dummy, rather than an infant CAMI dummy.

3. Add stability requirements for removable bassinet beds.

4. Add more stringent mattress flatness performance requirements to limit measured angle to 10 degrees (versus 14 degrees allowed in ASTM F2194–13).

5. Exempt bassinets that are less than 15 inches across from the mattress flatness requirement.

In 2016, ASTM approved and published the most recent version of the standard, ASTM F2194–16e1, with new requirements to bring the voluntary ASTM standard in line with the mandatory standard for bassinets in 16 CFR part 1218. In developing ASTM F2194–16e1, ASTM harmonized the voluntary standard with all modifications specified in part 1218. In addition to including all modifications contained in part 1218, ASTM added:

1. Additional clarification that strollers with a removable bassinet must be tested to the bassinet standard,

2. Minor formatting and editorial changes, and

3. An additional warning statement to be applied to bassinet bed products that are removable from the base/stand without the use of tools and that contain a lock/latch mechanism that secures the bassinet bed to the base/stand.

Staff assessed the additional changes to the voluntary standard, beyond harmonization with 16 CFR part 1218,

²⁵ Available at: <https://www.cpsc.gov/s3fs-public/IISPLettertoASTM-07162020.pdf?6ntZUkyau.r2mIrlQnM31s0B3g1EkUg.9>.

²⁶ The ASTM task group approach is different than CPSC's approach in this final rule, because ASTM is attempting to put safe sleep requirements in ASTM F3118, rather than rely on the performance and labeling requirements in the bassinets and cradles standard. The Commission determines in this final rule that the performance and labeling requirements in the bassinet standard are the minimum safe sleep requirements for infant sleep products. Thus, it remains unclear whether ASTM's approach can be successful. However, if the ASTM committee revises ASTM F3118–17a and notifies the Commission, the staff will evaluate the revised voluntary standard at that time.

and advises that the changes are either non-substantive, or an improvement in safety. We evaluate and discuss ASTM F2194–16e1 in this preamble to the final rule, and CPSC will update the reference in part 1218 to ASTM F2194–16e1 as soon as feasible.

The more significant requirements of ASTM F2194 include:

- Scope—describes the types of products intended to be covered under the standard.
- Spacing of rigid-side components—is intended to prevent child entrapment between both uniformly and non-uniformly spaced components, such as slats.
- Openings for mesh/fabric—is intended to prevent the entrapment of children's fingers and toes, as well as button ensnarement.
- Static load test—is intended to ensure structural integrity even when a child three times the recommended (or 95th percentile) weight uses the product.
- Stability requirements—is intended to ensure that the product does not tip over when pulled on by a 2-year-old male.
- Sleeping pad thickness and dimensions—is intended to minimize gaps and the possibility of suffocation due to excessive padding.
- Tests of locking and latching mechanisms—is intended to prevent unintentional folding while in use.
- Suffocation warning label—is intended to help prevent soft bedding incidents.
- Fabric-sided openings test—is intended to prevent entrapments.
- Rock/swing angle requirement—is intended to address suffocation hazards that can occur when latch/lock problems and excessive rocking or swinging angles press children into the side of the bassinet/cradle.
- Occupant restraints—is intended to prevent incidents where unused restraints have entrapped and strangled children.
- Side height requirement—is intended to prevent falls.
- Segmented mattress flatness—is intended to address suffocation hazards associated with “V” shapes that can be created by the segmented mattress folds.

The voluntary standard also includes: (1) Torque and tension tests to prevent components from being removed; (2) requirements for several bassinet/cradle features to prevent entrapment and cuts (minimum and maximum opening size, small parts, hazardous sharp edges or points, and edges that can scissor, shear, or pinch); (3) requirements for the permanency and adhesion of labels; (4) requirements for instructional literature;

and (5) corner post extension requirements intended to prevent pacifier cords, ribbons, necklaces, or clothing that a child may be wearing from catching on a projection. 78 FR 63019, 63020–21 (Oct. 23, 2013).

2. CPSC Staff's Work Within the ASTM Process

CPSC has been working with ASTM on the voluntary standard for bassinets and cradles since before publication of the original voluntary standard in 2002. CPSC began rulemaking under section 104 of the CPSIA, to create a mandatory standard for bassinet and cradles based on the voluntary standard, in approximately 2009, following passage of the CPSIA. CPSC issued a notice of proposed rulemaking in 2010 (75 FR 22303 (Apr. 28, 2010)), a supplemental notice of proposed rulemaking in 2012 (77 FR 64055 (Oct. 18, 2012)), and a final rule in 2013 (78 FR 63019 (Oct. 28, 2013)). The final rule is codified at 16 CFR part 1218, Safety Standard for Bassinets and Cradles. The final rule incorporated by reference the then-current voluntary standard, ASTM F2194–13, with modifications to make the standard more stringent.

CPSC staff has continually participated in the ASTM process, including attending subcommittee meetings,²⁷ participating in task groups,²⁷ commenting and voting on ballots to revise the voluntary standard,²⁸ and providing incident data, when requested. This has included ASTM's recent efforts to address hazards associated with currently unregulated flat sleep products, such as compact bassinets, baby boxes, and in-bed sleepers, since approximately 2015. ASTM has not yet been successful in adding any of these flat sleep products to the bassinet standard.

CPSC staff's correspondence with ASTM states that staff is opposed to removing or reducing the requirements of the bassinet and cradle voluntary standard to create new requirements specifically for these products, when such requirements are inconsistent with safe sleep principles already required in the bassinet standard. Accordingly, for example, in a December 12, 2019 letter to both the inclined sleep and bassinet

subcommittees, CPSC staff reiterated concerns with weakening the safe sleep requirements in the voluntary standard for bassinets and cradles in order to accommodate unregulated products, such as in-bed sleepers, compact bassinets, and baby boxes.²⁹ Additionally, on October 16, 2020, staff voted negatively on an ASTM ballot to modify the bassinet standard to include less stringent stability and side height requirements for compact bassinets, versus traditional bassinets.³⁰ To ensure safe sleep, staff's negative ballot vote urged ASTM to maintain the same side height and stability requirements for compact bassinets that are required of bassinets.

In June 2019, ASTM began to develop a separate in-bed sleeper voluntary standard. Staff provided data to ASTM regarding in-bed sleepers in 2017, and has participated in ASTM meetings for in-bed sleepers since June 2019, as well as working with performance and labeling task groups.³¹ Task groups working on the in-bed sleeper standard have been unable to reach consensus on performance requirements for in-bed sleepers, and have been focusing on developing warning labels for these products. CPSC staff continues to participate in all of these ASTM efforts, and to urge ASTM members to retain safe sleep principles in standards development. For example, in a July 8, 2020 letter to the Subcommittee Chairman for ASTM's in-bed sleeper committee, CPSC staff stated:

We would like to be clear that based on our evaluation of incident data related to in-bed sleepers, we have great concerns regarding the safety of in-bed sleepers and the feasibility of developing any safety standard that fully addresses potential hazards. Based on the 12 deaths discussed with the In-bed Sleeper Data Task Group members, CPSC staff cannot foresee how these products can be designed and regulated to ensure safe use for infants. Staff is not confident that an in-bed sleeper voluntary standard that differs

²⁹ Available at: https://www.cpsc.gov/s3fs-public/LetterToASTMBassinet_IISP_121219.pdf?uMq_ImMYhtDmFkoDH9l6vdmNl0hsm00.

³⁰ Available at: https://www.cpsc.gov/s3fs-public/VoteCommentToASTMBassinet_10162020.pdf?NbTgq8p5FBj12mr1AQeG0weJUDh_6ZL. CPSC's website, at <https://www.cpsc.gov/Regulations-Laws-Standards/Voluntary-Standards>, contains information on staff activities as well as correspondence with voluntary standards organizations.

³¹ Meeting logs describing ASTM meetings are available on CPSC's website: https://www.cpsc.gov/Newsroom/FOIA/ReportList?field_nfr_date_value%5Bvalue%5D%5Bmonth%5D=&field_nfr_date_value_1%5Bvalue%5D%5Byear%5D=&field_nfr_type_value=meeting&title=in-bed&=Apply.

²⁷ CPSC meeting logs associated with staff's work with ASTM can be found here: https://www.cpsc.gov/Newsroom/FOIA/ReportList?field_nfr_date_value%5Bvalue%5D%5Bmonth%5D=&field_nfr_date_value_1%5Bvalue%5D%5Byear%5D=&field_nfr_type_value=meeting&title=bassinet&=Apply.

²⁸ CPSC correspondence with the ASTM Subcommittee for Bassinets and Cradles can be found here: https://cpsc.gov/s3fs-public/VoteCommentToASTMBassinet_10162020.pdf?NbTgq8p5FBj12mr1AQeG0weJUDh_6ZL.

from the current bassinet standard will result in a safe sleep product.³²

VI. Assessment of the Voluntary Standards To Address Identified Hazard Patterns Associated With Infant Sleep Products

A. Inclined Sleep Products

The 2019 SNPR assessed the adequacy of ASTM F3118–17a to address the risk of injury associated with inclined sleep products. 84 FR 60955–56. The assessment relied, in part, on the Mannen Study regarding the safety of inclined sleep surfaces for infant sleep, attached as Tab B to Staff's SNPR Briefing Package, and also summarized in the 2019 SNPR. *Id.* at 60954. Based on the Mannen Study, CPSC staff advised that a flat sleep surface, meaning one that does not exceed 10 degrees from the horizontal, is the safest sleep surface for infants. *Id.* Accordingly, the Commission proposed in the 2019 SNPR to remove the term “inclined” in CPSC’s mandatory standard, and to require that all sleep products not otherwise subject to a CPSC sleep standard (full-size cribs, non-full-size cribs, play yards, bedside sleepers, and bassinets and cradles), meet the requirements of 16 CFR part 1218, Safety Standard for Bassinets and Cradles, which, among other requirements, mandates a seat back/sleep surface angle intended for sleep to be 10 degrees or less from horizontal. *Id.*

Here, we summarize the results of the Mannen Study again, summarize the assessment of ASTM F3118–17a in the 2019 SNPR, and update our assessment to determine whether the voluntary standards, ASTM F3118–17a, or ASTM F2194–16e1, are adequate to address the incidents associated with inclined sleep products, including the 71 new incidents reported since the 2019 SNPR.

Based on the following analysis, the Commission determines that ASTM F3118–17a is inadequate to address the risk of injury associated with inclined sleep products, and that more stringent requirements are necessary in the final rule to further reduce the risk of injury associated with infant inclined sleep products. Specifically, the Commission determines that the performance requirements in the mandatory standard, 16 CFR part 1218, Safety Standard for Bassinets and Cradles, would adequately address the risk of injury associated with these products.

1. Mannen Study Summary

During the development of the 2019 SNPR, staff reviewed 450 incidents, 59 were deaths that occurred while in infant inclined sleep products. Commission staff contracted with Dr. Erin Mannen, Ph.D., a mechanical engineer with a biomechanics specialization, to conduct infant testing to evaluate the design of inclined sleep products. The Mannen Study examined how the degree of a seatback angle affects an infant’s ability to move within the products and whether those designs directly impact safety or present a risk factor that could contribute to the suffocation of an infant. The testing compared infants’ muscle movement and oxygen saturation on a flat crib mattress at 0 degrees, 10 degrees, and 20 degrees, versus seven different inclined sleep products. The Mannen Study concluded that none of the inclined sleep products tested were safe for infant sleep. *Id.*

The Mannen Study concluded that muscle activity for infants who rolled over in inclined sleep products with a 20-degree incline sleep surface was significantly different than in products with a zero-degree incline surface. The increased demand on the abdominal muscles could lead to increased fatigue and suffocation if an infant is unable to reposition themselves after rolling from a supine to prone position. The Mannen Study also concluded that inclined sleep products with a 10-degree or less sleep surface incline do not significantly impact infant motion or muscle activity. Based on the Mannen Study, staff recommended that 10 degrees is the maximum sleep surface angle that should be allowed for any product intended for infant sleep, similar to the requirements found in the EN 1130:2019 *children’s cribs*, EN 1466:2014 *carry cots*, and the AS/NZS 4385:96 *infant rocking cradles* international standards. *Id.*

2. Hazard Pattern Categories

In the 2019 SNPR, CPSC reviewed 451 reported incidents involving inclined sleep products, which included 59 fatalities and 96 injuries. CPSC identified seven hazards that involved deaths and injuries (for this analysis, we did not consider patterns, such as consumer comments, that did not involve injuries or deaths):

- *Design issues* (31 percent). This hazard involved 19 deaths, 17 resulting from infants rolling over into a prone (face down) position. An additional 71 injuries were reported in this category, including five hospitalizations and four emergency department visits. Thirty-

three percent of the reported incidents involved infants rolling from their original supine (on their back) position.

- *Electrical issues* (28 percent). This hazard involved no deaths and two reports of injuries.

- *Undetermined* (8 percent). This hazard involved 28 deaths and six injuries. Among the 28 deaths, staff was unable to determine the product’s role, but often unsafe sleep environment was cited as a co-contributing condition to sudden infant death syndrome (SIDS).

- *Structural Integrity* (6 percent). This hazard involved no deaths and two injuries.

- *Insufficient information* (4 percent). This hazard involved eight deaths and six injuries. The reports did not provide information on the circumstances of deaths and injuries involved unspecified falls.

- *Other Product-Related Issues* (3 percent). This hazard involved no deaths and nine injuries. The category includes reports of instability (product tipping over) and inadequacy of restraints, and most of the injuries involved falls.

- *Infant placement issues* (1 percent). This hazard involved four deaths and no injuries. Three of the four deaths involved infants placed in a prone position.

Id. at 60952–53.

Since the 2019 SNPR, CPSC received a total of 71 new incident reports related to inclined sleep products. While the distribution of the data in this update varies somewhat, staff advises that the broader hazard categories are very similar. The 71 new reports included 10 fatalities and 17 injuries. Of the 10 fatalities, three deaths involved an infant who rolled from a supine position, one death involved an overturned sleeper, one death involved an infant placed with a blanket, and five deaths without reports containing information on the circumstances of the death. Of the 17 injuries 12 involved design issues, two involved structural integrity, and two involved unspecified falls.

3. Assessment of ASTM Standards in Addressing Hazards

Below we summarize the hazard patterns associated with deaths and injuries from all 522 incident reports related to inclined sleep products CPSC received and reviewed since the 2017 NPR. CPSC did not consider patterns, such as consumer comments, that did not involve injuries or deaths. The 522 incidents involved 69 deaths and 113 injuries. We assesses the adequacy of the voluntary standard for infant

³² See July 8, 2020 Letter from C. Kish to ASTM Subcommittee for In-bed Sleepers, available at: https://www.cpsc.gov/s3fs-public/InbedSleepers_07082020ASTM%20Letter.pdf?3SpzS3Gc3zvPjCLFamCz.9FxNjpUu2s.

inclined sleep products (ASTM F3118) and the adequacy of the voluntary standard for bassinets (ASTM F2194) in addressing hazards associated with injuries and deaths.

In the 2019 SNPR, CPSC determined that the voluntary standard for infant inclined sleep products, ASTM F3118–17a, is inadequate to address the risk of injury associated with the incline of sleep products, because the standard allows for products with a seatback angle greater than 10 degrees. *Id.* at 60955–56. The majority of deaths (in which the circumstances were known) were due to suffocation after the infant rolled over in the product, and the same hazard pattern was reported in nonfatal incidents. For the mandatory standard, CPSC proposed to modify ASTM F3118–17a to limit the seatback angle for all infant sleep products to 10 degrees or less, and to replace the performance requirements with the performance requirements in 16 CFR part 1218, Safety Standard for Bassinets and Cradles, which incorporates by reference ASTM F2194–13 *Standard Consumer Safety Specification for Bassinets and Cradles*, with modifications. With the modifications in the mandatory standard, the standard is substantially similar to ASTM F2194–16e1, which we use for the assessment here.

(a) Hazard: Design Issues

When combining the data from the 2019 SNPR with new incident data received since the SNPR, the “design issues” hazard is associated with 22 deaths and 83 injuries. At least 20 deaths involved infants rolling into a prone position (face down) and suffocating. More than one-third of the incidents also reported that infants rolled over—fully or partially—from their original supine (on their back) position.

In the 2019 SNPR, we concluded that a flat sleeping surface that does not exceed 10 degrees from horizontal offers infants the safest sleep environment. This conclusion was based on findings from the Mannen Study. 84 FR at 60955–56. Although some comments to the 2019 SNPR stated that more testing should be done to determine if the maximum angle for safe sleep may be between 10 degrees to 20 degrees, the Mannen Study suggested if future work were done on safe sleep angles, one area of study would be additional biomechanical testing to determine “which, if any, angles between 10- and 20-degrees may be safe for infant sleep.”

The Mannen Study recommendations do not imply that an incline angle between 10 and 20 degrees may be safe

for infant sleep, merely that if higher angles are considered, additional biomechanical testing is required. The Mannen Study also stated that its testing of awake infants was a limitation because “while the muscle use and motion may be similar, it is likely that infants who find themselves in a compromised position in an inclined sleep product during a nap or overnight sleep may not have enough energy or alertness to achieve self-correction and may succumb to suffocation earlier or more easily than infants who are fully awake.”

Given the vulnerability of newborn infants and infant fatalities who were most likely asleep at the time of incidents in inclined products, we conclude that additional research of inclines above 10 degrees is unnecessary for the final rule. Based on the biomechanical results of the Mannen Study, and its conclusion that 10 degrees is likely a safe incline for infant sleep, which supports the 10 degrees stated in the scope of ASTM F2194–16e1, the Commission concludes that 10 degrees is the maximum sleep surface angle that should be allowed for any product intended for infant sleep for young infants up to 5 months old. Additionally, other research³³ has demonstrated a discernable difference in infant ability between 5, 7, and 10 degrees in a side-to-side tilt, which formed the basis of the 7-degree maximum sleep surface angle in Health Canada’s regulations. Staff advises that additional research at angles higher than 10 degrees is unlikely to alter their assessment that 10 degrees is the maximum safe incline for infant sleep.

The current voluntary standard for infant inclined sleep products, ASTM F3118–17a, defines an “inclined sleep product,” in part, as having a seatback angle greater than 10 degrees and not exceeding 30 degrees. Based on the Mannen Study and the other factors discussed above, we conclude that ASTM F3118–17a does not adequately address the risk of injury related to a sleep surface incline greater than 10 degrees, because the voluntary standard does not limit the sleep surface to a safe incline angle. In comparison, the voluntary standard for bassinets, ASTM F2194–16e1, defines a sleep surface as being less than or equal to 10 degrees, and includes performance requirements for mattress flatness that limit measured

angles to 10 degrees or less.³⁴ Therefore, for the mandatory standard specified in this final rule, with respect to sleep surfaces, all infant sleep products, including inclined sleep products, must meet the more stringent sleep surface angle requirement of the voluntary standard for bassinets, ASTM F2194–16e1, as codified in 16 CFR part 1218, to further reduce the risk of death from suffocation.

(b) Hazard: Undetermined Product Issue

This hazard category is associated with 28 deaths and six injuries. Among the 28 deaths and six injuries, staff was unable to determine the product’s role. Without information on the product’s role in deaths or injuries, we are unable to assess whether the voluntary standard for infant inclined sleep, ASTM F3118–17a, or the voluntary standard for bassinets, ASTM F2194–16e1, would adequately address the hazards in this category.

(c) Hazard: Insufficient Information

This hazard category is associated with 13 deaths and eight injuries. The reports did not provide information on the circumstances of deaths and injury reports involving unspecified falls. Without information on the circumstances of deaths or injuries, staff is unable to assess if the voluntary standard for infant inclined sleep, ASTM F3118–17a, or the voluntary standard for bassinets, ASTM F2194–16e1, would adequately address the hazards in this category. Falls are discussed in more detail in “Other Product-Related Issues,” below.

(d) Hazard: Infant Placement

This hazard category is associated with five deaths and no injuries. Three of the deaths involved infants placed in a prone position, and one death involved an infant placed in a supine position with a blanket covering the face. Based on the Mannen study, sleep surfaces with a 20-degree incline significantly increased the demand on abdominal muscles and could lead to increased fatigue and suffocation if an infant is unable to reposition themselves after rolling from a supine to prone position. In three of the deaths in this hazard category, the infant was placed in the prone position and the inclined sleep surface may have contributed to suffocation if the angle of the sleep surface led to fatigue that prevented the infant from rolling to a supine position.

³³ Beal SM, Moore L, Collett M, Montgomery B, Sprod C, Beal A. The danger of freely rocking cradles. *J Paediatr Child Health*. 1995 Feb;31(1):38–40. doi: 10.1111/j.1440-1754.1995.tb02910.x. PMID: 7748688.

³⁴ In the final rule for bassinets, the Commission stated they intended to limit the scope of the bassinet standard to exclude all inclined products “when the incline is more than 10 degrees from horizontal.” 78 FR 63,021.

While infants can die in flat products when placed to sleep in the prone position, based on the Mannen Study, an inclined surface could further contribute to deaths in the prone position. A sleep surface limited to a 10-degree or less incline, as required in the bassinet standard (ASTM F2194–16e1), could reduce the risk of injury associated with the prone position, when compared to an inclined sleep product. Therefore, with respect to sleep surfaces, for the mandatory rule, all infant sleep products, including inclined sleep products, must meet the more stringent sleep surface angle requirement of the voluntary standard for bassinets, ASTM F2194–16e1, as set forth in 16 CFR part 1218, to further reduce the risk of death from suffocation.

(e) Hazard: Other Product-Related Issues (Instability, Restraints, etc.)

This hazard category includes reports of instability (product tipping over) and containment; the category is associated with one death and nine injuries. One death occurred when a foam-type reclined product tipped over and fell from the adult bed to the floor, trapping the infant underneath. Most of the injuries involved falls and at least 10 reports (with no injury reported) related to nearly or completely flipped over products.

The death, and most likely the injuries, relate to the stability of the product and how easy it is to tip the product over into a hazardous situation. The voluntary standard for infant inclined sleep products, ASTM F3118–17a, includes two stability performance requirements that apply to “Compact Inclined Sleep Products” and “Infant or Newborn Inclined Sleep Products.” For the “Compact Inclined Sleep Products,” the product must remain upright when placed on a 20-degree inclined test platform. For the “Infant or Newborn Inclined Sleep Products,” a 23-lb. vertical force and 5-lb. horizontal force are applied to the product’s side with a newborn CAMI dummy occupant to simulate an older sibling pulling up on the side to view the infant in the bassinet, and the product must remain upright containing the CAMI dummy. The “Compact Inclined Sleep Products” are exempt from the 23- and 5-pound force requirements, with the rationale that the compact products are intended to sit on a floor and are unlikely to have an older sibling attempt to pull up to see the infant inside.

The current voluntary standard for bassinets, ASTM F2194–16e1, includes an identical stability requirement that applies a 23-lb. vertical force and a 5-

lb. horizontal force to the product with a newborn CAMI dummy occupant, and this requirement applies to all products; it does not provide exemptions for “Compact Inclined Sleep Products” to meet only the less stringent 20-degree inclined test platform test. The rationale in ASTM F2194 states the dual application of forces simulates a 2-year-old male pulling on the side of the product; staff advises that sibling interaction is a reasonable scenario which may cause the product to tip over. Due to the portability of some of the unregulated compact sleep products, incident data confirm that the products are used on raised surfaces from which infants and product may fall. Therefore, regarding the product’s stability, in the final rule, all infant sleep products, including inclined products, must meet the more stringent stability requirement of the voluntary standard for bassinets, ASTM F2194–16e1, as codified in 16 CFR part 1218, to further reduce the risk of injury from tip over of the product.

(f) Hazard: Structural Integrity

This hazard category includes reports of some component failures on the product such as buckles/straps, hardware coming loose, hub/rail/leg coming loose, or other unspecified components breaking. This hazard category involved no deaths and four injuries. All injuries were related to falls, and include one hospitalization and three emergency department visits.

The voluntary standard for infant inclined sleep products, ASTM F3118–17a, includes performance requirements to assess the integrity of inclined sleep products. The requirements specify a dynamic test in which an 18-lb. load, consisting of a 6- to 8-inch steel shot bag, is dropped 50 times from a height of 1.0 inch onto the seat surface. The requirements also specify a static test in which a 50-lb. load or three times the product’s maximum recommended weight, whichever is greater, is gradually applied through a 6-inch square wooden block to the seat surface for 60 seconds. The current voluntary standard for bassinets, ASTM F2194–16e1, has a performance requirement to address structural integrity that specifies a static load test that applies a 54-lb. load or three times the manufacturer’s recommended weight, whichever is greater, through a 6-inch aluminum block to the sleep surface for 60 seconds. The rationale in ASTM F2194 states 54 lbs. is three times the weight of the 95th percentile of a 3- to 5-month-old infant.

Although the voluntary standard for infant inclined sleep products, ASTM F3118–17a, requires a dynamic test for

structural integrity, its effectiveness in evaluating the product’s strength is minimal, compared to the static test. The load in the dynamic test being one-third of the static load, the low drop height, short test timeframe, and presence of energy-absorbing material (shot bag and flexible product material), combine to minimize the effect of this test on the product’s structural integrity. In contrast, the static test applies a much larger load, three times the heaviest infant in the product, with a rigid applicator applied continuously for 60 seconds. Therefore, staff advises that the static test is the more stringent evaluator of product integrity than the dynamic test.

The static load in ASTM F2194–16e1 is 54 lbs., which is a more stringent load compared to the static load of 50 lbs. in ASTM F3118–17a. Therefore, to further reduce the risk of injury associated with structural defects, for the final rule, the Commission concludes that the static load test in ASTM F2194 is adequate to assess structural integrity of infant sleep products, and is more stringent than the static load test in ASTM F3118–17a. The final rule requires that all infant sleep products, including inclined sleep products, meet the more stringent structural integrity requirement of the voluntary standard for bassinets, ASTM F2194–16e1, as codified in 16 CFR part 1218.

(g) Hazard: Electrical Issues

This hazard category involved no deaths and two reports of injuries related to electric shock. Non-injury incidents reported overheating/melting of components and issues with batteries. As noted in the 2019 SNPR, the infant inclined sleep products standard, ASTM F3118–17a, does not include any performance requirements for electrical components. 84 FR at 60956. The voluntary standard for bassinets, ASTM F2194–16e1, also does not address electrical hazards. However, CPSC staff advises that they raised this issue with ASTM, and that the ASTM Ad Hoc task group is developing performance requirements to address electrical hazards across juvenile products. As these electrical requirements are added during the ASTM voluntary standard updates, CPSC can review the updated voluntary standard pursuant to the update provision in Public Law 112–28, and determine whether to revise the mandatory standard based on a revised voluntary standard.

4. Assessment of International Standards

(a) EN1466:2014 Carry Cots

The BS EN 1466:2014 *Child use and care articles—Carry cots and stands—Safety requirements and test methods* European standard applies to products intended for carrying a child in a lying position using a handle or stand. This standard applies to children who cannot sit unaided or roll over or push up on their hands and knees and is a maximum weight of 19.84 pounds.

i. Side Height

For cots on a stand, EN 1466:2014 standard requires an internal height of at least 7.87 inches (200 mm) from the top of a mattress, compressed by a 19.84-pound (9kg) steel plate, to the lowest point of the upper edge of the sides. For carry cots not on a stand, the standard requires an internal height 5.9 inches (150mm) to 7.09 inches (180mm), depending on the length of the cot, using the same test method. This requirement measures the internal side height when an occupant of the maximum weight compresses the mattress. This standard has a side height requirement similar to the ASTM F2194–16e1 *bassinet* standard, which requires a minimum side height of 7.5 inches from an uncompressed mattress. For bassinets on a stand, if the mattress compresses more than $\frac{3}{8}$ of an inch, ASTM F2194–16e1 requires a higher side. For bassinets not on a stand, ASTM F2194–16e1 has a higher side height of 7.5 inches from an uncompressed mattress, compared to the EN 1466:2014 requirement, which is 7.09 inches from a compressed mattress. Additionally, ASTM F2194–16e1 requires a consistent side height no matter the configuration.

ii. Sleep Surface Angle

The EN 1466:2014 standard requires a maximum sleep surface angle of 10 degrees. This requirement is similar to the ASTM F2194–16e1 *bassinet* standard, which requires a maximum sleep surface angle of 10 degrees.

iii. Latching Requirements

The EN 1466:2014 standard requires products with a folding stand mechanism not to collapse after the latch is operated (closed and opened) 300 times, and after a 44.96 pound-force (200N) is applied in the area of the stand most likely to cause the product to fold. The EN 1466:2014 standard's latching requirement only simulates the action of unintentionally folding the stand without the carry cot or box assembled on the stand. In contrast, the

ASTM F2194–16e1 *bassinet* standard tests both the stand and the bassinet as a fully assembled product.

The ASTM F2194–16e1 *bassinet* standard requires products without a latching or locking device not to fold when a 20 pound-force is applied to the top edge of the bassinet in the direction most likely to cause it to fold. The ASTM F2194–16e1 *bassinet* standard requires a lower force than the EN standard, but the force is applied at a higher location (top side of the bassinet) than the EN standard (force applied to the stand). The higher location of the force can create a higher torque at the latch due to the longer lever arm. For bassinets with a locking hinge or latch, the locking mechanism must withstand a 10-pound force in the direction most likely to release it. Determining which latching requirement is more stringent is difficult because the test parameters are not directly comparable. Staff assesses that testing the product fully assembled, as required by ASTM, is a better test because it simulates realistic use of the product.

The ASTM standard also includes a *Removable Bassinet Bed Attachment to Base/Stand* requirement and testing to address latching and locking devices intended to secure removable bassinet beds to the base/stand. These requirements and test are unique because they address known incidents of false latching of a removable bassinet bed. By considering the latching, unintentional folding, and bassinet bed attachments to the stand requirements in total, staff assesses that the ASTM F2194–16e1 *bassinet* standard's latching requirements are adequate.

iv. Stability Requirements

The EN1466:2014 standard requires products with an occupant test mass of 15.43 pounds not to tip over when placed on a 20-degree surface. EN1466:2014 rationalizes this test by stating: "Carry cots shall be designed so that they do not tip over when they are placed on slightly sloping ground or when the child leans against one side of the carry cot." This is different compared to the ASTM F2194–16e1 *bassinet* standard that requires the product (with simulated newborn occupant) to withstand a 23-lb. vertical force and 5-lb. horizontal force along its side, without tipping. The rationale in ASTM F2194 states the dual application of forces simulates a 2-year-old male pulling on the side of the product; staff advises that this is a reasonable scenario in which the product may tip over. Determining which stability requirement is more stringent is difficult, because both standards' torque

arms depend upon the product's geometry. Using a 10-inch wide by 10-inch tall sidewall box on a 10-inch stand as a reference product for comparison, staff determined the reference product would fail the ASTM F2194 *bassinet* standard's test and pass the EN 1466 standard's test. Therefore, staff assesses that the ASTM 2194–16e1 *bassinet* standard's stability requirement is more stringent for this reference product.

v. EN1466:2014 Summary

The EN 1466:2014 carry cots standard has a side height and sleep surface angle requirement similar to ASTM F2194–16e1's *bassinet* standard. However, the ASTM F2194–16e1 standard has a potentially more stringent stability requirement.

(b) EN 1130:2019 Children's Cribs and Cradles

The European Standard, EN 1130–1: 2019 "Furniture—Cribs and Cradles for Domestic Use" has several requirements not found in ASTM F2194–16e1. Most of these additional requirements address hazards associated with cribs intended for use with older children (in excess of the 5-month recommended maximum age for bassinets); and thus, these requirements are not applicable to bassinets.

i. Side Height

The EN 1130:2019 standard requires a side height of at least 7.87 inches (200 mm) when a 19.84-pound (9kg) steel plate is placed on the compressed mattress. This measures the crib's internal side height with a 19.84-pound occupant is compressing the mattress. This standard has a side height requirement similar to the ASTM F2194–16e1 *bassinet* standard, which requires a minimum side height of 7.5 inches from an uncompressed mattress. If the mattress compresses more than $\frac{3}{8}$ of an inch, ASTM F2194–16e1 requires a higher side.

ii. Sleep Surface Angle

The EN 1130:2019 standard requires a maximum sleep surface angle of 10 degrees. This standard has a sleep surface angle requirement similar to the ASTM F2194–16e1 *bassinet* standard, which requires a maximum sleep surface angle of 10 degrees.

iii. Latching Requirements

The EN 1130:2019 standard requires folding products to contain a dual-action locking mechanism, and to unlock with a tool, and to fold only when the crib is lifted, or not collapse after the latch is operated (closed and

opened) 300 times, and at least an 11.24-pound force (50N) is required to unlock it. The EN 1130:2019 standard's latching requirement only simulates the action of unintentionally folding the product's folding or adjustable legs, while the ASTM F2194–16e1 *bassinet* standard tests both the standard and the bassinet as a fully assembled product.

The ASTM F2194–16e1 *bassinet* standard requires products without a locking mechanism to withstand a 20-pound force applied to the top edge of the bassinet in the direction most likely to cause it to fold. For products with a locking hinge or latch, the locking mechanism must withstand a 10-pound force in the direction most likely to release it. Staff's assessment is that testing the product fully assembled, as required by ASTM, is a better test because it simulates realistic use of the product.

The ASTM standard also includes a *Removable Bassinet Bed Attachment to Base/Stand* requirement and testing to address latching and locking devices intended to secure removable bassinet beds to the base/stand. These requirements and the test are unique because they address known incidents of false latching of a removable bassinet bed. By considering the latching, unintentional folding, and bassinet bed attachments to the stand requirements in total, staff assesses that the ASTM F2194–16e1 *bassinet* standard's latching requirements are adequate.

iv. Stability Requirements

The EN1330:2019 standard requires products not to tip over when a 19.87-pound weight is placed on one side of the crib, while on the opposite side's top rail, a 6.74 pound-force is horizontally applied towards the weight. This test is similar to the ASTM F2194–16e1 *bassinet* standard with reasonably similar forces. EN1330:2019 rationalizes the test, stating the product "should remain stable when the child moves in the crib or when the crib swings along the amplitude permitted by the suspension device." ASTM F2194–16e1 is based on U.S. incident data of a 2-year-old sibling pulling over a bassinet, which is a more severe condition than an infant moving within the product. Therefore, staff concludes the ASTM F2194–16e1 *bassinet* standard's stability requirements are adequate.

v. EN 1130:2019 Summary

The EN 1130:2019 children's cribs and cradle standard has side height, sleep surface angle, and stability requirements similar to the ASTM F2194–16e1 *bassinet* standard; however,

the ASTM F2194–16e1 standard has a more extensive and stringent latching requirement.

(c) AS/NZS 4385:1996 Infant's Rocking Cradles

The Australian/New Zealand standard (AS/NZS 4385:1996) contains requirements for rocking and swinging angles used to develop some of the ASTM F2194–12 requirements. The ASTM rock/swing rest angle performance requirement is more stringent because the occupant surrogate, a CAMI dummy, is placed against the sidewall, resulting in higher rest angles.

i. Side Height

The AS/NZS 4385:1996 standard requires a minimum side height of 11.81 inches (300 mm) between the top of the mattress support to the top edge of the lowest rocking cradle's side. The maximum mattress thickness the AS/NZS standard permits is 2.95 inches (75mm). Therefore, the minimum side height between the top of the mattress and the top edge of the lowest side is 8.85 inches. This is similar to the ASTM F2194–16e1 *bassinet* standard, which requires a minimum side height of 7.5 inches between the top of the mattress and the top of the lowest sidewall.

ii. Sleep Surface Angle

The AS/NZS 4385:1996 standard requires the mattress angle on rocking cradles without a self-leveling device not to exceed 5 degrees and 10 degrees on rocking cradles with a self-leveling device. This is similar to the ASTM F2194–16e1 *bassinet* standard, which requires a maximum sleep surface angle of 10 degrees.

iii. Latching Requirements

The AS/NZS 4385:1996 standard does not contain any latching requirements to address the unintentional folding hazard. The ASTM F2194–16e1 *bassinet* standard is more stringent because it requires products without a locking mechanism to withstand a 20-pound force without folding, or a 10-pound force for hinges with locking mechanisms. The ASTM F2194–16e1 also addresses the false latching of a removable bassinet bed with requirements including an automatic locking latch or a false latch indicator.

iv. Stability Requirements

The AS/NZS 4385:1996 standard requires a product not to tip over when a 19.84-pound (9 kg) weight is on the mattress and a 4.49-pound force (20N) is applied horizontally to the uppermost rail. This test is similar to the ASTM

F2194–16e1 *bassinet* standard, which requires the product (with simulated newborn occupant) to withstand a 23-pound vertical force and 5-lb. horizontal force along its side, without tipping. The rationale in ASTM F2194 states the dual application of forces simulates a 2-year-old male pulling on the side of the product; staff concludes that this is a reasonable scenario in which the product may tip over.

v. AS/NZS 4385:1996 Summary

The AS/NZS 4385:1996 infant's rocking cradle standard has a side height, sleep surface angle, and stability requirement similar to the ASTM F2194–16e1 *bassinet* standard. However, the ASTM F2194–16e1 *bassinet* standard has a more stringent latching requirement.

(d) Canadian Standard (SOR/2016–152) Cribs, Cradles, and Bassinets

The Canadian standard (SOR/2016–152) includes requirements for cribs, cradles, and bassinets. Staff focused their analysis on the requirements for "bassinets," which are defined as providing sleeping accommodations for a child with sides to confine the child, and a sleep surface area less than or equal to 4000 cm² (620 in²).

i. Side Height

The Canadian standard requires a minimum side height of 230 mm (9.05 inches), measured from the mattress support. Because ASTM F2194–16e1 allows a bassinet mattress of 1.5 inches, measuring from the upper surface of the mattress support to the upper surface of the side would be 1.5 inches greater than measuring from the upper surface of an uncompressed mattress. Therefore, staff advises that the 7.5-inch side height, from the upper surface of an uncompressed mattress, is functionally equivalent to the 9-inch side height, measured from the upper surface of the mattress support in the Canadian standard.

ii. Sleep Surface Angle

The Canadian standard requires the sleep surface angle not to exceed 7 degrees, which is based on a 1995 study that demonstrated a discernable difference in infant ability between 5, 7, and 10 degrees in a side-to-side tilt. Staff advises they understand that Health Canada selected 7 degrees and applied it to all sides of the product, regardless of head-to-toe or side-to-side tilt. The ASTM F2194–16e1 *bassinets* standard allows for a side-to-side resting angle of 7 degrees for rocking cradles, and limits head-to-toe angle to 10 degrees. As discussed in section

VI.A.3(a) of this preamble, based on the Mannen Study and other factors, the Commission concludes that a flat sleeping surface that does not exceed 10 degrees from horizontal offers infants the safest sleep environment.

iii. Latching Requirements

The Canadian standard requires folding products to contain an auto-locking mechanism that requires a dual-simultaneous action to disengage and that does not fold when a 52.91-pound (24kg) load is applied on any area most likely to damage the mattress support. While the Canadian standard requires an auto-locking mechanism that requires a dual-simultaneous action to disengage, it also tests the latching strength by loading the mattress support. The ASTM F2194–16 ϵ 1 *bassinet* standard requires that products without a latching or locking device not fold when a 20-pound force is applied to the top edge of the bassinet in the direction most likely to cause it to fold. The ASTM F2194–16 ϵ 1 *bassinet* standard requires a lower force than the Canadian standard, but the force is applied at a higher location (top side of the bassinet) than the Canadian standard (force applied to the mattress support). The higher location of the force could create a greater torque at the latch, due to the longer lever arm. For bassinets with a locking hinge or latch, the locking mechanism must withstand a 10-pound force in the direction most likely to release it. Determining which latching requirement is more stringent is difficult because the test parameters are not directly comparable.

The ASTM standard also includes a *Removable Bassinet Bed Attachment to Base/Stand* requirement and testing to address latching and locking devices intended to secure removable bassinet beds to the base/stand. These requirements and test are unique because they address known incidents of false latching of a removable bassinet bed. By considering the latching, unintentional folding, and bassinet bed attachments to the stand requirements in total, staff assesses that the ASTM F2194–16 ϵ 1 *bassinet* standard's latching requirements are adequate.

iv. Stability Requirements

The Canadian requirement in Schedule 11, Test for Stability of Cradles, Bassinets, and Stands, of their regulation is substantially equivalent to the requirement in ASTM F2194–16 ϵ 1. The requirement specifies that the product (with a simulated newborn occupant) must withstand a 10-kg (approximately 22 pounds) static vertical load over a period of 5 seconds

and a 22 N (approximately 4.9 pounds) horizontal force, without tipping. Staff advises that this test evaluates the same stability hazard and is substantially equivalent to the ASTM F2194–16 ϵ 1 *bassinet* standard, differing slightly due to conversions to metric.

v. SOR/2016–152 Summary

The Canadian standard has a side height and stability requirement similar to the ASTM F2194–16 ϵ 1 *bassinet* standard. While the Canadian standard has a more stringent sleep surface angle requirement, the ASTM F2194–16 ϵ 1 *bassinet* standard has a more extensive latching requirement. Staff concludes that the requirements in the ASTM standard are adequate to address the risk of injury demonstrated in the incident data.

B. Flat Sleep Products³⁵

CPSC received public comments on the 2019 SNPR regarding the safety of currently unregulated flat infant sleep products available in the marketplace. In response, for the final rule CPSC staff completed a review of CPSC's epidemiological databases, CP SRMS and NEISS. CPSC received a total of 183 incident reports from January 1, 2019 through December 30, 2020, related to flat sleep products available in the marketplace that are currently not under the purview of any mandatory or voluntary standard that addresses sleep hazards. These flat sleep products include: In-bed sleepers, baskets (that can function as hand-held carriers as well), baby boxes, compact bassinets, most of which are portable for travel, and travel tents. All of these unregulated sleep products are flat (sleep surface has no incline) and most come with mattress pads (with the exception of some baby travel tents).

Based on the following analysis, the Commission determines that the performance and labeling requirements of the voluntary standard for bassinets and cradles, ASTM F2194–16 ϵ 1, as codified in 16 CFR part 1218, Safety Standard for Bassinets and Cradles, are adequate to address the risk of injury associated with flat infant sleep products, and furthermore, finds that requiring flat products to conform to these requirements would also further reduce the risk of injury associated with flat sleep products.

1. Hazard Pattern Categories

Of the 183 reported incidents, 11 are fatalities; among the remaining 172

nonfatal incidents, 16 reported an injury. Seven of the 11 fatalities involved suffocation. We identified six hazards related to the risk of injury or death (we did not consider patterns that did not relate to injuries or deaths, such as consumer comments). The hazard patterns identified among the 183 incidents are: Lock/latch problems, falls/containment issues, instability, asphyxiation/suffocation, product-related issues, and undetermined causes.

Engineering staff analyzed whether the voluntary standard for bassinets, ASTM F2194–16 ϵ 1, would address the identified hazards for flat sleep products. The voluntary standard for bassinets, ASTM F2194–16 ϵ 1, is more applicable to these flat products than ASTM F3118–17a, because these products have a sleep surface less than 10 degrees, and because, as set forth below, the standard addresses the identified hazards associated with these products. The current voluntary standard for infant inclined sleep products, ASTM F3118–17a, is not applicable to these flat sleep surface products, and it does not address hazards associated with flat sleep surfaces.

In the 2019 SNPR, the Commission proposed expanding the scope of ASTM F3118–17a for the mandatory rule, to include all infant sleep products (inclined and flat) that are not covered by another CPSC sleep standard, including the bassinets, cribs (full-size and non-full size), play yards, or bedside sleepers standards. The 2019 SNPR proposed to require that all products marketed or intended for infant sleep have a seatback angle of 10 degrees or less, and meet 16 CFR part 1218, Safety Standard for Bassinets and Cradles, which includes the performance requirements of ASTM F2194–16 ϵ 1 *bassinets*. The following are the identified hazards for flat sleep products are discussed below.

(a) Hazard: Lock/Latch Issue

One hundred fifteen of the 183 incidents, and no deaths, were related to latches that control the opening/closing of the cover on the product failed. Although these latch incidents did not relate to a product folding or collapsing, they illustrate, nevertheless, that these products have latch failures. From analyses on other products, staff is aware that failure of a product's latch can cause the product to fold or collapse unintentionally and pose a suffocation hazard to the infant. The ASTM F2194–16 ϵ 1 *bassinets* standard addresses hazards posed by a lock/latch failure with an unintentional folding

³⁵ Tab C of Staff's Final Rule Briefing Package contains CPSC staff's assessment of the adequacy of ASTM F2194–16 ϵ 1 to address incidents associated with flat sleep products.

requirement. The requirement specifies that if a folding product does not have a latching or locking device, then it shall not fold when a 20-lb. force is applied in the direction most likely to fold the product (with simulated infant occupant). The requirement also specifies if a folding product does have a single-action latch, then it shall not fold when a 10-lb. force is applied in the direction most likely to fold the product. Staff assesses that this requirement adequately simulates the action of unintentionally folding the product, and therefore, to address this risk of injury, we conclude that all flat sleep products with a lock or latch should at least meet the ASTM F2194–16 ϵ 1 *bassinets* standard's unintentional folding requirement.

The ASTM F2194–16 ϵ 1 *bassinets* standard also includes a “*Removable Bassinet Bed Attachment to Base/Stand*” performance requirement. A removable bassinet bed attaches to the bassinet stand and is secured with a latch/lock. This requirement states a removable bassinet bed shall:

- Not be supported by the bassinet stand in an unlocked/latched configuration;
- automatically lock to the bassinet stand and can't be placed in an unlocked position on the bassinet stand;
- clearly and obviously be unstable when the product is unlocked/latched by placing the sleeping surface at a 20-degree incline;
- have a false latch/lock visual indicator designed to visually alert caregivers when the bed is not properly locked to the stand; or
- have a lock/latch mechanism that is not needed to pass the stability requirement.

The purpose of this requirement is to ensure that bassinets that can be removed from their stand are securely latched to the stand when in use. Staff assesses that the ASTM F2194–16 ϵ 1 *bassinets* standard's requirement adequately simulates the action of a

bassinet unintentionally unlatching from its stand. Staff also assesses that the ASTM F2194–16 ϵ 1 *bassinets* standard's requirement is more stringent compared to the ASTM F3118–17a *infant inclined sleep products* standard, which lacks a requirement for products that can be removed from a stand. Therefore, the final rule requires that flat sleep products meet the ASTM F2194–16 ϵ 1 *bassinets* standard's “unintentional folding requirement” and the “Removable Bassinet Bed Attachment to Base/Stand” requirement,” if applicable, to address the risk of injury associated with locks and latching features on these products.

(b) Hazard: Falls/Containment Issue

Twelve of the 183 incidents were related to falls or an infant otherwise not being kept contained within the product. Of the 12 incidents, one resulted in a death, one required hospital admission, and nine required ED visits. Failure to contain occupants in an infant sleep product can lead to infants falling or climbing out of the infant sleep product into a hazardous area.

Typically, regulated sleep products do not allow an active occupant restraint system for occupant containment. Active restraint systems are only effective when the caregiver actively uses them and adjusts them correctly; however, in a sleep environment, active restraints can create an entanglement and asphyxiation hazard.

The ASTM F2194–16 ϵ 1 *bassinets* standard does not allow the use of restraints, and instead addresses containment-related hazards posed with a side height requirement, a passive safety feature. The requirement specifies that the product's interior side height with an uncompressed mattress shall be at least 7.5 inches.

In 2012, the ASTM F2194–12 *bassinets* standard first required a minimum 7.5-inch side height based on the Canadian standard.³⁶ The side height is measured from the upper surface of the uncompressed mattress to

the upper surface of the lowest side. This requirement remains in effect in the most recent version of the *bassinets* standard, ASTM F2194–16 ϵ 1. Canada requires a side height of 230 mm (9 inches), measured from the mattress support. Because ASTM F2194–16 ϵ 1 allows a bassinet mattress of 1.5 inches, measuring from the upper surface of the mattress support, which is underneath the mattress, to the upper surface of the side would be 1.5 inches greater than measuring from the upper surface of an uncompressed mattress. Therefore, staff assesses that the 7.5-inch side height, from the upper surface of an uncompressed mattress is functionally equivalent to the 9-inch side height, measured from the upper surface of the mattress support in Canada.

Products that CPSC staff identified as flat sleep products are not currently subject to a voluntary or mandatory standard that specifies a minimum side height. Flat sleep products that are considered hand-held carriers under 16 CFR part 1225, *Safety Standard for Hand-Held Infant Carriers*, and ASTM F2050–19, *Standard Consumer Safety Specification for Hand-Held Infant Carriers*, can be defined as a “hand-held bassinet/cradle” product intended for sleep, but “hand-held bassinet/cradles” are not subject to a side height requirement in the mandatory or voluntary standard. Products without a minimum side height could fail to contain occupants, which can lead to infants falling or climbing out of the product into a hazardous area.

Table 4 shows the side height requirements for each sleep product standard. Sleep products that have a minimum side height requirement range from 2-inches for the voluntary standard for infant inclined sleep products, to 9-inches for cribs. Bassinets, bedside sleepers, and infant inclined sleep products are intended for infants from birth to 5-months old. Cribs are intended for newborns up to children 35-inches tall, which is equivalent to a 95th percentile in stature 21-month-old.

TABLE 4—SIDE HEIGHT REQUIREMENTS FOR SLEEP PRODUCTS

Standard	Side height requirement	Age range
16 CFR 1218—Safety Standard for Bassinets and Cradles ASTM F2194–16 ϵ 1, <i>Standard Consumer Safety Specification for Bassinets and Cradles</i> .	7.5 inches	0–5 months, or sit up.
16 CFR 1219—Safety Standard for Full-Size Baby Cribs ASTM F1169–19, <i>Standard Consumer Safety Specification for Full-Size Baby Cribs</i> .	9 inches	0–35 inches tall (95th percentile 21-month old).

³⁶ 78 FR 63,109 (Oct. 23, 2013).

TABLE 4—SIDE HEIGHT REQUIREMENTS FOR SLEEP PRODUCTS—Continued

Standard	Side height requirement	Age range
16 CFR 1220—Safety Standards for Non-Full-Size Baby Cribs	9 inches	0–35 inches tall (95th percentile 21-month old).
16 CFR 1221—Safety Standards for Play Yards.		
ASTM F 406–19, <i>Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards</i> .		
16 CFR 1222—Safety Standard for Bedside Sleepers	4 inches on side next to adult bed.	0–5 months, or sit up.
ASTM F2906–13, <i>Standard Consumer Safety Specification for Bed-side Sleepers</i> .	7.5 inches for other 3 sides.	
ASTM F3118–17a, <i>Standard Consumer Safety Specification for Infant Inclined Sleep Products</i> .	3 inches	0–5 months, or sit up.
16 CFR part 1225 <i>Safety Standard for Hand-Held Infant Carrier</i>	2 inches	0–3 months.
ASTM F2050–19 <i>Standard Consumer Safety Specification for Hand-Held Infant Carrier</i> .	No requirements.	

Inclined sleep products covered in ASTM F3118–17a can meet the standard with a minimum side height of 3-inches, for products intended for newborns, to 5-month of age and a minimum side height of 2-inches, for products intended for newborns up to 3-months old.

Upon review of applicable standards, CPSC staff determined that the ASTM F2194–16 ϵ 1 *bassinets* standard's 7.5-inch side height requirement provided the greatest safety for the intended use for newborns to 5-months of age. Staff assesses that the minimum side height requirement of 2-inches and 3-inches in ASTM F3118–17a is inadequate to address the incidents of infants failing to be contained in low-sided products, and the 3-inch side height is lower than the center of gravity of a 5-month-old infant on its side. Staff determined that because most flat sleep products are intended for infants under 5 months, who cannot sit upright unassisted, the side height requirement in ASTM F2194–16 ϵ 1 is adequate to address containment incidents. Based on staff's analysis, the Commission determines that flat sleep products with no side height requirements pose a potential fall hazard, as reflected in the incident data.

Staff's analysis demonstrates that the ASTM F2194–16 ϵ 1 *bassinets* standard's 7.5-inch side height requirement is appropriate and would adequately address the falls/containment hazard in flat sleep products for infants up to 5 months old or who cannot sit up unassisted. Therefore, consistent with the 2019 SNPR, the final rule requires that all infant sleep products, inclined and flat, meet the side height requirement of the ASTM F2194–16 ϵ 1 *bassinets* standard, as provided in 16 CFR part 1218, to address fall/containment hazards.

(c) Hazard: Instability

Twelve of the 183 incidents were related to the instability of the product. An unstable product can lead to tip-over

incidents. Of the 12 incidents, two resulted in injuries, one involved an ED visit. The data summarized in Tab B of the Staff's Final Rule Briefing Package includes at least one incident in a small, portable infant sleep product involving a sibling interaction resulting in a fall. Specifically, the NEISS report states: "7WKOF WITH HEAD INJURY, FELL FROM PORTABLE BASSINET THAT WAS ON COUCH, APPROX 1.5FT, YOUNGER BROTHER PULLED THE BASSINET AND IT FLIPPED ONTO THE PLAYMAT, PT LANDED ON RT SIDE OF HEAD." This sibling interaction-type incident is addressed by the bassinet standard, as discussed below.

Unregulated flat sleep products are not required to have a stand. Therefore, these products can be placed directly on the floor or on potentially hazardous or unstable elevated surfaces, such as tables, countertops, soft mattresses, or couches. The ASTM F2194–16 ϵ 1 *bassinets* standard addresses this hazard scenario by requiring bassinets to have a stand/base/frame. ASTM F2194–16 ϵ 1 defines a "bassinet" as a small bed "supported by free standing legs, a stationary frame/stand, a wheeled base, a rocking base, or which can swing relative to a stationary base." This requirement to have a stand, and be raised off the floor, increases the stability of a portable product by discouraging or preventing use of the product on other, less stable, surfaces, such as elevated surfaces or soft surfaces (couches and adult beds). Therefore, with respect to this hazard scenario, and as proposed in the 2019 SNPR, the final rule requires that all infant sleep products, flat and inclined, meet the ASTM F2194–16 ϵ 1 *bassinets* standard's requirements, including requiring products to have a stand, to further reduce the risk of injury from a product placed on a hazardous elevated surface or an unstable surface, such as a couch or adult bed. This requirement in the

final rule is codified by requiring products to meet the definitional requirement of a "bassinet/cradle."

Additionally, the ASTM F2194–16 ϵ 1 *bassinets* standard addresses hazards posed by the product's instability with a stability requirement. The requirement specifies that the product (with simulated newborn occupant) withstand a 23-lb. vertical force and 5-lb. horizontal force along its side, without tipping. The rationale in ASTM F2194 states the dual application of forces simulates a 2-year-old male pulling on the side of the product; staff assesses that this is a reasonable scenario in which the product may tip over. Incident data also demonstrate that these compact products are used on elevated surfaces, such as beds and couches, from which the infant and product fell. Therefore, with respect to the product's stability, the final rule requires that all infant sleep products meet the stability requirement of the voluntary standard for bassinets, ASTM F2194–16 ϵ 1, as provided in 16 CFR part 1218, to further reduce the risk of injury associated with product tip-over.

The Canadian requirement in Schedule 11, Test for Stability of Cradles, Bassinets and Stands, of their regulation is substantially equivalent to the requirement in ASTM F2194–16 ϵ 1. The requirement specifies that the product (with a simulated newborn occupant) withstand a 10-kg (approximately 22 pounds) static vertical load over a period of 5 seconds and a 22 newton (approximately 4.9 pounds) horizontal force without tipping. Staff advises that this test is substantially equivalent to the ASTM test, differing slightly due to conversions to metric.

(d) Hazard: Asphyxiation/Suffocation

Nine of the 183 incidents were related to infants that partially or fully rolled over from their initial position in infant sleep products. Of the nine incidents, eight resulted in a death, and one

resulted in a near-suffocation prevented by a nearby parent.

The voluntary standard for bassinets, ASTM F2194–16e1, addresses the asphyxiation/suffocation hazard with the following general/performance requirements:

- **5.10 Corner Posts:** This requirement addresses corner post extensions that can entangle ribbons, pacifier cords, necklaces, or occupant clothing. Entanglement of any of these items could lead to the asphyxiation of the occupant. This requirement limits the extension of a bassinet's corner post from extending more than .06 inches above the upper edge of an end or side panel. Corner posts that extend at least 16 inches above the top of a side rail are exempt because they are deemed inaccessible to the occupant. These are the same requirements found in the regulated ASTM F406–19 (*non-full-sized cribs*) and ASTM F1169–19 (*full-sized cribs*) standards that CPSC staff previously concluded adequately address the corner post entanglement hazard.

- **6.1 Spacing of Rigid-Sided Bassinet/Cradle Components.** This requirement limits the distance between slats to less than 2 $\frac{3}{8}$ inches to mitigate the suffocation hazard from feet-first head entrapment.

- **6.2 Openings for Mesh/Fabric-Sided Bassinets/Cradle.** This requirement tests openings in the bassinet's mesh for entrapment of fingers, toes, and snaring buttons, often used on infant clothing. The snaring of a button entraps the button and could lead to asphyxiation as the infant becomes entangled and entrapped. In this performance requirement, the mesh-sided bassinet's openings cannot allow a $\frac{1}{4}$ -inch rod to fit through.

- **6.5.3 Pad Dimensions.** This requirement mitigates the hazard of suffocating when entrapped in the space between the edge of the mattress and the bassinet's sidewall, by limiting the available space to less than 1 inch.

- **6.7 Bassinets with Segmented Mattress: Flatness Test.** This requirement limits sleep surface variability of a segmented or folding mattress to 10 degrees or less. This angle was determined to reduce the likelihood of an infant's face becoming engulfed by a small "V" shape formed by the creases in a folded mattress, potentially present in a bassinet that uses a folding play yard mattress as the bassinet mattress.

- **6.8 Fabric-Sided Enclosed Openings.** This requirement addresses the hazard of a feet-first head entrapment through the openings of fabric-sided bassinets. This requirement limits the openings in a fabric-sided

bassinet to prevent the 5th percentile 0 to 2-year-old torso probe from passing through. This requirement prevents a child's torso from fitting through any openings in the fabric sidewalls; therefore, staff concludes this requirement would prevent a feet-first head entrapment.

- **6.9 Rock/Swing Angle.** This requirement limits the bassinet's sleeping surface angle to less than 20 degrees when rocked, and seven degrees when the bassinet is at rest. In the 2019 SNPR, and in this final rule, the Commission determined that a flat sleep surface that does not exceed 10 degrees offers infants the safest sleep environment. This conclusion is based on the Mannen Study.

In total, these requirements address known suffocation hazards with infant sleep and create a minimally safe sleep environment. Therefore, for the final rule, with respect to the asphyxiation/suffocation hazard, we finalize the 2019 SNPR proposal, by requiring that all infant sleep products meet general and performance requirements of the voluntary standard for bassinets, ASTM F2194–16e1, as provided in 16 CFR part 1218, to further reduce the risk of death from suffocation.

(e) Hazard: Product-Related Issues

Three of the 183 incidents were related to mold or quality of the product material. Two of the three products were in-bed sleepers, while the third was a compact bassinet/travel bed. All three reported an injury. None of the voluntary standards currently address conditions such as mold that manifest due to the conditions under which a product is used. A moisture-resistant requirement has been discussed in the ASTM task group for baby boxes (which is under the bassinet subcommittee), but the task group has not reached a consensus on appropriate performance requirements to address mold and moisture resistance. CPSC staff will continue to work with this task group.

(f) Hazard: Undetermined Issues

Three of the 183 incidents did not have enough reported information for us to determine the issue involved. Two of the incidents were fatalities; in both cases, CPSC Field investigation reports indicate that the cause of death is undetermined. The third incident resulted in a hospitalization due to unspecified breathing difficulties suffered by the infant. The reports did not provide sufficient information on the circumstances of deaths, and injury reports involved unspecified falls. Without information on the circumstances of deaths or injuries, we

are unable to assess whether the voluntary standard for bassinets, ASTM F2194–16e1, would adequately address the hazards in this category.

2. Assessment of International Standards

(a) EN12790:2009 Reclined Cradles

The scope of the European Standard, EN 12790–2009 "Child use and care articles—Reclined cradles" includes inclined bassinets/cradles, car seat carriers, hammocks, and bouncers. Some of the general requirements could apply, but because the scope of the products that fall within this standard is not the same as the final rule, most of the requirements are not applicable to infant sleep products.

i. Side Height

The EN 12790:2009 standard does not have a side height requirement, but it includes a three-point restraint to address the containment hazard. The ASTM F2194–16e1 *bassinet* standard is more stringent by requiring a minimum side height of 7.5 inches. Restraints are an active safety feature that might not always be used, while the side height requirement is a passive safety feature.

ii. Sleep Surface Angle

The EN 12790:2009 standard requires a seatback angle between 10 degrees and 80 degrees, while the ASTM F2194–16e1 *bassinet* standard is more stringent by requiring a maximum sleep surface angle of 10 degrees. The EN 12790:2009 standard was written for products that may or may not be intended for sleep, such as car seats, a scope that is broader than the scope of the ASTM bassinet standard. The Mannen Study concluded that a seatback angle of 10 degrees or less is safe. Accordingly, the sleep surface requirement in the final rule remains consistent with the Mannen Study findings, and as already codified in 16 CFR part 1218.

iii. Latching Requirements

The EN 12790:2009 standard specifies that infant rocking cradles must have at least one automatic locking latch mechanism, and that the locking mechanisms:

- Require 50N (11.24 pounds-force) to unlatch after operating the latch 300 times;
- Require a tool to unlatch;
- Require two consecutive actions to unlatch; or
- Require two independent and simultaneous actions to unlatch.

The EN 12790:2009 standard's latching requirement simulates the action of unintentionally folding the product. The ASTM F2194–16e1

bassinets standard similarly includes requirements that address the unintentional folding hazard and requirements that address the false latching of a removable bassinet bed. Therefore, staff assesses that the ASTM F2194–16 ϵ 1 *bassinets* standard's latching requirements are adequate.

iv. Stability Requirements

The EN 12790:2009 standard requires products with a test mass not to tip over when placed on a 15-degree surface. The test mass for cradles designed for occupants up to 13.22 pounds is 19.84 pounds. The test mass for cradles designed for occupants up to 19.87 pounds is 33.06 pounds. This standard simulates the stability of an occupied

reclined cradle on an uneven surface. This is different compared to the ASTM F2194–16 ϵ 1 *bassinets* standard, which requires the product (with simulated newborn occupant) to withstand a 23-lb. vertical force and 5-lb. horizontal force along its side, without tipping. The rationale in ASTM F2194 states the dual application of forces simulates a 2-year-old male pulling on the side of the product; staff concludes that this is a reasonable scenario in which the product may tip over.

v. EN 12790:2009 Summary

The EN 12790:2009 reclined cradle standard is less stringent than the ASTM F2194–16 ϵ 1 *bassinets* standard by not requiring any minimum side

height for containment and permits a more inclined sleep surface angle for products that include reclined cradles and car seats for children up to 19.84 pounds.

C. Applicability of ASTM F2194–16 ϵ 1 to Flat Sleep Product Hazards

Table 5 summarizes the hazards associated with flat sleep products and how each hazard category is addressed by the voluntary standard for bassinets, ASTM F2194–16 ϵ 1. Table 5 demonstrates that four hazard categories (shaded) are addressed by ASTM F2194–16 ϵ 1: Latching, Falls/Containment, Instability, and Asphyxiation/Suffocation.

TABLE 5—FLAT SLEEP PRODUCT HAZARDS ADDRESSED BY BASSINETS VOLUNTARY STANDARD

Product	Applicable voluntary standard	Infant sleep hazards					
		Latching	Falls/containment	Instability	Asphyxiation/suffocation	Miscellaneous product-related	Undetermined
Flat Sleep Products (flat and inclined).	.....	115 incidents: Not currently addressed.	12 incidents: 1 death. Not currently addressed.	12 incidents: 2 injuries. Not currently addressed.	9 incidents: 8 deaths; not currently addressed.	3 mold-related incidents; not currently addressed.	3 incidents: Two deaths. Too little information to determine addressability.
Bassinet/Cradle	ASTM F2194–16 ϵ 1.	Unintentional folding requirement.	Side height requirement.	Stability requirement.	Max sleep surface angle defined in definition; Restraints not allowed; Flatness/hazardous Vs identified; Pad dimensions; Corner posts; fabric sided enclosed openings; Spacing; Mesh openings.	Not currently addressed; task group work.	Too little information to determine addressability.

Based on this assessment of the hazards associated with flat sleep products, and consistent with the 2019 SNPR, the final rule requires that all infant sleep products not already regulated by a CPSC sleep standard meet the requirements in the ASTM F2194–16 ϵ 1 *bassinets* standard, as provided in 16 CFR part 1218, to address the risk of injury associated with these sleep products. Specifically, the final rule requires that infant sleep products, meaning products that are marketed or intended as a sleeping accommodation for an infant up to 5 months of age, and that are not subject to a CPSC sleep standard (bassinets and cradles, cribs (full-size and non-full-size), play yards, or bedside sleepers), meet the requirements of 16 CFR part 1218, including conforming to the definition of a “bassinet/cradle.”

VII. Response to Comments

The Commission collected comments on the 2017 NPR, which proposed to incorporate by reference the then-current voluntary standard for infant inclined sleep products, ASTM F3118–17, with a modification to the standard's

definition of “accessory.” 82 FR 16964 (April 7, 2017). The Commission also collected comments on the 2019 SNPR, which proposed to incorporate by reference the current voluntary standard for infant inclined sleep products (ASTM F3118–17a), with modifications to make the standard more stringent, to further reduce the risk of injury. 84 FR 60949 (Nov. 12, 2019). The 2019 SNPR proposed to expand the scope of the rule to include all unregulated infant sleep products, including inclined products and non-inclined, flat products. The 2019 SNPR invited the public to submit written comments during a 75-day comment period, beginning on the SNPR publication date, and ending on January 27, 2020. In response to a request for an extension of the comment period, the Commission extended the comment period by 30 days, closing on February 26, 2020. 85 FR 4918 (Jan. 28, 2020).

Below we consolidate the Commission's responses to comments on the 2017 NPR and the 2019 SNPR. In response to the 2017 NPR, the Commission received seven comments. In response to the 2019 SNPR, the

Commission received 56 comments within the comment period. We also considered two late-filed documents, one received on February 2, 2021, and one received on April 30, 2021. We organized the comments by rulemaking notice (2017 NPR or 2019 SNPR), and then by topic.

Numerous commenters on the 2019 SNPR, such as the American Academy of Pediatrics (AAP), consumer groups, and individual parents, supported the SNPR, because the products covered in the final rule will be required to follow the AAP safe sleep guidelines. Based on consideration of the comments received, for the final rule, the Commission will maintain the proposed 12-month effective date, and make several clarifications, as listed in section I.F of this preamble.

A. Comments on the 2017 NPR

1. Safety of Inclined Products

Comment 1: Three commenters disagreed with the 2017 NPR, stating that infant sleep products with a 30-degree seat back angle are not safe and contradict the AAP's safe sleep

recommendations. One commenter also indicated that the Commission should:

- Conduct more research on the 30-degree seat back angle;
- Conduct more research on developmental implications when an infant is restrained while sleeping;
- Provide performance requirements to address product misassembly;
- Make the side height requirement match the 7.5 side height requirement in the bassinets and cradles standard;
- Develop performance or design changes for compact units so they cannot be placed on a raised surface, in crib, or on soft surface;
- Add seat back height requirement for infant products like newborn products;
- Add requirements for hammocks to increase stability;
- Add requirements for flat sleep products, so an infant cannot move into an unsafe chin to chest position;
- Add pictograms to warnings like slings and hand-held carriers;
- Include “marking” on products to show compliance with new regulations;
- Conduct market surveillance after a regulation becomes effective; and
- Have a 6-month effective date for the final rule.

Response 1: We agree, based on the Mannen Study, that infant sleep products, as defined in the final rule, should not have a seat back/sleep surface angle greater than 10 degrees. The Commission proposed to address many of the commenter’s in-scope recommendations noted above in the 2019 SNPR, and is now finalizing the requirements, by requiring inclined and flat sleep products that are marketed or intended to provide a sleeping accommodation for an infant up to 5 months old, to meet the bassinet standard. Due to the expected significant economic impact on some manufacturers, the Commission will maintain the proposed 12-month effective date for the final rule.

2. Definition of “Infant Inclined Sleep Product”

Comment 2: A commenter stated that the phrase, “primarily intended and marketed to provide sleeping accommodations,” in the proposed definition of an “infant inclined sleep product,” is not needed, because “incorporating a manufacturer’s marketing intentions into a definition of a product which impacts the safety standard of that product opens the door to potential conflicts of interests.” The commenter reasoned that a child’s age and the product incline are objective factors, while a manufacturer’s intent is more subjective, and could allow

manufacturers to market the product in a way to avoid meeting the requirements of the rule.

Response 2: Although the definition the commenter refers to in the standard no longer includes the term “inclined,” we respond here to the concept of including the phrase “marketed or intended” in the definition of “infant sleep product” in the final rule. A manufacturer’s intended use of the product and marketing guide informs caregivers about the product’s safe use. Manufacturers of products that are not designed or marketed for use as an infant sleep product should provide caregivers with instructions and warnings regarding safe use of the product. Including a manufacturer’s marketing and intent in the definition also assists the Commission to enforce the regulation, because it provides objective criteria for CPSC staff to apply to a product’s name, packaging, warnings, labeling, and marketing materials about whether the product falls within the scope of the rule. CPSC staff has experience using marketing materials to enforce CPSC’s regulations, and CPSC is required to use such materials in some cases. For example, section 3 of the CPSA provides factors for determining whether a product is a “children’s product,” and includes several factors that require reviewing labeling, promotion, and advertising, to determine whether a product is “designed or intended primarily for children 12 years of age or younger.” 15 U.S.C. 2052(a)(2). Products that have no use other than infant sleep, based on the product’s design, cannot be labelled as not intended for infant sleep to avoid meeting the requirements of the final rule.

3. Comments Superseded by the 2019 SNPR

Comment 3: Two commenters agreed with the modification of the “accessory” definition in the 2017 NPR, and with the 12-month effective date. One commenter had a specific comment related to restraint requirements in the NPR.

Response 3: The 2019 SNPR supersedes the 2017 NPR. The proposed modification to the definition of “accessory” is no longer at issue in the final rule, because this definition has been removed, along with other requirements related to inclined sleep products. The Commission will maintain the 12-month effective date for the final rule, to provide manufacturers and importers sufficient time to come into compliance. Allowance of a restraint requirement in an infant sleep product was unique to inclined sleep

products to contain the infant in the product. Consistent with the 2019 SNPR, the Commission removed the restraint requirement in the final rule, because restraints can create a strangulation hazard. The passive containment provision in the bassinet and cradle standard, which requires a product side height of 7.5 inches and a flat (below 10 degree) sleep surface, follows safe sleep practices for containment: A bare, flat, infant sleep surface.

B. Comments on the 2019 SNPR

1. Scope of the Final Rule

(a) All Products Marketed, Promoted, or Otherwise Indicated for Sleep

Comment 4: A commenter suggested: “[t]he new standard should apply not just to those infant products intended by the manufacturer for sleep or certified as being for sleep, but also any product that is marketed, promoted, or otherwise indicated—or may be reasonably interpreted as indicating—as being for any kind of sleep, including products described using substitute language for sleep, such as ‘nap’ or ‘snooze.’”

Several other commenters expressed concern that various terms used in the 2019 SNPR were vague, and recommended that more precise definitions be provided for “sleep” and “sleeping accommodations.” In addition, commenters requested clarification regarding which products are included in the definitions.

Response 4: In response to this comment, the preamble and regulation text for the final rule: (1) Clarify that the scope of the rule includes products with inclined and flat sleep surfaces, and (2) more precisely explain the definition of an “infant sleep product.” For example, to clarify that the scope of the rule includes inclined and flat sleep products, the scope of CPSC’s regulation text in § 1236.2, and the scope of the revised voluntary standard in section 1.3, explain that the scope of the infant sleep products rule includes products with inclined and flat sleep surfaces. The final rule also broadens the definition of an “infant sleep product” to include the term “marketed”: Which is “a product marketed or intended to provide sleeping accommodations for an infant up to 5 months old that is not subject to any of the following” The definition then lists CPSC’s five infant sleep standards, to ensure that all infant products marketed or intended for infant sleep meet the requirements of a CPSC sleep standard, so that all products meet minimum safe sleep requirements. Staff modified the introduction, scope, and definitions in

the final rule to clarify the applicability of the rule to any infant sleep product not covered by another CPSC sleep standard.

While newborns can and do fall asleep in many products, because young infants sleep for extended hours throughout the day, certain products are designed, marketed, and intended for infant sleep. Therefore, “sleep” and “sleeping accommodations” refer to products that are marketed or intended for both extended, unattended sleep, and also napping, snoozing, and other types of sleep in which a parent may or may not be present, awake, and attentive. Additionally, if a product name implies the product is for use as an infant sleep product, such as use of the terms “bed,” “bassinet,” or “crib,” but does not already comply with the bassinet or crib regulation, the product falls within the scope of the final rule. If a product, through marketing, pictures, and written description, indicates that the product is being sold as an infant sleep product for infants up to 5 months old, that product will be covered by this regulation if it is not already subject to a CPSC sleep standard.

The 2019 SNPR included four definitions, “infant sleep products,” “newborn sleep products,” “compact sleep products,” and “accessory sleep products.” However, this distinction is not necessary and creates confusion when identifying infant sleep products, because there are no unique requirements in this rule based on these definitions. Accordingly, for the final rule, to clarify which infant sleep products are subject to the rule, the Commission removed the separate definitions of “newborn,” “compact,” and “accessory” sleep products, and will rely solely on the definition of an “infant sleep product”:

3.1.7 *infant sleep product, n*—a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that is not subject to any of the following:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles
- 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs
- 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs
- 16 CFR part 1221—Safety Standard for Play Yards
- 16 CFR part 1222—Safety Standard for Bedside Sleepers

(b) Distinguishing Non-Sleep Products

Comment 5: A commenter stated that infant car seats, swings, and rockers typically have seatback angles greater than 30 degrees, adding that these

products have use patterns very similar to products that fall within the scope of ASTM F3118. The commenter requested clarification of the distinguishing features or characteristics that differentiate these two types of products with very similar usage patterns.

Response 5: The purpose of the final rule is to regulate all products marketed or intended for infant sleep for infants up to 5 months old. Accordingly, the products within the scope of the final rule are all marketed and intended for sleep, and do not include car seats, swings, or rockers, unless a product is marketed or intended for sleep. Newborns can and do fall asleep in many products, because young infants typically sleep 16 to 17 hours a day, 1 to 2 hours at a time. By 3 months, infants can sleep 4 to 5 hours during the day and 9 to 10 hours during the night.³⁷ However, products such as car seats, swings, and rockers typically are not marketed for use as an infant sleep product; these products are intended for use while the child is awake. Moreover, regarding car seats, CPSC has jurisdiction only for use outside of an automobile, when the product is being used as an infant carrier; while the National Highway Traffic Safety Administration (NHTSA) has jurisdiction over car seats being used in an automobile, including the car seats’ angle and design for safe use in an automobile.

Comment 6: Several commenters stated that the scope of the 2019 SNPR was too broad, and expressed concerns that non-sleep products would be included. Some of the comments requested specific exclusions or inclusions to the scope of the final rule.

Response 6: The final rule does not apply to products that are not marketed or intended for infant sleep, such as bouncer seats, swings, infant chairs, or other similar durable infant or toddler products that are marketed for use while a child is awake. In addition, the Commission is specifically excluding crib mattresses that fall within the scope of the voluntary standard for crib mattresses, ASTM F2933, from the scope of the final rule. A crib mattress, alone, does not meet the definition of an “infant sleep product,” and is always used in conjunction with a sleep product, such as a crib or play yard, which are within one of the five existing CPSC sleep standards. The Commission issued a notice of proposed rulemaking for crib mattresses in 2020, and we intend to finalize a separate rule on crib mattresses this fiscal year.

³⁷ <https://www.stanfordchildrens.org/en/topic/default?id=infant-sleep-90-P02237>.

The purpose of the rule is to set minimum safe sleep requirements for products that are marketed or intended for infant sleep up to 5 months old. The Commission is aware that infant sleep products share hazard patterns that can be addressed by performance and labeling requirements; but currently, a gap exists between regulated and unregulated products. Therefore, the scope of the final rule includes all infant sleep products not already covered by a mandatory CPSC sleep standard (bassinets, full-sized cribs, non-full-sized cribs, play yards, or bedside sleepers), and requires the product to be tested to the bassinet standard as a default, so that all infant sleep products follow a mandatory safety standard for infant sleep, specifically (and minimally) the standard for bassinets and cradles. Based on staff’s evaluation, following the requirements of the bassinet and cradle standard would address the hazard patterns found in the incident data for unregulated inclined and flat sleep products (see section VI of this preamble and Tab B and C of Staff’s Final Rule Briefing Package).

The Commission is also concerned about new infant sleep products that come on the market and that do not follow any CPSC sleep standard. The concern is that caregivers may view these products as safe because they are on the market, even though these products may not address known infant sleep hazards or may not be tested to an appropriate standard. Accordingly, the final rule requires all products marketed or intended for sleep for infants up to 5 months old to follow core safe sleep principles, which the Commission, in agreement with AAP, states are: Place infants alone, on their back, and on a flat, firm surface with no restraints or loose fabric nearby.

Rather than list specific inclusions and exclusions, other than excluding crib mattresses, the scope and definitions in the final rule address potential confusion about which infant sleep products are covered. For example, the definition of an “infant sleep product” states:

3.1.7 *infant sleep product, n*—a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that is not subject to any of the following:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles
- 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs
- 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs
- 16 CFR part 1221—Safety Standard for Play Yards

- 16 CFR part 1222—Safety Standard for Bedside Sleepers

Comment 7: Several commenters asked for clarification regarding whether products, similar in design to inclined sleepers but marketed as a “soother,” “rocker,” or “lounger,” are in-scope for the rule, and suggested that such products should be in-scope due to the potential for consumer confusion as to intended uses. We also received a comment asking that inclined products for activity and transport, such as a bouncers, strollers, and swings, be excluded from the scope of the rule.

Response 7: Infant products, inclined or flat, do not fall within the scope of the final rule as long as they are not intended for sleep, and they are marketed conspicuously as not for sleep by infants up to 5 months old. This means that the product packaging, marketing materials, inserts, and instructions cannot indicate that the product is for sleep, or imply through pictures of sleeping infants that sleeping in the product is acceptable. In addition, if “attended” or “supervised” sleep is indicated, then the product would be considered within the scope of the final rule. The product name, description, and instructions also cannot include references to sleep, snooze, dream, or nap. CPSC staff would consider decorations on the product that include pictures of sleeping animals or sleeping cartoon figures to imply the product is intended for sleep. Additionally, the product must not be described as a bed. Some of these products, such as stroller accessories, are already required by the mandatory standard for that product type to meet the bassinet standard when the product is in bassinet mode.

Comment 8: One commenter acknowledged that the scope of the rule does not include sleep positioners and requested “the CPSC to better enforce the ban on sleep positioners.”

Response 8: Neither CPSC, nor FDA, has a “ban on sleep positioners”; however, both agencies advise consumers not to use them with infants due to the risk of suffocation. Sleep positioners are considered accessories, and not an “infant sleep product” under the definition proposed in the 2019 SNPR or as clarified in the final rule. Similar to crib mattresses, sleep positioners are not intended to be used as the sole product for sleep; instead, they are used in conjunction with a sleep product, for example, to hold an infant in a position while inside a crib. Therefore, sleep positioners do not fall within the final rule because they are not intended to provide a sleeping accommodation for an infant. The

Commission declines to explicitly exclude sleep positioners from the final rule at this time.

(c) Upper Age Limit for Infants Up to 5 Months Old

Comment 9: The 2019 SNPR posed a question regarding whether the Commission should remove the upper age limit from the scope of the mandatory standard, to accommodate a broad scope of infant sleep products. Several commenters stated that the final rule should remain applicable to products intended for infants up to 5 months old. Otherwise, the commenters said new requirements addressing containment, stability, and side height would need to be added to the bassinet standard for products intended for ages 6 to 12 months, noting that the existing bassinet requirements are designed only for infants up to 5 months old.

Response 9: After further consideration, the Commission agrees that changing the scope of the final rule to remove the upper age limit, or to include products intended for infants up to 12 months old (as suggested at an ASTM task group meeting), would require new performance, labeling, and testing requirements in the bassinet standard. As the commenters noted, the bassinet standard only applies to infants up to 5 months of age. Therefore, a number of requirements in the ASTM F2194–16e1 *bassinet* standard, would need to be changed to address older, larger, and more mobile and active infants, including changes to the scope in section 1.3, the stability requirement in section 6.4, and the side height requirement in section 6.5.4.

Additionally, the final rule focuses on hazards to young infants associated with infant sleep products because infants under 5 months old are the most vulnerable, due to their limited mobility and young, developing respiratory system. Requiring currently unregulated inclined and flat sleep products to meet the bassinet standard sets minimum requirements for safe sleep. Bassinets are designed for children who are not yet mobile, and the final rule addresses the hazards seen in this population. Older infants, *i.e.*, 6 to 12 months old, have different needs for sleep, and the existing standards for this older age group are designed to address those needs. By 6 months of age, infants have developed enough mobility that they can perform such actions as rolling back and forth and pulling themselves up. The Commission agrees with CPSC staff’s assessment that it is unsafe for 6 to 12 month olds to be in a confined space, such as a bassinet, for sleeping,

as they may roll out of the product, or pull themselves out of the product.

The unregulated products on the market with which CPSC has concerns, *e.g.*, in-bed sleepers, baby boxes, and compact bassinets, are intended for this younger, more vulnerable population. In addition, CPSC data indicate that 34 percent of the incidents involving inclined sleep products and 49 percent of the incidents involving unregulated, flat, sleep products happened to infants 0 to 5 months of age. Infants 6 to 12 months old were involved in 9 percent of inclined sleep products and 4 percent of unregulated, flat sleep product incidents, respectively. Therefore, consistent with the 2019 SNPR, the final rule limits the scope of the standard to infants up to 5 months of age. Due to the size and design of these unregulated compact/travel products, older infants should not be placed to sleep in these products, and older infants are not included within the scope of the final rule.

(d) Consumer Registration Rule

Comment 10: A commenter expressed no objection to requiring product registration cards for products within the scope of the rule, but suggested that the Commission “remain open to innovation as to the specific methods of achieving optimum product traceability, particularly now that so many products are linked to internet devices.”

Response 10: In the 2009 NPR for the consumer registration rule (74 FR 30986 (June 29, 2009)), the Commission said it: “intends to encourage innovation in the use of the internet for product registration,” and the methods of registration online are encouraged, whether through a website or email. The Commission is open to innovation in this area, but we note that section 104(e) of the CPSIA sets forth a process the Commission must follow to allow new technology for product registration, in lieu of the product registration card requirements in part 1130.

Comment 11: A commenter supported the Commission’s amendment of the consumer registration rule, 16 CFR part 1130, to identify infant sleep products as durable infant or toddler products subject to the product registration requirements, so that freestanding sleep products without a frame, are included within the scope of part 1130.

Staff Response 11: To avoid confusion, and to ensure that all infant sleep products fall within the requirements of part 1130, the final rule updates the list of durable infant or toddler products in part 1130 to explicitly identify “infant sleep products” as durable infant or toddler

products, as a subcategory of bassinets and cradles.

2. Incident Data

(a) Inclusion of Flat Sleep Products

Comment 12: Multiple commenters expressed concern about in-bed sleepers, baby boxes, and compact bassinets being subject to the standard. Concerns included:

- In-bed sleepers, baby boxes, and compact bassinets are not identified in CPSC data;
- Bed-sharing is a common practice in the United States and abroad;
- Potential disparity in safety among in-bed sleepers versus a potential ban of in-bed sleepers;
- Interest in increased advocacy regarding bed-sharing; and
- Differences among products necessitates different requirements based on demonstrable hazard data.

Commenters objected to including non-inclined sleep products in this rulemaking, including objecting to replacing the term “infant inclined sleep products,” with the more general “infant sleep products.” Instead, these commenters urged the Commission to focus on inclined products for this rulemaking and to review requirements for non-inclined products in separate rulemaking efforts. A commenter stated that it is inappropriate to require all products not subject to an existing standard to comply with the bassinet standard.

Response 12: The Commission recognizes that bed-sharing is a common practice of parents, both in the United States and abroad. However, we cannot recommend bed-sharing as a safe sleep practice, due to the increased risk of SIDS, overlay, and other hazards. AAP safe sleep recommendations encourage infants to room-share with parents, but to provide infants with their own firm, flat space, near the parents, but not in the same bed. For a more detailed discussion on bed-sharing, please see CPSC human factor’s staff memorandum at Tab D of Staff’s Final Rule Briefing Package.

As discussed in section III of this preamble, in response to the comments, the Directorate for Epidemiology staff identified 183 incident reports related to non-inclined, flat products marketed as infant sleep products, such as in-bed sleepers, and compact bassinets. The incident data, reported to have occurred during the period from January 1, 2019 through December 31, 2020, identified 11 fatalities and 16 injury reports. Seven of the 11 fatalities described a suffocation death. The other deaths involved the infant rolling over to a

prone position, or rolling out of the product and becoming entrapped. The final rule identifies the flat sleep products that fall within the scope of the rule, provides incident data, describes hazard patterns, analyzes the effectiveness of the bassinet standard to address the hazards, and compares the performance requirements in international standards to demonstrate that these products have similar hazard patterns that can be addressed by the requirements in the bassinet standard.

Comment 13: Several commenters urged the Commission to work with ASTM to develop product-specific safety standards for each of the identified flat products, such as in-bed sleepers, baby boxes, and compact bassinets, and to do so in a separate effort.

Response 13: The ASTM process for developing the voluntary standard for infant inclined sleep products took close to 5 years before the standard was published. The bassinet subcommittee also has been working about 5 years to add “compact bassinets” to the standard, which has not been completed. CPSC staff has participated in these efforts and provided incident data to the ASTM committees and task groups. Throughout all this time, inclined and compact infant sleep products have entered the retail market without meeting any safe sleep testing, voluntary or mandatory. The incident data discussed in section III of this preamble (Tab B of Staff’s Final Rule Briefing Package), and the engineering and human factors analysis in section VI of this preamble (Tabs C and D of Staff’s Final Rule Briefing Package), demonstrate that inclined, compact, and in-bed sleep products pose risks to infants and therefore, should not be allowed to be sold as infant sleep products without meeting one of CPSC’s mandatory sleep standards.

Comment 14: A commenter stated that no data indicate that overlay injuries or fatalities exist while using an infant in-bed sleeper.

Response 14: As part of CPSC staff’s participation with ASTM voluntary standards groups, in fall 2017³⁸ and summer 2019,³⁹ CPSC staff provided the ASTM in-bed sleeper working group with incident data that identified fatal and nonfatal incidents involving in-bed sleepers. This data demonstrated 11 fatalities and 22 nonfatalities associated with in-bed sleepers. The primary

hazard patterns, consistent with the incident data discussed in this final rule, involved infants falling out of in-bed sleepers, rolling into the side, bedsharing, and consumer complaints.

An overlay hazard typically occurs during bed-sharing, when a parent lays over their infant, and typically does not realize they have done so because they are asleep. Accordingly, during task group and subcommittee meetings, staff expressed additional concerns with low side height, soft-sided, in-bed sleepers, because use of such products may provide parents with a potentially false sense of security when bed-sharing. Based on this information, and bed-sharing concerns generally, CPSC has substantial concerns that a low, soft-sided, in-bed sleeper may not prevent a parent from inadvertently laying over an infant and suffocating the baby. CPSC data for in-bed sleepers is anecdotal in nature, and therefore, we may not have received overlay incidents that involve an in-bed sleeper, but the large number of overlay incidents reported to the CPSC generally indicate that bed-sharing can be hazardous.

Comment 15: A commenter stated that the 2019 SNPR is well-intentioned, but that it is premature, and that the scope of the rule ultimately may harm consumer safety, because consumers will use soft bedding and other tools to replace an entire category of products that effectively are banned under the SNPR. The commenter stated that the data necessary to support the rule is either missing or incorrect. Another commenter stated that the data on in-bed sleepers, and the existing CPSC sleep standards, do not support CPSC’s approach in the 2019 SNPR, noting that babies die in all types of infant sleep products despite having an existing standard, citing bassinets, cribs, and play yards. Infants die for reasons not associated with the product, the commenter asserted, adding that CPSC has not presented data to warrant all infant sleep products without a standard to comply with the bassinet standard. This commenter maintained that CPSC is using a “back-door method” to remove infant products from the market without the data to support or justify this action. The commenter opined that CPSC should write safety standards that will ensure safe sleep for each product type, and not funnel various products into one standard, bassinets and cradles, which was not intended for these products.

Response 15: In coordination with a range of stakeholders, CPSC has carefully developed safety regulations for five infant sleep products (cribs: full-size and non-full-size, bassinets, play

³⁸ October 2, 2017 email from Hope Nesteruk to Lisa Trofe and Meredith Thomas, JPMA contacts for ASTM meetings.

³⁹ Email dated June 4, 2019, from Hope Nesteruk to Meredith Thomas, JPMA contact for ASTM meetings.

yards, and bedside sleepers), and we encourage consumers to use these products for infant sleep. The Commission is aware that deaths occur in these products, but as noted, infant deaths are not always associated with the product. We particularly urge consumers to follow the AAP safe sleep recommendations when using any product intended for infant sleep. CPSC data, in section III of this preamble (Tab B of Staff's Final Rule Briefing Package), and evaluated in section VI of this preamble (Tabs C and D of Staff's Final Rule Briefing Package), show that deaths and injuries occur in untested and unregulated infant sleep products, including inclined and flat sleep products, and sometimes these incidents involve a use contrary to AAP recommendations. However, CPSC's evaluation of the incidents in section VI of this preamble demonstrates that requiring currently unregulated infant sleep products to meet the requirements of the bassinet standard will further reduce the risk of death and injury associated with these products (Tab C of Staff's Final Rule Briefing Package).

The argument that parents will use soft bedding and other tools to replace products taken off the market is the same argument used in support of creating a separate voluntary and mandatory standard for infant inclined sleep products, and infants died in these products that did not meet AAP safe sleep guidelines. Accordingly, to further reduce the risk of death and injury, the final rule requires that all products marketed or intended as a sleeping accommodation for infants up to 5 months old be tested and certified to an existing CPSC sleep standard, and that CPSC, the AAP, and the industry, continue to promote and educate caregivers about safe sleep practices for infants.

(b) Statistically Significant Data

Comment 16: One commenter questioned whether the data presented in the 2019 SNPR are statistically significant for inclined sleep products, or are the deaths due to SIDS?

Response 16: The analysis presented in the 2019 SNPR and in this final rule is based on reported incidents, and therefore, anecdotal in nature. This means that the data do not constitute a statistical sample representing all incidents related to inclined and flat sleep products; nor do the data represent a complete set of incidents that may have occurred involving the products. As such, no statistical inference is possible. However, the data do provide at least a minimum count for

the number of incidents related to each type of product reviewed.

Many of the fatality reports contain unclear, conflicting, and/or inconsistent information. For example, for some deaths, medical examiners may have concluded the cause of death to be SIDS or Sudden Unexpected Infant Death (SUID), but they also may mention co-contributing conditions, such as an unsafe sleep environment (e.g., soft bedding, inclined sleep surface) or other pre-existing medical condition(s). This can confound CPSC's ability to determine a predominant factor in the fatality. Staff used a consensus-based decision-making process to review incident data. If an unsafe sleep environment or a product design was one of the factors, staff classified the death under that category. Otherwise, staff classified the reported incident under the "undetermined" category, when no one factor stood out, or staff classified the incident under the "insufficient information" category, when staff did not have enough information to classify the incident in another category to avoid overestimating the risk.

3. Degree of Incline

(a) Additional Testing for Inclines Between 10 and 20 Degrees

Comment 17: Several commenters stated that the Commission should conduct additional research on the safety of inclines between 10 and 20 degrees for infant sleep products. A commenter stated that CPSC has failed to provide relevant data to support the 2019 SNPR's approach regarding inclined sleep products, to limit the seat back angle to 10 degrees or less, and not to conduct additional study on the 10 to 20 degree angle, or to provide information or incidents to support this decision.

Response 17: During the development of the 2019 SNPR, Commission staff contracted with Dr. Erin Mannen to examine how the degree of a seat back angle affects an infant's ability to move within inclined sleep products, and if the incline angle directly impacts safety or presents a risk factor that could contribute to the suffocation of an infant.⁴⁰ The Mannen Study findings showed that infants in products with a seat back angle greater than 20 degrees exhibit increased demand on their abdominal muscles. The Mannen Study concluded that this could lead to

increased fatigue and suffocation, if an infant is unable to reposition themselves after an accidental roll from supine to prone. The Mannen Study concluded that a sleep surface that is 10 degrees or less, is comparable to a crib mattress surface and can be considered a safe sleep surface. The Mannen Study suggested if future work were done on safe sleep angles, one area of study would be additional biomechanical testing to determine "which, if any, angles between 10- and 20-degrees may be safe for infant sleep."

The Mannen Study recommendations do not imply that an incline angle above 10 degrees may be safe; rather, the Mannen Study merely suggests that if higher angles are considered, additional biomechanical testing is required. We are not aware of existing research that suggests that an inclined sleep surface between 10 and 20 degrees is safe, nor is CPSC currently conducting similar research. The Mannen Study also stated that its testing of awake infants was a limitation because "while the muscle use and motion may be similar, it is likely that infants who find themselves in a compromised position in an inclined sleep product during a nap or overnight sleep may not have enough energy or alertness to achieve self-correction and may succumb to suffocation earlier or more easily than infants who are fully awake." Given the vulnerability of newborn infants and the precedence of fatalities of infants who were most likely asleep in inclined products at the time of incidents, additional research of inclines above 10 degrees is unnecessary for the final rule.

Additionally, other research⁴¹ has demonstrated a discernable difference in infant ability between 5, 7, and 10 degrees in a side-to-side tilt, which formed the basis of the 7-degree maximum sleep surface angle in Health Canada's regulations and the 5-degree limit in the Australian requirement. The 10-degree sleep surface limit in the final rule is a slightly higher allowed sleep surface angle than other countries. Based on the Mannen Study and the research that supports sleep surface angles in international standards reviewed by CPSC staff, staff believes that it is unlikely that additional research at angles higher than 10 degrees will demonstrate that an angle greater than 10 degrees is safe for infant sleep. Accordingly, for the final rule, infant sleep products must be tested for a seat back or sleep surface angle of 10

⁴⁰ Read the full report from Dr. Mannen beginning on page 91, Tab B, of CPSC Staff's SNPR Briefing Package: https://cpsc.gov/s3fs-public/SupplementalNoticeofProposedRulemakingforInfantSleepProducts_10_16_2019.pdf.

⁴¹ Beal SM, Moore L, Collett M, Montgomery B, Sprod C, Beal A. The danger of freely rocking cradles. *J Paediatr Child Health*. 1995 Feb;31(1):38-40. doi: 10.1111/j.1440-1754.1995.tb02910.x. PMID: 7748688.

degrees or less from horizontal, and they must meet the requirements of the bassinet and cradle standard.

(b) Adopt Canadian Standard of 7 Degrees

Comment 18: One commenter stated that Canada only allows up to 7-degree seat back angle in sleep products, and suggested CPSC should consider adopting the Canadian standard. Another commenter supported the SNPR proposal that infant sleep surfaces be no more than 10 degrees from horizontal.

Response 18: The Mannen Study concluded that a seatback angle of 10 degrees or less is safe. This seatback angle is consistent with CPSC's Safety Standard for Bassinets and Cradles, which also requires a 10 degree or less incline. We recognize that Health Canada is using a 7-degree maximum incline; however, that requirement is based on a side-to-side tilt study of infants in rocking cradles published in 1995. The 2019 Mannen Study compared infant muscle and breathing behavior on a flat crib mattress and on a crib mattress, head-to-toe 10 degrees from horizontal, and determined that infant responses were essentially the same on both sleep surfaces. Accordingly, based on the Mannen Study findings, to provide a safe sleep surface, the final rule is consistent with the current requirement in the bassinet and cradle standard, requiring that infant sleep products must have a head-to-toe incline angle of 10 degrees or less.

(c) Highest Seat Back Angle Clarification

Comment 19: A commenter requested that CPSC replace the phrase: "the manufacturer's recommended highest seat back angle position intended for sleep," with "the seat back angle position that is the highest position intended for sleep or that is the highest position that a reasonable consumer would consider as being for infant sleep, whichever is higher."

Response 19: The commenter's suggestion, by focusing on the "seat back" of an infant sleep product, illustrates some confusion with terminology. The 2019 SNPR applied to infant sleep products, and required all infant sleep products to be 10 degrees or less from horizontal—the same as the sleep surface in bassinets. However, the safe sleep principle requirement from the Mannen Study, and already reflected in the bassinet standard, is that infants should sleep flat on their backs. Accordingly, the SNPR term "seat back" created confusion, because the term implies that infant sleep products are for "sitting" in a device with a "seat."

Thus, to reduce this confusion in the final rule, we replace the term "seat back" with the term "*Seat Back/Sleep Surface*."

4. Safe Sleep Principles

(a) Request to Ban Infant Inclined Sleep Products

Comment 20: Approximately 25 commenters requested that CPSC "ban" or "remove" infant inclined sleep products from store shelves. Of those commenters, three indicated that their child died while sleeping in an inclined sleep product.

Response 20: Many products with an incline greater than 10 degrees from horizontal have been removed from the market through CPSC recalls. To address newly manufactured products, the final rule does not "ban" all infant sleep products with an angle, but addresses the hazards associated with inclined sleep products by requiring that any product marketed or intended for sleep for infants up to 5 months old must not have a sleep surface angle greater than 10 degrees, and that any currently unregulated infant sleep product meet the bassinet standard. The purpose of these requirements is to ensure that all infant sleep products meet minimum safe-sleep principles, including the sleep surface angle, as addressed through an existing CPSC sleep standard.

(b) Aligning with AAP Safe Sleep Practices

Comment 21: One commenter acknowledged that the 2019 SNPR aligns with the AAP's safe sleep recommendations, and encourages CPSC to ensure that the proposed rule sends a clear message addressing safe sleep practices.

Response 21: The Commission is committed to addressing safe sleep practices in this rulemaking and ensuring that all products marketed, intended, promoted, or otherwise indicated as being for any kind of infant sleep for infants up to 5 months old are addressed. Therefore, the final rule requires that all infant sleep products, including inclined and flat products, be subject to 16 CFR part 1218, Safety Standard for Bassinets and Cradles, because part 1218 includes safe sleep requirements. Additionally, CPSC's website provides extensive information regarding best practices for safe sleep through its CPSC's Safe Sleep Campaign and Baby Safety information at: <https://www.cpsc.gov/SafeSleep>.

(c) Use of Unsafe Products by Sleep Deprived Parents

Comment 22: One commenter expressed concern that parents, particularly those who are sleep deprived, cannot reasonably be expected to use a product that is unsafe by design in a safe manner.

Response 22: Lack of sleep may have a detrimental effect on a parent's judgment when using an infant sleep product. Research demonstrates that fatigue can negatively affect memory, concentration, and decision making.⁴² The final rule is the most effective method of ensuring that infant sleep products for infants up to 5 months of age are safe for use.

5. Definitions

(a) Remove "Intended" From Definitions

Comment 23: A commenter requested that the word "intended" be struck from the definitions of infant and newborn sleep products.

Response 23: We disagree with the request to remove "intended" from the definitions. Manufacturer's intent, which can be evaluated through stated warning messages, marketing photos, product instructions and other factors, must remain a factor for staff's consideration. As the commenter noted, some products are marketed for swinging or bouncing. If infant products are not intended for sleep and are not marketed in ways that imply they are for sleeping or napping, they are not subject to the infant sleep product standard. CPSC will evaluate a manufacturer's intent using all available materials, including marketing. Accordingly, the final rule maintains the word "intended" and also broadens the definition of an "infant sleep product" to include the word "marketed."

(b) Define or Clarify "Free Standing" Infant Sleep Products

Comment 24: One commenter contended that "free standing" is an ambiguous term.

Response 24: A "free-standing" infant sleep product is a sleep product that can be used by itself, without the need of another product, such as a portable play yard. ASTM F3118—17a contains a separate definition for "accessory inclined sleep product," which applies to products that are supported by another product, such as a play yard. The term "free-standing" is used without issue in other ASTM and CPSC standards. For the final rule, the

⁴² <https://www.sleepfoundation.org/sleep-deprivation>.

definition of “infant sleep product” is broadened to cover all inclined and flat products marketed or intended as a sleeping accommodation, regardless of whether the product is free-standing or attached to another product. Accordingly, we removed the term “free-standing” from the definition of “infant sleep product” in the final rule, to reduce confusion about which infant sleep products are subject to the rule.

6. Warnings and Instructions

(a) Provide Information About Scoliosis and Torticollis

Comment 25: One commenter recommended that information about deformities, such as scoliosis and torticollis, be included on an insert with all infant sleep products.

Response 25: Providing parents with information and resources regarding various infant deformities is beneficial, and manufacturers are not prevented from including this information if they desire. However, as indicated in the 2019 SNPR, increases in the number of children with plagiocephaly may actually be attributed to the AAP’s recommendation to place infants to sleep on their backs to decrease the risk of SIDS. The final rule does not contain any modifications to the voluntary standard to address this issue.

(b) Placement of Warnings

Comment 26: One commenter recommended that warnings should be placed on the outside and inside of the packaging, as well as on the product. The commenter also recommended that packaging should be labeled, easily visible, and easy to read/understand.

Response 26: Consistent with the 2019 SNPR, the final rule requires that infant sleep products not already subject to a CPSC sleep standard, be subject to the warning requirements set forth in the bassinet standard, ASTM F2194–16e1, which requires that warning labels be present on the product and its packaging, and that warning information be present in the instructional literature. ASTM F2194–16e1 also requires that the warnings be conspicuous, permanent, and easy to read/understand.

7. Economic Analysis

Comment 27: A commenter suggested that CPSC conduct an exposure study to research the relative risks of these different sleep products. This commenter also suggested that CPSC perform a full cost-benefit analysis of the final rule.

Response 27: CPSC is continuing research topics related to safe sleep, which may potentially involve types of

infant sleep products. Although an exposure study is an effective means to estimate exposure, we can estimate exposure by comparing annual sales of products to the number of live births, and staff identifies the hazard patterns from the incident data. The Commission is not required to conduct cost-benefit analyses under section 104 of the CPSIA, and has not done so for any durable infant or toddler rulemaking. We are uncertain what the purpose of such an analysis would accomplish for a rule promulgated under section 104 of the CPSIA, where cost/benefit considerations are not germane to the Commission’s rulemaking authority.

8. Effective Date

Comment 28: Commenters both supported and opposed the 12-month effective date. Some opposing commenters supported a 6-month effective date instead, because additional time for the rule to become effective puts infants at risk, while other opposing commenters wanted a longer effective date, or an indefinite delay until ASTM completes additional standards for specific products. The 2019 SNPR proposed that the effective date would apply to products manufactured or imported after the final rule effective date. We received multiple comments that the effective date should apply to products sold after the final rule effective date instead of the “sold by date,” to prevent stockpiling and remove the hazards as soon as possible.

Response 28: For the final rule, the Commission will maintain the 2019 SNPR proposed effective date of 12 months after the date of publication in the **Federal Register**. A 6-month effective date may seem reasonable because suppliers have had ample lead time to prepare for this rule since the SNPR was published in 2019, and many of the products within the scope of the final rule have been withdrawn from the market or redesigned, particularly for inclined sleep products. However, for manufacturers of other unregulated flat sleep products that remain in the market, there will likely be a significant economic impact as a result of this final rule. While some suppliers can reduce the impact of this rule by relabeling their products as not for infant sleep, not all manufacturers can simply remarket the product if the physical form of the product demonstrates that it is intended for sleep. For some of these products, manufacturers could relabel them as intended for infants older than five months, or, in some cases, for pets. However, the demand for infant sleep products for pet use is probably limited.

The final rule is considered a consumer product safety standard issued under the Commission’s authority in section 104 of the CPSIA. Section 104(b)(1)(B). We are unclear regarding what the commenters’ “sold by” date references. The Consumer Product Safety Act (CPSA) sets forth requirements for manufacturers and importers once a rule becomes effective. Section 19(a)(1) of the CPSA states:

(a) It shall be unlawful for any person to—

(1) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is regulated under this Act or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under this Act, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission;

15 U.S.C. 2068(a)(1). Accordingly, the CPSA provides that, as of the effective date of the final rule, it is unlawful to “sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States,” any infant sleep product, as defined in the rule, that is not in conformity with the final rule.

9. Procedural Comments

(a) Products Subject to the Final Rule

Comment 29: A commenter stated that the proposed rule would apply to domestic products, and not to products made overseas. The commenter stated that the rule should apply to products made overseas and sold in the United States, for “optimal consumer safety.”

Response 29: The commenter appears to misunderstand the scope of products subject to the final rule. If finalized, the rule would make it unlawful to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States, an infant sleep product that is not in conformity with this rule, regardless of whether the product was manufactured in the United States or overseas.

(b) Incorporation by Reference

Comment 30: A commenter states that the Commission should publish the legal standard for infant sleep products, rather than incorporate the standard by reference. The commenter stated:

- Publishing the legal standard “will advance fundamental principles of fair notice and due process by ensuring that the public has open and unimpeded access to the law.”
- The law belongs to the people, regardless of who drafts the law, and thus citizens have a fundamental right to know what the law contains.

- When the public is not informed about relevant legal standards, this has the potential for arbitrary or discriminatory enforcement.
- People cannot comply with a law if they do not know the substance of the law.

Response 30: Section 104 of the CPSIA directs the Commission to issue standards for durable infant or toddler products that are “substantially the same as,” or more stringent than, applicable voluntary standards. Thus, unless the Commission determines that more stringent requirements are necessary to further reduce the risk of injury, the Commission’s rules must be, for the most part, the same as the applicable voluntary standard. In this case, the final rule would incorporate by reference ASTM F3118–17a, with substantial modifications to make the standard more stringent, to further reduce the risk of injury associated with infant sleep products. This final rule would set forth in the Code of Federal Regulations (CFR): Definitions, one test for the seatback/sleep surface angle of an infant sleep product, and otherwise require infant sleep products that do not already meet a CPSC sleep standard to meet the requirements of the bassinet standard, to further reduce the risk of injury associated with inclined and flat infant sleep products. CPSC’s bassinet standard, 16 CFR part 1218, currently incorporates by reference performance and labeling requirements in ASTM F2194–13, with modifications set forth in the CFR. CPSC’s mandatory standard is substantially similar to ASTM F2194–16e1.

ASTM’s voluntary standards are protected by copyright, which the Commission (and the federal government generally) must observe. The United States may be held liable for copyright infringement. 28 U.S.C. 1498. Accordingly, the Commission cannot violate copyright law by publishing ASTM’s voluntary standards in the CFR. The Office of the Federal Register (OFR) has established procedures for incorporation by reference that seek to balance the interests of copyright protection and public accessibility of material. 1 CFR part 51. OFR’s regulations are based on Freedom of Information Act provisions that require materials to be “reasonably available” when incorporated by reference with approval of the Director of the Federal Register. 5 U.S.C. 552(a)(1). Under the OFR’s requirements, an agency may incorporate by reference specific publications, including standards, if they are “reasonably available to and usable by the class of persons affected.”

1 CFR 51.7. To ensure the material is “reasonably available,” an agency must summarize the material it will incorporate by reference and discuss how that material is available to interested parties in the **Federal Register** notice. *Id.* §§ 51.3(a), 51.5(a). Manufacturers and importers of infant sleep products represent the class of persons affected by the final rule. Although any interested person has access to the content of CPSC’s regulations through **Federal Register** notices of proposed and final rules, the CFR, and the content of voluntary standards on ASTM’s website, under the statutory scheme set forth in the CPSIA, it is those manufacturers and importers who want to “sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States,” any durable infant or toddler product, that must conduct testing using a third party conformity assessment body (lab) and certify their product as compliant with the applicable consumer product safety rule. 15 U.S.C. § 2063(a)(2).

The Commission complies with the requirement that publications, including standards, are “reasonably available to and usable by the class of persons affected,” whenever incorporating material by reference. For example, when the Commission proposes a rule under section 104 of the CPSIA, the Commission describes and summarizes the requirements of the rule, including the voluntary standard, in the preamble of the rule printed in the **Federal Register**, and explains that ASTM’s copyrighted voluntary standards are available to review online for free during the comment period at <https://www.astm.org/CPSC.htm>. Once a rule becomes effective, ASTM provides a read-only copy of the standard for review on the ASTM website at: <https://www.astm.org/READINGLIBRARY/>. As always, any person can purchase a voluntary standard from ASTM, or may schedule a time to review a voluntary standard (for free) at the Commission’s headquarters in Bethesda, MD, or at the National Archives and Records Administration (NARA). Accordingly, citizens who are interested in the content of the law have unimpeded access to the regulation, and have several avenues for free access to the text of voluntary standards incorporated by reference into a mandatory CPSC standard for a durable infant or toddler product.

Comment 31: A commenter states that CPSC’s practice of incorporating voluntary standards by reference into law forces citizens to either visit the agency in person, or pay for access, to

view the proposed law. The commenter contends that CPSC’s actions to allow public access to the proposal, including summarizing the proposed requirements in the preamble to the proposed rule, making the voluntary standard available for review at CPSC’s offices, or reading the standard on ASTM’s website free of charge, are all problematic, as the regulations are not “reasonably available” to the class or persons affected. The commenter states that ASTM’s restrictions on downloading or printing the standard (unless the standard is purchased) are an impediment to accessing the law, and describes the Commission’s access to the proposed law as “limited” and insufficient to “ensure robust public access to the law.” Specifically, the commenter notes that without the ability to download graphs and charts in the ASTM standard, the graphs are unreadable in portrait view. The commenter states that “reasonably available” is not defined in the APA, but should be interpreted broadly “to promote fundamental constitutional values. . . .”

Response 31: We disagree with the commenter that CPSC’s efforts to make voluntary standards “reasonably available” are “limited.” For rules issued under section 104 of the CPSIA, stakeholders have several ways to access the content of the voluntary standard proposed to be incorporated by reference, and after the standard is incorporated by reference into a regulation, including reading a summary of the requirements of a voluntary standard in a proposed or final rule (free), reviewing voluntary standards in person at CPSC’s offices (free), reviewing read-only copies of the voluntary standard on ASTM’s website (free), and by purchasing a copy of the standard. The OFR’s regulations do not require free access to the contents of copyrighted materials. In developing a regulation, the OFR considered whether to require free access to materials that are incorporated by reference into regulations, and specifically declined to do so. 79 FR 66267 (Nov. 7, 2014). The OFR found that adopting requirements to summarize the content of the material incorporated, and explaining to stakeholders how to obtain the material, was adequate to make the material “reasonably available.” *Id.* at 66,270. Accordingly, CPSC’s efforts to make copyrighted materials reasonably available exceed the OFR’s requirements.

Comment 32: A commenter states that incorporation by reference, without providing free access to the law, undermines due process because it may

limit public input and exclude meaningful participation by some stakeholders. The commenter explains, for example, that to participate in ASTM standards development, one must be an ASTM member, which costs \$75 per year. The commenter notes that the regulated community can afford this and participate, while members of the public cannot meaningfully participate.

Response 32: Stakeholders have several options to review the content of a voluntary standard for free, as described in response to comments 30 and 31. ASTM typically seeks a cross section of stakeholders to participate in standards development. While ASTM requires membership to vote on balloted items to create or revise a voluntary standard, ASTM does not require membership to participate in ASTM meetings where stakeholders discuss standards development for durable infant or toddler products. Thus, if a consumer wanted to participate in an ASTM meeting, they could do so without membership. Additionally, if a consumer wanted to become an ASTM voting member and cannot afford the membership fee, that person can contact ASTM to learn about additional options for membership. For example, students can be ASTM members free of charge.

We further note that CPSC's regulation at 16 CFR part 1031 does not allow staff to participate in voluntary standards meetings that are not open to the public. CPSC staff's participation in ASTM meetings discussing durable infant or toddler products are posted on CPSC's calendar (on CPSC's website) at least a week in advance. The meeting notice provides the date, time, purpose of the meeting, the staff attending, and contact information for staff (to obtain ASTM login information) so that any person who wants to participate in the ASTM meeting may do so. Moreover, CPSC staff creates a written meeting log for each ASTM meeting where staff participates, which summarizes the meeting content.

We encourage members of the public to meaningfully participate in standards development efforts for durable infant or toddler products through the ASTM process and by commenting on CPSC's proposed rules.

Comment 33: A commenter describes a recent holding by the Eleventh Circuit finding that annotations to a Georgia statute were "sufficiently law-like" to require free public access. The commenter also describes two district court cases challenging PACER system fees, but notes the cases are in the early stages of litigation, but "the underlying principles of free public access to the

law and legal proceedings are directly relevant here."

Response 33: As described in response to comments 30 and 31, CPSC exceeds the OFR's regulation requiring that voluntary standards that are incorporated by reference be made reasonably available to the class of persons affected, because the voluntary standards incorporated by reference by CPSC in rules under section 104 of the CPSIA are available for review by all interested parties. ASTM provides access to review voluntary standards incorporated by reference before and after a rulemaking, free of charge, on ASTM's website. Additionally, any person can schedule a time to review a voluntary standard (for free) at the Commission's headquarters in Bethesda, MD, or at the National Archives and Records Administration (NARA).

(c) Alleged Notice and Comment and Section 104 Procedural Defects

Comment 34: A commenter states that the rulemaking process for including flat products within the scope of the 2019 SNPR, such as in-bed sleepers, is procedurally deficient and does not follow the procedure for rules issued under section 104 of the CPSIA, because the Commission's 2019 SNPR did not include sufficient data demonstrating the need for a rule to cover non-inclined sleep products. The commenter states that the data set for non-inclined products is incomplete and insufficiently reviewed, suggesting that the Commission did not review incident data for non-inclined products with the ASTM committee. The commenter states that the Commission's failure to publish a revised SNPR to include CPSC staff's concerns with compact bassinets, baby boxes, and in-bed sleepers, as described in a December 12, 2019 letter from staff to several ASTM subcommittees, which the commenter states did not appear in the 2019 SNPR, and to instead provide a 30 day extension of the comment period, was insufficient notice to all interested parties, and may result in a flawed standard that is unable to withstand judicial scrutiny.

Response 34: The 2019 SNPR provided notice to stakeholders that unregulated, non-inclined, flat infant sleep products were included in the proposal, by proposing to remove the term "inclined" from the standard, and to include within the scope of the rule currently unregulated infant sleep products, including inclined and non-inclined products. For example, the SNPR states:

- "CPSC's proposed standard would cover products intended for infant sleep

that are not already addressed by another standard." 84 FR at 60949.

- "CPSC proposes to define 'infant sleep products' as products that provide sleeping accommodations for infants that are not currently covered by bassinets/cribbs, cribs (full-size and non-full size), play yards, and bedside sleepers . . ." *Id.* at 60950. Similar statements are also made on pages 60951 (three times), 60956, and in the draft regulatory text (proposed § 1236.1, § 1236.2(b)(4)(D) and § 1236.2(b)(11)(i)) at 60962–63).

- "The Supplemental NPR proposes to incorporate ASTM F3118–17a with substantial modifications, including revisions in the scope of the standard, section 1.3, to remove the term "inclined," and to include any infant sleep product not currently covered by another mandatory rule for infant sleep products. . . ."

- The request for comments on page 60961 asks for comments on non-inclined products likely to be impacted by the SNPR, including, for example, a request for comment on:

- ". . . any additional types of products that commenters believe may be impacted by the Supplemental NPR."
- ". . . products with inclines less than or equal to 10 degrees that do not already comply with the bassinet standard."

- removing the upper age limit of 5 months because the SNPR "proposes to address 'infant sleep products' not already covered by traditional sleep product [standards]."

- The Staff's October 16, 2019 SNPR Briefing Package, referenced in the **Federal Register** notice, contains similar statements about the scope of the rule (pages 15, 16, 21, 117, 136), and on page 133 also specifically states (and on page 134, Figure 1 provides a picture of an unregulated flat sleep product):

The draft supplemental proposed rule would also cover products with inclined sleep surfaces greater than 30 degrees and less than 10 degrees, if they are intended or marketed for children under 5 months of age for sleep purposes, and they are not subject to another sleep product standard. For example, the draft supplemental proposed rule would include the hammock-style crib accessory shown in Figure 1. It appears to have an incline of 10 degrees or less, but does not fall under another sleep category.

CPSC's description of the scope of the rule throughout the 2019 SNPR and the Staff's SNPR Briefing Package, and the request for comment on these products, were sufficient to inform stakeholders that these unregulated flat sleep

products were included within the scope of the rule.

In addition, ASTM members had actual notice of the contents of the 2019 SNPR before and after publication. Sections V.A.3 and V.B.2 of this preamble discuss staff's work with the ASTM subcommittees and task groups. Staff's SNPR Briefing Package was posted on the Commission's website on October 16, 2019, before ASTM held fall meetings on voluntary standards for juvenile products, and before the Commission voted on the SNPR, so that ASTM members and other stakeholders could review the package, including the Mannen Study, before the ASTM meetings, and so that staff could discuss the package and the Mannen Study with ASTM members. The ASTM Agenda for the Infant Inclined Sleep Products meeting that occurred on October 21, 2019 included a link to Staff's SNPR Briefing Package. CPSC staff discussed the 2019 SNPR Briefing Package at the ASTM meetings in October 2019, including with the ASTM subcommittees for infant inclined sleep products, in-bed sleepers, and bassinets, discussing the Mannen Study findings, as well as addressing the fact that flat sleep products were covered by the SNPR. Dr. Mannen attended the subcommittee meeting for infant inclined sleep products via telephone, to discuss the Mannen Study and to answer questions.

The SNPR published in the **Federal Register** on November 12, 2019. In a December 12, 2019 letter to both the ASTM inclined sleep and bassinet subcommittees, CPSC staff again reiterated its concerns with weakening the safe sleep requirements in the voluntary standard for bassinets and cradles to accommodate unregulated products, such as in-bed sleepers, compact bassinets, and baby boxes. Thus, the letter represents an additional effort to ensure that the relevant ASTM subcommittees (and thus subcommittee members) were aware of CPSC staff's concerns with these products, as well as the content of the 2019 SNPR, which proposed that flat sleep products would need to meet the requirements of the bassinet standard. Even though this letter was in addition to, and not instead of, the notice provided in the 2019 SNPR, the Commission extended the comment period for an additional 30 days, to accommodate any confusion among stakeholders. The final rule addresses scope and data concerns submitted by commenters on the inclusion of unregulated flat sleep products.

With regard to in-bed sleepers, baby boxes, and compact bassinets

specifically, ASTM members, which include manufacturers of these products, have been well aware of CPSC staff's concerns with these products for years, based on activity on the bassinet subcommittee which has been developing requirements for these products to include in the bassinet standard, but has thus far been unsuccessful. With regard to in-bed sleepers, ASTM created a separate standards development effort for this product, which CPSC staff has participated in, and provided incident data on the products, including notice of the injuries and fatalities associated with these products. Indeed, through staff's participation in the ASTM process, including attending meetings, providing incident data, and providing comments and votes on ballot efforts, staff's concerns with unregulated flat sleep products, and the incident data associated with these products, is not unknown to stakeholders and these commenters.

Comment 35: A commenter states that CPSC statutes require the Commission to defer to voluntary standards under certain conditions, and that CPSC's website states that CPSC follows OMB Circular A-119, but the Commission has done neither in this case. Another commenter states that the 2019 SNPR did not rely on the ASTM consensus-driven process to develop a standard, and that CPSC's data cannot be presented belatedly to ASTM participants, after or at the same time as the SNPR was provided to the Commission. This commenter states that while CPSC claims the process was a collaborative one, for the 2019 SNPR, the process was not.

Response 35: Rulemaking pursuant to sections 7 and 9 of the CPSA requires the Commission to rely on a voluntary standard, rather than promulgate a rule, if: (1) The voluntary standard adequately addresses the risk of injury associated with a product, and (2) there is likely to be substantial compliance with the voluntary standard. If either of these criteria are not met, the Commission may proceed with rulemaking under sections 7 and 9 of the CPSA, if the Commission can make the other required findings. Those criteria are not relevant under section 104 of the CPSIA, which requires the Commission to consult "with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products," and to promulgate rules that are substantially

the same as the voluntary standards, or more stringent than the voluntary standards, if the Commission finds that more stringent standards would further reduce the risk of injury.

Although CPSC staff's standards development work through the ASTM process can colloquially be termed "collaborative," nothing in section 104 of the CPSIA requires "collaboration" on a rule outside of the rulemaking process. Under section 104, the Commission is not required to "defer" to the voluntary standard, rather, the Commission must promulgate rules, and those rules must be substantially the same as the voluntary standard, or more stringent than the voluntary standard, if more stringent requirements would further reduce the risk of injury. Section 104 requires the Commission to consult regarding the effectiveness of a voluntary standard; the Commission is not required to consult on the timing of a proposed rule, the Commission's enforcement work, or on the content of a proposed rule outside of the rulemaking process. In the case of bassinets, unregulated flat sleep products, and inclined sleep products, staff has been consulting on the effectiveness of the voluntary standards, or lack thereof, for these products for many years.

Generally, CPSC staff's work through the ASTM process has improved the safety of durable infant or toddler products. However, nothing in section 104 of the CPSIA requires the Commission to delay addressing risks of harm to the most vulnerable infants in sleep products that parents rely upon as a safe place for an infant, until all ASTM members have reached a consensus on whether and how to create or revise a voluntary standard to address the risk. The Commission would be relinquishing the statutory mandate to protect consumers by ceding product safety to the very industry Congress required the agency to regulate. CPSC met the requirement to consult on the effectiveness of the voluntary standards. The lengthy record of staff's participation with the infant inclined sleep committee since the 2017 NPR is available on regulations.gov, as well as through ASTM records. A similarly robust record of staff's participation on the bassinet and cradle committee, outside of the rulemaking process, is available through ASTM, on CPSC's website, and through CPSC's Office of the Secretariat.⁴³

Finally, as reviewed in response to comment 12, the final rule addresses

⁴³ <https://cpsc.gov/Regulations-Laws--Standards/Voluntary-Standards>.

scope and data concerns submitted by commenters on the inclusion of unregulated flat sleep products, by specifically listing the products included within the scope of the final rule in this preamble, reviewing incident data and hazard patterns associated with flat products, and by demonstrating that the requirements in the bassinet standard are adequate to address the risk of injury associated with flat infant sleep products. CPSC's description of the scope of the rule throughout the 2019 SNPR and Staff's SNPR Briefing Package, and the request for comment on these products (including a 30 day comment extension), were sufficient to inform stakeholders that these unregulated flat sleep products were included within the scope of the rule. Moreover, the Commission received comments on the inclusion of flat sleep products within the scope of the rule, demonstrating knowledge of their inclusion.

Comment 36: A commenter states that CPSC had been participating collaboratively with the ASTM committee for ASTM F3118 before the summer of 2019, when the commenter states the Commission rescinded its rulemaking to adopt ASTM F3118 as a mandatory standard, and to modify the standard through the SNPR. The commenter states that the better practice would be to issue an advanced notice of proposed rulemaking (ANPR) while also seeking modifications to ASTM F3118 through the ASTM process, so that stakeholders can "work with urgency" toward addressing CPSC incident data to develop a performance-based standard, versus a design restrictive standard. The commenter also expressed disappointment that CPSC is "subverting" the ASTM process, which has a proven track record for resolving product problems. The commenter requests that CPSC "correct its course" and provide the relevant data to the ASTM committee, so that the committee can address the problems associated with inclined sleep products through the ASTM process. The commenter requests that CPSC hold the SNPR in abeyance while proceeding as the commenter has suggested, with an ANPR and working through the ASTM process.

Response 36: Although staff submitted an NPR termination package for infant inclined sleep products to the Commission on June 12, 2019, the Commission never voted on the termination package. Instead, the Commission voted (5–0) on October 25, 2019 to issue the SNPR for infant sleep products.

Generally, CPSC staff's work through the ASTM process to improve the requirements of voluntary standards to address hazards associated with durable infant or toddler products has improved the safety of these products, and CPSC will continue its work through the ASTM process. Accordingly, CPSC did not, and is not, subverting the ASTM process to address the hazards associated with inclined and flat sleep products. CPSC staff has been participating in the infant inclined sleep product standards development process, as well as the bassinet and cradle standards development committee, for many years, both before and after the Commission issued the 2019 SNPR.

ASTM did not hold subcommittee meetings or task group meetings on inclined sleep products or the SNPR for almost one full year after the October 2019 ASTM meetings, and did not schedule any meetings until after CPSC staff sent a letter to the ASTM subcommittee for infant inclined sleep products on July 16, 2020. After staff's letter, the ASTM F3118 subcommittee established a task group to revise the infant inclined sleep standard's title, introduction, and scope, to be more in line with the proposal in the 2019 SNPR. In December 2020, the ASTM subcommittee introduced ballot F15–18 (20–1) to change the standard's title, introduction, and scope to include all infant sleep products (and not just inclined sleep products). A more detailed description of this ballot is in section V.A.3 of this preamble. However, in January 2021, the ballot did not pass due to six negative votes. The ASTM F3118 subcommittee discussed the ballot results at a meeting on January 27, 2021. During this meeting, ASTM members disagreed on the intent and consequences of changes to the voluntary standard, and the meeting ended without a consensus on a path forward.

Based on the ballot results and the discussions in these ASTM meetings, staff advises that it is unlikely that ASTM will be able to move forward with changes to ASTM F3118 that address safe sleep requirements in the near term. However, we note that a task group to review safe sleep requirements across infant sleep product standards (the comparison task group) has met four times since the January 27, 2021 meeting. CPSC staff has participated in all of these ASTM efforts, including commenting on ASTM's ballot.

The December 2020 ASTM ballot to revise the title, introduction, and scope of ASTM F3118, and the January 2021 meeting to discuss the negatives on the ballot, demonstrate that ASTM members

do not have a consensus on moving forward to address the hazards associated with infant sleep products, despite CPSC's 2019 SNPR and staff's continued participation in the process. Although ASTM task groups continue to work on revisions to the voluntary standard, staff reports that the ASTM process is not close to completing their work, and staff was not confident that ASTM would achieve consensus on revisions to the standard in the near term.

In a recent ASTM task group meeting on revisions to the title, introduction, and scope of the standard (April 22, 2021), task group members discussed balloting the proposed regulatory text in the 2019 SNPR to replace ASTM F3118–17a, to prevent the sale of infant inclined sleep products that purport to certify to ASTM F3118–17a, meaning products with an incline above 10 degrees, while ASTM works to revise the voluntary standard. However, the task group did not plan to ballot the requirement that all infant sleep products meet the bassinet standard, because an ASTM task group is attempting to identify minimum safe sleep requirements that could apply to infant sleep products to include in F3118. Staff is participating in this effort as well, but, based on the assessment in this final rule, does not believe that requirements that are different and less stringent than the requirements in the bassinet standard will adequately address the risk of injury associated with infant sleep products.

Section 104 of the CPSIA requires CPSC to consult regarding the effectiveness of the voluntary standard; it does not require CPSC to consult on the timing of rulemaking, the content of a rule outside the rulemaking process, or to delay rulemaking until ASTM members achieve consensus. Moreover, stakeholders have now had sufficient time to consider and comment on the Mannen Study, which has been available on CPSC's website as an attachment to Staff's SNPR Briefing Package since October 2019, and how to address hazards associated with products within the scope of the SNPR, through the rulemaking and the ASTM processes. Despite having a year and a half to make progress through the ASTM process, stakeholders have not achieved consensus on how to move forward. When ASTM members do not have, or cannot achieve, consensus on whether or how a voluntary standard can address associated hazards, product safety is not improved.

The Commission's statutory mandate under section 104 of the CPSIA is to ensure that durable infant or toddler

product standards provide the highest level of safety for such products that is feasible. Accordingly, CPSC will not delay the final rule, and section 104 of the CPSIA does not require CPSC to delay under the circumstances.

Comment 37: A commenter states that the scope of the 2019 SNPR includes many different types of products, with different sizes, age capacities, breathability, firmness, geometry, perceived usage, and different warnings. The SNPR did not explain CPSC's rationale to include all of these products under ASTM F3118 and to conclude that all of these products are unsafe.

Response 37: The 2019 SNPR stated that the rule applied to all infant sleep products not subject to a CPSC sleep standard, including products with an incline less than 10 degrees, as outlined in response to comment 34. CPSC staff has been participating on the ASTM committees for bassinets and infant inclined sleep for many years about the hazards associated with products that would fall within the scope of the final rule. The infant inclined sleep product standard and the developing in-bed sleeper standard both evolved from the bassinet standard, and ASTM is currently trying to create new requirements in the bassinet standard to accommodate designs of certain flat sleep products. Accordingly, as provided in response to comment 36 regarding staff's efforts through the ASTM process, stakeholders understand the scope of products addressed in the 2019 SNPR and the final rule, ASTM's efforts to modify the bassinet requirements to accommodate these products, and CPSC staff's objection to modification of the safe sleep requirements in the bassinet standard. To address comments on the 2019 SNPR, the final rule includes additional incident data and analysis to demonstrate that the performance and labeling requirements of the bassinet standard would address the risk of injury associated with currently unregulated flat and inclined sleep products.

Comment 38: A commenter states that CPSC followed the process set forth in section 104 of the CPSIA when it issued the 2017 NPR to incorporate by reference into a mandatory rule, ASTM F3118. The commenter notes that the NPR was substantially the same as the voluntary standard, and that CPSC staff consulted with representatives from consumer groups, juvenile product manufacturers, and independent child product engineers and experts, to examine and assess the effectiveness of ASTM F3118, as required by section 104 of the CPSIA. The commenter states,

however, that the 2019 SNPR for infant sleep products did not meet these two requirements in the CPSIA. Instead of consulting with consumer groups, manufacturers, and product safety experts through the section 104 process, CPSC staff "informed" stakeholders about the Commission's change in direction at the October 2019 ASTM committee meetings, after the SNPR was already issued. Moreover, although CPSC staff remains engaged in the ASTM F3118 subcommittee, their engagement is in support of the SNPR. The commenter maintains that the 2019 SNPR was not a collaborative effort, and that CPSC did not consult with stakeholders before issuing the SNPR. The commenter states: "The stakeholder community, impacted and potentially impacted manufacturers, are in the very unfortunate position of being subject to a mandatory rule that they had no part in helping to craft, by way of the ASTM development process." The commenter also suggests that CPSC staff has acted in an "ultra vires manner to sanitize from incline sleep products" that are otherwise subject to an existing standard and to the rulemaking. The commenter recommends that the Commission issue another SNPR to clarify the scope of the rulemaking and evaluate and mitigate any unintended consequences, and to allow time for stakeholders and CPSC staff to work through the ASTM process to examine the impact of the proposed rule. Another commenter similarly urges the Commission to proceed in accordance with section 104 of the CPSIA by working with ASTM to develop a standard with a clearly defined scope, clear definitions, and creation of performance requirements based on specific product types within the infant sleep product category. This approach would require working with ASTM, and then reissuing an SNPR, before proceeding with a final rule.

Response 38: Section 104(b)(1) of the CPSIA requires the Commission to: "(A) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products;" and (B) in accordance with the informal notice and comment rulemaking requirements under section 553 of the Administrative Procedures Act (APA), "promulgate consumer product safety standards that—(i) are substantially the same as such voluntary standards; or (ii) are more stringent than such voluntary standards, if the

Commission determines that more stringent standards would further reduce the risk of injury associated with such products."

The regulated community participates in the rulemaking process by commenting on a proposed rule. Neither section 104 of the CPSIA nor the APA requires that stakeholders craft a CPSC mandatory rule. CPSC is required to consult regarding the effectiveness of the voluntary standard and to promulgate rules. As set forth in section V.A.3 and V.B.2 of this preamble, CPSC staff has been consulting about the effectiveness of the voluntary standards at issue, infant inclined sleep products and bassinets and cradles, for many years, through participation with the relevant ASTM subcommittees and task groups. For example, since ASTM began development of an infant inclined sleep product standard in or around 2011, CPSC has participated in the development of the standard. Similarly, CPSC staff has participated in the development and revisions to the bassinet and cradle standard since at least 2002. For both standards, CPSC staff has provided incident data, participated in subcommittee and task group meetings, and submitted comments and/or votes on ASTM ballots. For this final rule, CPSC has reviewed the incident data, hazard patterns, and the adequacy of the voluntary standards to address the risk of injury associated with products within the scope of the final rule, unregulated inclined and flat sleep products, and is promulgating a rule that is more stringent than the voluntary standard, as proposed in the 2019 SNPR, to further reduce the risk of injury associated with infant sleep products.

ASTM members have now had ample time to consider the hazards associated with infant sleep products, to comment on the SNPR, and to address associated hazards through revised voluntary standards. ASTM is still working on these issues and staff will continue working with ASTM to develop a voluntary standard that addresses the risk of injury associated with infant sleep products. If and when ASTM has revised ASTM F3118–17a, it may send the revised standard to CPSC to evaluate, through the update process set forth in section 104 of the CPSIA.

Comment 39: Commenters allege that the 2019 SNPR represents an unprecedented effort by CPSC to issue a mandatory rule that would create a pre-market testing and approval process for an entire product category. Commenters state that creating an omnibus rule that requires infant sleep

products to meet the bassinet standard, instead of creating product specific standards, would have the unintended consequence of stifling innovation.

Response 39: As with all of CPSC's regulations to set performance and labeling requirements, CPSC's mandatory rules for durable infant or toddler products set a floor for safe consumer products. CPSC does not require pre-market approval of consumer products, nor does the agency have the authority to do so. However, CPSC does have the authority to create mandatory performance requirements through rulemaking, and to require that all products offered for sale in the United States meet these requirements to protect consumers from injuries or death. When the Commission is aware of a gap in the regulatory framework for infant sleep products, the Commission can use its authority to address the associated hazards.

Mandating a safety standard for infant sleep products offered for sale in the United States that are not already within the scope of another CPSC sleep standard is not "unprecedented" and is no different than standards for other durable infant or toddler products that contain different product types within the same standard, such as strollers and high chairs, each of which include a variety of product types. No company can sell a stroller in the United States that does not comply with the stroller standard, simply based on the type of stroller. Similarly, no company can sell a high chair in the United States unless it complies with the high chair standard. This is not a novel idea. The only difference in these product categories is how the voluntary standards evolved. The scope of the stroller and high chair standards are broad for the purpose of encapsulating all products. Standards for sleep products evolved on a different track. But the Commission is not required to continue a patchwork regulatory scheme that does not serve the interests of consumer safety. In this case, the Commission seeks to ensure that all products marketed or intended for infant sleep, for infants up to 5 months of age, meet the infant sleep product standard to set a floor for safe infant sleep. CPSC's mission is to protect consumers, and the agency will use its authority to protect the most vulnerable infants, up to 5 months old, and their unsuspecting parents, from sleep surfaces that do not follow known safe sleep principles, as set forth in the existing CPSC sleep standards. Accordingly, the Commission's effort in the 2019 SNPR is consistent with CPSC's statutory mandate to protect

consumers, and specifically, under section 104, to promulgate standards for product categories that the Commission determines to be of the highest priority, and to ensure that such standards provide the highest level of safety for such products that is feasible.

Because CPSC staff has been working with ASTM members on the bassinet and cradle subcommittee for years, on both inclined sleep products, as well as unregulated flat infant sleep products, ASTM members should be well aware of staff's efforts and concerns with both product types. Once CPSC issues an NPR, CPSC's docket on *Regulations.gov* includes a record of staff's participation through the ASTM process, and ASTM records should reflect this participation as well. CPSC's Office of the Secretariat maintains meeting logs summarizing staff's participation with external parties, such as ASTM, outside of the rulemaking process, and these meeting logs are searchable on CPSC's website.

Finally, performance and labeling requirements for consumer products allow for innovation with certain baseline safety requirements. While we understand the concerns that innovation beyond the baseline safety requirements may be discouraged, we note the development of infant inclined sleep products as a prime example of innovation preceding safety. Infant inclined sleep products were first marketed as an innovative sleep solution for parents; however, no safety standard existed for these products when they were introduced to the market. Commenters to the 2010 NPR and 2012 SNPR for bassinets indicated that hammocks and inclined sleep products should have their own standard because they could not meet the requirements for bassinets, and parents were likely to create their own "unsafe" alternative if a regulated product was not available. The ASTM standards development process for inclined sleep products took many years before the standard was published in 2015, and during that time, manufacturers were designing and selling innovative inclined products. As time went on, the hazards posed by inclined products became apparent in the accumulation of infant deaths and incidents associated with this product category. To avoid a repeat of this process, involving the most vulnerable infants up to 5 months old, the Commission is issuing this infant sleep product standard that contains key elements of safe sleep, so that product innovation does not compromise safe sleep for infants up to 5 months old.

Comment 40: A commenter states that section 104 of the CPSIA does not

permit the application of the bassinet standard to an open-ended and undefined scope of products. The commenter contends that section 104 requires the Commission to consider specific product types, characteristics, and hazards. The commenter states that the 2019 SNPR approach is "arbitrary" and "is a reversal of the Section 104 process" for existing and new products that are sleep products, but not bassinets or cradles. The commenter states that CPSC must clearly define the scope of the rule and the products that fall within the scope of the rule.

Response 40: As set forth in response to comment 34, the 2019 SNPR provided notice that the rulemaking included flat infant sleep products. Moreover, the preamble to this final rule identifies product types that fall within the scope of the rule, as well incident data, hazard patterns, and an analysis of how the requirements in the bassinet and cradle standard address the risk of injury associated with flat infant sleep products. The purpose of the rule is to regulate any product marketed or intended as a sleeping accommodation for an infant up to five months old that is not already regulated by another CPSC sleep standard. Accordingly, the scope of the rule is not "open-ended," and the final rule demonstrates that the bassinet standard provides minimum safe sleep characteristics for these infant sleep products.

Comment 41: A commenter states that to implement a rule that requires specific products to meet the requirements of the bassinet standard, CPSC must provide a rationale that is supported by "substantial evidence." The commenter states that the 2019 SNPR did not provide a rationale for the application of the bassinet standard to specific products within the infant sleep product category.

Response 41: As stated in response to comment 37, CPSC and stakeholders have been working through the ASTM process regarding requirements for unregulated flat and inclined sleep products for many years, as part of development of the bassinet standard. Accordingly, based on the 2019 SNPR and this ongoing work with ASTM, staff's efforts have been to maintain the safe sleep requirements in the bassinet standard and apply them to all sleep products marketed and intended for infants up to 5 months old. In response to comments, the final rule makes clearer the unregulated flat sleep products that fall within the scope of the rule, provides incident data, identifies hazard patterns, analyzes the effectiveness of the bassinet standard to address the hazards, and compares the

performance requirements in international standards to demonstrate that products within the scope of the final rule have similar hazard patterns that can be addressed by the requirements in the bassinet standard.

Comment 42: A commenter states that the Commission previously recognized the importance of product specificity in promulgating the consumer registration rule, 16 CFR part 1130. Despite this, the commenter states that the 2019 SNPR failed to discuss which product types would be considered “durable infant or toddler products” for product registration card purposes, and “simply concludes in a circular fashion that infant sleep products are durable infant or toddler products.” The commenter believes that a specific rationale is required for each product to “independently qualify” as a durable infant or toddler product. The commenter concludes that under the APA, CPSC must specifically define products that fall within an “infant sleep product” in another SNPR before it can issue a final rule.

Response 42: The preamble for the final rule identifies product types that fall within the scope of the rule. However, the 2019 SNPR and the final rule purposely do not define product types by name in the regulation text, and instead identify product types by purpose and age limit, to ensure that all infant sleep products meet minimum safe sleep requirements in the bassinet standard, including existing products and future products.

Section 104(f)(1) of the CPSIA does not require any further product type specificity to identify these products as durable infant or toddler products. The statute defines a durable infant or toddler product as “a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years” and then provides a list of products that are durable infant or toddler products. The Commission’s implementing rule at 16 CFR 1130.2(a) states:

DEFINITION OF DURABLE INFANT OR TODDLER PRODUCT means the following products intended for use, or that may be reasonably expected to be used, by children under the age of 5 years. The listed product categories are further defined in the applicable standards that the Commission issues under section 104(b) of the Consumer Product Safety Improvement Act of 2008, and include products that are combinations of the following product categories . . .

Based on this definition in part 1130, a product marketed or intended as a sleeping accommodation for an infant up to 5 months old is a durable infant or toddler product. Because the

products are intended for infants up to 5 months old, the products are “intended for use,” and “reasonably expected to be used,” by children under 5 years old. Products intended for infant sleep are similar to products on the statutory list intended for infant sleep, such as cribs, and bassinets and cradles. Additionally, “infant sleep products” are further defined in the final rule.

Accordingly, adding “infant sleep products” as a durable infant or toddler product is consistent with the Commission’s approach of adding a durable infant or toddler product category with a mandatory standard to the list of products in part 1130, to clarify that these products must meet the consumer registration rule, and the testing and certification requirements for durable infant or toddler products.

Comment 43: A commenter contends that the creation of specific types of infant sleep products is not by the Commission’s choice, but required by section 104 of the CPSIA. The commenter states that Congress purposely listed different types of infant sleep products separately in section 104, because “differences between these products warrant individual consideration in any rulemaking proceeding,” and that this principle is true with the remaining infant sleep product types.

Response 43: The commenter offers no legislative history to support the idea that Congress listed sleep products separately because product differences warranted individual rulemaking proceedings. The products listed as durable infant or toddler products are examples of durable infant or toddler products that Congress expected the Commission to regulate by issuing a mandatory standard. Most of these products had existing voluntary standards in 2008 when Congress passed the CPSIA. Congress gave CPSC the authority to add products to the list of durable infant or toddler products, gave CPSC the mission to protect consumers, and instructed CPSC to “periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.”

Flat sleep products that are subject to the final rule are not currently defined or covered by any existing ASTM standard. If CPSC could not use its authority to expand the scope of a rule to include such products, especially when staff’s analysis demonstrates that the existing bassinets and cradles standard would address the risk of injury associated with such products, ASTM could dictate when and if

durable infant or toddler products are regulated by CPSC. Similarly, when products fall within an ASTM standard, CPSC should not be bound by ASTM’s categorization of such products if CPSC can demonstrate that the voluntary standard is inadequate to address the risk of injury associated with the products, but another voluntary standard would be adequate.

Comment 44: A commenter states that CPSC must not only specifically identify product types that fall within the infant sleep product category, but must also provide the rationale for applying the bassinet and cradle standard requirements to each product type within the category, as well as establishing the product type is a durable infant or toddler product. The commenter contends that this analysis must identify the specific characteristics for each product type and the related hazards, to describe how the bassinet standard would address each hazard pattern. The commenter contends that a requirement that may be applicable to one product type may not be applicable to another product type. The commenter contends that “[n]o broad product category to date has ever been subject to a rule without such specificity.” The commenter states this level of specificity is required to avoid banning existing safe products or chilling future innovation.

Response 44: As set forth in response to comment 34, the 2019 SNPR provided notice that the rulemaking included flat infant sleep products, and multiple other efforts, including those at ASTM, reinforced this. In response to comments, the preamble to this final rule provides further clarity, identifying product types that fall within the scope of the rule, including inclined and flat sleep products, as well associated incident data and hazard patterns. This final rule also provides an analysis demonstrating that the requirements of the bassinet standard are adequate to address each risk of injury associated with infant sleep products, both flat and inclined product types. As set forth in response to comment 39, we disagree that a rule under section 104 of the CPSIA cannot have a scope that is broader than one product type. For example, many types of carriages and strollers fall within the Safety Standard for Carriage and Strollers. Strollers offered for sale in the United States must meet the requirements in this regulation, regardless of product type.

The Commission’s statutory mandate under section 104 of the CPSIA is to ensure that durable infant or toddler product standards provide the highest level of safety for such products that is

feasible. Congress specifically included five products intended for infant sleep in the statutory list of durable infant or toddler products (full-size cribs, non-full-size cribs, play yards, and bassinets and cradles), demonstrating intent for CPSC to regulate such products. Currently, multiple flat and inclined sleep products are not subject to a CPSC regulation, but CPSC has the authority to add “infant sleep products” as a durable infant or toddler product, and to regulate this product category. Accordingly, the final rule regulates any product marketed or intended as a sleeping accommodation for an infant up to 5 months old, that is not already regulated by another CPSC sleep standard. In response to comments, the final rule expands the justification from the 2019 SNPR to demonstrate that the bassinet standard provides the minimum safe sleep characteristics for these infant sleep products. Finally, the scope of the final rule is well-defined, and allows a manufacturer to intentionally design and market a product as an infant sleep product, or to choose not to design and market a product as an infant sleep product.

VIII. Final Rule Establishing a Safety Standard for Infant Sleep Products

This final rule establishes a children’s product safety standard for infant sleep products as a type of durable infant or toddler product under section 104 of the CPSIA. The Mannen Study and CPSC staff’s analysis of the incident reports, hazard patterns, and adequacy of the voluntary standard, demonstrate that ASTM F3118–17a is inadequate to address the risk of injury associated with inclined sleep products. ASTM F3118–17a is inadequate to address the risk of injury associated with inclined sleep products, because it allows products with a seat back angle greater than 10 degrees, and does not address additional hazard patterns associated with inclined sleep products, such as containing the infant. The Commission determines that more stringent requirements are necessary in the mandatory standard to further reduce the risk of injury associated with inclined sleep products. Staff’s assessment in the 2019 SNPR, and section VI of this preamble, demonstrate that the performance requirements in the current voluntary standard for bassinets and cradles, ASTM F2194, which is incorporated into the Commission’s mandatory standard, 16 CFR part 1218, is adequate to address the risk of injury associated with infant inclined sleep products, and will further reduce the risk of injury associated with inclined sleep products.

As proposed in the 2019 SNPR, the definition of an “infant sleep product” in the final rule also includes flat sleep products, such as in-bed sleepers, baby boxes, compact bassinets, and baby tents, which currently do not fall within the scope of any voluntary or mandatory standard. Staff’s assessment of the incident reports and hazard patterns associated with flat sleep products in this final rule demonstrates that the risk of injury and death associated with flat sleep products are similar, and can be addressed by meeting the requirements in the current voluntary standard for bassinets and cradles, ASTM F2194, which is incorporated into the Commission’s mandatory standard, 16 CFR part 1218.

Accordingly, the final rule incorporates by reference ASTM F3118–17a as the mandatory standard for infant sleep products, both inclined and flat, with the following modifications to the voluntary standard:

- Revise the introduction of the standard, to state the purpose of the standard is to address infant sleep products not already covered by traditional sleep product standards, to reduce deaths associated with known sleep hazards, including but not limited to, a seat back or sleep surface angle that is greater than 10 degrees from the horizontal. This requirement is intended to broaden the purpose of the standard to more clearly address inclined and flat sleep products, including known hazards associated with infant sleep.

- Revise the scope of the standard, to remove the term “inclined” and broaden the scope to include infant sleep products, including inclined and flat sleep surfaces, marketed or intended to provide a sleeping accommodation for an infant up to 5 months old, and that are not already subject to a mandatory CPSC sleep standard:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles, incorporating by reference ASTM F2194, Standard Consumer Safety Specification for Bassinets and Cradles;

- 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs, incorporating by reference ASTM F1169, Standard Consumer Safety Specification for Full-Size Baby Cribs;

- 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs, incorporating by reference applicable requirements in ASTM F406, Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards;

- 16 CFR part 1221—Safety Standard for Play Yards, incorporating by reference applicable requirements in ASTM F406, Standard Consumer Safety

Specification for Non-Full-Size Baby Cribs/Play Yards;

- 16 CFR part 1222—Safety Standard for Bedside Sleepers, incorporating by reference ASTM F2906, Standard Consumer Safety Specification for Bedside Sleepers.

The purpose of this revision is to more clearly establish the scope of the final rule, which includes all products marketed or intended for infant sleep for children up to 5 months of age, so that these products that are currently unregulated must now meet one of the mandatory standards for infant sleep.

- Revise the scope of the standard to explicitly state that crib mattresses that meet the requirements of ASTM F2933 do not fall within the scope of the standard. This exclusion clarifies that crib mattresses that meet the voluntary standard do not meet the definition of an infant sleep product, and are always used in conjunction with a sleep product, such as a crib or play yard, that falls within one of CPSC’s sleep standards. The final rule also modifies referenced documents in the standard, to add the voluntary standard for crib mattresses, ASTM F2933;

- Modify the definition of “infant inclined sleep product” to remove the term “inclined” and revise the definition to state that an “infant sleep product” is “a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that is not subject to any of the following:

- 16 CFR part 1218—Safety Standard for Bassinets and Cradles
 - 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs
 - 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs
 - 16 CFR part 1221—Safety Standard for Play Yards
 - 16 CFR part 1222—Safety Standard for Bedside Sleepers

This requirement aligns the definition of “infant sleep product” with the scope of the rule, including the intent of the rule to ensure that all infant sleep products, inclined and flat, are subject to a mandatory CPSC sleep standard, to address the risk of injury associated with infant sleep products.

- Remove the definitions of accessory, compact, and newborn inclined sleep products because they are no longer necessary and have no unique requirements in the standard, because all infant sleep products are subsumed under the definition of “infant sleep product.”

- Modify seat back/sleep surface angle so the maximum allowable angle, as tested per the rule, must be equal to

or less than 10 degrees from horizontal in all positions recommended for sleep. Although the bassinet standard also requires a sleep surface equal to or less than 10 degrees, the bassinet standard does not have a test for the sleep surface angle. Accordingly, infant sleep products are required to test for the sleep surface angle, in addition to meeting the bassinet standard.

- Add a new requirement that infant sleep products must meet 16 CFR part 1218, Safety Standard for Bassinets and Cradles, including conforming to the definition of bassinet/cradle. As the final rule analysis demonstrates, conforming to the requirements in the bassinet standard addresses the risk of injury associated with infant sleep products. Requiring products to meet the definition of a bassinet/cradle also ensures that the products meet the requirement to have a stand.
- Remove all the performance requirements except for the above new or modified requirements.
- Remove all test methods except for maximum seat back/sleep surface angle.

The name of CPSC's final rule does not include the term "inclined," and will be codified as 16 CFR part 1236, Safety Standard for Infant Sleep Products. Finally, as proposed in the 2019 SNPR, because infant sleep products must meet the bassinet standard, infant sleep products must also meet the warning requirements in the bassinet and cradle standard, instead of those stated in ASTM F3118–17a. 84 FR at 60956–57. An Appendix to Tab C of Staff's Final Rule Briefing Package contains a redline of the final rule changes, compared to the requirements in ASTM F3118–17a.

IX. Amendment to 16 CFR Part 1112 To Include NOR for Infant Sleep Products

The CPSA establishes certain requirements for product certification and testing. Products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard or regulation under any other act enforced by the Commission, must be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a). Certification of children's products subject to a children's product safety rule must be based on testing conducted by a CPSC-accepted third party conformity assessment body. *Id.* 2063(a)(2). The Commission must publish an NOR for the accreditation of third party conformity assessment bodies to assess conformity with a children's product safety rule to which a children's product is subject. *Id.* 2063(a)(3).

The Commission published a final rule, *Requirements Pertaining to Third Party Conformity Assessment Bodies*, 78 FR 15836 (March 12, 2013), codified at 16 CFR part 1112 ("part 1112") and effective on June 10, 2013, which establishes requirements for accreditation of third party conformity assessment bodies to test for conformity with a children's product safety rule in accordance with section 14(a)(2) of the CPSA. Part 1112 also codifies all of the NORs issued previously by the Commission.

All new NORs for new children's product safety rules, such as the infant sleep products standard, require an amendment to part 1112. Accordingly, the 2019 SNPR proposed to amend the existing rule that codifies the list of all NORs issued by the Commission, 16 CFR part 1112, to add 16 CFR part 1236, *Standard Consumer Safety Specification for Infant Sleep Products*, to the list of children's product safety rules for which CPSC has issued an NOR, because a final rule would be a children's product safety rule that requires third party testing by a CPSC-accepted third party conformity assessment body. 84 FR at 60957. The Commission received no comment on the proposed amendment, and is finalizing the amendment as proposed in the SNPR.

Test laboratories applying for acceptance as a CPSC-accepted third party conformity assessment body to test to the new standard for infant sleep products are required to meet the third party conformity assessment body accreditation requirements in part 1112. When a laboratory meets the requirements as a CPSC-accepted third party conformity assessment body, the laboratory can apply to CPSC to have 16 CFR part 1236, *Standard Consumer Safety Specification for Infant Sleep Products*, included in the laboratory's scope of accreditation of CPSC safety rules listed for the laboratory on CPSC's website at: www.cpsc.gov/labsearch. Part 1236 includes one performance test to check for a seat back/sleep surface angle that is 10 degrees or less, and then requires infant sleep products to meet 16 CFR part 1218, Safety Standard for Bassinets and Cradles.

The new 16 CFR part 1236 for infant sleep products should have sufficient testing capacity by the effective date of the final rule. The test to check the sleep surface angle required in part 1236 involves use of the "Hinged Weight Gage—Infant" identified in F3118–17a. Because the gage is also used for testing to the 16 CFR part 1223, Safety Standard for Infant Swings (incorporating by reference ASTM F2088), labs

conducting infant swing testing will already have the gage. Staff advises that 33 labs are currently CPSC-accepted to test to the bassinet and cradle standard. Of these 33, 19 of the labs are also accredited to test to the infant swings standard, meaning these labs have all of the test equipment required to test to the new part 1236. These labs should be able to more easily become accredited to test to part 1236. Also, labs that already test to part 1218 *bassinets*, must only acquire the test gage, which staff advises is manufactured with readily available metal and is estimated to cost \$800. Moreover, labs that previously tested to the current ASTM F3118–17a for the JPMA certification program have the gage, because F3118 contains a test to measure the seat back angle using the gage. Finally, the effective date of this final rule is 12 months from publication in the **Federal Register**. Accordingly, labs seeking to become accredited to part 1236 have a full year to obtain the necessary test equipment, become ISO accredited, and have CPSC-accept their accreditation to test to part 1236.

The Commission certified in the 2019 SNPR that the proposed NOR for infant sleep products would not have a significant impact on a substantial number of small laboratories. 84 FR 60959. CPSC expects that laboratories that are already accredited to test to the bassinet and cradle standard will find it relatively easy to become accredited to test to this standard, because the primary substantive requirement added by this standard is the sleep surface angle. Moreover, CPSC did not receive any comments regarding the NOR. Therefore, for the final rule, the Commission continues to certify that amending part 1112 to include the NOR for the infant sleep products final rule will not have a significant impact on a substantial number of small laboratories.

X. Amendment to Definitions in Consumer Registration Rule

The statutory definition of "durable infant or toddler product" in section 104(f) applies to all of section 104 of the CPSIA. In addition to requiring the Commission to issue safety standards for durable infant or toddler products, section 104 of the CPSIA also directed the Commission to issue a rule requiring that manufacturers of durable infant or toddler products establish a program for consumer registration of those products. Section 104(d) of the CPSIA.

In 2009, the Commission issued a rule implementing the consumer registration requirement. 16 CFR part 1130. As the CPSIA directs, the consumer registration rule requires each manufacturer of a

durable infant or toddler product to: Provide a postage-paid consumer registration form with each product; keep records of consumers who register their products with the manufacturer; and permanently place the manufacturer's name and certain other identifying information on the product. When the Commission issued the consumer registration rule, the Commission identified six additional products as "durable infant or toddler products" to add to the statutory list in section 104(f)(2) of the CPSIA:

- children's folding chairs
- changing tables;
- infant bouncers;
- infant bathtubs;
- bed rails; and
- infant slings.

16 CFR 1130.2. The Commission stated that the specified statutory categories were not exclusive, but that the Commission should explicitly identify the product categories that are covered. The preamble to the 2009 final consumer registration rule states: "Because the statute has a broad definition of a durable infant or toddler product but also includes 12 specific product categories, additional items can and should be included in the definition, but should also be specifically listed in the rule." 74 FR 68668, 68669 (Dec. 29, 2009).

In the SNPR, the Commission proposed to amend the definition of "durable infant or toddler product" in the consumer registration rule to clarify that "infant sleep products" fall within the term "durable infant or toddler product" as a subset of bassinets and cradles, and must comply with the consumer registration rule and section 104 of the CPSIA. CPSC received a comment stating that the SNPR failed to discuss which product types would be considered "durable infant or toddler products" for product registration card purposes, and "simply concludes in a circular fashion that infant sleep products are durable infant or toddler products." The commenter believes that a specific rationale is required for each product to "independently qualify" as a durable infant or toddler product. The commenter concludes that under the APA, the Commission must specifically define products that fall within an "infant sleep product" in another SNPR before it can issue a final rule.

We disagree with the commenter and finalize the amendment to part 1130, as proposed in the 2019 SNPR, to include "infant sleep products" as a durable infant or toddler product, as a subcategory of bassinets and cradles. Based on the definition of a "durable

infant or toddler product" in section 104(f) of the CPSIA, and in § 1130.2, which define the term as products "intended for use, or that may be reasonably expected to be used, by children under the age of 5 years," "infant sleep products" are a durable infant or toddler product. "Infant sleep products" are defined in the final rule as a product marketed or intended as a sleeping accommodation for an infant up to 5 months old. Accordingly, the products are "intended for use," and "reasonably expected to be used," by children under 5 years old. Moreover, products intended for infant sleep are similar to products on the statutory list intended for infant sleep, such as cribs, bassinets and cradles. Moreover, "infant sleep products" are further defined in the final rule. Finally, as discussed in section V of this preamble, the Safety Standard for Infant Sleep Products, for both inclined and flat sleep products, is an outgrowth of efforts to develop a safety standard for bassinets and cradles, and may be considered a subcategory of bassinets. To provide greater clarity that inclined sleep products are durable infant or toddler products subject to the consumer registration rule, as well as third party testing and certification requirements for durable infant or toddler products, the Commission finalizes the amendment to 16 CFR 1130.2(a)(12), as proposed, to explicitly include "infant sleep products" as a subcategory of bassinets and cradles.

XI. Incorporation by Reference

Section 1236.2(a) of the final rule provides that each infant sleep product must comply with applicable provisions of ASTM F3118–17a. The Office of the Federal Register (OFR) has regulations concerning incorporation by reference. 1 CFR part 51. For a final rule, agencies must discuss in the preamble to the rule the way in which materials that the agency incorporates by reference are reasonably available to interested persons, and how interested parties can obtain the materials. Additionally, the preamble to the rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR's requirements, sections VI.A and VIII of this preamble summarize the provisions of ASTM F3118–17a that the Commission is incorporating by reference. ASTM F3118–17a is copyrighted. Before the effective date of this rule, you may view a copy of ASTM F3118–17a at: <https://www.astm.org/cpsc.htm>. Once the rule becomes effective, ASTM F3118–17a can be viewed free of charge as a read-only document at: <https://www.astm.org/>

READINGLIBRARY/. To download or print the standard, interested persons may purchase a copy of ASTM F3118–17a from ASTM, through its website (<http://www.astm.org>), or by mail from ASTM International, 100 Bar Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428; <http://www.astm.org>. Alternatively, interested parties may inspect a copy of the standard free of charge by contacting Alberta E. Mills, Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: 301–504–7479; email: cpsc-os@cpsc.gov.

XII. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of the final rule. 5 U.S.C. 553(d). CPSC generally considers 6 months to be sufficient time for suppliers of durable infant and toddler products to come into compliance with a new standard under section 104 of the CPSIA. Six months is also the period that the Juvenile Products Manufacturers Association (JPMA) typically allows for products in the JPMA certification program to transition to a new standard once that standard is published.

The 2019 SNPR proposed 12-month effective date after publication of the final rule, for products manufactured or imported on or after that date, because: (1) the Commission was proposing to incorporate by reference, ASTM F3118–17a, a relatively new voluntary standard that covers a variety of products whose manufacturers may not be aware that their product must comply; and (2) the Commission proposed to make substantial modifications to ASTM F3118–17a, and a 12-month effective date would allow time for infant sleep product manufacturers to bring their products into compliance after a final rule is issued. 84 FR 60958. The 2019 SNPR stated that the Commission expects that most firms should be able to comply within the 12-month timeframe. The 2019 SNPR also requested comment on the proposed 12-month effective date, because of the hazards involved with infant inclined sleep products, and stated that the final rule could issue with a shorter effective date, so that safer products would be available sooner. *Id.*

The 2019 SNPR commenters both supported and opposed the 12-month effective date. Some commenters supported a 6-month effective date, urging that additional time for the rule to become effective puts infants at risk.

Other commenters requested a longer effective date, or an indefinite delay of the rulemaking, until ASTM completes additional standards for specific products covered by the final rule.

For the final rule, the Commission will maintain the 2019 SNPR proposed effective date of 12 months after the date of publication in the **Federal Register**. Accordingly, as of the effective date of the final rule, it is unlawful to “sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States,” any infant sleep product, as defined in the rule, that is not in conformity with the final rule. 15 U.S.C. 2068(a)(1).

A 6-month effective date may seem reasonable because suppliers have had ample lead time to prepare for this rule since the SNPR was published in 2019, and many of the products within the scope of the final rule have been withdrawn from the market or redesigned, particularly for inclined sleep products. However, some manufacturers of flat sleep products that remain in the market will likely experience a significant economic impact as a result of this final rule. While some suppliers can reduce the impact of this rule by relabeling their products as not for infant sleep, not all manufacturers can simply remarket the product if the physical form of the product demonstrates that it is intended for sleep. For some of these products, manufacturers could relabel them as intended for infants older than five months, or, in some cases, for pets. However, the demand for infant sleep products for pet use is probably limited. Accordingly, maintaining the proposed 12-month effective date will provide manufacturers and importers time to spread the impact of the rule over a 12 month time period, to reduce the economic impact of the final rule.

XIII. Regulatory Flexibility Act

A. Introduction

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires that agencies review a proposed rule and a final rule for the rule’s potential economic impact on small entities, including small businesses. Section 604 of the RFA generally requires that agencies prepare a final regulatory flexibility analysis (FRFA) when promulgating final rules, unless the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Staff prepared a FRFA that is available at Tab E of Staff’s Final Rule Briefing Package.

The scope of this FRFA and the number of firms impacted is different

from the Initial Regulatory Flexibility Analysis (IRFA) that accompanied the 2017 NPR, because the scope of the NPR was inclined sleep products, while the scope of the final rule is infant sleep products, defined in the final rule as products that are marketed or intended to provide sleeping accommodations for an infant up to 5 months of age, and that are not already covered by a mandatory CPSC sleep standard: Full-size cribs, non-full-size cribs, play yards, bassinets and cradles, or bedside sleepers. This change in scope from the proposed rule was specified in the 2019 SNPR, and includes inclined and non-inclined (flat) infant sleep products. Some inclined sleep products have been recalled or otherwise voluntarily removed from the market since 2019, so some firms that were forecast to be impacted in the IRFA are not likely to be impacted by this final rule, because the firms have already stopped selling those products. However, a significant economic impact is possible for suppliers of flat sleep products that were not analyzed in the IRFA, as well as remaining suppliers of inclined products. Flat sleep products without inclined sleep surfaces include: Baby boxes, compact and travel bassinets that do not meet the bassinet standard, in-bed sleepers, baby tents marketed for infant sleep, baby pods, and baby nests.

Pursuant to the final rule, firms whose infant sleep products do not comply with any CPSC sleep standard will need to evaluate their products, determine what changes would be required to meet an existing CPSC standard, or 16 CFR part 1218, the Safety Standard for Bassinets and Cradles, and decide how to proceed. Noncompliant products would need to be removed from the U.S. market, modified to meet the mandatory standard as specified in this final rule, remarketed for children older than 5 months, or remarketed as not intended for infant sleep. New infant sleep products introduced to the market would also need to comply with the standard, or one of the other CPSC sleep standards. The final rule defines an “infant sleep product” as a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that does not already meet a mandatory CPSC sleep standard. CPSC interprets this definition to include products that are marketed for “napping,” “snoozing,” “dreaming,” or any other word that implies sleeping, or that are called a “bed,” and items marketed with a picture of a sleeping infant, to be an infant sleep product.

Based on the staff’s analysis, the Commission anticipates a possible significant economic impact for twelve

small importers and nine small domestic manufacturers that supply infant sleep products to the U.S. market, as well as for hundreds of home-based small businesses that ship from the U.S. We provide a summary of the FRFA below.

B. The Market for Infant Sleep Products

Section II of this preamble describes the infant sleep products within the scope of the final rule, the products excluded from the final rule, and a description of the market for infant sleep products, including a summary of retail prices for various types of infant sleep products.

C. Products and Small Entities to Which the Final Rule Would Apply

1. Overview of Products Covered by, and Excluded From, the Final Rule

Section II.A and B of this preamble describe the products subject to, and excluded from, the final rule. This rule is intended to cover “infant sleep products,” defined in the final rule as products that are marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not already covered by a mandatory CPSC sleep standard: Full-size cribs, non-full-size cribs, play yards, bassinets and cradles, or bedside sleepers. A detailed description of the products covered by the final rule is set forth in section II.C of this preamble, and includes:

- *Inclined products*, such as: Hard frame inclined sleepers, compact foam inclined sleepers, inclined play yard accessories, and baby hammocks; and
- *Flat products*, such as: Soft-sided products (baby pods and baby nests, soft-sided travel bassinets or travel beds, hand-held carriers marketed for sleep, and in-bed sleepers), rigid-sided and rigid-framed compact bassinets, travel bassinets, and similar products (baby boxes, compact, portable, or travel bassinets, or infant travel beds), and baby tents.

None of these products is covered by an existing CPSC sleep standard. CPSC considers that any items marketed for “napping,” “snoozing,” or “dreaming,” or any other word that implies sleeping, or that are called a “bed,” as well as items marketed with a picture of a sleeping infant, to be an infant sleep product.

Products that are subject to another CPSC sleep standard, or to another durable infant or toddler product rule that is not marketed for sleep, such as infant bouncers or swings, are not subject to the final rule. Moreover, a crib

mattress, as defined in ASTM F2933–19, is not an infant sleep product covered by the final rule.

2. Suppliers to This Market

Manufacturers of infant sleep products are categorized under many different North American Classification System (NAICS) categories, because there is not a NAICS code specifically for infant sleep products. These items are made by companies that have baby furniture, baby bedding items, mattresses, other durable baby items including strollers or car seats, toys, or general merchandise as their primary business. Businesses are generally considered small per the Small Business Administration (SBA) size standards if they have fewer than 100 employees for importers or wholesalers, or fewer than 500 employees for most of the relevant types of manufacturers for this rule. The SBA size standard for mattress manufacturing is 1,000 employees. The relevant NAICS codes include:

314999 (All Other Miscellaneous Textile Product Mills)
 337910 (Mattress Manufacturing)
 339930 (Doll, Toy, and Game Manufacturing)
 339999 (All Other Miscellaneous Manufacturing)
 423220 (Home Furnishing Merchant Wholesalers)
 424330 (Women's, Children's, and Infants' Clothing and Accessories Merchant Wholesalers)

The SBA size standards for “small” for the relevant NAICS codes mean that most suppliers in this product category are considered “small.” A U.S. company that has a factory employing 100 people might be a top 10 supplier in a particular infant sleep product category, but would be considered “small” by SBA standards. Similarly, an importer with a U.S. warehouse staff of 50 people would also be considered “small.”

Prior to the recalls of some infant inclined sleep products, large domestic and foreign companies and the larger “small” companies by SBA size standards were responsible for most of the sales volume for the hard frame inclined sleep products and inclined play yard sleeper accessories. Many of the inclined sleep products were available at big box chain retailers, and a few were available at mattress retailers. The larger companies have recalled or discontinued these products, and most big box stores have stopped stocking them. However, inclined sleep products are still available from small manufacturers and importers, and discontinued items made by large companies are still available from online merchants. Small companies have always accounted for a majority of

the suppliers of the unregulated flat-bottomed sleep products and infant hammock categories. A large number of suppliers exist for these products; the market is fragmented with many sellers. Many of the products covered by the final rule, particularly the soft-sided products and the products sold by small businesses, are only available online.

The majority of the suppliers to which this final rule would apply are small by SBA standards. At least 60 small U.S.-based manufacturers and importers are in this market, as well as 5 large domestic companies, and dozens of foreign companies, some of which ship these items directly to customers in the U.S. via online marketplaces. In addition, more than a thousand home-based businesses supply flat sleep products that would be subject to the final rule, of which hundreds ship from the U.S. Some firms sell these items under multiple brand names and models, including small manufacturers that make “store brands” for larger companies. The number of importers selling flat sleep products is approximate because the proliferation of online retail makes it possible for importers to quickly change their product offerings based on demand for particular products. The number of foreign companies is approximate for the same reason. In addition to the foreign companies that ship from U.S. distribution sites, dozens of third-party sellers are on major internet retail sites that ship products to U.S. consumers directly from a foreign country. The analysis in this FRFA focuses on the impact on small U.S. manufacturers and importers that ship from the U.S., as well as U.S.-based home businesses, but the large and foreign companies will also be impacted by the cost of complying with this rule. The large number of companies in the flat sleep products market covered by this rule reflects both a strong market demand for these products and a competitive market with relatively low margins.

D. Testing and Certification

Under section 14 of the CPSA, once the new infant sleep product mandatory standard become effective, all suppliers will be subject to the third party testing and certification requirements under the CPSA and the Testing and Labeling Pertaining to Product Certification rule (16 CFR 1107), which requires that manufacturers and importers certify that their products comply with the applicable children's product safety standards, based on third party testing, and subject their products to third party testing periodically. Third party testing costs are in addition to the costs of

modifying the infant sleeper products to meet the standard.

For infant sleep products, the third-party testing costs are expected to be about \$1,500 per testing cycle per model, including both the costs of the testing and the costs of the samples to be tested. This is consistent with the IRFA in the SNPR, which estimated a cost of \$1,100 for testing alone, not including the cost of the samples to be tested; we did not receive any comments on the SNPR providing a different estimate. Based on comments received on the bassinet and cradle final rule published in 2013, one-time costs of redesigning a product to meet the standard could be as high as \$500,000 for products requiring major redesign. As allowed by the component part testing rule (16 CFR 1109), importers may rely upon third party tests obtained by their suppliers, which could reduce the impact on importers. In addition, all businesses selling products covered by this rule were already required to certify compliance to general children's product rules for lead, phthalates, and small parts with third party testing, so those third-party testing costs would not be considered new costs of compliance for this rule.

E. Impact of Final Rule by Product Category

The impact on small businesses would vary by product category. We describe each product, provide information on the types of firms that supply the product, and describe the impacts for each product type for complying with this rule or taking action to exit the market sector.

1. Inclined Sleep Products

(a) Hard Frame Inclined Sleepers, Compact Foam Inclined Sleepers, and Play Yard Accessories

Since the NPR was published in 2017, some inclined sleep products have been recalled or otherwise removed from the market. However, while resale of recalled products is prohibited, discontinued items that were not recalled are still available on the secondary market, as well as additional physically similar products sold by small companies that were not recalled. JPMA has two manufacturers that are certified as compliant to the current ASTM F3118 standard for inclined sleepers. While larger companies have removed most of their inclined products from the market or remarketed them as chairs or loungers, some smaller importers and foreign direct shippers still offer them as sleep products. Some play yards with inclined sleep

accessories are still available. To date, the lack of a CPSC mandatory standard means that new entrants are free to enter this market sector with new inclined sleep products that do not comply with the existing ASTM standard, ASTM F3118–17a, or any other ASTM or CPSC sleep standard. Many of the recalled items were still available from smaller internet merchants in the spring and summer of 2020. Some items that were not recalled, but merely discontinued by the manufacturer, are still available for sale from retailers, at least until the remaining stock is sold.

Once the final rule is published and becomes effective, suppliers of inclined sleep products must either redesign existing products to comply with the standard and conduct third-party testing to demonstrate compliance, stop selling the products, or remarket the products as not intended for infant sleep. The impact of those options will depend upon how much redesign the product requires, and what portion of the company's sales are inclined sleep products. The impact on small companies that sell many different products in different categories, which is relatively common, especially for importers, will likely not be as significant as the impact on small companies that sell only a few types of products or that concentrate on sleep products covered by this rule.

The impact of remarketing products for a different use, such as for an older child, a pet, or not for sleep, will depend on the extent to which consumers demand the product for the different use. Given the proliferation of floor chairs, lounge chairs, rockers, and bouncer seats on the market, it seems likely that consumers find value in physically similar products that are marketed for a different use, and that remarketing will not reduce demand. U.S. sales of the combined category of bouncer seats, rockers, and sleepers totaled more than 2 million units and \$126 million dollars in 2018.⁴⁴

Suppliers of the hard-plastic framed rocker-type items may choose to redesign their items to meet the requirements of a different mandatory safety standard, particularly the one for infant bouncer seats. Most of the hard-framed products were made by large or foreign companies, although the market

volume has shifted to smaller companies as the larger companies have already removed these items from the market or remarketed them as chairs, rockers, or chair/swing combos. Two small domestic companies that make inclined sleep products may experience a significant economic impact⁴⁵ as these were some of their best-selling products, and one of them also supplied the product as a “store brand” to another company. The other sells multiple types of sleepers within the scope of the final rule. Redesigning, relabeling, or discontinuing the products could be a significant impact on these firms. The rest of the small domestic companies that sold this product and small importers will likely not be significantly impacted because they sell many other products that would not be subject to the final rule.

Suppliers of inclined compact foam products will need to redesign their products with an incline of 10 degrees or less and meet other requirements of this standard, remove these products from the market, or relabel them as not being intended for sleep by children under 5 months of age. Some of these products have restraining harnesses to keep the infant from sliding down on the slanted product, which is not compliant with any of the existing CPSC sleep standards. Some suppliers have already remarketed the products as loungers or floor chairs without changing the design. Several of the companies that sell these products sell larger wedge pillow products for adults and older children as “body pillows” or sleeping positioners, so the infant sleep products are not their only product line. Redesign or remarketing could have a significant impact for the three small domestic companies and one importer that have such products, as well as other products in the scope of this rule, as a large portion of their product line.

Suppliers of inclined play yard accessories will need to redesign their products with an incline of 10 degrees or less and meet other requirements of this standard, remove these products from the market, or relabel them as not being intended for sleep by children under 5 months of age, if appropriate. Most play yard suppliers have already discontinued or recalled the inclined accessory products and replaced them with flat products instead. The ASTM standard for non-full-size-cribs and play yards, F406–19, already specifies that

bassinet, changing table, or similar accessories must comply with the applicable requirements of ASTM standards addressing those product types. Play yard suppliers were already required to comply with the requirement that bassinet accessories meet the bassinet standard. Because the main product is the play yard, not the particular accessories, and suppliers were already required to comply with the bassinet standard for bassinet-type accessories, this rule should not have a significant impact on any of the suppliers of play yards, unless they had “napper” or “inclined sleeper” accessories that did not meet the bassinet standard. The impact could be significant for one small domestic company that still sells inclined play yard accessories, and has other products in the scope of this rule.

(b) Baby Hammocks

Suppliers of baby hammocks are unlikely to be able to redesign their product to meet any of the existing CPSC infant sleep standards. An inclined sleep angle is inherent in the design of hammocks, which shift shape as the infant moves. Sleeping pads in the bottom of a hammock would still leave the product with sides that shift shape in use. For hammock accessory products sold separately that attach to the corners of a crib or play yard, there is no standard installation that could be tested to meet incline, gap, side heights, or stability requirements: The incline would depend on the size of the crib or play yard and the weight of the infant, and the gaps between the hammock side and the side of the crib or play yard would depend on the size of the crib or play yard. Therefore, relabeling and remarketing baby hammocks as being not for sleep or as being intended only for children at over 5 months of age may be the only compliance option, other than removing the products from the market altogether.

Since the NPR was published, some baby hammocks have been withdrawn from the market by small companies that make and import other types of baby products or adult hammocks. However, many home-based suppliers remain in the market, as well as several small domestic businesses, one of which appears to have infant crib hammocks as its only product. Multiple importers based in the U.S. also sell hammocks with frames made by foreign companies, but those companies will not be significantly impacted because they sell many other products that would not be impacted by the final rule. Several foreign companies that make baby hammocks will have to stop distributing

⁴⁴ Baby feeding, care, and travel accessory unit sales in the United States in 2018, by product type—<https://www.statista.com/statistics/891908/baby-feeding-care-and-travel-accessory-unit-sales-by-product-type-us/> And Baby feeding, care, and travel accessory sales in the United States in 2018, by product type <https://www.statista.com/statistics/891889/baby-feeding-care-and-travel-accessory-sales-by-product-type-us/>.

⁴⁵ Please note that the number of companies impacted for each product type sums to more than the total number of impacted companies for the rule as a whole, because several small companies sell products in multiple product categories impacted by this rule.

them in the U.S., or conspicuously label them as being for use only by children over 5 months of age.

If baby hammocks are removed from the market, the impact will likely be significant for one small domestic company for which baby hammocks constitute most, if not all, of their product line, as well as possibly significant for several small importers that do not appear to have many other products. The impact will likely be significant for dozens of home-based manufacturers that have crib hammocks or other fabric hammocks without a frame as their main or only product, if they choose to exit the market. However, it is possible that some sellers of hammocks will simply relabel and remarket them for older children or as toy storage hammocks. The demand for these products for older children or toy storage uses is unknown.

2. Flat Sleep Products

(a) Flat, Soft-Sided Products

Many of the suppliers of flat, soft-sided products would likely be significantly impacted by the final rule. This is because compliance with any of the sleep product standards, particularly the stability, side height, and occupant containment requirements, would be difficult for a product with low, soft sides. A product with low, soft sides cannot meet the bassinet standard by simply adding a stand, nor can it meet the hand-held carrier standard by simply adding handles. Also, adding rigid higher sides may be contrary to the intended product use as in-bed sleepers. Relabeling the products as being not intended for infant sleep might not be an option if the product is clearly intended for infant sleep, and is not large enough for an older child, although these items could be remarketed as pet beds. At least nine small importers and four domestic manufacturers that supply these products have these products as most or all of their product line. There are also potentially hundreds of small, home-based businesses for which such low, soft-sided products appear to be their major product line. The impact for suppliers that have these products as most of their product line would likely be significant. In addition, the many home-based businesses do not currently have warning labels, instruction manuals, or certification to other CPSC or ASTM standards. Some products are already being remarketed as loungers, nappers, or “for tummy time”, but will be required to comply with the final rule if they are marketed for sleep, including napping.

Flat play yard accessories are already required to meet the bassinet or other applicable standard. The ASTM standard for non-full-size-cribs and play yards, F406–19, already specifies that bassinet, changing table, or similar accessories must comply with the applicable requirements of ASTM standards addressing those accessories. Most flat play yard accessories are hard-framed, not soft-sided, and are discussed in the next section. Because the main product is the play yard, not the particular accessories, and suppliers were already required to comply with the bassinet standard for bassinet-type accessories, this rule should not have a significant impact on any of the suppliers of flat play yard accessories, unless they have “napper” accessories that are not compliant with the bassinet standard. One importer has only one model of play yard with a flat mesh accessory as their main product; that importer could be significantly impacted if their product is not compliant and they cannot find another supplier with a compliant product.

(b) Flat, Rigid-Sided and Rigid-Framed Compact Bassinets, Travel Bassinets, and Similar Products

Compact bassinets with rigid sides or rigid-framed sides but without a stand or legs cannot meet the stability or physical requirements of CPSC’s bassinet and cradle standard or this standard, independent of whether the product has an incline. Suppliers may choose to offer their products with a stand to meet this standard, or add a handle and redesign the product to meet the hand-held carrier standard. In either case, the cost of redesigning the product could be significant. These products usually already have flat sleep surface and rigid sides, as required by the bassinet/cradle standard, but may not meet the side-height requirement of the bassinet/cradle standard. However, the cost to redesign could still be significant, as even a simple re-design could cost hundreds of thousands of dollars per model and require new third-party testing, and all of the product marketing, instructions, and packaging would have to be revised. Adding a stand would also increase the retail price of the product, which would likely reduce sales, assuming that demand is responsive to price and that other products like hand-held carriers are considered by consumers to be reasonable substitutes. Moreover, these products likely cannot be remarketed for another use by infants 5 months and younger, as the physical design suggests the product is for sleep, although they could be remarketed for older children

or for pets, depending on whether the size is appropriate for those uses. For the importers, the impact is likely not significant, as they do not have these products as most of their product line and can therefore either stop selling the product or obtain a compliant product from a different supplier at minimal cost to them. For the two domestic manufacturers of these products that have these products as most of their product line, or sell multiple products covered by this rule, the cost of compliance could be significant.

Baby boxes have similar compliance impacts to the larger category of compact bassinets. Some compact bassinets are marketed as suitable for bed-sharing, so may be considered as rigid in-bed sleepers. Suppliers of baby boxes and in-bed sleepers with rigid or rigid-framed sides may also choose to offer their products with a stand to meet the bassinet standard. Given that these products already have rigid sides and flat sleeping surfaces, the redesign may be relatively minor, but could still cost hundreds of thousands of dollars to implement and test, especially given the need to adapt them to meet stability requirements. These suppliers could also choose to add a handle to these products and make other design, instructions and labeling changes in order to comply with the hand-held carrier standard. Labeling these products as not for infant sleep is likely not an option, as these items are intended for sleep, and are too small to be used by older children. Remarketing as storage boxes is possible, but likely a much lower price point. The impact could be significant for two suppliers of baby boxes.

Flat sleep surface play yard accessories are already required to meet the bassinet or other applicable standard. The ASTM standard for non-full-size-cribs and play yards, F406–19, already specifies that bassinet, changing table, or similar accessories must comply with the applicable requirements of ASTM standards addressing those accessories. Because the main product is the play yard, not the particular accessories, and suppliers were already required to comply with the bassinet standard for bassinet-type accessories, this rule should not have a significant impact on any of the suppliers of flat rigid-sided play yard accessories, with the possible exception of a few “napper” products from small importers. Those importers should be able to find a new compliant supplier relatively easily, or relabel the items as not for sleep.

(c) Baby Tents

Baby tents cannot meet any of CPSC's sleep standards, due to the physical form of these products, which includes slanted flexible sides connected to the floor, sometimes with hanging cords and anchoring spikes. Therefore, relabeling these products as not for infant sleep or removing the products from the market are the only compliance options. We assume that most suppliers will choose to remarket their items as not for sleep or for older children, and that this will not reduce sales, because the advertised primary purpose of the product is shade and insect screen. Also, most suppliers in this product sector are importers with many other unrelated products or foreign direct shippers. CPSC believes it unlikely most of the suppliers in this category will experience a significant economic impact as a result of this rule. One small importer does not appear to have any other products that might be significantly impacted if they cannot find a compliant supplier.

F. Summary of Costs and the Economic Impact of the Final Rule

Suppliers that choose to stay in the market for infant sleep products will need to comply with the final rule, or another CPSC sleep standard, and certify compliance through third party testing. Suppliers that choose to relabel their products as bouncer seats or swings will need to meet the standards for those products. Suppliers that relabel their products for use by children over 5 months will still need to meet general testing and certification requirements required for all children's products, such as testing for lead content and phthalates, as well as small parts, but they were already required to meet those requirements.

Based on costs for compliance with other ASTM and CPSC standards for durable nursery products, the expected cost to comply with third party testing will be about \$1,500 per model tested, including the costs of the samples to be tested. This is for compliance with the specific standard for infant sleep products only; the costs for complying with general requirements for children's products should not be new costs for any suppliers. Some of the companies that are small by SBA standards have up to a dozen models of different products impacted by this rule, each of which will have to be tested for compliance with this standard. This would suggest testing costs of about \$18,000 per testing cycle.

The suppliers of low, soft-sided products and hammocks are unlikely to

be able to redesign their products to meet any of the sleep standards, so they will need to decide whether to exit the market or relabel their products for use by older children. The impact is likely to be significant for suppliers of these products if these products constitute a substantial portion of their product line, and they choose to exit the market rather than remarketing the items for older children or pets.

Some manufacturers and importers, both large and small, may be able to minimize the impact of this rule by marketing their products as not for infant sleep, thus effectively putting their products out of scope of this rule. This may involve conspicuously labeling and marketing their items as not for sleep by children under 5 months. Some flat sleep surface rigid-sided products could demonstrate compliance with this standard and the bassinet standard with the addition of a stand or other rigid support. Some non-compliant items might be remarketed for pet use, which has apparently happened with some former children's products, but the market for such products is probably limited. Remarketing these products could still result in significant impact of suppliers if such relabeling results in a substantial reduction in product demand.

While some items can be credibly remarketed as not for infant sleep, such as items that resemble chairs or swings, the design of other items suggest they are intended for infant sleep, including hammock crib accessories, baby boxes, and in-bed sleepers, as are most compact bassinets and anything marketed as a "bed". Some of these products could be marketed for children over 5 months, depending on the size of the product, but many are too small for a larger child. Suppliers of products where the design and function of the product communicates to the consumer that the product is intended for infant sleep may experience a significant economic impact if those products are a substantial portion of their product line.

Most home-based manufacturers will have the choice of either remarketing their products as not for infant sleep or stopping the sale of the products. The cost of redesigning the product to comply with the standard could be a significant portion of revenue for home-based manufacturers, and redesign might not even be possible for some products commonly sold by home-based manufacturers, such as baby hammocks and low, soft-sided flat products. Additionally, even if redesign were possible, the testing costs alone could be sufficient to induce these home-based manufacturers to withdraw from the

market for these products. The economic impact of the rule on these home-based manufacturers is likely to be significant. In some cases, these manufacturers might be able to relabel their products for older children, or for pet use. In the case of hammocks, the items could also be marketed for toy storage. However, the demand for infant sleep products for these types of alternative uses is likely to be limited.

We discussed earlier the impacts for specific types of sleeper markets. In summary, the suppliers of inclined sleepers can redesign their items to meet this standard, remove them from the market, relabel them for use by older children, or remarket them as some type of chair. Some inclined items have already been remarketed as types of chairs or chair/swing combination products. The impact would depend on the demand for these products as chairs; the current remarketing suggests that companies have found there is indeed demand for these products as chairs. Suppliers of inclined play yard accessories have similar options; it appears that most play yard suppliers have chosen to remove these items from the market and replace them with flat sleep surface accessories instead. Because play yards were already required to comply with the bassinet standard if in bassinet mode, this may not be a significant impact. Suppliers of compact rigid-sided and rigid-framed products without a stand may be able to redesign their products to meet this standard, or remarket them for use by older children. The size of some of these products would be appropriate for use by older children. Some suppliers of soft-sided "travel" and "compact" bassinets are unlikely to be able to redesign their products to comply with this standard, but may be able to remarket them for use by older children. Similarly, suppliers of in-bed sleepers and baby hammocks are unlikely to be able to redesign their products to comply with this rule, but some may be able to remarket them for use by older children or pets, depending on the size of the products, although demand for those uses may be limited.

In general, suppliers of products with limited remarketing options, where the size of the product is not conducive to use by older children, the low, soft sides cannot easily be redesigned to meet this standard, and the physical configuration of the product limits uses other than sleep, are likely to be significantly impacted. Some suppliers may be able to remarket their infant sleep products for alternative uses. However, this market is probably limited; otherwise, some of these suppliers would already

have been producing products for these alternative uses. At least nine small domestic companies and twelve small importers are likely to be significantly impacted because products in scope of this rule represent most or a substantial portion of their product line. Hundreds of home-based manufacturers based in the U.S. supply baby nests, baby pods, in-bed sleepers, hammocks, and crib hammocks are likely to be significantly impacted, although some may be able to relabel their items as not for sleep or for older children. If the products cannot be remarketed, many of these home-based manufacturers may eliminate infant sleep products from their product lines; it also possible that a significant proportion may go out of business.

In summary, taking all of these factors into account, the final rule is likely to have a significant economic impact on a substantial number of small entities.

G. Other Potential Impacts of the Final Rule

The final rule would make it illegal to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States products not compliant with the rule 12 months after the publication of the rule in the **Federal Register**. This means that parents and other caregivers would not be able to purchase these items. The large volume of these products sold or home-made reflect that these products all address a demand for a compact sleep space for babies, so it is reasonable to assume that demand will continue for new or redesigned products that meet one of CPSC's sleep standards. As discussed earlier, products that are compliant with the current CPSC sleep standards are already widely available, provide compact sleep spaces, and are in the same general price range as the items covered by this rule.

Several public commenters suggested that this rule would cause caregivers to resort to less safe sleep solutions, such as putting infants to sleep in car seats, or using pillows to position infants on adult beds. Caregivers may already make home-made sleep places or misuse other types of products, and CPSC is unaware of data to support the assertion that this rule would further encourage such practices. Directions for making home-made baby nests were widely available on the internet before CPSC published the 2017 NPR. The DNPES, which was done in 2014, found that a majority of parents were using products for sleep that are not marketed for sleep, such as swings, bouncer seats, and hand-held carriers at least once a

week.⁴⁶ In addition, many inclined products have already been removed from the market or relabeled as not for sleep since publication of the 2017 NPR. While some of the inclined products may be remarketed as not for infant sleep, the final rule will provide parents and other caregivers clearer information as to the manufacturer's intended safe use.

The effective date is a "sold by" date. This means that retailers will need to sell or otherwise dispose of their stock by that date. Given that this rule has been in progress for several years through a notice and comment rulemaking, and that many of the inclined products have already been withdrawn from the market, this should not have a significant impact on small retailers.

This rule would require all infant sleep products not in the scope of other CPSC sleep standards to comply with this rule. This means that new products would have to comply with this rule, or one of the other sleep standards. Suppliers may introduce new products that comply with any of those standards, such as an innovative bassinet design that meets all the requirements of the bassinet standard. They may also work with ASTM to revise one of the ASTM sleep standards to cover their new product, and then CPSC could consider such revision as part of CPSC's procedures for accepting revisions to voluntary standards that are the basis for CPSC mandatory standards. Suppliers of innovative products may also work with ASTM to develop a separate, new sleep standard, then seek to have CPSC codify the new ASTM standard as a mandatory infant sleep standard under section 104 of the CPSIA.

H. Efforts to Minimize the Impact on Small Entities (Alternatives)

CPSC has attempted to minimize the impact of the final rule on small entities by defining the scope of this rule to only include infant sleep products that are:

- Not within the scope of another standard;
- marketed or intended for infant sleep, including napping; and
- marketed or intended for use by children up to 5 months old.

These requirements provide small businesses the opportunity to remove their products from the scope of this

standard by marketing them as not intended for sleep, or only intended for use by older children, or for pets. Companies can also redesign their products to meet the requirements of another standard, such as infant bouncer seats or hand-held carriers. In some cases where there is another use for the product, the only change required to make a product subject to one of these other standards is to relabel or remarket the product, removing any references to its use for sleeping.

CPSC also published an SNPR in 2019, which means firms have been aware of this rulemaking effort and have had several years to prepare for implementation of the final rule. Many companies that had inclined products that were in the scope of the 2017 NPR have removed those products from the market since 2019, or remarketed them as loungers, bouncer seats, or other products not for sleep.

While the Commission has exempted small batch manufacturers from the testing requirements proposed under other rules, under Section 14(d)(4)(C)(ii) of the CPSA, the Commission cannot "provide any alternative requirements or exemption" from third party testing for "durable infant or toddler products," as defined in section 104(f) of the CPSIA. Consequently, staff cannot recommend a small batch exemption for small baby nest and hammock home-based manufacturers absent a statutory change.

The ASTM F3118 committee considered wording that would allow manufacturers to choose whether to comply with F3118 or another ASTM sleep standard, to allow innovative products to enter the market more easily. This final rule requires suppliers to comply with this rule or one of CPSC mandatory standards for full-size cribs, non-full-size cribs, bassinets and cradles, play yards, or bedside sleepers. The approach considered by ASTM to allow suppliers to choose other ASTM sleep product standards would allow suppliers to sell products that did not meet an existing CPSC sleep standard, such as a drop side crib, so long as that product had a sleep surface incline of less than 10 degrees and otherwise complied with ASTM F3118. Staff did not recommend this approach, which would effectively allow potentially unsafe, non-compliant sleep products to re-enter the market.

Finally, the IRFA discussed allowing a later effective date. A later effective date would reduce the economic impact on firms in two ways. Firms would be less likely to experience a lapse in production/importation, which could result if they are unable to comply and

⁴⁶ The DNPES reported that in households with children under 6, children slept in bouncer seats at least once a week in 70% of households that owned a bouncer seat, slept in swings at least once a week in 91% of households with a swing, and slept in hand-held carriers at least once a week in 87% of households with hand-held carriers.

third-party test within the required timeframe. Also, firms could spread costs over a longer time period, thereby reducing their annual costs, as well as the present value of their total costs. CPSC received comments both supporting and opposing a later effective date. Given that many of the products have already been removed from the market or otherwise remarketed to be out of scope of this rule, reducing the impact on domestic small businesses, and that companies already had notice that this final rule was in progress since November 2019, the Commission will maintain a 12-month effective date, as proposed in the 2019 SNPR.

XIV. Environmental Considerations

The Commission's regulations address whether the agency is required to prepare an environmental assessment or an environmental impact statement. Under these regulations, certain categories of CPSC actions normally have "little or no potential for affecting the human environment," and therefore, they do not require an environmental assessment or an environmental impact statement. Safety standards providing requirements for products come under this categorical exclusion. 16 CFR 1021.5(c)(1). The final rule for infant sleep products falls within the categorical exemption.

XV. Paperwork Reduction Act

The final rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501–3521).

Under 44 U.S.C. 3507(a)(1)(D), an agency must publish the following information:

- A title for the collection of information;
- a summary of the collection of information;
- a brief description of the need for the information and the proposed use of the information;
- a description of the likely respondents and proposed frequency of response to the collection of information;
- an estimate of the burden that shall result from the collection of information; and
- notice that comments may be submitted to the OMB.

The preamble to the 2019 SNPR (84 FR 60959–61) discussed the information collection burden of the supplemental proposed rule and specifically requested comments on the accuracy of our estimates. The OMB assigned control number 3041–0177 for this information collection. We did not receive any comment regarding the information collection burden of the proposal in the 2019 SNPR. For the final rule, CPSC adjusts the number of small home-based manufacturers from 6 to 1,200, and the number of other suppliers from 13 to 125. In accordance with PRA requirements, the Commission provides the following information:

Title: Safety Standard for Infant Sleep Products.

Description: The final rule defines an "infant sleep product" as a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that is not already subject to one of the mandatory CPSC sleep standards: Full-size cribs,

non-full-size cribs, play yards, bassinets, cradles, or bed-side sleepers. The infant sleep products covered by this rule include inclined and flat sleep products, such as inclined sleepers, play yard infant sleep accessories, baby nests and pods, in-bed sleepers, baby hammocks, compact or travel bassinets without a stand or legs, and baby tents. This final rule for infant sleep products incorporates by reference the voluntary standard for infant inclined sleep products issued by ASTM International, ASTM F3118–17a, *Standard Consumer Safety Specification for Infant Inclined Sleep Products*, with modifications to further reduce the risk of injury associated with infant sleep products. The final rule sets a safety floor for all infant sleep products sold in the United States, by requiring infant sleep products to have a seat back/sleep surface angle of 10 degrees or less from horizontal, and to meet the requirements of 16 CFR part 1218, Safety Standard for Bassinets and Cradles, including conforming to the definition of a bassinet/cradle. Part 1218 incorporates by reference the performance and labeling requirements of ASTM F2194–16e1. Sections 8 and 9 of ASTM F2194–16e1 contain requirements for marking, labeling, and instructional literature. These requirements fall within the definition of "collection of information," as defined in 44 U.S.C. 3502(3).

Description of Respondents: Persons who manufacture or import infant sleep products.

Estimated Burden: We estimate the burden of this collection of information as follows:

TABLE 6—ESTIMATED ANNUAL REPORTING BURDEN

Burden type	Type of supplier	Number of respondents	Frequency of responses	Total annual responses	Hours per response	Total burden hours
Labeling	Home-based manufacturers	1,200	1	1,200	7	8,400
	Other Suppliers	125	2	250	1	250
Labeling Total .....	.....	.....	.....	.....	.....	8,650
Instructional literature	Home-based manufacturers	1,200	1	1,200	50	60,000
Total burden .....	.....	.....	.....	.....	.....	68,650

Two groups of quantifiable entities supply infant sleep products to the U.S. market that will likely need to make some modifications to their existing warning labels to meet the requirements for warnings. The first group consists of very small home-based manufacturers, which may not currently have warning labels on their infant sleep products. Similar rulemakings (such as that for

slings carriers) assumed that it would take home-based manufacturers approximately 15 hours to develop a new label. Given that some home-based manufacturers supply infant sleep products with warning labels already, we have estimated approximately 7 hours per response for this group of suppliers. Therefore, the total burden hours for very small home-based

manufacturers is 7 hours per model $\times$ 1,200 entities $\times$ 1 models per entity = 8,400 hours.

The second group of quantifiable entities supplying infant sleep products to the U.S. market that will need to make some modifications to their existing warning labels are non-home-based manufacturers and importers. These firms do not operate at the low

production volume of the home-based firms. All of the firms in this second group have existing warning labels on their products, but not necessarily labels that are compliant with the requirements of ASTM F2194, as specified in 16 CFR part 1218, and would therefore, have to make label modifications. Given that these firms are used to working with warning labels, we estimate that the time required to make any modifications now or in the future would be about 1 hour per model. Based on an evaluation of supplier product lines, each entity supplies an average of 2 models of infant sleep products; therefore, the estimated burden associated with labels for this second group is 1 hours per model $\times$ 125 entities $\times$ 2 models per entity = 250 hours.

The total burden hours attributable to warning labels is the sum of the burden hours for both entity groups: Very small home-based manufacturers (8,400 burden hours) + non-home-based manufacturers and importers (250 burden hours) = 8,650 burden hours. We estimate the hourly compensation for the time required to create and update labels is \$33.71 (U.S. Bureau of Labor Statistics, "Employer Costs for Employee Compensation," December 2020, Supplementary table 1, total compensation for all sales and office workers in goods-producing private industries: <https://www.bls.gov/web/ecec/ecsupctc.pdf>). Therefore, the estimated annual cost to industry associated with the labeling requirements is \$291,591.50 (\$33.71 per hour $\times$ 8,650 hours = \$291,591.50). No operating, maintenance, or capital costs are associated with the collection.

ASTM F2194 (section 9) requires instructions to be supplied with the product. As already noted, the proposed Safety Standard for Infant Sleep Products requires infant sleep products to meet these requirements. Under the OMB's regulations (5 CFR 1320.3(b)(2)), the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the "normal course of their activities" are excluded from a burden estimate, where an agency demonstrates that the disclosure activities required to comply are "usual and customary."

We are unaware of infant sleep products that generally require use instructions but lack such instructions. However, it is possible that the 1,200 home-based manufacturers of infant hammocks, baby nests, and in-bed sleepers may not supply instruction manuals as part of their "normal course of activities." Based on information collected for the infant slings

rulemaking, staff tentatively estimates that each small entity supplying homemade infant hammocks, baby nests, or in-bed sleepers might require 50 hours to develop an instruction manual to accompany their products. These firms typically supply only one infant sleep product model. Therefore, the costs of designing an instruction manual for these firms could be as high as \$2,022,600 (50 hours per model $\times$ 1 model per entity $\times$ 1,200 entities = \$2,022,600). However, this cost estimate may overestimate the annual cost to industry because many home-based firms might not pay average U.S. domestic wage rates. Not all firms would incur these costs every year, but new firms that enter the market would incur these costs, and this is a highly fluctuating market. Other firms are estimated to have no burden hours associated with instruction manuals because any burden associated with supplying instructions with infant sleep products would be "usual and customary" and not within the definition of "burden" under the OMB's regulations.

Based on this analysis, CPSC staff estimates that the final rule for infant sleep products would impose a burden to industry of 68,650 hours at a cost of \$2,314,191.50 annually. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted the information collection requirements of this final rule to the OMB.

XVI. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that when a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a standard or regulation that prescribes requirements for the performance, composition, contents, design, finish, construction, packaging, or labeling of such product dealing with the same risk of injury unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the Commission for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision "consumer product safety standards." Therefore, once this final rule for infant sleep products issued under section 104 of the CPSIA takes effect, the rule will preempt in accordance with section 26(a) of the CPSA.

XVII. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The submission must indicate whether the rule is a "major rule." The CRA states that the Office of Information and Regulatory Affairs ("OIRA") determines whether a rule qualifies as a "major rule." Pursuant to the CRA, OIRA designated this rule as not a "major rule," as defined in 5 U.S.C. § 804(2). A "major rule" is one that the Administrator of OIRA finds has resulted in, or is likely to result in: (A) An annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) a 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. 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects

16 CFR Part 1112

Administrative practice and procedure, Audit, Consumer protection, Reporting and recordkeeping requirements, Third party conformity assessment body.

16 CFR Part 1130

Administrative practice and procedure, Business and industry, Consumer protection, Reporting and recordkeeping requirements.

16 CFR Part 1236

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, and Toys.

For the reasons discussed in the preamble, the Commission amends Title 16 of the Code of Federal Regulations as follows:

PART 1112—REQUIREMENTS PERTAINING TO THIRD PARTY CONFORMITY ASSESSMENT BODIES

■ 1. The authority citation for part 1112 continues to read as follows:

Authority: 15 U.S.C. 2063; Pub. L. 110–314, section 3, 122 Stat. 3016, 3017 (2008).

■ 2. Amend § 1112.15 by adding paragraph (b)(46) to read as follows:

§ 1112.15 When can a third party conformity assessment body apply for CPSC acceptance for a particular CPSC rule and/or test method?

* * * * *

(b) * * *

(46) 16 CFR part 1236, Safety Standard for Infant Sleep Products.

* * * * *

■ 3. The authority citation for part 1130 continues to read as follows:

Authority: 15 U.S.C. 2056a, 2056(b).

■ 4. Amend § 1130.2 by revising paragraph (a)(12) to read as follows:

PART 1130—REQUIREMENTS FOR CONSUMER REGISTRATION OF DURABLE INFANT OR TODDLER PRODUCTS

§ 1130.2 Definitions.

* * * * *

(a) * * *

(12) Bassinets and cradles, including bedside sleepers and infant sleep products;

* * * * *

■ 5. Add part 1236 to read as follows:

PART 1236—SAFETY STANDARD FOR INFANT SLEEP PRODUCTS

Sec.

1236.1 Scope.

1236.2 Requirements for infant sleep products.

Authority: Sec. 104, Pub. L. 110–314, 122 Stat. 3016 (15 U.S.C. 2056a); Sec. 3, Pub. L. 112–28, 125 Stat. 273.

§ 1236.1 Scope.

This part establishes a consumer product safety standard for infant sleep products, including inclined and flat sleep surfaces, that applies to all products marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that are not already subject to any of the following standards:

(a) 16 CFR part 1218 Safety Standard for Bassinets and Cradles;

(b) 16 CFR part 1219 Safety Standard for Full-Size Baby Cribs;

(c) 16 CFR part 1220 Safety Standard for Non-Full-Size Baby Cribs;

(d) 16 CFR part 1221 Safety Standard for Play Yards;

(e) 16 CFR part 1222 Safety Standard for Bedside Sleepers.

§ 1236.2 Requirements for infant sleep products.

(a) Except as provided in paragraph (b) of this section, each infant sleep

product must comply with ASTM F3118–17a, Standard Consumer Safety Specification for Infant Inclined Sleep Products (approved on September 1, 2017). 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 ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; phone: (610) 832–9585; www.astm.org. A read-only copy of the standard is available for viewing on the ASTM website at <https://www.astm.org/READINGLIBRARY/>. You may inspect a copy at the Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4330 East-West Highway, Bethesda, MD 20814, telephone (301) 504–7479, email: cpssc-os@cpssc.gov, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fedreg.legal@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

(b) Comply with ASTM F3118–17a with the following additions or exclusions:

(1) Instead of complying with Introduction of ASTM F3118–17a, comply with the following:

(i) *Introduction*. This consumer safety specification addresses incidents associated with infant sleep products identified by the U.S. Consumer Product Safety Commission (CPSC).

(A) In response to incident data compiled by CPSC, this consumer safety specification attempts to minimize the following:

(1) Fall hazards,

(2) Asphyxiation and suffocation, and

(3) Obstruction of nose and mouth by bedding.

(B) The purpose of the standard is to address infant sleep products not already covered by traditional sleep product standards and to reduce deaths associated with known infant sleep hazards, including, but not limited to, a seat back or sleep surface angle that is greater than 10 degrees from the horizontal.

(C) This consumer safety specification is written within the current state-of-the-art of infant sleep product technology and will be updated whenever substantive information becomes available that necessitates additional requirements or justifies the revision of existing requirements.

(ii) [Reserved]

(2) In section 1.1 of ASTM F3118–17a, replace the term “infant inclined sleep products” with “infant sleep products.”

(3) In section 1.2 of ASTM F3118–17a, replace the term “infant inclined sleep products” with “infant sleep products.”

(4) Instead of complying with section 1.3 of ASTM F3118–17a, comply with the following:

(i) 1.3 This consumer safety performance specification covers infant sleep products, including inclined and flat sleep surfaces, marketed or intended to provide a sleeping accommodation for an infant up to 5 months old, and that are not already subject to any of the following standards:

(A) 16 CFR part 1218—Safety Standard for Bassinets and Cradles, incorporating by reference ASTM F2194, Standard Consumer Safety Specification for Bassinets and Cradles;

(B) 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs, incorporating by reference ASTM F1169, Standard Consumer Safety Specification for Full-Size Baby Cribs;

(C) 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs, incorporating by reference applicable requirements in ASTM F406, Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards;

(D) 16 CFR part 1221—Safety Standard for Play Yards, incorporating by reference applicable requirements in ASTM F406, Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards;

(E) 16 CFR part 1222—Safety Standard for Bedside Sleepers, incorporating by reference ASTM F2906, Standard Consumer Safety Specification for Bedside Sleepers.

(ii) 1.3.1 If the infant sleep product can be converted into a product for which a CPSC regulation exists, the product shall meet the applicable requirements of the CPSC regulation, when in that use mode. If the infant sleep product can be converted into a product for which no CPSC regulation exists, but another ASTM consumer safety specification exists, the product shall meet the applicable requirements of the ASTM consumer safety specification, when in that use mode.

(iii) 1.3.2 Crib mattresses that meet the requirements of ASTM F2933 are not covered by the specifications of this standard.

(5) In section 1.4 of ASTM F3118–17a, replace the term “infant inclined sleep product” with “infant sleep product.”

(6) Instead of complying with section 2.1 of ASTM F3118–17a, comply with the following:

(i) F406 Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards;

(ii) F1169 Standard Consumer Safety Specification for Full-Size Baby Cribs;

(iii) F2194 Standard Consumer Safety Specification for Bassinets and Cradles;

(iv) F2906 Standard Consumer Safety Specification for Bedside Sleepers;

(v) F2933 Standard Consumer Safety Specification for Crib Mattresses.

(7) Instead of complying with section 2.2 of ASTM F3118–17a, comply with the following:

(i) 16 CFR 1218—Safety Standard for Bassinets and Cradles;

(ii) 16 CFR 1219—Safety Standard for Full-Size Baby Cribs;

(iii) 16 CFR 1220—Safety Standard for Non-Full-Size Baby Cribs;

(iv) 16 CFR 1221—Safety Standard for Play Yards;

(v) 16 CFR 1222—Safety Standard for Bedside Sleepers.

(8) Do not comply with sections 2.3 and 2.4 of ASTM F3118–17a, including Figures 1 and 2.

(9) Do not comply with sections 3.1.1 through 3.1.6 of ASTM F3118–17a.

(10) Instead of complying with section 3.1.7 of ASTM F3118–17a, comply with the following:

(i) 3.1.7 *infant sleep product, n*—a product marketed or intended to provide a sleeping accommodation for an infant up to 5 months of age, and that is not subject to any of the following:

(A) 16 CFR part 1218—Safety Standard for Bassinets and Cradles;

(B) 16 CFR part 1219—Safety Standard for Full-Size Baby Cribs;

(C) 16 CFR part 1220—Safety Standard for Non-Full-Size Baby Cribs;

(D) 16 CFR part 1221—Safety Standard for Play Yards;

(E) 16 CFR part 1222—Safety Standard for Bedside Sleepers.

(ii) [Reserved]

(11) Do not comply with sections 3.1.7.1 through 3.1.13 of ASTM F3118–17a.

(12) Do not comply with section 3.1.15 through 3.1.16 of ASTM F3118–17a.

(13) Do not comply with section 5 of ASTM F3118–17a.

(14) Do not comply with sections 6.1 through 6.8 of ASTM F3118–17a.

(15) Instead of complying with section 6.9 of ASTM F3118–17a, comply with the following:

(i) 6.9 *Maximum Seat Back/Sleep Surface Angle*:

(ii) 6.9.1 *Infant Sleep Product*—The angle of the seat back/sleep surface intended for sleep along the occupant's head to toe axis relative to the horizontal shall not exceed 10 degrees when tested in accordance with 7.11.2.

(iii) Do not comply with 6.9.2.

(iv) 6.9.3 *Infant Sleep Products*—shall meet, 16 CFR part 1218, Safety Standard for Bassinets and Cradles, including conforming to the definition of a “bassinet/cradle.”

(16) Do not comply with sections 6.10 through 7.10 of ASTM F3118–17a.

(17) Do not comply with section 7.11.1.3 of ASTM F3118–17a.

(18) In section 7.11.2 of ASTM F3118–17a, replace “*Infant Inclined Sleep Product and Infant Inclined Sleep Product Accessory*” with “*Infant Sleep Products*.”

(19) Instead of complying with section 7.11.2.1 and 7.11.2.2 of ASTM F3118–17a, comply with the following:

(i) 7.11.2.1 If applicable, place the product in the manufacturer's recommended highest seat back/sleep surface angle position intended for sleep.

(ii) 7.11.2.2 Place the hinged weight gage—infant in the product and position the gage with the hinge centered over the seat bight line and the upper plate of the gage on the seat back/sleep surface. Place a digital protractor on the upper torso/head area lengthwise.

(20) Do not comply with sections 7.11.3 through 9, or the Appendix, of ASTM F3118–17a.

(21) Add section 10.2 to ASTM F3118–17a:

(i) 10.2 infant sleep product

(ii) [Reserved]

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2021–12723 Filed 6–22–21; 8:45 am]

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FEDERAL REGISTER

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June 23, 2021

Part III

The President

Notice of June 21, 2021—Continuation of the National Emergency With Respect to North Korea

Presidential Documents

Title 3—**Notice of June 21, 2021****The President****Continuation of the National Emergency With Respect to North Korea**

On June 26, 2008, by Executive Order 13466, the President declared a national emergency with respect to North Korea pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula. The President also found that it was necessary to maintain certain restrictions with respect to North Korea that would otherwise have been lifted pursuant to Proclamation 8271 of June 26, 2008, which terminated the exercise of authorities under the Trading With the Enemy Act (50 U.S.C. App. 1–44) with respect to North Korea.

On August 30, 2010, the President signed Executive Order 13551, which expanded the scope of the national emergency declared in Executive Order 13466 to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the continued actions and policies of the Government of North Korea, manifested by its unprovoked attack that resulted in the sinking of the Republic of Korea Navy ship *Cheonan* and the deaths of 46 sailors in March 2010; its announced test of a nuclear device and its missile launches in 2009; its actions in violation of United Nations Security Council Resolutions 1718 and 1874, including the procurement of luxury goods; and its illicit and deceptive activities in international markets through which it obtains financial and other support, including money laundering, the counterfeiting of goods and currency, bulk cash smuggling, and narcotics trafficking, which destabilize the Korean Peninsula and imperil United States Armed Forces, allies, and trading partners in the region.

On April 18, 2011, the President signed Executive Order 13570 to take additional steps to address the national emergency declared in Executive Order 13466 and expanded in Executive Order 13551 that would ensure implementation of the import restrictions contained in United Nations Security Council Resolutions 1718 and 1874 and complement the import restrictions provided for in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*).

On January 2, 2015, the President signed Executive Order 13687 to expand the scope of, and to take further steps with respect to, the national emergency declared in Executive Order 13466, as expanded in Executive Order 13551, and addressed further in Executive Order 13570, to address the threat to the national security, foreign policy, and economy of the United States constituted by the provocative, destabilizing, and repressive actions and policies of the Government of North Korea, including its destructive, coercive cyber-related actions during November and December 2014, actions in violation of United Nations Security Council Resolutions 1718, 1874, 2087, and 2094, and commission of serious human rights abuses.

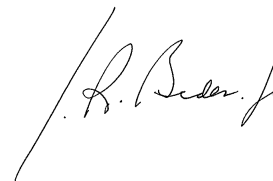
On March 15, 2016, the President signed Executive Order 13722 to take additional steps with respect to the national emergency declared in Executive Order 13466, as modified in scope and relied upon for additional steps in subsequent Executive Orders, to address the Government of North Korea's continuing pursuit of its nuclear and missile programs, as evidenced by

its February 7, 2016, launch using ballistic missile technology and its January 6, 2016, nuclear test in violation of its obligations pursuant to numerous United Nations Security Council resolutions and in contravention of its commitments under the September 19, 2005, Joint Statement of the Six-Party Talks, that increasingly imperils the United States and its allies.

On September 20, 2017, the President signed Executive Order 13810 to take further steps with respect to the national emergency declared in Executive Order 13466, as modified in scope and relied upon for additional steps in subsequent Executive Orders, to address the provocative, destabilizing, and repressive actions and policies of the Government of North Korea, including its intercontinental ballistic missile launches of July 3 and July 28, 2017, and its nuclear test of September 2, 2017; its commission of serious human rights abuses; and its use of funds generated through international trade to support its nuclear and missile programs and weapons proliferation.

The existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula and the actions and policies of the Government of North Korea continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared in Executive Order 13466, expanded in scope in Executive Order 13551, addressed further in Executive Order 13570, further expanded in scope in Executive Order 13687, and under which additional steps were taken in Executive Order 13722 and Executive Order 13810, must continue in effect beyond June 26, 2021. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13466 with respect to North Korea.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
June 21, 2021.

Reader Aids

Federal Register

Vol. 86, No. 118

Wednesday, June 23, 2021

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids **202-741-6000****Laws** **741-6000**

Presidential Documents

Executive orders and proclamations **741-6000****The United States Government Manual** **741-6000**

Other Services

Electronic and on-line services (voice) **741-6020**Privacy Act Compilation **741-6050**

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FEDERAL REGISTER PAGES AND DATE, JUNE

29173-29482.....	1
29483-29674.....	2
29675-29928.....	3
29929-30130.....	4
30131-30374.....	7
30375-30532.....	8
30533-30752.....	9
30753-31086.....	10
31087-31426.....	11
31427-31584.....	14
31585-31902.....	15
31903-32184.....	16
32185-32360.....	17
32361-32628.....	21
32629-32716.....	22
32717-33076.....	23

CFR PARTS AFFECTED DURING JUNE

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

1000.....29483

3 CFR

Proclamations:

10218.....29925
 10219.....29929
 10220.....30131
 10221.....30133
 10222.....30135
 10223.....30137
 10224.....30139
 10225.....30141
 10226.....30143
 10227.....31903
 10228.....32359
 10229.....32717
 10230.....32719

Executive Orders:

13959 (partially
 superseded and
 amended by
 14026).....30145
 13974 (revoked by
 14032).....30145
 14031.....29675
 14032.....30145
 14033.....31079
 13942 (revoked by EO
 14034).....31423
 13943 (revoked by EO
 14034).....31423
 13971 (revoked by EO
 14034).....31423
 14034.....31423

Administrative Orders:

Memorandums:
 Memorandum of June
 4, 2021.....30533
 Memorandum of June
 8, 2021.....32629
 Presidential
 Determinations:
 PD No. 2021-08 of
 June 11, 2021.....32631
 Notices:
 Notice of June 8,
 2021.....31083
 Notice of June 8,
 2021.....31085
 Notice of June 21,
 2021.....33075
 Orders:
 Order of May 28,
 2021.....29927

3 CFR

Proclamations:

10228.....32359

5 CFR

335.....30375

Ch. CII.....29931

Proposed Rules:

890.....32813

6 CFR

Proposed Rules:

37.....31987

7 CFR

3.....30535
 984.....32721
 4284, Subpart L.....31585
Proposed Rules:
 272.....30795
 273.....30795
 3555.....30555

10 CFR

Ch. I.....29683
 15.....32146
 34.....29173
 170.....32146
 171.....32146
 1061.....29932
Proposed Rules:
 Ch. I.....32817
 429.....29888
 430.....29704, 29888, 29954,
 29964
 431.....30796, 31182, 32332

12 CFR

Ch. III.....32728
 Ch. X.....32723
 204.....29937
 1026.....29685

Proposed Rules:

210.....31376

14 CFR

11.....31006
 39.....29176, 29178, 29181,
 29183, 29185, 29187, 29483,
 29486, 29939, 29942, 29944,
 30151, 30153, 30155, 30158,
 30162, 30380, 30383, 30753,
 30756, 30759, 30761, 30763,
 30766, 30768, 30770, 31087,
 31089, 31092, 31095, 31097,
 31101, 31599, 31601, 31604,
 31609, 31612, 31905, 32735
 71.....29488, 29489, 29946,
 30164, 30165, 30167, 30168,
 31103, 31104, 31105, 31107,
 31108, 31109, 31111, 31112,
 31113, 31114, 31907
 73.....29687
 91.....31006
 97.....29688, 29690
 111.....31006, 32185

Proposed Rules:

39.....29212, 29216, 29705,

29707, 30216, 30218, 30395,
30398, 30819, 30822, 30824,
31194, 31451, 31453, 31989,
31992, 31995, 32653
71 29530, 29531, 29967,
29969, 30399, 31998, 32363

15 CFR

Ch. VII.....32757
732.....29189
734.....29189
744.....29190, 31909
760.....30533
922.....32737

16 CFR

1112.....33022
1130.....33022
1236.....33022
1632.....32758

Proposed Rules:

305.....29533

17 CFR

200.....31115
240.....31115
242.....29195
249.....31115

18 CFR

37.....29491
38.....29491
154.....29503
260.....29503
284.....29503

19 CFR

Ch. I.....32764, 32766
12.....31910

21 CFR

130.....31117
131.....31117
1308 29506, 30772, 30775,
31427, 32633
1310.....30169

22 CFR

22.....31614, 31617
120.....30778
121.....29196
123.....29196
124.....29196
126.....29196
129.....29196
213.....31139
306.....30169

Proposed Rules:

212.....30558

24 CFR

5.....30779
28.....31619
91.....30779
92.....30779, 32767
570.....30779
574.....30779
576.....30779
903.....30779

26 CFR

1.....31146, 32185
301.....31146

Proposed Rules:

54.....32813

27 CFR

9 32186, 32189, 32191
Proposed Rules:
478.....30826
479.....30826

28 CFR

31.....31152

29 CFR

1473.....29196
1910.....32376
2204.....31165
4044.....31619

Proposed Rules:

10.....32818
531.....32818
2590.....32813

30 CFR

723.....29509
724.....29509
845.....29509
846.....29509

Proposed Rules:

917.....29709
1206.....31196
1241.....31196

31 CFR

50.....30537, 31620
525.....29197

32 CFR

45.....32194
310.....31430

33 CFR

100.....29691, 32768
117.....29204
165 30178, 30180, 31166,
31167, 31170, 31431, 31620,
31916, 32215, 32218, 32219,
32635

Proposed Rules:

100 29711, 30221, 30224,
30851
165 29725, 29727, 30228,
30230, 31456, 31459, 31999,
32846

34 CFR

685.....31432
Ch. I.....32637
Ch. III.....32770

37 CFR

11.....32640
201.....32640
202.....32640
203.....32640
210.....32640
351.....31172
370.....32640

38 CFR

5.....30182
9.....30541

39 CFR**Proposed Rules:**

20.....29732
111.....29734

40 CFR

1.....31172
9 30184, 30190, 30196
30 29515
49 31918
51 29948
52 29205, 29517, 29520,
29948, 29949, 30201, 30387,
30543, 30545, 30793, 31918,
31920, 31922, 31924, 31926,
31927, 32363, 32366
78 29948
81 29522, 30204, 31438
97 29948
124 31172
141 29526, 31939
142 31939
147 32221
180 29694, 30206, 31948,
31950
261 31622
271 29207, 31622
372 29698
721 30184, 30190, 30196,
30210

Proposed Rules:

52 29219, 29222, 29227,
30232, 30234, 30854, 31218,
31645, 32006, 32656, 32848,
32850
63 31225
81 31460
121 29541
141 32856
174 29229
180 29229
261 30237
271 31233
721 31239
725 31239

41 CFR**Proposed Rules:**

300-3.....31659
302-2.....31659
302-3.....31659
302-12.....31659
302-15.....31659
302-17.....31659

42 CFR

405.....29526
417.....29526
422.....29526
423.....29526
455.....29526
460.....29526

Proposed Rules:

51c.....32008

43 CFR

3160.....30548
9230.....30548

Proposed Rules

8365.....31665

44 CFR

61.....31177
328.....31448

45 CFR

1225.....30169

Proposed Rules:

149.....32813

47 CFR

1.....30389, 32775
27.....30389, 32775
54.....30391
64.....29952
73 29702, 30550, 31954,
32221
302.....31638

Proposed Rules:

Ch. I.....31464
1.....29735
2 29735, 30860, 32669
15.....32669
25.....32669
27.....29735, 32669
52 31404
64 29969, 30571, 31668
73 32011
87 30860
90 30860
101.....32669

48 CFR

Ch. I.....31070, 31075
7 31070
11 31074
16 31073
19 31074
22 31074
26 31074
42 31074
52 31074
53 31074

Proposed Rules:

2.....31468
5.....31468
6.....31468
13.....31468
19.....31468
52.....31468

49 CFR

107.....29528
383.....32643
384.....32643
391.....32643

Proposed Rules:

1180.....30243

50 CFR

17 30688, 31830, 31955,
31972
300.....31178
622.....29209, 30393
648.....32651
660 29210, 30551, 32361,
32804
665.....32239

Proposed Rules:

17 29432, 29975, 30888,
31668, 32241, 32857, 32859
18.....29364
91.....32878
219.....30080
648.....31262
660.....29544
665.....30582
679.....29977, 31474

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List June 21, 2021

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